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

INTERVENERS

FACTUM OF THE JOINT INTERVENERS CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC and SOUTH ASIAN LEGAL CLINIC OF ONTARIO

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

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Part I: Overview

1. The Appellant Mr. Wing Wha Wong, a permanent resident of Canada, has sought to have his guilty plea to one count of trafficking struck on the basis that he had not been informed of its immigration consequences. Mr. Wong's appeal raises a number of important issues facing permanent residents, including many clients of the Chinese and Southeast Asian Legal Clinic and the South Asian Legal Clinic of Ontario (the "Interveners"), who are caught in the criminal justice system and plead guilty without being first informed of the immigration consequences of the plea. These uninformed guilty pleas put permanent residents at serious risk of deportation. In view of the unique nature of immigration consequences and their significant impact on non-citizen accused, the Interveners submit that each instance of a guilty plea uninformed of immigration consequences constitutes a miscarriage of justice. The Interveners submit that to minimize the risk of such occurrences, judges presiding over criminal trials must make the appropriate inquiries before accepting a guilty plea.

Part II: Points in Issue

2. This Court is being asked to define the framework to be applied by appellate courts in deciding whether to strike a guilty plea by an individual who was not informed of significant collateral consequences of their plea. In light of the risk of deportation facing non-citizens, the Interveners submit that any such framework must consider the following factors:

    a. The unique and significant nature of immigration consequences;
    b. Deportation itself as a form of punishment;
    c. Whether a plea uninformed of immigration consequences automatically gives rise to a miscarriage of justice; and
    d. The need for judges to adopt a general practice of raising the issue of possible immigration consequences before accepting a guilty plea.

Part III: Arguments

A) Immigration consequences are unique relative to other collateral consequences and are always significant for non-citizens

3. In *R v Pham*[1], this Honourable Court defines the collateral consequences of a sentence as "any consequences for the impact of the sentence on the particular offender".[2] While these consequences are not, strictly speaking, aggravating or mitigating factors, they are relevant because they are a part of the circumstances of the offender. They help the sentencing court achieve individualization and parity, as well as the sentencing objective of assisting in the rehabilitation of offenders (s. 718(d) of the *Criminal Code*).[3]

4. The weight to be given to collateral consequences, according to *Pham*, varies from case to case and should be determined having regard to the type and seriousness of the offence.[4] Collateral consequences specifically related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.[5]

5. In *Pham,* this Court did not need to engage in a fulsome analysis of whether immigration consequences can or should be distinguished from other types of collateral consequences. That issue now arises in this case and is central to determining whether a guilty plea uninformed of the immigration consequences should automatically amount to a miscarriage of justice. It is submitted that immigration consequences are significantly different in nature from other collateral consequences to a criminal conviction.

(i) The Severe Nature of Immigration Consequences

6. Unlike other collateral consequences, immigration consequences are *always* significant for non-citizens as they can result in a person being removed permanently from Canada, thereby

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[1] *R v Pham*, 2013 SCC 15.
[2] *Ibid* at para 11.
[3] *Ibid.*
[4] *Ibid* at para 12.
[5] *Ibid* at para13.

having a serious impact on the individual and their family.

7. The fundamental difference between immigration consequences and other collateral consequences can be illustrated by comparing the circumstances of Mr. Wong in this case with those of the appellant in the landmark Ontario case of *R v Quick*.[6] In *Quick*, the collateral consequence in question was the indefinite suspension of Mr. Quick's driver's license due to his guilty plea. The Ontario Court of Appeal determined that the indefinite suspension of Mr. Quick's driving privileges was significant enough to render his plea uninformed and, according to Laskin JA, "to deny the accused a trial on the merits when the plea is uninformed would be a miscarriage of justice."[7]

8. With due respect to Mr. Quick's case, the consequences for Mr. Wong in the current case are far more severe and significant. As a permanent resident of Canada, the Appellant's guilty plea and sentence of nine months' incarceration renders him inadmissible under s. 36(1)(a) of the *Immigration and Refugee Protection Act* (*IRPA*)[8] and therefore subject to a removal order and deportation. To make matters worse, s. 64(2) of the *IRPA* denies the Appellant's right to appeal the removal order to the Immigration Appeal Division (IAD).

9. For the Appellant Mr. Wong and other permanent residents subject to immigration consequences from a criminal conviction, deportation would be devastating. Mr. Wong has lived in Canada for about 25 years and has a wife and child in Canada. Deportation would result in family separation or the dislocation of the entire family from their established lives and communities, in addition to the loss of employment and livelihood.[9]

10. In many cases, the consequences of the inadmissibility finding can be far more severe than the underlying criminal sentence itself. For example, the Federal Court of Appeal held in *Tran* that conditional sentences are considered part of the term of imprisonment for the

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[6] *R v Quick*, 2016 ONCA 95 [*Quick*].
[7] *Ibid* at para 16.
[8] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].
[9] Appellant's Factum at paras 6, 7 and 14.

purpose of s. 36(1)(a) of the *IRPA*.[10] As such, under the current jurisprudence, Canadian permanent residents who are given only a conditional sentence of six months or more are subject to deportation and will also be denied the right to appeal their removal order to the IAD. *Tran* is now being considered by this Honourable Court. Even in cases where permanent residents retain the right to appeal their removal order, and even if the appeal is ultimately granted, immigration proceedings often take years. In the meantime, these permanent residents and their families live in a state of immigration limbo and constant anxiety while awaiting the outcome of their appeal.

(ii) Immigration Consequences as a Direct Consequence of Criminal Conviction

11. Immigration consequences can also be distinguished from other types of collateral consequences due to the directness by which immigration consequences flow from the underlying criminal conviction. The *IRPA* authorizes immediate and often permanent expulsion from Canada upon conviction of certain crimes.[11] Once deemed criminally inadmissible and removed, a non-citizen may only return to Canada to reunite with their families if they obtain discretionary authorization from the Minister.[12]

12. Central to this integrated criminal/immigration legislative framework is the state's complete control over who is deemed inadmissible on the basis of their criminal conviction, who is allowed the right to appeal their removal, and whether their banishment from Canada is *de facto* permanent in nature. In this sense, immigration consequences flowing from criminality are therefore not collateral at all in nature, but are rather a direct legislated consequence of a criminal conviction. A similar observation was made by the Supreme Court of the United States in *Padilla v Kentucky* when it noted the difficulty of classifying deportation as either a direct or a collateral consequence because of its close connection to the criminal process.[13]

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[10] *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 237 [*Tran*].
[11] *IRPA*, *supra* note 8 at ss. 22, 36 and 44.
[12] *Ibid* at s. 52(1); *Immigration and Refugee Protection Regulations*, SOR/2002-227 at s. 226(1) [*IRPR*].
[13] *Padilla v Kentucky*, 130 S Ct 1473 (2010) at 8 [*Padilla*].

B) Deportation is in itself a form of punishment

13. Given the severity of the consequences to the persons affected, deportation should be considered a form of punishment in and of itself. Therefore, an accused should always be informed of the risk of deportation, as part and parcel of the sentencing or punishment.

14. The idea that a sentence should be proportionate to the crime it is intended to punish dates back at least to the time of Hammurabi's Code (circa 1780 BCE).[14] Today in Canada, this principle is codified as a fundamental principle of sentencing in section 718.1 of the *Criminal Code*, which states that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".[15]

15. By virtue of the criminal inadmissibility provisions in the *IRPA*, which tie a permanent resident's right to remain in Canada to the outcome of the criminal proceedings, immigration consequences (and particularly deportation) have effectively been codified as a form of punishment. The idea of deportation as part and parcel of *de facto* criminal punishment was recognized by the Supreme Court of the United States in *Padilla v Kentucky* when it adopted the view that "deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on non-citizen defendants who plead guilty to specified crimes."[16] Noting that removal is nearly an automatic result for certain non-citizen offenders, the Court in *Padilla* stated that its jurisprudence had long found it "most difficult" to divorce the immigration penalty from the conviction in the deportation context.[17]

16. In *R v KRJ*[18], this Court set out the framework for defining punishment under s. 11(i) of the *Charter*. In that case, the Court revisited *Rodgers*[19], which had developed a two-part test for determining whether a consequence amounts to "punishment" under s. 11(i), namely that: (1)

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[14] Eric Monkman, "A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing" (2014) 72:2 UT Fac L Rev 38-74 quoting Hammurabi's Code of Laws [translated by LW King], online: Exploring Ancient World Cultures <eawc.evansville.edu/anthology/hammurabi.htm> [Hammurabi's Code]; Charles F Horne, "The Code of Hammurabi: Introduction" Ancient History Sourcebook (1915), online: Fordham University <www.fordham.edu/halsall/ancient/hamcode.asp>.
[15] *Criminal Code* at s. 718.1.
[16] *Padilla* , *supra* note 13 at 6.
[17] *Ibid* at 8.
[18] 2016 SCC 31 [*KRJ*].
[19] *R v Rodgers*, 2006 SCC 15 [*Rodgers*].

the measure must be a consequence of a conviction that "forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence"; and (2) it must be "imposed in furtherance of the purpose and principles of sentencing."[20]

17. This Court in *KRJ* concluded that public protection is an insufficient litmus test for defining punishment. In distilling the purpose and principles of sentencing, it drew on s.718 of the *Criminal Code*, which provides that the "fundamental purpose of sentencing is to protect society" and to contribute "to respect for the law and the maintenance of a just, peaceful and safe society." The Court went on to state that "[t]his overarching purpose is accomplished by "imposing just sanctions" that reflect one or more of the traditional sentencing objectives: denunciation, deterrence, **separation of offenders from society**, rehabilitation, reparation, and promoting a sense of responsibility in offenders (*emphasis added).*"[21] The Court concluded that the s. 11(i) test for punishment must embody a clearer, more meaningful consideration of the impact a sanction can have on an offender.

18. On that basis, the Court in *KRJ* restated the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, *and either* (2) it is imposed in furtherance of the purpose and principles of sentencing, *or* (3) it has a significant impact on an offender's liberty or security interests.[22]

19. Applying this framework, deportation and related immigration consequences fit within this Court's definition of punishment as set out in *KRJ* because they are part of the arsenal of sanctions to which an affected non-citizen may be liable *and* because of their significant impact on non-citizens' liberty and security interests.[23] As such, deportation ***is*** punishment, as it satisfies both the first and the third prongs of the test in *KRJ*.

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[20] *Ibid* at paras 62 and 63.
[21] *KRJ, supra* note 18 at para 32.
[22] *Ibid* at para 41.
[23] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 17.

20. While the framework for punishment in *KRJ* was developed within the context of s.11(i) of the *Charter*, it can be applied with equal force when considering the validity of an uninformed guilty plea, an issue that speaks to a fundamental right for the accused. Applying that framework, it is respectfully submitted that because deportation is a form of punishment, its potential of imposition must give rise to strong procedural protections. In the context of accepting a guilty plea by non-citizens, procedural safeguards must therefore be put in place to ensure that all non-citizen accused are informed of the immigration consequences (including the possibility of deportation) of their plea.

C) A guilty plea uninformed of immigration consequences is a miscarriage of justice

21. It is respectfully submitted that the potential for deportation (without a right to appeal, in some circumstances) as a consequence of a guilty plea is of such severity as to *automatically* give rise to a miscarriage of justice in cases where the accused was uninformed of the immigration consequences. A similar conclusion was readily reached in *Quick* concerning the *Highway Traffic Act* consequences of a criminal guilty plea.[24]

22. In *Quick*, Laskin JA called for a "fact-specific inquiry in each case to determine the legal relevance and the significance of the collateral consequence to the accused," in order to decide whether the consequences that the accused was unaware of would have ultimately mattered to them.[25] In cases dealing with non-citizens and immigration consequences, one can comfortably dispense with such an inquiry given the importance and significance of immigration consequences in all potential situations. In many cases, preserving the right to remain in Canada "may be more important…than any potential jail sentence".[26]

23. In the alternative, should this Honourable Court decide to adopt a subjective test requiring the accused to demonstrate that their guilty plea would have been influenced by knowledge of the immigration consequences in order to give rise to a miscarriage of justice, this Court should adopt a rebuttable presumption that such knowledge would have influenced the accused's plea. Such a presumption would be proportional to the high degree of procedural

[24] *Quick*, *supra*, note 6 at para 16.
[25] *Ibid* at para 33.
[26] *Padilla* , *supra* note 9 at 10.

protection demanded by the severity of the rights at stake for the accused, even if the ultimate result is not deportation. Even in cases where permanent residents retain the right to appeal their removal order, and even if appeal is ultimately granted, it should be presumed that the accused, when considering a plea, would be influenced by virtue of knowing that their guilty plea could give rise to very lengthy and taxing immigration proceedings along with the risk of deportation.

24. In addition, racialized permanent residents face a number of systemic issues in the criminal justice system when they are charged with criminal offences. These include, *inter alia*: barriers to accessing legal aid and/or legal representation, lack of understanding of the criminal justice system due to linguistic and other barriers, and lack of understanding and information regarding the immigration consequences arising from their criminal conviction.[27] In addition, a growing number of accused are appearing before courts without legal representation or are only given cursory legal advice by duty counsel with a very high volume of cases to review. To impose a legal test that requires the uninformed accused in these situations to prove that they would have been subjectively influenced by the knowledge of the immigration consequences is to ignore the reality of systemic barriers experienced by racialized and immigrant accused with respect to access to justice.

D) The need for judges to adopt a general practice of raising the issue of possible immigration consequences before accepting a guilty plea

25. In view of their multiple barriers in access to justice, racialized non-citizen accused cannot always rely on their counsel – assuming they have one – or duty counsel to advise them of immigration consequences. For those who are unrepresented, the chances of being made aware of such consequences before entering a guilty plea are markedly lower. Simply imposing a professional duty on criminal defense counsel to inform their clients of potential immigration consequences before taking a guilty plea would not ensure that all non-citizen accused are properly informed before pleading guilty.

[27] See *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995) at 171-173, 196- 202, 204, 206, 209-210 and 236-237.

26. As a remedy, this Honourable Court should issue guidelines for judges presiding over criminal trials and pleas to raise the issue of immigration consequences before accepting a guilty plea, regardless of whether the accused is represented by counsel. This procedural safeguard is necessary to help prevent a miscarriage of justice by ensuring that all non-citizen accused are aware of the potentially devastating immigration consequences that can result from a guilty plea. Before accepting a guilty plea, judges should ask the accused if they are aware that non-citizens may be subject to a risk of deportation if found guilty of a criminal offence, and whether their guilty plea has taken into account any possible immigration consequences. This judicial inquiry need not be overly complex, time-consuming or fact-specific and can be easily implemented.

27. It should be noted that judicial inquiries of this nature have already been implemented in criminal courts in Ontario as a result of the evolving jurisprudence. For instance, before accepting guilty pleas in *Brown* and *Buric*, the courts in Barrie and Brampton, respectively, made simple inquiries of the accused's understanding of the potential collateral driving consequences.[28] Similar inquiries regarding potential immigration consequences will be just as workable in courts.[29]

28. It is submitted that trial judges are best placed to make this particular inquiry for two reasons. First, criminal counsel may not always be aware of the potentially complex immigration consequences of a criminal conviction and as such may not always ask clients about their immigration status.[30] Second, there are a growing number of unrepresented parties before the courts who may or may not have received proper assistance from duty counsel, and due to time constraints, duty counsel often do not have time to fully canvass the particular circumstances of any one accused. The only way for the court to ensure that a guilty plea is fully informed is for the presiding judge to make the necessary inquiry of the accused before accepting such a plea.

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[28] Transcript of *R v Brown*, dated July 6, 2016 at page 22 lines 27-32 and page 23 lines 1-16 [*Brown*]; Transcript of *R v Buric*, dated April 28, 2017 at page 4 lines 10-24 [*Buric*].

[29] See Respondent's Factum at paras 94-100 arguing that such inquiries will be unworkable.

[30] See for instance, in *R v Sangs*, 2017 ONCA 683 where the Court of Appeal for Ontario set aside a guilty plea based on fresh evidence by the accused that his counsel never asked him about where he was a citizen and never advised him of the immigration consequences of his guilty plea.

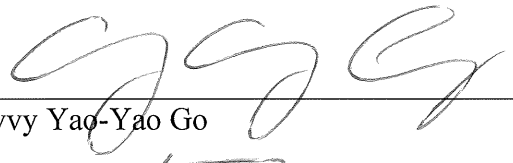
29. A guideline of this nature is consistent with s.606(1.1) of the *Criminal Code,* which sets out the conditions required for a Court to accept a guilty plea. The section provides in part that a court may accept a plea of guilty only if it is satisfied that the accused (a) is making the plea voluntarily; and (b) understands **the nature and consequences of the plea**. When dealing with a non-citizen accused, a court cannot be satisfied that the plea has been made voluntarily and that the accused understands the consequences of the plea without verifying whether the accused has been made aware of the significant immigration consequences of their plea.

30. Further, issuing this guideline does not take away the discretion of judges in deciding whether to accept the guilty plea and how to craft the sentence, if any, to be imposed. Instead, it serves to promote the accused's right to an informed plea and thereby reinforces one of the fundamental principles of the Canadian criminal justice system.

Part IV: Costs

31. The joint interveners seek no costs and request that none be awarded against them.

All of which is respectfully submitted this 21st day of September, 2017.



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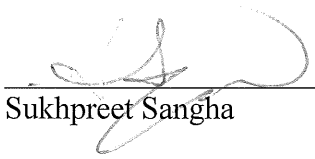

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Part VI: Table of Authorities

Jurisprudence	Paragraph(s)
Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9	19
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Padilla v Kentucky, 130 S Ct 1473 (2010)	12, 15, 22
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Transcript of *R v Brown*, dated July 6, 2016	27
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Secondary Sources	Paragraph(s)
Eric Monkman, "A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing" (2014) 72:2 UT Fac L Rev 38	14
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Legislation	Paragraph(s)
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Court File No. 37367

WING WHA WONG **Appellant**	**-AND-**	**HER MAJESTY THE QUEEN** **Respondent**
	-AND-	**ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF ONTARIO, CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS, ASSOCIATION DES AVOCATS DE LA DÉFENSE DE MONTRÉAL, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, CANADIAN COUNCIL FOR REFUGEES, CANADIAN CIVIL LIBERTIES ASSOCIATION, AFRICAN CANADIAN LEGAL CLINIC** **Interveners**

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

FACTUM OF THE JOINT INTERVENERS CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC and SOUTH ASIAN LEGAL CLINIC OF ONTARIO

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