SCC File No. 37367

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

B E T W E E N:

WING WHA WONG

Appellant (on appeal)
Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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PARTS I & II – OVERVIEW, FACTS AND POINTS IN ISSUE

1. This case asks the Court to consider whether the appellant's guilty plea should be set aside because he was unaware of immigration consequences. The Attorney General of Ontario takes the position that the validity of the plea should be assessed by reference to the substantive and procedural components of a guilty plea, and an examination of the values of the criminal justice system. Specifically, in order to set aside a guilty plea as "uninformed" based on consequences unknown at the time of the plea, an appellant should be required to show: (1) that a reasonable person in the circumstances of the appellant would not have pleaded guilty, and (2) that the appellant himself would not have pleaded guilty. The strength of the Crown's case and any available defence may be relevant to this analysis.

2. Ontario adopts the facts as stated in the British Columbia Court of Appeal's judgment.

PART III – BRIEF OF ARGUMENT

3. Assessment of the validity of a guilty plea should focus on a plea's substantive and procedural effects. Substantively, a guilty plea is an acknowledgment of guilt, and an admission of the essential elements of the offence. Procedurally, in pleading guilty the accused gives up the most important rights in the criminal process: the right to be presumed innocent, the right to require the Crown to prove its case beyond a reasonable doubt, and the right to make full answer and defence.[1] An attack on a guilty plea thus raises two potential questions: (1) was the guilty plea factually accurate in being a truthful admission to the essential elements of the offence? (2) did the accused give up his rights in a fair process?

4. The analysis should be informed by the core values of the criminal justice system, e.g.: avoiding wrongful convictions; respect for personal autonomy and human dignity, including that of victims; finality; solemnity of court proceedings; procedural fairness; and the overall integrity of the justice system.[2] These values are engaged in varying degrees in different types of complaints about guilty pleas. For that reason, it is helpful to situate the narrow issue of unknown consequences in relation to other types of cases. Challenges to guilty pleas fall into four loose categories, which courts have treated in different ways.

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[1] *R. v. T.(R.)*(1992), 10 O.R. (3d) 514, [1992] O.J. No. 1914 (C.A.) at para. 13.

[2] *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726 at paras. 44, 67; *R. v. Swain*, [1991] 1 S.C.R. 933 at 970-972; *R. v. Eizenga*, 2011 ONCA 113 at para. 70; *R. v. M.A.W.*, 2008 ONCA 555 at paras. 33-36; *R. v. Abraham*, 2007 ONCA 401 at para. 1; *R. v. Alec*, 2016 BCCA 282 at para. 78; *R. v. Duong*, 2006 BCCA 325 at para. 10; *R. v. Hoang*, 2003 ABCA 251 at paras. 24-27.

Four Categories of Complaints about Guilty Pleas

(i) Complaints that raise no serious concerns about factual accuracy or procedural fairness

5. Requests to set aside a plea that do not touch on the factual accuracy of the plea in any meaningful way and which do not identify a non-trivial flaw in the process should be easily dismissed. The accused's change of heart, perhaps because he or she is unhappy about the sentence imposed, is not a valid basis to set aside a plea.[3] Respect for the integrity of the plea process and the importance of finality speak conclusively in favour of upholding the guilty plea.

(ii) Complaints that impugn factual accuracy, despite a fair process

6. A guilty plea that is voluntary, informed and unequivocal, and not tainted by any other form of procedural unfairness will nevertheless be set aside where there is a genuine concern about the accused's actual guilt. This flows from the importance of avoiding wrongful convictions and concern for the integrity of the administration of justice, notwithstanding the absence of procedural unfairness or the fact that the accused knowingly and voluntarily pleaded guilty for reasons that seemed appropriate at the time.[4]

(iii) Complaints about the fairness of the process that render the plea factually unreliable

7. This is a broad category that covers a spectrum of complaints about procedural fairness, united by the common feature that the complaint at least potentially undermines the factual accuracy of the plea.

8. Involuntary and equivocal pleas fall into this category, as do pleas that are the product of a process that was unfair in ways that affected the accused's ability to make full answer and defence. In these types of cases, the problem is that the accused has pleaded guilty for reasons that have nothing to do with actual guilt, or without full consideration of the elements of the offence.[5] Some species of uninformed pleas will meet this description. For instance, where an

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[3] *R. v. Lyons*, [1987] 2 S.C.R. 309 at 372; *R. v. Antoine*, [1988] 1 S.C.R. 212.

[4] *R. v. Hanemaayer*, 2008 ONCA 580; *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queen's Printer, 1993) at 293-294. See also: *R. v. Bawkovy*, 2009 ABCA 213; *R. v. Corkum* (1984), 64 A.R. 354 (C.A.); *R. v. Jawbone* (1998), 126 Man.R. (2d) 295 (C.A.); *R. v. Santos* (1985), 34 Man.R. (2d) 9 (C.A.); *R. v. Kumar*, 2011 ONCA 120 at para. 34; *R. v. Abraham*, 2007 ONCA 401.

[5] Some examples: *R. v. Laperrière*, [1996] 2 S.C.R. 284, rev'g (1995), 101 C.C.C. (3d) 462 (Que. C.A.); *R. v. Nevin*, 2006 NSCA 72; *R. v. Toussaint* (1984), 40 C.R. (3d) 230 (Que. C.A.); *R. v. Lamoureux* (1984), 40 C.R. (3d) 369 (Que. C.A.); *R. v. Cesari* (1986), 50 C.R. (3d) 93 (Que. C.A.); *R. v. Lucas* (1983), 9 C.C.C. (3d) 71 (Ont. C.A.); *R. v. K.(S.)* (1995), 24 O.R. (3d) 199

accused is unaware of the nature of the allegations against him, does not know the true elements of the offence, or believes that he still has a right to call a defence, the guilty plea cannot be taken as a reliable admission of guilt.[6]

9. When these types of complaints are made out, the plea is typically set aside without any discussion of the strength of the Crown's case or available defences. There are some exceptions,[7] but in Ontario's submission this Court's decision in *Laperrière* speaks conclusively on this point. In that case, defence counsel had a conflict of interest when he was personally under investigation for witness tampering, and pressured the accused to plead guilty. The majority of the Quebec Court of Appeal dismissed the appeal on the basis that the result would have been the same. Bisson J.A. dissented on the basis that even though the accused did not argue that he was not guilty, the circumstances showed that the guilty plea "was not his own."[8] This Court allowed the appeal "essentially for the reasons given by Bisson J.A."[9]

10. It makes sense that the accused not be required to show an articulable route to acquittal in cases where the very nature of the procedural fairness complaint diminishes the court's faith in what the plea represents. The values of fairness and the accused's ability to make free and autonomous choices are squarely implicated, and there is at least the potential danger of wrongful conviction. The integrity of the justice system and procedural fairness require that the core rights arising out of the accusatorial and adversarial process be restored to the accused.

11. This category of procedural unfairness that implicates reliability of the plea also includes complaints that have no intrinsic relationship to the reliability of the plea, but which do have a potential relationship to it, and further investigation would reveal whether the factual accuracy of the plea is at stake. Examples would be instances of Crown non-disclosure[10] and defence counsel

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(C.A.); *R. v. Yarlasky* (1999), 140 C.C.C. (3d) 281 (Ont. C.A.); *R. v. Goloubev*, 2009 ONCA 333; *R. v. Djekic* (2000), 147 C.C.C. (3d) 572 (Ont. C.A.); *R. v. Mitchell*, [1997] O.J. No. 272 (C.A.); *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323 (C.A.); *R. v. Stork and Toews* (1975), 24 C.C.C. (2d) 210 (B.C.C.A.); *R. v. Kavanagh* (1955), 22 C.R. 396 (Ont. C.A.).

[6] For example: *R. v. Barwick*, [2005] O.J. No. 5400 (S.C.) at para. 42; *R. v. N.C.*, [2001] O.J. No. 4484 (C.A.).

[7] For example: *R. v. Lewis*, 2012 SKCA 81; *R. v. Huynh* (1986), 75 A.R. 238 (C.A.). The line of authority in British Columbia on this point is discussed by Fitch J.A. in the case on appeal, *R. v. Wong*, 2016 BCCA 416 at paras. 72-75 (see: *R. v. Alec*, 2016 BCCA 282; *R. v. Singh*, 2014 BCCA 373 at para. 51; *R. v. Read*, [1994] B.C.J. No. 1491 (B.C.C.A.) at para. 43).

[8] *R. v. Laperrière* (1995), 101 C.C.C. (3d) 462 (Que. C.A.) at 469-471.

[9] *R. v. Laperrière*, [1996] 2 S.C.R. 284.

[10] *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307 at paras. 85-90, 108-113.

error in reviewing disclosure.[11] In those circumstances, the appellate court considers whether there is a reasonable possibility that the accused would have run the risk of a trial if he had known of the undisclosed or misunderstood evidence. This entails an assessment of how the information could be used at a contested trial. In Ontario's submission, this does take the analysis into a consideration of the strength of the Crown's case and (at least potentially) what defences were available to the accused.

(iv) Complaints about procedural fairness that have no bearing on factual accuracy

12. When an appellant seeks to set aside a guilty plea based on a procedural defect that does not have even a potential impact on the factual accuracy of the plea, the appellate court is asked to overlook the solemnity of court proceedings and to disregard finality despite the fact that there is no concern about actual wrongful conviction. Although dealing with a different issue, Smith J.A.'s comments in *Sanders*, quoted with approval by this Court in *Bamsey*,[12] speak to these concerns:

> On the face of it, there would seem something anomalous in the law if it allowed an accused person, with full understanding, to plead "guilty" before a Magistrate and then, because he found the sentence unexpectedly heavy, or had unexpected consequences, or for some other reason having nothing to do with the merits, allowed him to appeal to the County Court and, without explanation, blandly plead "not guilty", and thus obtain a full trial on the merits. That seems to be playing fast and loose with the administration of justice.[13]

13. Complaints that a plea is "uninformed" because of unexpected consequences fall into this category, whether the issue is the type of sentence, collateral consequences, or purely legal consequences such as inability to appeal an adverse ruling that preceded the guilty plea. In order to establish that an unknown consequence creates a level of procedural unfairness that would justify setting aside a guilty plea as uninformed, an appellant should have to establish (1) that a reasonable person in the circumstances of the appellant would not have pleaded guilty, and (2) that he himself would not have pleaded guilty.[14]

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[11] *R. v. Henry*, 2011 ONCA 289 at paras. 36-37.
[12] *R. v. Bamsey*, [1960] S.C.R. 294 at 300. Ritchie J. emphasized the words "without explanation."
[13] *R. v. Sanders* (1953), 106 C.C.C. 76 (B.C.C.A.).
[14] *R. v. Riley*, 2011 NSCA 52 at para. 38.

14. ***The objective component.*** The test should have an objective component because a purely subjective test would erode the understanding of a guilty plea, from a full acknowledgement of responsibility, into an idiosyncratically conditional acknowledgment: i.e. "guilty unless there is some consequence that is important to me that I don't know about." Applying a solely subjective test would trivialize the meaning of a guilty plea, and would undermine finality in capricious ways. The objective component must, however, be informed or modified by the situation and characteristics of the accused. To borrow language from *Taillefer*, the court should ask "whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial" if fully informed of the consequences.[15]

15. ***The subjective component.*** This Court set out a purely objective test and rejected a subjective test in *Taillefer* for determining the impact of non-disclosure on a decision to plead guilty. In Ontario's submission, in addition to considering whether a reasonable person would have pleaded guilty, the accused whose complaint relates exclusively to an unknown consequence should also be required to show that he or she would not have pleaded guilty. Unlike material non-disclosure, an unknown consequence does not "cast doubt on the validity of the appellant's admission of guilt and the waiver of the presumption of innocence that pleading guilty involved."[16] It would undermine the solemnity of court proceedings and the finality of verdicts to permit the accused to have a second go at the trial process when he would not have done anything differently the first time around even if fully informed. That said, accused persons should be taken to act reasonably, and it would presumably be an unusual case where a complaint about unknown consequences would fail on the subjective component in the face of a finding that a reasonable person would not have pleaded guilty.

Factors Relevant to Unknown Consequences

16. A review of the case law suggests that the following factors should inform the assessment of whether an unknown consequence provides a basis to set aside a guilty plea, as uninformed:

(a) What factors informed the guilty plea in the first place?

17. In order to know whether the unknown consequence would have affected the accused's decision, the reviewing court will necessarily have to consider the reasons why the accused

[15] *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307 at para. 90.
[16] *R. v. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307 at para. 113.

originally decided to plead guilty and the course of events that led to the plea.[17] Most guilty pleas are at least in part informed by some assessment of the strength of the Crown's case and the overall likelihood of conviction at trial. This gives rise to perhaps the most contentious point in this appeal: is it enough for the accused to show that he pleaded guilty without knowing about a bad consequence, or does he also have to show that he had at least some prospect of being acquitted at a trial? The Ontario Court of Appeal has held that a plea that is uninformed as to a legally relevant consequence should be set aside without inquiring into the likelihood of conviction.[18] The Nova Scotia Court of Appeal has held that likelihood of conviction is a relevant inquiry.[19] Other courts have held that a plea will only be set aside where the accused also shows that he had a viable defence.[20]

18. Ontario submits that the Nova Scotian approach is correct. The values of finality, the solemnity of court proceedings and the overall integrity of the administration of justice would be unacceptably compromised by an analysis that disregarded the strength of the Crown's case and the accused's prospects at a contested trial. There could be cases where the bad consequence is so dire and follows so inevitably from the guilty plea, that no reasonable person would knowingly sign up for it by pleading guilty. However, in other circumstances, it would be appropriate to consider the strength of the Crown's case and any available avenues of defence. If a conviction is virtually inevitable, an appellate court should be reluctant to find that a reasonable person would have exercised his right to a contested trial.

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[17] See, for instance: *R. v. Tyler*, 2007 BCCA 142 at para. 23; *R. v. Kitawine*, 2016 BCCA 161 at paras. 22-28; *R. v. Armstrong*, [1997] O.J. No. 45 (C.A.) at paras. 2-3; *R. v. Al-Diasty* (2003), 174 C.C.C. (3d) 574 (Ont. C.A.) at paras. 2-7; *R. v. Saddlemire*, 2007 ONCA 36 at paras. 21-33.

[18] *R. v. Rulli*, 2011 ONCA 18 at paras. 2-3 (although leave to appeal was actually refused on the basis of no miscarriage of justice); *R. v. Quick*, 2016 ONCA 95 at para. 38; *R. v. Sangs*, 2017 ONCA 683 at para. 8. But see also *R. v. Hetsberger* (1979), 47 C.C.C. (2d) 154 (*per* Weatherston J.A. in chambers (application for extension of time)), (1980), 51 C.C.C. (2d) 257 (Ont. C.A.) and *R. v. Closs*, [1998] O.J. 172 (C.A.) (*per* Carthy J.A. in chambers) at para. 8.

[19] *R. v. Riley*, 2011 NSCA 52 at paras. 39-45.

[20] *R. v. Wong*, 2016 BCCA 416 at paras. 25-26 (*per* Saunders J.A.), paras. 71-78 (*per* Fitch J.A. expressing reservations) and para. 82 (*per* Harris J.A. also expressing reservations); *R. v. Slobodan*, 1993 ABCA 33 at para. 4; *R. v. Hunt*, 2004 ABCA 88 at paras. 15-22; *R. v. Vasconcelos* (1985), 38 Man. R. (2d) 106 (C.A.) at para. 5; *R. v. Nersysyan*, 2005 QCCA 606 at paras. 6-9 (however, see also *R. v. Belciug*, 2009 QCCA 1710 at paras. 3-5).

(b) Would knowledge of the unknown consequence have affected strategic decisions or plea negotiations?

19. The Ontario Court of Appeal's decision in *Quick* provides an example. A delay of a few months would have meant that the accused's prior convictions would no longer have triggered the lifetime driving suspension under provincial legislation.[21] With respect to collateral consequences that are properly a factor in sentencing, there will be many cases where both parties' positions would be affected. For example, in *Pham*, the Crown conceded that it would have agreed to a sentence of two years less a day rather than two years.[22]

(c) What is the significance of the unknown consequence both in general terms and to this accused person?

20. Built into this inquiry is an assessment of how the unknown consequence affects the accused's human dignity.[23] A trivial consequence, or one that would not have any long-term effect on the accused would not justify setting aside a guilty plea.

(d) What is the strength of the connection between the guilty plea and the unknown consequence?

21. If the unknown consequence results from a combination of factors and was only tenuously related to the guilty plea, or is in fact unlikely to actually transpire, this would make it less likely that a reasonable person would have chosen to have a contested trial, or that knowledge of the consequence would have affected the accused's decision.

(e) Could the unknown consequence be avoided or significantly mitigated if it were considered as a factor justifying a discharge or a lesser fit sentence?

22. In some cases an unknown consequence will flow from a finding of guilt. In others it will flow from conviction or from the length of sentence. If consideration of the consequence by the trial judge would have resulted in a disposition (discharge or lesser fit sentence) that would have avoided or significantly mitigated the concern, this is a relevant consideration to whether a

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[21] *R. v. Quick*, 2016 ONCA 95 at paras. 9, 37.
[22] *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739.
[23] Some examples of other collateral consequences: life-time ineligibility for receipt of social assistance (*R. v. Dennis*, 2013 BCCA 153), loss of child custody (*R. v. L.R.B.*, 2016 BCPC 172), community banishment (*R. v. Hayes*, 2007 ONCA 816, *per* MacPherson J.A. on application for extension of time).

reasonable person would still have pleaded guilty. Similarly, in some circumstances, a guilty plea will be the accused's "best bet" for avoiding or mitigating the impugned consequence, in that it is the only option that realistically reduces the risk. For instance, if the accused faces a strong Crown case without a viable defence, then pleading guilty and relying on the plea as a mitigating factor to obtain a discharge or a lower sentence could be the only sensible course of action as compared to an inevitable finding of guilt following a contested trial and the more severe consequences that might follow.[24] In these types of circumstances, if the appellate court finds that a reasonable person would still have pleaded guilty, it should decline to set aside the plea, and should instead review the sentence imposed with regard to the new information. [25]

(f) Was the accused put on notice or did he take reasonable steps to inform himself?

23. Where the accused was alerted to the potential for the impugned consequence, and chose not to inform himself, this could weigh against a finding that he would have acted differently because it suggests that the consequence was not in fact all that important to him.[26] Conversely, where the accused did take steps to inform himself but received bad advice, this would support the application to set the plea aside.[27] The accused's background, level of education and sophistication would be relevant to whether he was realistically able to take steps to inform himself.[28]

Additional Considerations

24. Three points bear further discussion. First, what is the relevance of defence counsel's conduct? Second, to the extent that it is appropriate to assess the strength of the Crown's case and/or the viability of any defence, how should this be approached? Third, can the set-aside guilty plea have any evidentiary value at a retrial?

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[24] *R. v. Singh*, 2016 ONSC 3596 would seem to be an example of this.

[25] For example, *R. v. Nassri,* 2015 ONCA 316 and *R. v. Ismail,* 2017 ONCA 597. Both cases involved serious immigration consequences that were not known at the time of trial. The accused did not seek to set their pleas aside, but the sentences were reduced on appeal.

[26] For example, *R. v. Tyler*, 2007 BCCA 142 at paras. 21-26; *R. v. Kitawine* 2016 BCCA 161 at paras. 21-29; *R. v. Shiwpradshad*, 2015 ONCA 577 at paras. 70-73; *R. v. Argueta*, 2017 ONSC 230.

[27] For example, *R. v. Meehan,* 2013 ONSC 1782.

[28] *R. v. Harvey*, 2017 ONSC 4500 at paras. 21, 34.

Defence counsel's conduct

25. Although immigration consequences in particular seem like an obvious and necessary point for defence counsel to discuss with a client, a finding of ineffective assistance of counsel should not be a prerequisite to setting aside a plea for being uninformed about a bad consequence. Nevertheless it is, in Ontario's submission, almost inevitable that the accused will have to waive solicitor-client privilege as regards the decision to plead guilty in order for an appellate court to have a proper understanding of the factors that motivated the plea, and the accused's state of knowledge or reasonable steps about the consequences of pleading guilty.

Manner of assessing the strength of the Crown's case

26. Appellate courts are not well suited to complex fact finding, and significant expansion of the circumstances in which they have to engage in wide ranging and time consuming analysis of fresh evidence would be detrimental to the appeals process. However, appellate examination of the strength of the Crown's case need not turn into a proxy for a trial itself. The appellate court could proceed based on reliable hearsay materials, keeping in mind that the issue is "what was the strength of the Crown's case?" and/or "was there a viable defence?" and not "has the Crown proved guilt beyond a reasonable doubt?" or "does this defence evidence leave a reasonable doubt?"[29]

Evidentiary value of the set-aside guilty plea

27. In *Thibodeau*, this Court held that the trial judge erred in using the accused's previously-withdrawn guilty plea to corroborate the evidence of an accomplice.[30] The plea in that case would fall into the third category outlined above, in that it was entered in circumstances that showed it to be tainted by a level of unfairness that had to call the reliability of the plea into question. Indeed, Cartwright J. held that if admissibility of the withdrawn plea fell to be determined under the confessions rule, it would clearly have been rejected. In contrast, in *Dietrich*, the Ontario Court of Appeal held that a plea to non-capital murder (as an included offence to capital murder), which was set aside on appeal as a nullity because it was only entered in front of the judge, not the jury, could be relied upon by the Crown as an admission at the

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[29] The appellate court could also use its case management powers and, for appeals involving indictable offences, the leave requirement under s. 675(1)(a)(iii) of the *Criminal Code*, to weed out claims that are not arguable on the face of the appellant's written materials.

[30] *R. v. Thibodeau*, [1955] S.C.R. 646 at 653-655; *R. v. Boulet*, [1978] 1 S.C.R. 332 at 334.

retrial.[31] Although not a legal nullity, a plea that is set aside solely because of unknown consequences is very different from the type of complaint at issue in *Thibodeau*. In Ontario's submission, it should, in at least some circumstances, be open to the Crown at a retrial to rely on the earlier plea as an evidentiary admission. For instance, ignorance of the provincial driving suspension provisions caused the accused in *Quick* to make a poor strategic decision about the timing of his plea. At its highest, his appeal established that if properly informed, he would have sought to delay his plea by a few months. The procedural unfairness that justified setting his guilty plea aside would in no way be implicated by evidentiary use of his plea as an admission at a retrial. In appropriate cases, permitting evidentiary use of the earlier guilty plea at a retrial would go some way towards offsetting the harm that is done to the overall integrity of the justice system when a guilty plea is set aside for reasons that have absolutely no bearing on its factual accuracy.

PART IV – COSTS

28. Ontario makes no submissions regarding costs.

PART V – REQUEST TO PRESENT ORAL ARGUMENT

29. Ontario requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH is respectfully submitted by,

Alison Wheeler
Counsel

Dated at Toronto this 26th day of September, 2017

[31] *R. v. Dietrich*, [1970] 3 O.R. 725 (C.A.) at 54-58.

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