IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

WING WHA WONG

APPLICANT

and

REGINA

RESPONDENT

MEMORANDUM OF ARGUMENT OF THE APPLICANT ON LEAVE

(Pursuant to s. 25(1)(c) of the *Rules of the Supreme Court of Canada*)

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OVERVIEW

1. The Applicant seeks leave to appeal the decision of the British Columbia Court of Appeal dismissing the appeal of his conviction for trafficking in a controlled substance. The Applicant, with the assistance of previous counsel, entered a plea of guilty to one count of trafficking in cocaine and was sentenced to 9 months incarceration. He did not learn until afterwards that because he was a permanent resident of Canada, the plea rendered him inadmissible under s.36(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*") and he therefore faced deportation. As a result of the sentence he would have no right of appeal to seek equitable relief at the Immigration Appeal Division of the Immigration and Refugee Board. He therefore sought to have his guilty plea struck on the basis that he had not been fully informed of its consequences.

2. There is broad consensus that a valid plea must be informed. However, the case at bar demonstrates a significant level of confusion and lack of clarity in the various approaches taken in appellate courts across Canada in decisions on whether to allow appellants to strike uninformed pleas, in particular in cases where the person was not informed of a collateral consequence like potential deportation.

3. The approaches in the various appellate courts diverge on whether *any* knowledge of collateral consequences is ever required for a plea to be valid, with several courts taking the position that there is no such requirement. Among the courts where there is agreement on the legal relevance of at least some collateral consequences, there is no consensus on the manner in which legal relevance is to be assessed or on the level of knowledge of those consequences that might be required.

4. Even in cases where it is acknowledged that a plea was uninformed, there is substantial divergence about the framework to assess whether it resulted in prejudice and a miscarriage of justice. The Ontario Court of Appeal has unequivocally stated that an uninformed plea is inherently prejudicial, finding that nothing further need be demonstrated. Others have found that an appellant must also prove that a different plea would have been entered had the person been informed of the relevant consequences. Finally, in the most onerous test, an appellant must also show that there is an articulable route to an acquittal should a plea

of not guilty be entered.

5. Even within the case at bar, the three judges on the panel diverged on the nature of the test to be applied, and in particular on the question of whether the Appellant would need to articulate a route to an acquittal in order for the plea to be struck. Given the importance of guilty pleas in our criminal justice system, there is significant interest in having a consistent and coherent application of the law on a national level. The number of aspects upon which there is divergence on the issue make it incumbent upon this Court to intervene and provide much needed clarity and guidance.

PART I – STATEMENT OF FACTS

6. The Applicant is a 52-year-old citizen of China who came to Canada in 1990. He continues to be a permanent resident of Canada. His wife and Canadian child reside with him in Kamloops, British Columbia. [Submissions on Sentence - Applicant's Records ("AR"):74]

7. On April 3, 2012, the Applicant was charged with one count of trafficking in cocaine under s.5(1) of the *Controlled Drugs and Substances Act*, arising from an incident in Kelowna on February 29, 2012. An undercover officer, acting on a tip from a confidential informant, called him and asked to purchase "powder". They later met and he allegedly sold her two flaps of cocaine for $60.00. [Submissions on Sentence - AR:69]

8. On January 6, 2014, the Applicant entered a plea of guilty with the assistance of former counsel.

9. The Applicant was not informed of the immigration consequences of his plea. This was confirmed by former counsel who deposed that he did not advise the Applicant of the consequences of a guilty plea as they pertained to his immigration status. [Affidavit of M. Kennedy, paras. 55-56 – AR:94]

10. On February 21, 2014, the Applicant was sentenced to 9 months jail before Hogan J. of the Provincial Court of British Columbia. Although the Applicant's status as a permanent resident was mentioned in submissions [AR:74, l.12-13], there were no submissions made on the immigration consequences of the plea or sentence and no inquiry on the issue by the

sentencing judge.

11. The Applicant learned about a potential immigration consequence arising from his plea when he was in jail and the Canadian Border Services Agency ("CBSA") spoke to him. [Affidavit of Appellant, AR:85]

12. On January 8, 2015, the Applicant filed an appeal of his conviction in the British Columbia Court of Appeal with an application for an extension of time.

13. In a letter dated April 13, 2015, the Applicant was given notice to appear at an admissibility hearing where a deportation order would be sought under s.36(1)(a) of *IRPA*. This hearing was adjourned pending the Applicant's conviction appeal. [AR:104]

14. Section 36(1)(a) of *IRPA* renders a permanent resident inadmissible on grounds of serious criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. A permanent resident found inadmissible in Canada under s.36(1)(a) is issued a deportation order.[1]

15. A permanent resident or a protected person may have a right to appeal the order to the Immigration Appeal Division which can exercise equitable jurisdiction in deciding whether to affirm, quash or stay the order. Under s.64(2) of *IRPA*, a person will not have a right of appeal if they are inadmissible for serious criminality in relation to an offence "punished in Canada by a term of imprisonment of at least six months."

16. As a result of his conviction and sentence in the case at bar, the Applicant was rendered inadmissible under s.36(1)(a) of *IRPA*, and as a result of the 9 month sentence does not have a right of appeal to the Immigration Appeal Division.

British Columbia Court of Appeal

17. On October 26, 2016, the British Columbia Court of Appeal dismissed the Applicant's conviction appeal. Each member of the panel wrote separate reasons concurring in the

[1] *Immigration and Refugee Protection Regulations* (SOR/2002-227) at s.229(1)(c).

result but diverging on the nature of the legal test to be applied for striking a guilty plea.

18. Accepting that the Applicant had not been informed of the significant immigration consequences of his guilty plea, Saunders J.A. set out two additional requirements for striking a plea which she found had not been met:

> First, Mr. Wong has not established that the lack of information in respect to the immigration consequences of conviction would have made a difference to his decision to plead guilty. [...]
> Second, Mr. Wong has not advanced an articulable route to a conclusion different from a guilty verdict. [...] Mr. Wong needs to avoid conviction altogether to avoid the consequences of s. 36 of the *Immigration and Refugee Protection Act*. He has not articulated any basis to avoid conviction or to consider he has any prospect of success in respect to the verdict. [paras. 42-43]

19. In concurring reasons, Fitch J.A. framed the issues in the following terms:

> 1. Did Mr. Wong understand the immigration consequences of his guilty plea when it was entered?
> 2. If the answer to the first question is "No", did Mr. Wong have to understand those immigration consequences for his guilty plea to be informed?
> 3. If the answer to the second question is "Yes", is the conviction entered following the guilty plea the product of a miscarriage of justice? [para. 55]

20. Justice Fitch accepted that the Applicant did not understand the immigration consequences of the plea, and that the plea was therefore not informed:

> [66] I am satisfied that for Mr. Wong's plea of guilty to be informed, he had to understand the immediate immigration consequence to him – criminal inadmissibility under s. 36(1)(a) of the Act. In my view, Mr. Wong has met his onus of showing on a balance of probabilities that his plea of guilty was not informed with respect to a legally relevant consequence.

21. On the third question, however, Fitch J.A. found that an uninformed plea is not presumptively a miscarriage of justice but that the appellant "bears the onus of demonstrating that the plea would not have been entered had the legally relevant consequences of doing so been known." [para. 67] He concluded that the Applicant had not met that burden and therefore dismissed the appeal. [paras. 68-70]

22. The separate concurring reasons of Harris J.A. come to a similar conclusion that the

Applicant had "not established that he would not have pleaded guilty if he had been properly informed of the immigration consequences of his plea." [para. 80]

23. Both Fitch J.A. and Harris J.A. went on to express concerns about the requirement set out by Saunders J.A. that an appellant articulate a defence or route to acquittal as a prerequisite for withdrawal of a plea. Harris J.A. summarized the issue as follows:

> [82] I agree that the jurisprudence in this court appears to have embedded, as a prerequisite of withdrawing a guilty plea on the ground that otherwise would result in a miscarriage of justice, the need to demonstrate something akin to "an articulable route to an acquittal" or a valid defence. Accordingly, I consider myself bound by authority in respect of that issue. Nonetheless, I share the concerns of principle regarding such a requirement articulated by Mr. Justice Fitch.

24. Justice Fitch engaged in a somewhat more detailed discussion of the jurisprudence on this issue, ultimately coming to the conclusion that because the case was being disposed of on other grounds the matter did not need to be decided in this case [paras. 71-78].

PART II – ISSUES

1) What is the framework to be applied by an appellate court in deciding whether to strike a guilty plea by an individual who was not informed of significant collateral consequences of their plea?

PART III – LAW AND ARGUMENT

Introduction

25. Entering a plea of guilty when facing criminal charges is among the most significant and life-altering acts an accused person may ever be called upon to make. This Court discussed the nature of guilty pleas in *Adgey v. R.,* [1975] 2 SCR 426 at p.440 in the following terms:

> A plea of guilty carries an admission that the accused so pleading has committed the crime charged and a consent to a conviction being entered without any trial. The accused by such a plea relieves the Crown of the burden to prove guilt beyond a reasonable doubt, abandons his non-compellability as a witness and his right to remain silent and surrenders

> his right to offer full answer and defence to a charge. It is important, therefore, that the plea be made voluntarily and upon a full understanding of the nature of the charge and its consequences and that it be unequivocal.

26. The case at bar deals with one aspect of a guilty plea - the scope of understanding of the consequences of a plea required for a plea to be to be properly informed and thus valid, and the important question of when a guilty can be struck by an appellate court when it is not informed.

27. Section 606 (1.1) of the *Criminal Code* sets out the conditions required for a Court to accept a guilty plea in the following terms:

> (1.1) 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
> (i) that the plea is an admission of the essential elements of the offence,
> (ii) the nature and consequences of the plea, [...]

28. There is little disagreement among appellate courts about the fundamental requirements for the validity of a guilty plea. A widely cited passage from *R. v. R.T.* (1992), 10 O.R. (3d) 514 (C.A.), at para. 14 succinctly summarizes the basic principles:

> 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 [...]

29. There also appears to be general agreement about the legal basis upon which an appellate court could intervene to strike an invalid guilty plea. Section 686(1) of the *Criminal Code* sets out the power for a Court of Appeal to allow the appeal of a conviction, and appellate courts have generally assessed the striking of guilty pleas under 686(1)(a)(iii) in terms of whether there was a miscarriage of justice.

30. There are, however, two broad classes of cases in which an individual seeks to strike a guilty plea on appeal. The first type of case includes an alleged failure by defence counsel to inform their client about the relevant consequences of a plea. These cases are often

assessed in the context of incompetence of counsel at the same time as assessing the uninformed nature of the plea, leading to some confusion within the appellate jurisprudence about the nature of the test being applied. The second line of cases consists of those where the plea was alleged to be uninformed for reasons unrelated to defence counsel's competence, such as due to incomplete disclosure[2].

31. The case at bar falls within the first line of cases, in which competence of counsel was at issue. Defence counsel failed to inform the Applicant of the potentially devastating immigration consequences of his plea. The plea was entered almost a year after this Court's decision in *R. v. Pham* 2013 SCC 15 confirmed a long line of cases in British Columbia which emphasized the importance of considering immigration consequences in the criminal context. It is difficult to understand how competent counsel engaging in a sentencing-related practice could fail to be aware of a long-standing sentencing principle in British Columbia that had been recently confirmed in this Court. Several years earlier, the British Columbia Court of Appeal in *R. v. Martinez-Marte*, 2008 BCCA 136, had even urged Crown counsel to raise the issue of immigration consequences upon the failure of defence counsel to do so:

> [19] A number of recent cases in this Court have raised this issue. It is to be hoped that in future, the record will demonstrate adequate consideration of the immigration consequences of any sentence to be imposed. It is perhaps not too much to ask the Crown to address these matters before the sentencing judge in the event that defence counsel fails to do so.

32. The Supreme Court of the United States in *Padilla v. Kentucky*, 130 S. Ct. 1473 – 2010 framed the issue of informing an accused of significant immigration consequences in terms of the professional responsibilities of counsel:

> The severity of deportation—"the equivalent of banishment or exile," [...] only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." [...] To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.

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[2] For example *R. v. Taillefer*, 2003 SCC 70; [2003] 3 S.C.R. 307.

33. In the case at bar, the issue of whether the Applicant was informed of the immigration consequences was not contested. It is not clear whether a finding with respect to the competence of counsel makes a difference to the validity of the plea if it is found to be uninformed, in particular given the wide variation in approaches taken by the various appellate courts in Canada.

34. The question of what is required for a plea to be informed has been the subject of substantial disagreement among appellate courts in terms both of the scope and depth of knowledge needed. There are also fundamental differences among the courts with respect to the framework to be applied should a plea be found to be uninformed. Both these issues are addressed in the following sections and require resolution by this Court.

Requirements for an Informed Plea

35. There is general agreement that an informed plea requires the accused to understand the nature of the charges, the allegations and the general scope of *Criminal Code* consequences that may result from entering a guilty plea. However, there is less agreement among appellate courts when it comes to consequences collateral to the criminal sentencing regime.

36. Writing for this Court, Wagner J. addressed the question of collateral immigration consequences at sentencing in *R. v Pham* 2013 SCC 15 in the following terms[3]:

> [T]he collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(*a*) of the Criminal Code). Their relevance flows from the application of the principles of individualization and parity. [para. 11]

37. The Court went on to address the scope within which appellate courts could intervene when

[3] This Court has also pointed out in *B010 v. Canada (Citizenship and Immigration)* 2015 SCC 58 that "Obstructed or delayed access to the refugee process is a "penalty" within the meaning of art. 31(1) of the Refugee Convention." [para. 53, see also para. 63] Inadmissibility under s.36(1)(a) has a similar impact for refugee claimants.

collateral consequences had not been considered at sentencing:

> [24] An appellate court has the authority to intervene if the sentencing judge was not aware of the collateral immigration consequences of the sentence for the offender, or if counsel had failed to advise the judge on this issue. In such circumstances, the court's intervention is justified because the sentencing judge decided on the fitness of the sentence without considering a relevant factor: *M. (C.A.)*, at para. 90.

38. The Court in *Pham* did not address the question of the impact a lack of knowledge of collateral consequences would have on the validity of a plea. There are three issues that arise in the context of assessing whether knowledge of collateral consequences is required for an informed plea. The first question is whether knowledge of collateral consequences is required at all for a plea to be valid. Secondly, if collateral consequences are legally relevant in some circumstances, the threshold for legal relevance must be established. Finally, the required level of knowledge or understanding of legally relevant consequences by the accused must be identified. Each of these will be addressed in turn.

(1) Requirement to be informed at all

39. The first issue is whether an accused need be aware of consequences outside the criminal law at all in order for a plea to be informed. The Alberta Court of Appeal in *R. v. Slobodan* 1993 ABCA 33 took the view that knowledge of such consequences is irrelevant to whether a plea was "informed":

> [4] The argument made by Mr. Kantor, in essence, is that here the unexpected additional two years loss of driving privileges translates into a legal consequence which entities the appellant to now change her plea. There is nothing to show that the appellant misunderstood the nature of the charge and the effect of the plea of guilty. An unexpected penalty dictated by law after a voluntary and informed plea of guilty does not now justify a change of plea.

40. This approach was confirmed in *R. v. Hunt*, 2004 ABCA 88 , a case like the one at bar dealing with immigration consequences:

> [9] We decide, that where there has been an unequivocal free and voluntary admission of the facts constituting the offence, not disputed on appeal, that an unexpected legal consequence such has occurred here is

> not such as to allow the withdrawal of the plea of guilty. In *R. v. Hoang* (2003), ABCA 251, this Court stated at paragraph 36 that:
> "The requirement that the accused understand the nature and consequences of a guilty plea is not a requirement to canvass every conceivable consequence which may result or may be forgone. Such a requirement be a practical impossibility."

41. The approach in *Hunt* has also been followed outside Alberta. The Québec Court of Appeal, for example, adopted the above passage in *Nersysyan c. R.*, 2005 QCCA 606 [at para. 9] and *Raymond c. R.*, 2009 QCCA 808 [at para. 114].

42. As will be seen in the following sections, other appellate courts have rejected the approach in *Hunt* and *Slobodan*, including the British Columbia Court of Appeal in the case at bar. While there was disagreement on the test to be applied, all three judges in the Court below agreed that the collateral immigration consequences were legally relevant and that the Applicant's plea was therefore uninformed. This threshold issue alone calls out for resolution by this Court.

(2) Scope of legally relevant consequences

43. For Courts that have recognized the possibility that lack of knowledge of collateral consequences could render a plea uninformed, the next question is the scope of the collateral consequences that are "legally relevant" in this context. The Ontario Court of Appeal in *R. v. Quick*, 2016 ONCA 95 established a test based on the circumstances of the accused and importance of the consequence in question:

> [33] What is called for is a fact-specific inquiry in each case to determine the legal relevance and the significance of the collateral consequence to the accused. A simple way to measure the significance to an accused of a collateral consequence of pleading guilty is to ask: is there a realistic likelihood that an accused, informed of the collateral consequence of a plea, would not have pleaded guilty and gone to trial? In short, would the information have mattered to the accused? If the answer is yes, the information is significant. I draw support for this approach from the reasons of Lebel J. in *R. v. Taillefer; R. v. Duguay*, 2003 SCC 70; [2003] 3 S.C.R. 307 and the reasons of Watt J.A. in *R. v. Henry*, 2011 ONCA 289.

44. Laskin J.A. therefore separates the question of legal relevance and the "informed" nature of the plea from the question of whether there has been a miscarriage of justice, which he

undertakes after finding the plea was uninformed. Although *Quick* is referred to in some detail in the case at bar, it is unclear precisely how the approach set out by Laskin J.A. is in fact being applied.

45. Saunders J.A. appears to incorporate the framework set out in *Quick* for assessing legal relevance directly into the miscarriage of justice analysis. This approach is particularly confusing because, as will be seen below, Saunders *J.A.* explicitly rejects the approach to miscarriage of justice in *Quick* by requiring an articulable path to acquittal.

46. The approach taken by Fitch J.A. does not appear to follow the *Quick* framework, although the failure to clearly articulate the framework renders the reasoning more difficult to follow. Fitch J.A. clearly comes to the conclusion that the collateral immigration consequences are "legally relevant" and that the plea was therefore uninformed:

> [66] I am satisfied that for Mr. Wong's plea of guilty to be informed, he had to understand the immediate immigration consequence to him – criminal inadmissibility under s. 36(1)(a) of the Act. In my view, Mr. Wong has met his onus of showing on a balance of probabilities that his plea of guilty was not informed with respect to a legally relevant consequence.

47. However, as will be seen below, after acknowledging the plea to be uninformed Fitch J.A. goes on to engage with the question of whether the Applicant would have entered a different plea if informed. Implicit in this approach is a rejection of the framework employed by Laskin J.A. in *Quick*, as the issue would already have been dealt with in the context of legal relevance prior to addressing the issue of prejudice and miscarriage of justice.

48. The confusion surrounding the analysis of this issue would appear to be a result of the wide range of approaches taken to these cases in the appellate courts and the lack of a coherent and consistent framework, all of which calls out for resolution by this Court.

(3) Level of Awareness Required

49. The final question is the level of awareness of collateral consequences required in order for a plea to be informed. The British Columbia Court of Appeal recently discussed this issue in *R. v. Kitawine*, 2016 BCCA 161 in the following terms:

> [20] *Quick* was a case of absence of knowledge. More difficult are those cases where the accused had a general awareness of the nature of the collateral consequences, but not necessarily an appreciation of the precise outcome. The general trend in such cases, beginning with *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; *R. v. Tyler*, 2007 BCCA 142 , in this jurisdiction; and *R. v. Shiwprashad*, 2015 ONCA 577 in Ontario, is to uphold the plea as sufficiently informed.

50. In the case at bar, the level of knowledge was not at issue, and there was consensus that the Applicant had not been informed at all of the immigration consequences of his plea.

Remedy for an Uninformed Plea

51. The Nova Scotia Court of Appeal was quite candid in its assessment in *R. v. Riley*, 2011 NSCA 52 that:

> Demonstrated or claimed lack of knowledge of the consequences of pleading guilty has not always resulted in consistent outcomes in Canadian jurisprudence. [para. 15]

In effect, even in cases where there is a clear finding of an uniformed plea, appellate courts diverge significantly on the test to be applied.

52. There appears to be some consensus about the basis upon which a plea might be struck, as a remedy under s. 686(1)(a)(iii) of the *Criminal Code* requires a finding of a "miscarriage of justice". As Fitch J.A. pointed out in the case at bar, "Inherent in the miscarriage of justice test as it applies in this context is a requirement that an appellant demonstrate prejudice." There are, however, at least three remarkably different approaches to assessing prejudice resulting from an uninformed plea.

53. The first approach, applied by the Ontario Court of Appeal, finds that giving up one's right to a trial is inherently prejudicial and therefore an uninformed plea is presumptively a miscarriage of justice.

54. The second approach requires that the appellant demonstrate that the plea would have been different if informed. Even within this second approach, there is some confusion about the test both in terms of the evidence required and the evidentiary threshold to be met. First, there is disagreement about whether the issue is to be assessed subjectively as it was in the

case at bar or objectively as suggested by this Court in *Taillefer*. Secondly, there is divergence on whether the standard that must be met is to show a "reasonable possibility" that a different plea would have been entered had the accused been properly informed or whether a "reasonable probability/likelihood" is required.

55. The third and most onerous approach is that taken by Saunders J.A. in the case at bar and applied in the Alberta and Québec appellate courts, requiring a threefold test be met by an appellant to strike a plea. The appellant must demonstrate not only that the plea was uninformed and that there would have been a different plea had the appellant been informed but also that there is an articulable route to an acquittal should a plea of not guilty be entered.

56. It will be helpful to examine each of these approaches in more detail.

(1) Uninformed Plea as Miscarriage of Justice

57. The Ontario Court of Appeal explicitly rejected the requirement that an appellant seeking to strike an uninformed plea need show anything more. The decision of Moldaver J.A. (as he then was), Feldman J.A. and MacFarland J.A. in *R. v. Rulli*, 2011 ONCA 18[4] is unequivocal about the prejudice inherent in an uninformed plea:

> [2] With respect, the summary conviction appeal judge applied the wrong legal test in assessing whether the plea should have been struck. In the circumstances, he should have focused on whether the plea was informed. If it was not, the prejudice lies in the fact that in pleading guilty, the appellant gave up his right to a trial. Whether he had a viable defence was not a relevant factor in the circumstances.

58. The Ontario Court of Appeal recently returned in some detail to the circumstances in which a plea entered in ignorance of significant collateral consequences could be struck in *R. v. Quick* 2016 ONCA 95. The case dealt with an accused who entered a plea to dangerous driving under the *Criminal Code* without being informed of significant consequences under the provincial *Highway Traffic Act*. Accepting that the plea was uninformed, the Court in *Quick* explicitly endorsed the statement above from *Rulli* [para. 38], finding prejudice

[4] The principle enunciated is also cited with approval by Pardu J.A. in *R. v. Aujla*, 2015 ONCA 325.

inherent in the uninformed plea and therefore allowing it to be struck.

(2) Onus to Demonstrate Alternate Plea

59. In the case at bar, Fitch J.A. accepted that the plea was uninformed but went on to consider whether the uninformed plea resulted in a miscarriage of justice:

> Inherent in the miscarriage of justice test as it applies in this context is a requirement that an appellant demonstrate prejudice. Prejudice is established when the appellant satisfies the court that he or she would not have entered the guilty plea had the legally relevant consequences of doing so been known. [para. 67]

60. The statement of the law above does not address the standard of proof required, but simply states that the onus is on the appellant to demonstrate that a different plea would have been entered.

61. In the case at bar, Saunders J.A. discusses the burden of proof, albeit in the context of ineffective assistance of counsel, citing the decision in *R. v. Aulakh*, 2012 BCCA 340:

> [42] A miscarriage of justice will occur where there is a reasonable probability or reasonable possibility (the terms are used interchangeably in the jurisprudence) that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome": *Strickland v. Washington*, 466 U.S. 668 (1984) per O'Connor J. at 2068, cited in *Joanisse* at 64. The standard of reasonable probability/possibility falls somewhere between a mere possibility and a likelihood: *Joanisse* at 64.

62. It should be underlined that the decision in *Joanisse* was made prior to the decision from this Court in *Taillefer*. In dealing with a failure to disclose evidence, this Court in *Taillefer* was clear that the standard of proof was a "reasonable possibility":

> [90] […] The accused must demonstrate that there is a reasonable possibility that the fresh evidence would have influenced his or her decision to plead guilty, if it had been available before the guilty plea was entered. [...] Thus the impact of the unknown evidence on the accused's decision to admit guilt must be assessed. If that analysis can lead to the conclusion that there was a realistic possibility that the accused would have run the risk of a trial, if he or she had been in possession of that information […] leave must be given to withdraw the plea.

63. This Court made no mention in *Taillefer* of "reasonable probability" as a standard. The Ontario Court of Appeal in *Quick* does specifically address the standard, referring to the decision of Watt J.A. in *R. v. Henry* 2011 ONCA 289:

> [36] In Henry, Watt J.A. also applied a subjective test when he set aside a guilty plea because the accused was misinformed about the viability of a constitutional challenge. And the standard he used was "realistic likelihood", not "reasonable possibility".

64. With respect, it is not clear from *Henry* that Watt J.A. had turned his mind to the distinction in the thresholds to be applied, as he was concluding that there was a "realistic likelihood" the appellant in *Henry* would have acted differently and therefore the plea was struck.

65. The limited discussion of the evidentiary burden in the jurisprudence also does not address the nature of the evidence that presumably would need to be adduced. The primary reproach of the Court of Appeal against the Applicant was the failure to declare in an affidavit that he would have entered a different plea had he been informed of the immigration consequences. While such a declaration appears necessary on the test applied by both Saunders and Fitch JJ.A., it is not clear if such a declaration would be sufficient. If the Court were to believe the Applicant's subjective assertion but find the basis for it objectively unreasonable it is unclear whether some form of modified test would be applied.

66. This brings us squarely to the second issue of contention, which is whether the test is subjective or objective. This Court made it clear in *Taillefer* that an objective test applied in the context of striking the guilty plea in that case:

> However, the test is still objective in nature. The question is not whether the accused would actually have declined to plead guilty, but rather whether a reasonable and properly informed person, put in the same situation, would have run the risk of standing trial if he or she had had timely knowledge of the undisclosed evidence, when it is assessed together with all of the evidence already known.

67. In the case at bar, Saunders J.A. specifically considered and rejected the objective test set out in *Taillefer* in favour of what she interpreted to be the subjective test set out in *Quick*:

> [38] The objective test described by Justice LeBel, which falls short of requiring the appellant to establish the information not known would have made a difference to the plea, is one measure that may be applied to the task of the appellant seeking to set aside his conviction because of unexpected collateral consequences. The *Taillefer* approach is not the only approach that may be taken, however.

68. All three members of the panel appear to apply the subjective test set out by Saunders J.A., focusing on the lack of direct evidence from the Applicant that he would personally have made a different decision.

(3) Articulable Path to Acquittal

69. In a widely cited case, the Alberta Court of Appeal in *R. v. Hunt*, 2004 ABCA 88 found that a valid defence or at least an assertion of factual innocence were required for striking a guilty plea:

> [2] The appellant cites cases in which it was found that the accused did not fully understand the legal consequences of pleading guilty and therefore was allowed to withdraw a guilty plea: [...]
> [3] However, these cases are all distinguishable from the case at bar in that in each of the above referenced cases, the accused either asserted that he or she had a valid defence or at least did not admit to the facts comprising the offence.

70. In *Nersysyan c. R.*, 2005 QCCA 606 the Québec Court of Appeal makes it clear that even denying the facts and asserting one's innocence would not be sufficient, but that an actual path to acquittal would be required:

> [6] [...] Le facteur primordial à considérer est le déni de justice. Dans ce contexte, il incombe à l'appelant d'établir qu'il avait des moyens de défense valables et non futiles à présenter. Il ne suffit pas de spéculer sur l'issue du procès qui a été évité. Or, dans le présent cas, l'appelant se contente d'une dénégation générale des actes qu'on lui reproche;

71. In the case at bar, Saunders J.A. reviewed the state of the law in British Columbia in the following terms:

> I would interpret the requirement as one of establishing an articulable route to an acquittal, allowing that the hope of a favourable verdict must be from more than the chance that evidence needed for conviction will have become unavailable. [para. 26]

72. Both Fitch and Harris JJ.A. expressed reservations about this being a requirement for the withdrawal of a guilty plea, but declined to rule on the issue as the case was being decided on other grounds. In an analysis endorsed by Harris J.A. [para. 82], Fitch J.A. engaged in a detailed discussion of the origin of the requirement in British Columbia and the reasons he is reluctant to endorse it [paras. 71-78]. He explicitly refers with apparent approval to the rejection of this requirement by the Ontario Court of Appeal in *Rulli*.

73. A variation of the criteria is applied by the appellate courts in Nova Scotia and Newfoundland/Labrador. In *R. v. K.R.F.*, 2011 NLCA 2, Rowe J.A. (as he then was) considered the test for striking a guilty plea in an application for release on bail pending appeal. The test cited was set out by the Court in *R. v. Stockley*, 2009 NLCA 38, citing with approval the formulation for withdrawal of a plea before a trial judge in *R. v. Joseph*, [2000] B.C.J. No. 2850 adopted by the Nova Scotia Court of Appeal as relevant to setting aside pleas on appeal in *R. v. Nevin*, 2006 NSCA 72:

> In considering whether the exercise of a court's discretion to allow an application to be withdrawn should be exercised, there are a number of factors to be considered. These included firstly, was the accused represented by experienced counsel.
> Secondly, was the accused apprised of his position in law, based upon his disclosure of the facts to his counsel, and thus can be said to have understood the nature of the charge to which he pled. Thirdly, did the accused on those facts have a defence, if proved, that would be consistent with a valid defence. Fourthly, was the plea given in circumstances that amounted to pressure [...]. Fifth, what was the experience of the accused with the criminal justice system, [...].

74. While the third element of the above framework alludes to a valid defence, it is referred to as a "factor to be considered", which is remarkably different from the "requirement" it has apparently become in Québec and British Columbia. It is also notable that the ultimate source for the framework is within the context of the very line of British Columbia cases that caused concern for Fitch and Harris JJ.A. in the case at bar.

Conclusion

75. The Applicant entered a guilty plea under an Act of Parliament prosecuted by the Public Prosecution Service of Canada and faces significant collateral consequences under the

federal *Immigration and Refugee Protection Act* of which he was not informed prior to his plea. The question of whether the plea of someone in the Applicant's circumstances will be struck should not depend on the province in which he happens to find himself.

76. The case at bar demonstrates a significant level of confusion and lack of clarity in the various approaches taken in our appellate courts with respect to the striking of uninformed pleas. Given the importance of guilty pleas in our criminal justice system, there is significant interest in having a consistent and coherent application of the law on a national level. The number of aspects of the issue upon which there is divergence make it incumbent upon this Court to intervene and provide much needed clarity and guidance.

PART IV: SUBMISSIONS AS TO COSTS

77. The Applicant does not seek costs and asks that no costs be awarded against him.

PART V: NATURE OF THE ORDER SOUGHT

78. Pursuant to s.691(1)(b) of the *Criminal Code*, the Applicant requests an order granting leave to appeal from the judgment of the British Columbia Court of Appeal delivered October 30, 2016.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia this 23rd day of December, 2016.

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Peter Edelmann
Erica Olmstead
Solicitors for the Applicant

PART VI: TABLE OF AUTHORITIES

Legislation

PART VII: STATUTORY PROVISIONS

Criminal Code, R.S.C., 1985, c. C-46	**Code criminal, L.R.C. (1985), ch. C-46**
Conditions for accepting guilty plea	**Acceptation du plaidoyer de culpabilité**
606 (1.1) A court may accept a plea of guilty only if it is satisfied that the accused	**606** (1.1) Le tribunal ne peut accepter un plaidoyer de culpabilité que s'il est convaincu que les conditions suivantes sont remplies:
(a) is making the plea voluntarily; and	a) le prévenu fait volontairement le plaidoyer;
(b) understands	b) le prévenu :
(i) that the plea is an admission of the essential elements of the offence,	(i) comprend que, en le faisant, il admet les éléments essentiels de l'infraction en cause,
(ii) the nature and consequences of the plea, and	(ii) comprend la nature et les conséquences de sa décision,
(iii) that the court is not bound by any agreement made between the accused and the prosecutor.	(iii) sait que le tribunal n'est lié par aucun accord conclu entre lui et le poursuivant.
* * *	* * *
686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal	**686** (1) Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel:
(a) may allow the appeal where it is of the opinion that	a) peut admettre l'appel, si elle est d'avis, selon le cas :
(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,	(i) que le verdict devrait être rejeté pour le motif qu'il est déraisonnable ou ne peut pas s'appuyer sur la preuve,
(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or	(ii) que le jugement du tribunal de première instance devrait être écarté pour le motif qu'il constitue une décision erronée sur une question de droit,
(iii) on any ground there was a miscarriage of justice;	(iii) que, pour un motif quelconque, il y a eu erreur judiciaire;

* * *	* * *
Immigration and Refugee Protection Act, S.C. 2001, c. 27	**Loi sur l'immigration et la protection des réfugiés, L.C. 2001, ch. 27)**
Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
* * *	* * *
No appeal for inadmissibility	**Restriction du droit d'appel**
64 (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64** (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality	**Grande criminalité**
	(2) L'interdiction de territoire pour grande criminalité vise, d'une part, l'infraction

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).	punie au Canada par un emprisonnement d'au moins six mois et, d'autre part, les faits visés aux alinéas 36(1)b) et c).
* * *	* * *
Humanitarian and compassionate considerations	**Motifs d'ordre humanitaires**
65 In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	**65** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.
* * *	* * *
Immigration and Refugee Protection Regulations, SOR/2002-227	**Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227**
Paragraph 45(d) of the Act — applicable removal order	**Application de l'alinéa 45d) de la Loi : mesures de renvoi applicables**
229 (1) For the purposes of paragraph 45(d) of the Act, the applicable removal order to be made by the Immigration Division against a person is	**229** (1) Pour l'application de l'alinéa 45d) de la Loi, la Section de l'immigration prend contre la personne la mesure de renvoi indiquée en regard du motif en cause:
…	…
(c) a deportation order, in the case of a permanent resident inadmissible under subsection 36(1) of the Act on grounds of serious criminality or a foreign national inadmissible under paragraph 36(1)(b) or (c) of the Act on grounds of serious criminality;	c) en cas d'interdiction de territoire pour grande criminalité du résident permanent au titre du paragraphe 36(1) de la Loi ou de l'étranger au titre des alinéas 36(1)b) ou c) de la Loi, l'expulsion;