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Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario
KIA OJI

February 16, 2017

**RE: Wing Wha Wong v. Her Majesty the Queen, File No.: 37367**

Pursuant to Rule 28 of *the Rules of the Supreme Court of Canada*, the Appellant replies to the Respondent's Memorandum of Argument on Application for Leave to Appeal ("the Response"), dated February 6, 2017.

It is notable that the Respondent does not even attempt to reconcile the clear divergences between the provincial appellate courts on the test to be applied for the withdrawal of a guilty plea. Instead, the Respondent frames the entire issue as a vague "fact-specific inquiry" not requiring any type of coherent legal framework or analysis. The focus of the Respondent's argument would appear to be that substantial disagreements in the appellate courts are of no concern because the Appellant was found not to meet the test set out by the Ontario Court of Appeal in Quick. The Appellant disagrees with this assertion on three levels.

First and foremost, it is not clear that the approach in Quick is the correct approach to the issue at bar. The Court in Quick diverged from this Court's decision in Taillefer, which sets out an objective test for assessing whether a plea ought to be withdrawn in circumstances where a plea is uninformed. This Court ought to clarify whether that divergence from Taillefer is in fact warranted in the context of collateral consequences, or whether a more objective standard might still be appropriate. One can imagine that if it turned out the Appellant would have entered a different plea because he was misinformed of the relevant astrological context, the Crown would be arguing for some form of objective assessment regardless of whether or not the Appellant would subjectively have entered a different plea. It is clear that applying the test in Taillefer to the case at bar, there is at the very least a "realistic possibility" that a reasonable person in the Appellant's circumstances would have entered a different plea had he been made aware of the serious immigration consequences. One of the fundamental questions in the case at bar is precisely whether this Court's objective test in Taillefer ought to be applied or whether some variation of the several mutually incompatible tests being applied in the provincial appellate courts is more appropriate.

Secondly, the Respondent's argument relies on the suggestion that Fitch J.A. "applied the analytic formula employed by Laskin J.A. in Quick." [Respondent factum, para. 17]. This is simply not the case. Both Laskin J.A. in Quick and the Ontario Court of Appeal in Rulli are clear that an uninformed plea is presumptively a miscarriage of justice. Justice Fitch, on the contrary, explicitly finds the Appellant's plea to have been uninformed with respect to a "legally relevant consequence". He then goes on to find that the failure of the Appellant to explicitly attest that he would have entered a different plea is required for the second stage of the test, whether the uninformed plea led to a miscarriage of justice. He does not address the statements in both Rulli and Quick that an uninformed plea is inherently a miscarriage of justice.

It should be underlined that in the approach taken by Fitch J.A. both the burden and the onus of proof on the Appellant become highly relevant at the second stage of the analysis. Justice Fitch places the onus squarely on the Appellant to prove, presumably on a balance of probabilities, what he subjectively would have done in order to show there was a miscarriage of justice. In reframing the question before the Court, the Respondent uses similarly problematic language: "the applicant failed to establish that he would not have pleaded guilty" [Respondent factum, para. 23]. Aside from framing the subjective onus on the Applicant, this wording indicates a higher evidentiary threshold than the "realistic possibility" set out by this Court in Taillefer. These problems highlight that the attempt by the Respondent to frame the issue as a vague "fact-specific inquiry" does not address the fundamental problem of the law that ought to be applied to that inquiry. This is an understandable approach for the Respondent given the lack of consensus among appellate courts, but simply underlines the lack of clarity in this area of the law and the need for intervention by this Court.

Finally, in the context of the current case there are compelling grounds to conclude that the Appellant would have entered a different plea had he been made aware of the immigration consequences. The Appellant's actions after becoming aware of the immigration consequences speak very strongly to such an inference. The Appellant deposed that he became aware of the immigration consequences after he had completed his jail sentence. He sought to withdraw his guilty plea, placing the immigration consequences front and center in terms of both the reasons for seeking an extension of time to appeal, and of the allegations of incompetence of counsel. The focus on the failure to include a specific statement to that effect in the affidavit is a triumph of form over substance.

In conclusion, this Court should clarify the proper approach to be taken by appellate courts in assessing the validity of guilty pleas, one of the most fundamental procedures in the criminal justice system. The substantial divergence and confusion among and within the appellate courts cries out for intervention by this Court.

Yours truly,

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cc. John Walker, Solicitor for the Respondent, and
George Dolhai, Agent for the Respondent