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The Informed Guilty Plea in Criminal Proceedings: a 2020 Year in Review

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Introduction

This past year, appellate courts across Canada have opined on the "informed" guilty plea: what it means, and what criminal law practitioners must do to ensure that they properly inform their clients of the consequences of a plea. Failing to do so can result in serious prejudice to clients, including the risk of deportation where immigration consequences are concerned. In some cases, courts may not set aside guilty pleas even where defence counsel is at fault, leaving clients to bear its long-term consequences. It is therefore crucial for defence counsel to discharge this responsibility properly.

This paper will first introduce the concept of the guilty plea, including what it means for clients to be properly informed and the requirements to set one aside. The discussion will then turn to how appellate courts in 2020 ruled on claims that trial counsel failed to properly inform their clients, and what measures criminal defence counsel should take to better discharge this responsibility going forward.

Background

In criminal proceedings, an accused party may enter a guilty plea for any offence(s) they are charged with. By doing so, they admit the factual and mental elements of the offence(s) and waive their right to a trial.

Guilty pleas must be accepted by the Court to be valid. Section 606(1.1) of the *Criminal Code*[1] requires that the accused party:

> (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, and
> (iii) that the court is not bound by any agreement made between the accused and the prosecutor.

Courts have interpreted section 606(1.1) to mean that guilty pleas must be voluntary, unequivocal, and informed.[2]

[1] *Criminal Code*, R.S.C. 1985, c. C-46.
[2] *R. v. Wong*, 2018 SCC 25 at para. 43 [*Wong*].

***R. v. Wong*, 2018 SCC 25**

The requirements of an informed guilty plea

In 2018, the Supreme Court of Canada in *Wong* held that an informed guilty plea requires the accused to be aware of its criminal consequences and its legally relevant collateral consequences. A legally relevant collateral consequence is one which "bears on sufficiently serious legal interests of the accused".[3] This includes immigration consequences, including the possibility of deportation, that flow from a conviction and/or sentence once a plea is entered.[4]

In *Wong*, the Court found the appellant's guilty plea to be uninformed because his trial counsel never told him that entering it would subject him to removal from Canada once convicted and sentenced.

Withdrawing a plea: the subjective prejudice framework

Simply establishing that a guilty plea is uninformed is not enough to set it aside. To withdraw a plea, the appellant must credibly demonstrate that they suffered subjective prejudice, as measured against objective circumstances. Specifically, the appellant must establish, by filing an affidavit, that there existed a "reasonable possibility" that they would have proceeded differently had they understood the consequences of pleading guilty. Meaning, they would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions.[5] The courts will scrutinize the appellant's assertion against objective, circumstantial evidence to test its veracity against a standard of reasonable probability. Courts will consider, for example:

a) the strength of the Crown's case;
b) the strength of connection between the plea and the collateral consequence;[6]

and any other evidence, including contemporaneous evidence, to assess the credibility of the appellant's claims.

In *Wong*, the Court declined to set aside the appellant's plea. In his affidavit filed before the Court of Appeal, the appellant failed to depose what he would have done differently in the plea process had he been informed of the immigration consequences of his plea.

***R. v. Khungay*, 2020 BCCA 269**

[3] *Ibid.* at para. 4.
[4] *Ibid.*
[5] *Ibid.* at para. 6.
[6] *Ibid.* at para. 26.

In *Khungay*,[7] the British Columbia Court of Appeal challenged the applicant's claim of subjective prejudice under the *Wong* framework. The applicant sought an extension of time to appeal from his prior convictions on the basis that the guilty pleas he entered in 2009 were uninformed. He alleged that his trial counsel never told him that he would be deported from Canada upon pleading.

The Court found the appellant's pleas to be uninformed, but that his assertion of prejudice lacked credibility. Specifically:

a) the applicant first knew that he could be deported in June 2010 but did nothing to address this issue in the 10 years since;
b) the Crown had a strong case; and
c) depositions from the applicant's trial counsel suggested that the pleas were entered primarily in a desire by the applicant to accept early responsibility.[8]

Ultimately, the Court granted the applicant an extension of time to appeal in the "interests of justice", separate from his claims of subjective prejudice.

***R. v. Seerattan*, 2020 ONCA 201**

In *Seerattan*,[9] the Ontario Court of Appeal found sufficient merit to the appellant's appeal and granted him interim release. The appellant sought to appeal convictions arising from an uninformed guilty plea that he entered at the advice of trial counsel. The Court did not directly opine on the issue of whether the appellant met the *Wong* test for withdrawal but suggested that he had.

The appellant pleaded guilty to a joint sentence structured by his defence counsel and the Crown. This sentence was based on a mistaken belief by both parties that the appellant, a foreign national, had the right to appeal any deportation order that might be imposed following a guilty plea. By law, he had no such right because he did not hold a permanent resident visa.

The Court found the appellant to have been uninformed and misinformed when he acted on this belief. There was also evidence that he was subjectively prejudiced: at the time of his pleas, the appellant commented to counsel in open court about his intention to go to trial than face immigration consequences from a plea.

[7] *R. v. Khungay*, 2020 BCCA 269 [*Khungay*].
[8] *Ibid.* at paras. 64-67.
[9] *R. v. Seerattan*, 2020 ONCA 201 [*Seerattan*].

***R. v. Davis*, 2020 ONCA 326**

In *Davis*,[10] the Ontario Court of Appeal set aside the appellant's guilty pleas on the basis that he was uninformed and subjectively prejudiced. The appellant was a permanent resident in Canada. He entered pleas after trial counsel erroneously advised him that there would be no immigration consequences to doing so. Months later, the Immigration and Appeal Division notified the appellant that he was subject to deportation as a result of those pleas.

The appellant argued that trial counsel's erroneous advice played a significant role in his decision to plead. The Court agreed. Trial counsel responded that he simply relied on the trial Crown who researched the issue of immigration consequences and advised him that there were none.

The Court found that the appellant was uninformed and that his claims of subjective prejudice were credible. Specifically,

i) The appellant had an interest in remaining in Canada as he had a child living with him at the time of the plea process; and

ii) The appellant's guilty pleas came in the middle of his preliminary hearing, a proceeding designed to test the strength of the Crown's case. The timing of the plea suggests that, had he known that he would be removed from Canada by pleading guilty, he likely would not have done so. Instead, he likely would have continued with the preliminary hearing, and then perhaps a trial.[11]

The Court held that it is trial counsel's responsibility to conduct their own research and consultation about the consequences of a plea.

Concluding Remarks

For criminal law practitioners, failing to properly inform clients of the consequences of a guilty plea can cause serious and sometimes irreversible prejudice. As demonstrated in *Wong*, courts may not set aside an uninformed plea in every circumstance. Criminal lawyers must take careful measures to prevent their clients from being locked into the consequences of an uninformed guilty plea.

First, where immigration consequences are concerned, defence counsel should seek independent legal advice from a member of the immigration bar. This includes obtaining an opinion letter detailing all potential immigration consequences of a client's plea.

[10] *R. v. Davis*, 2020 ONCA 326 [*Davis*].
[11] *Ibid.* at para. 22.

Secondly, defence counsel should make contemporaneous notes of their interactions with clients and adopt good record keeping practices. Get written instructions from the client and document their decisions. Ask the client of their citizenship status at the outset of the retainer and record their response in writing. Inquire about the client's lifestyle, employment, and other travel obligations: sometimes, a guilty plea may prevent them from travelling outside a specific region or working with certain groups of people like children or vulnerable people. As Justice Campbell advised, "detailed notes and written instructions... permit defence counsel to confidently distinguish one similar case from the next, and reliably explain how they discharged their important professional obligations in each case".[12]

Thirdly, it is up to defence counsel to conduct their own research and consultation as to the consequences of a client's plea. As the *Seerattan* and *Davis* decisions demonstrate, this responsibility rests solely with defence counsel, not the Crown.

Resources including checklists and guidelines are available to assist defence counsel in the plea inquiry process.[13]

[12] *R. v. Shofman*, 2015 ONSC 6876 at para. 50.
[13] Legal Aid Ontario, *Plea Comprehension Inquiry*, online: <https://www.legalaid.on.ca/wp-content/uploads/plea-comprehension-inquiry-EN.pdf>