IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Astudillo,*

2024 BCSC 2234

Date: 20241210

Docket: 35041; 35042

Registry: Vancouver

Rex

v.

Telman Vladamir Astudillo

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Crown:	D. Meagher
Counsel for the Appellant:	J. Dawkins
Place and Date of Trial/Hearing:	Vancouver, B.C. April 19, 2024 May 13, 2024 August 20, 2024
Place and Date of Judgment:	Vancouver, B.C. December 10, 2024

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Introduction

[1] Mr. Astudillo seeks:

a) an extension of time to appeal two guilty pleas; and

b) leave to withdraw two guilty pleas.

[2] Mr. Astudillo submits that his guilty pleas constitute a miscarriage of justice because he was not aware of the full consequences. Mr. Astudillo is a permanent resident of Canada. He faces the prospect of deportation as a result of his guilty pleas, on the basis that the charges carried a maximum sentence of 10 years or more.

[3] The Crown opposes the application, arguing that Mr. Astudillo does not meet the test for either item of relief sought.

[4] For the reasons set out below, I dismiss Mr. Astudillo's application to extend the time to appeal.

[5] I set out below Mr. Astudillo's history, the facts of the offences, the events regarding his entering of the two guilty pleas, and the chronology of events following those guilty pleas. I then discuss the arguments regarding the two parts of application. My analysis focuses primarily on the application to extend the time to appeal.

Issues

[6] The issues for me to decide are:

a) Do the facts in this case meet the legal test for the court to extend the time for filing the two appeals?

b) If so, is there a legal basis to grant leave to Mr. Astudillo to withdraw his guilty pleas?

Background Information

[7] Mr. Astudillo was born in Chile in 1974. His family fled Chile, and they were resettled in Canada as refugees in 1976. He has lived in Canada since he was two years old. All of his immediate family, including his son, live in Canada. He has no real ties to Chile.

[8] Mr. Astudillo's past criminal record and immigration history is relevant. In total he has more than 30 convictions. His criminal record includes the following (not including the two guilty pleas from 2020):

a) He had seven convictions as a youth.

b) In the 1990s he had 20 convictions including:

i. In 1994 he was convicted firearms possession offences.

ii. In 1995 he was convicted of robbery and use of a firearm for which he was sentenced to three years in prison.

c) He has had 12 convictions since 2000, including:

i. three prior harassment convictions;

ii. assault with a weapon;

iii. two convictions for uttering threats;

iv. one conviction for break and enter and utter threats.

[9] Following his 1995 robbery conviction, Mr. Astudillo received a letter (dated August 8, 1995), from the Ministry of Citizenship and Immigration (the "Ministry"). Mr. Astudillo was notified that the Ministry was contemplating issuing an opinion that he constituted a danger to the public in Canada.

[10] Mr. Astudillo retained counsel and successfully challenged that finding at the Federal Court. His lawyer's submission stated, in part, "In this case, where a finding against Mr. Astudillo could result in the removal of appeal rights and deportation, it is clear that a quasi-judicial process involving full disclosure must be engaged." I note the inclusion of the possibility of deportation.

[11] The Federal Court reasons are reported: *Astudillo v. Canada (Citizenship and Immigration*), 139 F.T.R. 47, 1997 CanLII 16605 (F.C.). In part, the decision stated:

[16] For the foregoing reasons, this application for judicial review will be allowed, the decision of the respondent's delegate that in her or his opinion, the applicant represents a danger to the public will be set aside, and the matter will be referred back to the respondent or a different delegate for redetermination. For clarity, I wish to emphasize that on the basis of the material before the Court, an opinion that the applicant represents a danger to the public in Canada might very well be open to the respondent or her delegate. However, in reaching such an opinion, there is a duty of fairness on the respondent that was not met in the process leading to the decision under review.

[12] No further steps were taken by the Ministry in the 1990s.

[13] In 2012 Mr. Astudillo was convicted of 11 offences, including assault with a weapon, two counts of uttering threats and two counts of criminal harassment under s. 264(2) of the *Criminal Code*, R.S.C. 1985, c. C-46. There were no immigration consequences from those 2012 convictions.

[14] The next step taken by the Ministry, occurred after the guilty pleas in 2020, the subject of this application.

Circumstances of the Offences in Question

[15] The Crown submits that the circumstances of the two offences are relevant. At the time of sentencing, the Crown summarized the facts underlying the two charges.

The First Offence

[16] Mr. Astudillo met the complainant in March 2018. The complainant ended the relationship in early September 2018 after a fight during which Mr. Astudillo refused to leave her apartment. Between September 11 and September 21, 2018, Mr. Astudillo continued to contact the complainant despite her request that he cease contact. On September 21, 2018, Mr. Astudillo's sister contacted the complainant, telling her that he was missing. The complainant went to his residence but did not locate him. On the next day, Mr. Astudillo contacted the complainant and yelled at her for checking on him the day before. The complainant told him not to speak to her again. She blocked his phone number, and she blocked him on social media.

[17] Following these events, Mr. Astudillo sent multiple emails and messages, and made multiple phone calls to the complainant. He created fake accounts on social media to contact her and then later revealed his identity. On September 26, 2018, Mr. Astudillo approached the complainant on the street near her home. He was upset and wanted to talk. The complainant told him to leave. He followed her for one block until she went into a restaurant. She then went to her workplace. When she left her workplace, Mr. Astudillo was waiting on the opposite side of the street. He crossed the street and began yelling at her, calling her a liar and other derogatory names.

She then walked several blocks through the downtown core. Mr. Astudillo approached her and yelled at her again.

[18] In the month of October 2018, Mr. Astudillo continued contacting complainant despite her request that he stop. On October 29, 2018, he approached the complainant on Powell Street near her apartment. He was angry and upset and followed her for a block along Powell Street. He left and then came back and approached her outside of her apartment. On October 31, 2018, Mr. Astudillo approached the complainant at a concert. He was angry and tried to talk to her. He was escorted away by a friend of the complainant.

The Second Offence

[19] Mr. Astudillo met the second complainant on a social media "app" in November 2018. They began dating, but she broke off the relationship at the end of December 2018. On January 19, 2019, she told the accused she no longer wanted to see him. He became angry. He took her house keys and fob, and did not return them for approximately one week. Approximately one week later, the accused attended at the complainant's apartment to return her keys and pick up some of his belongings. She would not let him into her residence. He put his foot in the door, so she could not close it. He then ripped the key hook near the door off the wall.

[20] Thereafter, he relentlessly called and texted complainant until she blocked him. He continued to call her from numbers that she did not recognize. He sent her approximately 100 text messages in one day. He called her approximately 50 times on another day.

[21] After she blocked his calls, he would come to her home and ring the doorbell. She found him outside her apartment building in the morning and at midday. The complainant estimated that he came to her apartment 10 times in one week prior to January 31, 2019. He would also follow her to work. During this period, he texted naked images of her that he had taken. He told her that he had taken a sex tape of them and threatened to send it to her employer and other contacts.

The Criminal Charges

[22] The Information on the first charge was filed September 27, 2018.

[23] The Information on the second charge was filed February 2, 2019, and amended on April 17, 2019.

[24] Both charges were under s. 264 of the *Criminal Code*.

[25] The criminal file numbers are 252792-1K and 253073-1K, respectively.

[26] Both matters were scheduled for trial. On February 4, 2020, Mr. Astudillo entered guilty pleas on both charges. On February 25, 2020, the Crown and defence made matching (but not joint) submissions on sentencing which were accepted by the court. The court imposed a two-year suspended sentence with two years of probation.

[27] I accept that there was no discussion of immigration consequences at the sentencing hearing.

Immigration Proceedings

[28] The chronology of the immigration proceeding is relevant. The Crown argues that Mr. Astudillo has not moved with all due diligence. I do not accept that submission, but I set out the chronology here.

[29] All steps were taken pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]:

a) A procedural fairness letter was sent to Mr. Astudillo on June 16, 2020. Mr. Astudillo confirms that he received the letter by the late summer of 2020. That letter provided a timeline for Mr. Astudillo to make submissions on his immigration status, including deadlines on October 12, 2021, and November 23, 2021.

b) Mr. Astudillo failed to make submissions before the timeline set out in the letter.

c) Mr. Astudillo appeared at a prehearing conference at the Immigration Review Board on November 22, 2022. He confirmed that he had received the minister's disclosure package. The hearing was adjourned for two months.

d) Mr. Astudillo failed to attend the Immigration Review Board hearing on January 23, 2023.

e) Mr. Astudillo received an extension of time to provide written submissions. Those submissions were made on February 28, 2022, with the assistance of legal counsel. Those submissions raise, for the first time, the issue of a non-informed guilty plea.

f) A hearing was scheduled for May 31, 2023, but later postponed.

g) On June 13, 2023, another hearing was postponed, in part, on the basis that Mr. Astudillo's new counsel, Mr. Slayen, indicated his intention to pursue a criminal appeal.

h) The immigration proceedings were further adjourned on August 10, September 28, and October 23, 2023; and January 29, 2024.

i) On February 20, 2024, the Immigration and Refugee Board of Canada issued a deportation order to Mr. Astudillo. The order was based on the two harassment convictions. The order was authorized because both charges were under s. 264, which is an (hybrid) indictable offence that is punishable by a maximum term of imprisonment of 10 years. However, because Mr. Astudillo did not receive a carceral sentence of more than six months, he retains a right of appeal to the Immigration Appeal Division.

j) Section 264 is a hybrid offence. Although the Crown proceeded summarily, *IRPA* deems it to be an indictable offence.

k) The deportation order is under appeal and judicial review. (There was a deadline missed through no fault of Ms. Astudillo, and his appeal was deemed abandoned. There is an application for an internal re-opening of the appeal.)

[30] The stakes for these applications are:

· If Mr. Astudillo is able to withdraw his guilty pleas, the deportation order will be overturned (subject to re-prosecution by the Crown).

· If he is unsuccessful on these applications, he will pursue his appeal through the Immigration Appeal Division.

Evidence Regarding Mr. Astudillo's Knowledge and Understanding

[31] I outline the tests and the factors to be considered below. Importantly, I accept the guidance from the Court of Appeal that each case must be decided on its own facts. That advice is found in *R. v. Coffey*, 2017 BCCA 359. Although that decision pre-dates the leading case, *R. v. Wong*, 2018 SCC 25, I accept the guidance regarding the individual accused's level of knowledge:

[50] In summary, an informed guilty plea requires the accused to have some awareness of the potential immigration consequences of their plea. Further, immigration consequences may be a necessary consideration in sentencing. However, an accused need not necessarily know the precise immigration consequences of their conviction and sentence. Case-by-case analysis is required to determine the degree to which an accused person must be aware of the specific details of the immigration consequences of their guilty plea.

[Emphasis added.]

[32] With that guidance in mind, the crux of this application relates to Mr. Astudillo's state of knowledge regarding the immigration consequences of his guilty pleas.

[33] Mr. Astudillo tendered the following evidence:

a) His own affidavit dated April 12, 2024;

b) The affidavit of his criminal counsel, Mr. Longay, dated July 26, 2024;

c) Two affidavits of his immigration counsel, Mr. Slayen, dated July 18, 2024, and August 6, 2024;

d) The Reasons for Sentence and the sentencing submissions.

[34] Mr. Astudillo's affidavit states the following regarding his knowledge of the immigration consequences of his guilty pleas:

11. I was worried about my immigration status and sought advice from my counsel on multiple occasions prior to entering pleas. My counsel indicated that he would speak with colleagues with immigration law experience and get back to me, as he didn't know that information himself. I am not aware of whether he ultimately did so.

12. I was of the belief that an admissibility hearing would only be commenced if I received the custodial sentence of more than six months. I shared this belief with my counsel on the day I entered my guilty pleas and was not advised otherwise.

13 I was never advised by my counsel, nor was I aware at the time of entering my pleas or sentencing, that pleading guilty to an offence with a possible 10-year sentence, regardless of the sentence I received, would trigger admissibility proceedings.

14. … I understood that I would be sentenced following my guilty pleas but I did not understand collateral immigration consequences of those pleas.

...

18. It was not until I retained Mr. Slayen that I learned that, even though the crown proceeded summarily and I received a suspended sentence, I could still be removed from Canada on the ground of serious criminality.

19. It was also not until speaking with Mr. Slayen that I learned I could seek to withdraw my guilty pleas on the basis that I was unaware of the significant collateral consequence of those pleas.

20. Had I known about the immigration consequences that stemmed from my guilty pleas, I would have conducted myself differently. I would not have entered guilty pleas to the defences as charged and would have instructed my counsel to consider alternate pleas or proceed to trial.

[35] Mr. Longay was Mr. Astudillo's criminal defence lawyer in 2020. His affidavit states:

5. Long before my involvement with Mr. Astudillo, I was aware that criminal convictions could lead to immigration consequences for noncitizens, and it was (and is) my understanding that those consequences could include ineligibility for entry into this country, ineligibility for citizenship and deportation.

6. Since becoming aware of these conviction-related immigration issues, it has always been my practice to advise clients I know to be non-citizens about the existence of these issues prior to any trial or plea, and to recommend that they seek the advice of a qualified immigration lawyer about whether those consequences may apply in their particular circumstances. It was not my practice to offer that sort of immigration law advice myself, as I have very limited direct experience with immigration law, and I do not feel I am qualified to offer reliable opinions on those subjects

7. I have no current recollection of discussing potential immigration issues with Mr. Astudillo until after I learned he was already facing a finding of potential inadmissibility.

8. Despite my lack of current recollection of discussing these issues with Mr. Astudillo prior to his guilty pleas, I believe that a discussion about these immigration issues did occur before his pleas.

[36] In support of his belief that immigration issues were discussed, Mr. Longay attached, as an exhibit to his affidavit, one page of notes that he wrote during a meeting with Mr. Astudillo on January 10, 2020. Those handwritten notes include the words, "PR status still –>concerned".

[37] As to the Crown's argument that he has not pursued this application with due diligence, Mr. Astudillo notes:

a) He did not know that he could apply to withdraw his guilty pleas until he received that advice from his immigration counsel, Mr. Slayen.

b) He retained criminal counsel on this application and appeal in August 2023, and the application for an extension of time to appeal was filed in October 2023.

c) In January 2024, he obtained direction in this Court that the application for extension of time to appeal and the substantive appeal could be heard at the same time. As a result, he was permitted to file the notice of appeal.

d) The notice of appeal was filed February 23, 2024.

e) He filed an affidavit on April 12, 2024.

f) Mr. Longay provided an affidavit on July 26, 2024.

[38] Based upon this chronology, I accept Mr. Astudillo's submission that he acted with due diligence. It appears that Mr. Astudillo (somewhat haltingly) has taken the necessary steps to keep his immigration appeal extant. Regarding this application, I accept that he moved forward with his lawyers' advice when he received it.

Jurisdiction and Standard of Review

[39] This is an appeal of a summary conviction. It is governed by s. 686(1) of the *Criminal Code*. The appellant relies on s. 686(1)(a)(iii), which provides that an appeal should be allowed to avoid a "miscarriage of justice":

Powers

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

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

[Emphasis added.]

[40] Pursuant to Rule 6(2) of the *Supreme Court Criminal Rules*, an appeal must be commenced within 30 days of the date of conviction unless a judge extends that time frame where necessary and in the interests of justice.

[41] As noted, Mr. Astudillo brings both the application to extend time and the appeal of his guilty pleas. I address those issues in order.

Test for an Extension of Time to Appeal

[42] Mr. Astudillo pleaded guilty on February 25, 2020. His application to extend the time to appeal was filed more than three years after the expiry of the appeal period.

[43] There are five factors for the court to consider on an application to extend time to appeal, as set out in *R. v. Gendreau*, 2016 BCCA 141 at para. 23:

[23] The factors to be considered on an application to extend time to file a notice of appeal are well-known. As recently reiterated in *Sidhu*, an applicant must show special circumstances, with the ultimate issue being whether it is in the interests of justice to grant the extension. The factors to be considered include:

(a) whether the applicant had a *bona fide* intention to appeal before the expiration of the appeal period and communicated that intention to the opposing party;

(b) whether the opposing party would be unduly prejudiced by an extension of time;

(c) the extent of the delay;

(d) whether there is a proper explanation for the delay; and

(e) the merits of the proposed appeal.

[44] I discuss each factor below. I recognize that the factors are to be considered under the larger banner of the interests of justice. Further, the fifth factor contains its own set of considerations.

Bona Fide Intention to Appeal

[45] Mr. Astudillo concedes that he did not have an intention to appeal within the 30 days after his guilty plea. However, he argues that he could only form an intention after he became aware of the immigration consequences and he took legal advice on his ability to apply to withdraw the guilty pleas. He further submits that this factor is only one consideration. He notes courts in this province have granted extensions in excess of nine years (see *R. v. Khungay*, 2020 BCCA 269; and *R. v. Innes*, 2023 BCSC 2172).

[46] The Crown's position is that Mr. Astudillo clearly does not meet this factor.

[47] I accept that delay is highly relevant. However, I also accept that the weight to be placed on this factor can be mitigated by other compelling factors (*Khungay* at para. 35). Clearly, Mr. Astudillo's intention to appeal was tied to receiving the legal advice that he had an avenue of appeal. I consider this factor in more detail below.

Prejudice to the Opposing Party

[48] Mr. Astudillo submits that the only prejudice would be the effects of time on the memory of witnesses. Hence, the Crown could pursue the charges through a new trial.

[49] The Crown submits that there is clear prejudice. The case against Mr. Astudillo was based upon the complainants' lived experience. The events in question occurred approximately six years ago.

[50] The Crown further notes that the Crown's decision to take a lenient position on sentencing was based upon saving the witnesses from the stress of a trial. Restarting the proceedings has the potential to re-traumatize the victims.

[51] I accept that the Crown, and the complainants, would suffer prejudice. In my opinion, the passage of time alone would prejudice the Crown's case.

The Extent of the Delay

[52] The delay in commencing this process was 3 years and 8 ½ months.

Whether there is a proper explanation for the delay

[53] As noted above, Mr. Astudillo explains that he did not understand that he could apply to withdraw his guilty pleas until he retained Mr. Slayen.

[54] The Crown makes no submission on this issue.

[55] I accept that Mr. Astudillo has provided a proper explanation for the delay.

The Merits of the Appeals

[56] The fifth factor assesses the merits of the appeals. This assessment requires a further sub-test. However, for the context of my discussion below, I accept that the applicant does not have to establish that any appeal will likely be successful. Nor does he have to establish that there is an avenue to a successful defence. The threshold of the "merits" at this stage is low (*Innes* at para. 51).

[57] The legal issue to be examined in this situation is specific: What is the test applied to appeals relating to pleas where the offender has later incurred immigration consequences? Both sides accept that the test was enunciated in *Wong*.

[58] For the context of the test in *Wong*, I note that on this application, the parties make opposing submissions regarding the required depth of the applicant's knowledge of possible consequences. That issue relates directly to the "merits" of the appeal.

[59] As noted above, the crux of my decision turns on the degree of Mr. Astudillo's knowledge.

[60] In *Wong*, the majority reasons discussed the considerations that are required to establish an "informed" guilty plea. Mr. Wong pled guilty to drug trafficking offences. He faced deportation. (Mr. Wong had one prior conviction in 1994. There were no immigration consequences from that conviction.) Because of the length of his trafficking sentence, under the *IRPA,* he was not admissible to Canada, and he had no right of appeal. The majority wrote:

[4] We agree with our colleague Wagner J. that for a plea to be informed, an accused must be aware of the criminal consequences of the plea as well as the legally relevant collateral consequences. A legally relevant collateral consequence is one which bears on sufficiently serious legal interests of the accused. Here, Mr. Wong was not aware of the immigration consequences of his conviction and sentence. Immigration consequences bear on sufficiently serious legal interests to constitute legally relevant consequences. His guilty plea was therefore uninformed.

...

[6] In our view, the accused should be required to establish subjective prejudice. Meaning, accused persons who seek to withdraw their guilty plea on the basis that they were unaware of legally relevant consequences at the time of the plea must file an affidavit establishing a reasonable possibility that they would have either (1) opted for a trial and pleaded not guilty; or (2) pleaded guilty, but with different conditions. To assess the veracity of that claim, courts can look to objective, contemporaneous evidence. The inquiry is therefore subjective to the accused, but allows for an objective assessment of the credibility of the accused's subjective claim.

[61] The *Wong* two-part test can be summarized as follows:

a) Viewed objectively, the appellant must establish that he was uniformed about a legally relevant consequence of his guilty plea (*Wong* at para. 34).

b) The lack of information resulted in prejudice. On this second point, the inquiry is subjective: Whether the accused would have taken a meaningfully different course of action. However, the court must be satisfied that there was a reasonable possibility that the accused would have (or could have) proceeded in a different manner had they been aware of the collateral consequence. (*Wong* at para. 35).

[62] Mr. Astudillo's submission on this point focusses on his position that the pleas were uninformed. He submits that he was not aware of the collateral immigration consequences. If he had been aware, he would have taken another avenue (*i.e.*, not plead guilty). Hence, he submits, to hold him to his uninformed guilty plea would constitute a miscarriage of justice. This argument flows through the remainder of the his submission. Mr. Astudillo says:

a) His appeal has merit because:

i. he was not aware of the immigration consequences, and

ii. he suffered prejudice by pleading guilty;

b) Hence, the interests of justice require that the time for an appeal be extended.

c) It follows that, because the appeal has merit, the appeal should be allowed.

[63] I address each part of the *Wong* test in order.

Was Mr. Astudillo Uninformed about a Legally Relevant Consequence?

[64] As noted, Mr. Astudillo submits that he was not aware of the collateral immigration consequences. He says that there is sufficient evidence to conclude that he was not aware:

a) There was no discussion of his immigration status at the sentencing hearing.

b) The affidavit of Mr. Longay indicates that Mr. Longay did not advise Mr. Astudillo of the "serious criminality" provisions of the *IRPA*.

c) In his own affidavit he states:

i. He believed that an admissibility hearing would only be instituted if he received a sentence of more than six months;

ii. He was never advised by counsel that pleading guilty to these offences (under s. 264) would trigger admissibility proceedings.

iii. Only when he retained Mr. Slayen did he learned that he could still be removed from Canada on the ground of serious criminality.

[65] On that basis, Mr. Astudillo submits that his guilty plea was not informed.

[66] The Crown's position is that Mr. Astudillo cannot establish that he was uninformed about immigration consequences. The Crown submits:

a) He was not misinformed by his counsel about his immigration jeopardy;

b) He was alive to the possibility that there may be immigration consequences;

c) He failed to exercise due diligence.

[67] On the first two points, the Crown submits that Mr. Astudillo had sufficient knowledge at the time of his guilty pleas. The Crown relies on the decision in *R. v. Johnson*, 2024 SKCA 58. In that case, the court dealt with an accused who entered two guilty pleas knowing that some immigration consequences were possible. Ms. Johnson did not seek any advice from counsel about the immigration consequences of her plea. The Saskatchewan Court of Appeal divided the examination into the level of knowledge into two part. The court reasoned:

[26] Turning to the second component of the first step of the *Wong* test, I am mindful of the observation made by the Ontario Court of Appeal in *Girn* that "the authorities have resisted imposition of a fixed quantum or standard of information necessary to characterize the plea as 'informed'" (at para 75). However, from my review of the case law, a consistent general principle has emerged in cases involving a guilty plea carrying collateral immigration consequences. That general tenet is that it is sufficient, for the purposes of an informed plea, for an accused to know of the *possibility* that a criminal conviction or sentence will place his or her immigration status in *serious jeopardy*. Two aspects of this approach warrant elaboration. First, the accused need not be certain, or even confident, that immigration consequences will follow collaterally from the particular guilty plea: see *Tyler*; *R v Shiwprashad*, 2015 ONCA 577, 328 CCC (3d) 191; and *R v Kitawine*, 2016 BCCA 161. Rather, the accused need only know that such immigration consequences are a *possibility.* Second, the accused need not know the details of those immigration consequences, but he or she must have a general understanding that they involve "*serious jeopardy*". In other words, proof that an accused knew of the possibility of removal or deportation is sufficient to refute the assertion that a plea was uninformed.

[27] Thus, in the following cases, courts have found that a guilty plea was sufficiently informed when the accused knew that there was a possibility that immigration consequences might arise from a criminal conviction and that those consequences might involve serious jeopardy for the accused. For example:

(a) in *Girn*, the appellant had received a general warning from an immigration enforcement officer that he may be removed from Canada if convicted of certain criminal offences. The Ontario Court of Appeal found that, as a result of having received this warning, "the appellant had an adequate understanding of the immigration consequences of his plea" (at para 78) and therefore concluded that it "would not permit the appellant to withdraw his guilty plea on the basis that it was uninformed" (at para 83).

(b) in *Coffey*, the British Columbia Court of Appeal found that the appellant knew his guilty plea could jeopardize his immigration status and lead to a removal order, although he did not know the specific details of the immigration consequences or that it meant he would lose his ability to appeal a removal order. Nevertheless, the Court determined that "Mr. Coffey's plea was sufficiently informed" and "[o]n this basis alone [we] would dismiss the appeal" (at para 51).

(c) in *Tyler*, the British Columbia Court of Appeal reasoned, on "the question whether the appellant was sufficiently aware of the immigration consequences of his plea" (at para 22), that "the difference between awareness of an automatic effect, and knowledge of a highly probable result, is too fine a distinction" (at para 25), and it, therefore, dismissed the appeal.

[Emphasis added.]

[68] On this point, the Crown notes:

a) Objectively, Mr. Astudillo knew of the connection between criminal convictions, and immigration hearings and possible deportation. He had experienced the threat of deportation in 1997. He avoided further steps toward deportation by successfully commencing a judicial review. His lawyer specifically addressed deportation as a possible consequence in those submissions.

b) Despite that brush with deportation, Mr. Astudillo committed, and was convicted of, further offences.

c) Mr. Astudillo's affidavit indicates that, at the time of his guilty pleas in 2020, he was concerned about the immigration consequences and he discussed those concerns with his then counsel, Mr. Longay.

d) Mr. Longay's contemporaneous notes confirm that this concern was discussed.

e) Mr. Astudillo deposed that he believed that an admissibility hearing would be commenced only if he received a custodial sentence of more than six months. It is unclear where he obtained this information, but it was not from a lawyer.

[69] The Crown submits that this evidence establishes that Mr. Astudillo had a sufficient level of knowledge. According to *Wong* and *Johnston*, the applicant need only know that serious immigration consequences are a <u>possibility</u>. It is not necessary that he know the details of those immigration consequences.

[70] The Crown submits that it is undisputed that Mr. Astudillo had a concern about his immigration status. It was discussed with his criminal lawyer. The Crown submits that, given his prior judicial review, and viewed objectively, he knew of the possible serious consequences.

[71] The Crown further submits that the appropriate lens to apply is the one immediately prior to Mr. Astudillo's guilty pleas. To return to the advice provided in *Johnson* (at para. 26), Mr. Astudillo:

a) need only know that such immigration consequences are a possibility;

b) need not know the details of those immigration consequences, but he must have a general understanding that they involve "*serious jeopardy*".

[72] The Crown submits that, applying the test from *Johnson* to the facts of this case, it is clear that Mr. Astudillo knew of the possibility of serious immigration consequences. The Crown submits that once an accused understands that there is a possibility that serious immigration consequences may follow, they must exercise a degree of diligence to investigate those possibilities. The evidence establishes that he was aware of the possibility of those consequences.

The Crown submits that it is irrelevant that he was unaware of the specific mechanism by which that jeopardy would occur.

[73] The Crown further submits that now, in 2024, Mr. Astudillo, using hindsight, regrets his guilty plea. However, those consequences lie with him, and not with the state or his counsel. There is no miscarriage of justice.

[74] In response to the Crown's submission, the appellant cites *R. v. Pineda*, 2019 ONCA 935, where the court allowed the withdrawal of the guilty plea based on the offender's evidence that he was not aware that his guilty plea, plus sentence, would mean that he could be deported without a right of appeal. The court accepted that Mr. Pineda would have elected to stand trial if he had been aware.

[75] The Crown distinguishes *Pineda* on the basis that the Ontario court accepted that Mr. Pineda did not understand that deportation was a possible result. The Crown notes that Mr. Pineda had no prior convictions or interaction with the criminal judicial system. Still further, the Crown notes that the court accepted that Mr. Pineda "was not otherwise aware of the potentially serious immigration consequences arising from his guilty pleas, specifically that he could be deported without a right of appeal" (at para.12). The court also accepted that there were triable issues and a possibly "weak" Crown case. The Crown submits that Mr. Astudillo's evidence does not rise to the level of the evidence in *Pineda*.

[76] I address this issue below. However, to foreshadow, I accept the Crown's submission on this point. I accept three things about Mr. Astudillo's level of knowledge:

a) He did not have specific knowledge of the jeopardy he faced.

b) He did not know the mechanism by which he faced that jeopardy.

c) However, he did know of the possibility that he faced serious immigration jeopardy arising from his 2020 guilty pleas. His actual knowledge was based upon his prior experience in 1995.

Legally Relevant Consequence

[77] The next part of the first step in the analysis requires the applicant to establish that he will suffer a "legally relevant consequence". In this case, the Crown disputes Mr. Astudillo's assertion.

[78] Mr. Astudillo submits that the prospect of deportation clearly meets this standard of a "legally relevant consequence".

[79] The Crown, in response, submits that the prospect of deportation is not relevant. The Crown notes that Mr. Astudillo still has a right to appeal the deportation order. The Crown submits that the ability to appeal distinguishes Mr. Astudillo from the facts in *Wong* and *Pineda* where the appellant had received a sentence that barred any right of appeal. The Crown submits that Mr. Astudillo's right of appeal in the immigration sphere weighs against a finding that the underlying guilty pleas constituted a "miscarriage of justice".

[80] On this point, I accept that the prospect of deportation is a legally relevant consequence, whether or not there is a right of appeal.

Subjective Prejudice

[81] The second step in the *Wong* test looks at the accused's subjective choice measured against the objective circumstances to determine whether the accused would have acted differently had he been armed with the knowledge of the legally relevant consequence.

[82] Mr. Astudillo's affidavit states that, if fully informed, he would not have entered guilty pleas to the offences as charged. He would have opted for trial or sought to plead to lesser offences that did not have the immigration consequences. He submits, and I accept, that the legal test does not require him to show that there were viable defences to the charges. He points to *Wong* (at para. 100) which discusses a spectrum of immigration consequences:

[100] There will be circumstances, however, where the Crown's case will be irrelevant to the assessment of prejudice. In other words, the amount of work done at the second step of the test as set out above, which assesses the prejudice flowing from the uninformed plea, may differ depending on the legally relevant consequence at issue. For example, as a matter of logic, the strength of the Crown's case and the viability of a defence diminish in relevance when balanced against a collateral consequence as serious as deportation. Where an accused is subject to a consequence with such severe ramifications, the prejudice flowing from not being informed of that consequence will likely be easy to establish. However, where a different and perhaps less obviously serious consequence is at issue, a more exacting inquiry to assess prejudice at the second step of the test may be required. This does not create a "variable standard of scrutiny": majority reasons, at para. 17. With respect, it is simply a matter of common sense; the more serious the consequence, the more easily prejudice is likely to be established. Of course, this always depends on the relevance of the consequence in the particular circumstances of the accused. Similarly, the strength of the Crown's case may also become largely irrelevant in circumstances where the *only* way for the accused to avoid the collateral consequence in issue is by pleading not guilty and going to trial, no matter how unlikely an acquittal may be: see e.g. *Lee v. United States*, 137 S. Ct. 1958 (2017).

[Emphasis added.]

[83] Mr. Astudillo says that, given the seriousness of the prospect of deportation, he would clearly have chosen another option and he would not have pleaded guilty to the offences charged.

[84] The Crown submits that I should not accept the statements by the applicant as being true, or even possible. The Crown submits that, looking at the objective situation, there were no better options available to Mr. Astudillo in February 2020.

[85] The Crown submits that Mr. Astudillo's evidence does not meet the high credibility bar required under this test. On this point, the Crown relies on *Wong* at para. 26:

[26] That the analysis focusses on the accused's subjective choice does not mean that a court must automatically accept an accused's claim. Like all credibility determinations, the accused's claim about what his or her subjective and fully informed choice would have been is measured against objective circumstances. Courts should therefore carefully scrutinize the accused's assertion, looking to objective, circumstantial evidence to test its veracity against a standard of reasonable possibility. Such factors may include the strength of the Crown's case, any concessions

or statements from the Crown regarding its case (including a willingness to pursue a joint submission or reduce the charge to a lesser included offence) and any relevant defence the accused may have. The court may also assess the strength of connection between the guilty plea and the collateral consequence, that is, whether the trigger for the collateral consequence is the finding of guilt as distinct from a particular length of sentence. More particularly, where the collateral consequence depends on the length of the sentence — keeping in mind that a guilty plea typically mitigates a sentence — the court may have reason to doubt the veracity of the accused's claim.

[Emphasis added.]

[86] The Crown submits that Mr. Astudillo's statements must be scrutinized against the contextual background of the objective facts. The Crown focusses on the appellant's affidavit evidence, his criminal conviction history and the strength of the evidence underlying the two charges. The appropriate moment of consideration is not today, but at the time of the guilty pleas (assuming he had the relevant information). In that regard, the Crown submits:

a) The evidence supporting the charges against Mr. Astudillo was strong.

b) There were aggravating circumstances in the offences.

c) He had a prior criminal record and prior custodial sentences, including a prior harassment conviction. Hence, there was a prospect that if he chose to go to trial, and if he was convicted, he would have received a custodial sentence.

d) Further, given his prior criminal record, a guilty plea to a lesser offence was unlikely to be offered by the Crown.

e) The February 2020 sentencing submissions by Crown were lenient in the circumstances.

f) In this set of facts, it is unlikely that any immigration lawyer would have been able to provide him with firm advice about what immigration consequences would happen, as opposed to what might happen. At best, Mr. Astudillo would have learned that deportation was a possibility:

i. if Immigration pursued him (which they had not done after his 2012 conviction); and

ii. if he was unsuccessful on his appeal at the Immigration Review Board.

[87] The Crown submits that these factors provide substantial objective evidence to suggest that Mr. Astudillo chose to plead guilty for reasons that were unrelated to his immigration status. He plead guilty in order to receive a lenient sentence and avoid returning to prison. It was his best option at the time.

[88] Further, the Crown submits, there was the prospect that if he did not take the plea deals, then he would be convicted, and receive a sentence of more than six months. In that case he would have no right of appeal under *IRPA* following a six-month sentence. Mr. Astudillo's affidavit noted that he believed that a carceral sentence of six months was relevant to his immigration status.

[89] The Crown submits that, looking at the situation objectively, the options available to Mr. Astudillo were limited. His decision to accept the plea deals was made in pursuit of avoiding

time in prison. Hence, the Crown submits, I should not accept Mr. Astudillo's statement that he would have pursued a different path.

Discussion – Was Mr. Astudillo Uninformed?

[90] In my opinion, Mr. Astudillo's affidavit evidence falls short of establishing that he was uninformed about a legally relevant consequence. As foreshadowed above, I find that he did have sufficient knowledge. I find significant reason to doubt his recollection of events in 2020.

[91] First, given his history, including the 1997 judicial review relating to whether he was a "danger to the public in Canada", I do not accept that he was unaware of the possibility that a criminal conviction could have serious immigration consequences. He had faced those very potential consequences in the past. His counsel at the time acknowledged that he could face deportation.

[92] Following the 1997 Federal Court decision, Mr. Astudillo committed and was convicted of more than 10 offences. He received further carceral sentences.

[93] Further, it is clear that he was concerned about his immigration status when meeting with his criminal defence counsel in 2019 and 2020. His criminal lawyer's notes indicate that the issue was discussed.

[94] Mr. Astudillo's affidavit suggests that his criminal lawyer had been assigned the job of finding immigration counsel to provide advice on the guilty plea. I do not accept that suggestion. Mr. Astudillo's criminal lawyer's affidavit states that his practice is to recommend that clients, like Mr. Astudillo, seek the advice of a qualified immigration lawyer. On a balance of probabilities, I find that Mr. Astudillo did not obtain the immigration advice that he now claims was essential for an informed guilty plea.

[95] In my opinion, the facts and reasoning in *Pineda* are distinguishable. The facts in that case involved a person who had faced only one set of charges. The court found that he was not informed by his counsel, and he was not, otherwise, aware of serious immigration consequences. Those are not the facts of this case. Prior to February 2020, Mr. Astudillo has been convicted of more than 30 offences. He had been to the Federal Court on immigration issues. I have found that Mr. Astudillo was aware of serious immigration consequences, although he may not have understood the mechanism.

[96] In my opinion, Mr. Astudillo was not uninformed. He knew that criminal convictions could possibly lead to serious immigration consequences. He had been to Federal Court to address that very issue.

Discussion Regarding "Prejudice"

[97] Turning to my consideration the "Prejudice" issue, I accept the following points made in the Crown's submission:

a) In January 2020, at the time of his guilty plea and sentencing, Mr. Astudillo did not have a lot of options:

i. If he proceeded to trial and lost,

(1) he would probably receive a carceral sentence; and

(2) that carceral sentence could have exceeded six months.

ii. If he considered two guilty pleas, the suspended sentence:

(1) was objectively lenient given the underlying facts and his criminal record; and

(2) provided him with the immediate certainty that he would not return to prison.

iii. Further, if he had received immigration advice, it would, at best, have informed him of what might happen with a guilty plea.

[98] Hence, assessing the credibility of Mr. Astudillo's statement that he would have pursued other avenues, I find that, measured against objective circumstances, I cannot accept his affidavit evidence as true. Looking to objective, circumstantial evidence, in my opinion:

a) opting to go to trial would invite the prospect of a carceral sentence; and

b) it was unlikely that the Crown would have agreed to a plea under a different section of the *Criminal Code*.

[99] Hence, I am unable to find that Mr. Astudillo suffered prejudice from the guilty pleas. It is correct the he faces immigration consequences. However, I do not believe that prejudice arises out of a misinformation about his guilty plea. In my opinion, viewed from the time before he pleaded guilty, if he had full knowledge, he would have been aware that immigration consequences were "possible". In other words, the Ministry may come after him again, as they did in 1997. In my opinion, he already had that level of knowledge.

[100] I find that Mr. Astudillo fails to satisfy either step in the *Wong* test. He was not uninformed. He suffered no prejudice.

Interests of Justice

[101] Taking all of the above-discussed factors into account, I must now determine whether it is in the interests of justice to grant the extension.

[102] The appellant argues that the special circumstances of this case establish that it is in the interests of justice to grant the extension.

[103] The Crown's submission recognizes that the prospect of deportation seems excessive in the circumstances, but says that this application is the wrong forum to address that issue. The issue of compassionate grounds can be raised in the immigration context.

[104] In my opinion, viewing the circumstances in their entirety, it is not in the interests of justice to grant an extension of time. In coming to that conclusion, I am considering the following evidence:

a) As noted, Mr. Astudillo had more than 30 convictions prior to the two guilty pleas in question.

b) Mr. Astudillo had faced serious immigration consequences in the past. In 1997 the Ministry advised him that he was at risk of being found to be a danger to Canada. He was successful in a judicial review that reversed the Ministry's position that he may be a danger to Canada. Hence,

Mr. Astudillo was aware of the possibility of serious immigration consequences arising from a criminal conviction even before he was charged with the two harassment offences in 2018 and 2019.

c) In 2019 and 2020, his criminal defence counsel was aware of the immigration issue and discussed it with Mr. Astudillo, as set out in his notes.

d) I accept that Mr. Astudillo did not receive specific legal advice about the immigration consequences; however:

i. It is unclear whether anyone could have told him what the Ministry would do, as opposed to what they might do. He already knew that criminal convictions and serious immigration consequences were linked. Hence, he was not misinformed.

ii. Based upon the objective situation that Mr. Astudillo faced in January 2020, in my opinion:

(1) there were compelling reasons for him to accept the plea deals:

(a) The evidence underpinning the charges had aggravating features;

(b) He had a prior criminal record, including a prior conviction for harassment;

(c) By accepting the pleas, he avoided the prospect of a return to prison.

iii. The same factors made the prospect of a different plea deal unlikely.

[105] I find that Mr. Astudillo knew that immigration consequences were possible. In my opinion, the difference between that knowledge, and the knowledge that he might face deportation, is not sufficient to render his guilty pleas "uninformed". He knew the consequences could possibly be serious. Further, viewed objectively, it is unlikely that he had any path other than the guilty pleas that he accepted. Hence, there was no prejudice to his decision.

[106] It follows that, in my opinion, it is not in the interests of justice to extend the time for Mr. Astudillo to appeal his guilty pleas. He was not uninformed. He has suffered no prejudice.

[107] Given that finding, I need not address the second part of the two applications which seeks the withdrawal of the two guilty pleas.

[108] The appellant's two applications on Vancouver Registry Files #35041 and #35042 are dismissed.

"A. Ross J."