

CANADA / JUDGMENT

R. v. Klassen

2023 BCCA 103

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 103 R. v. Klassen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Klassen,

2023 BCCA 103

Date: 20230306

Docket: CA46179

Between:

Rex

Respondent

And

Beverley Keith Klassen

Appellant

Before:

The Honourable Justice Dickson

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated
July 27, 2018 (R. v. Klassen, Surrey Docket 220423-1).

Counsel for the Appellant:

T.B. Magder

Counsel for the Respondent:

C.W. Greenwood

Place and Date of Hearing:

Vancouver, British Columbia

May 11-12, 2022

Place and Date of Judgment:

Vancouver, British Columbia

March 6, 2023

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

Summary:

The appellant and a third party were tried together for possession of controlled drugs for the purpose of trafficking. The appellant pleaded guilty to all counts mid-trial after the trial judge made certain Charter rulings. At the time, the appellant was unaware that if he pleaded guilty he would not be able to appeal the Charter rulings or apply for a stay of proceedings based on s. 11(b) of the Charter and Jordan principles. The trial continued after his pleas were accepted and the trial judge convicted the third party but later stayed the proceedings because her s. 11(b) Charter right to be tried within a reasonable time had been infringed. On appeal, the appellant asks this Court to set aside his guilty pleas, quash his convictions, and direct a new trial. Held: Appeal allowed--the appellant's guilty pleas are set aside, his convictions are quashed, and a new trial is directed. The appellant's guilty pleas were uninformed because he was unaware that by pleading guilty he would be unable to challenge the trial judge's Charter rulings and/or apply for a stay of proceedings for the infringement of his right to be tried within a reasonable time under s. 11(b) of the Charter. Further, the appellant suffered prejudice giving rise to a miscarriage of justice because there is a reasonable possibility that he would not have pleaded guilty had he been properly informed.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

- [1] This appeal concerns whether and, if so, why this Court should set aside the appellant's guilty pleas and quash his convictions for possession of controlled drugs for the purpose of trafficking. The appellant, Beverly Keith Klassen, and his friend, Janessa Rae Marchuk, were tried together on those charges on a three-count Information. Following adverse Charter rulings on admissibility, Mr. Klassen pleaded guilty to all three counts and the trial continued against Ms. Marchuk. Mr. Klassen testified and claimed sole responsibility for the offences, but the trial judge convicted Ms. Marchuk. However, she later stayed the proceedings on the basis that Ms. Marchuk's s. 11(b) Charter right to be tried within a reasonable time, as contemplated in *R. v. Jordan*, 2016 SCC 27, had been infringed.
- [2] On appeal, Mr. Klassen asks this Court to set aside his guilty pleas and quash his convictions. In his submission, allowing the convictions to stand would amount to a miscarriage of justice because his trial counsel provided him with ineffective assistance and his pleas were uninformed. According to Mr. Klassen, armed with proper information he would not have pleaded guilty, the outcome of the proceedings likely would have been different, and therefore he was prejudiced. Consequently, he submits, we should set aside his guilty pleas, allow the appeal, and direct a new trial.
- [3] In my view, Mr. Klassen's guilty pleas were uninformed because he was unaware of their direct legal consequences, namely, that he was forfeiting his right to appeal the Charter rulings and to pursue a Charter remedy based on s. 11(b) and *Jordan* principles. It is also reasonably possible that he would not have pleaded guilty had he been aware of the consequences of doing so. As a result, Mr. Klassen was prejudiced and allowing his pleas to stand would amount to a miscarriage of justice pursuant to the principles articulated in *R. v. Wong*, 2018 SCC 25. For that reason and those that follow, I would set aside the guilty pleas, quash the convictions, allow the appeal, and direct a new trial.

Background

- [4] In the early morning hours of August 8, 2016, Constable Sylka was on general patrol in the Newton area of Surrey. He noticed a car with a burnt-out tail light, activated his emergency lights, and pulled over the car. The car had two occupants: Mr. Klassen, the driver and owner, and Ms. Marchuk, the front passenger.
- [5] Constable Sylka approached and asked Mr. Klassen for his insurance papers. While speaking with him he noticed multiple cell phones inside the car, frequent cell phone ringing, and a piece of paper with writing which led him to believe it was a score sheet. Based on his observations, he decided to detain Mr. Klassen and Ms. Marchuk for a drug investigation.
- [6] After asking them to exit the car and advising that they were being detained for a drug investigation, Constable Sylka provided Mr. Klassen and Ms. Marchuk with their s. 10 Charter rights from memory. However, he failed to mention that they could contact counsel immediately and the right was not contingent on their ability to afford private counsel. Next,

he asked Mr. Klassen if he had any drugs on his person or in his car. Mr. Klassen replied "no" to both questions. When Constable Sylka asked Ms. Marchuk the same questions, she replied "no" to the first, and "yes, a joint, maybe a roach" to the second, at which point he arrested both parties for possession of marijuana.

- [7] As he was reading Mr. Klassen his Charter rights following his arrest, Constable Sylka noticed Ms. Marchuk throwing baggies of what looked like drugs onto the ground. In response, he arrested both parties for possession of drugs for the purpose of trafficking. Based on the change in Mr. Klassen's jeopardy, Constable Sylka read him his s. 10 Charter rights again, then searched his car and his person. In Mr. Klassen's car, he found the score sheet and various drugs. On his person, he found drugs, cash, and a cell phone.
- [8] Mr. Klassen and Ms. Marchuk were charged with possession of heroin, fentanyl, cocaine, and methamphetamine for the purposes of trafficking. The Information was sworn on January 25, 2017 and their first appearance was on March 8, 2017. Thereafter, the case was adjourned for approximately two months to allow Ms. Marchuk to obtain counsel. However, she failed to appear on the return date and a bench warrant was issued for her arrest.
- [9] Mr. Klassen was arraigned on May 23, 2017 while Ms. Marchuk was still at large after the bench warrant was issued. A two-day trial was scheduled for February 8 and 9, 2018. In November 2017 Ms. Marchuk was arrested. When she was brought before the court, she agreed to the trial dates previously scheduled by Mr. Klassen.

At Trial

- [10] The trial commenced on February 8, 2018, as scheduled. It began with a voir dire dealing with multiple issues. These included whether Constable Sylka had reasonable grounds to arrest Mr. Klassen for possession of marijuana, whether his Charter rights were breached, and, if so, in what way.

Evidence on First Voir Dire on Grounds for Arrest for Possession of Marijuana

- [11] Constable Sylka was the only witness on the first voir dire. He described the events of August 8, 2016, including his decision to arrest Mr. Klassen and Ms. Marchuk for possession of marijuana. After explaining his prior decision to detain them for a drug investigation and his incomplete advice on their s. 10 Charter rights, Constable Sylka described the questions he asked and the parties' answers, including Ms. Marchuk's statement "yes, a joint, maybe a roach". In response to Crown counsel's question "[w]hat happened after that?", he replied "[b]ased on her statement I arrested them for possession of a controlled substance, specifically marijuana".
- [12] Crown counsel went on to ask Constable Sylka why he decided to arrest both Mr. Klassen and Ms. Marchuk. He replied that according to Ms. Marchuk there was a fresh marijuana cigarette inside the vehicle, that fresh marijuana would typically emit an odour, and that while he had not smelled anything he believed anyone inside the car would have been able

to detect the odour of marijuana. Therefore, he stated, Mr. Klassen "would have known that those were inside his vehicle". The exchange concluded with Crown counsel asking: "Was it the statement in and of itself that made you think that they were arrestable for possession?". Constable Sylka replied in the affirmative. On cross-examination, he confirmed that he arrested Mr. Klassen based on Ms. Marchuk's statement and stated "[h]ad that statement not been made and I had no further grounds to arrest Mr. Klassen, then yes, he would have been free to go".

- [13] The first voir dire took both of the scheduled trial days. In argument, Mr. Klassen's trial counsel submitted that Constable Sylka had no grounds to arrest him for possession of marijuana because there was no evidence beyond his status as owner and driver of the car "that he had any knowledge or control or any possession of marijuana that Ms. Marchuk had disclosed may be in the vehicle".

Ruling on First Voir Dire: April 26, 2018

- [14] The judge outlined the background facts, Constable Sylka's testimony, and the issues: (i) whether Constable Sylka had reasonable grounds to detain Mr. Klassen and Ms. Marchuk; (ii) whether their arrest for possession of marijuana was lawful; and (iii) whether their Charter rights were breached. Then she dealt with each issue in turn.
- [15] The judge found that Constable Sylka was a credible witness. She concluded he had reasonable grounds to detain Mr. Klassen and Ms. Marchuk for a drug investigation, but the caution he provided did not fulfill the informational component of s. 10(b), and therefore their s. 10(b) Charter rights were breached at the detention stage. Next, she considered the arrests for possession of marijuana and found they were arrested for that offence as a result of Ms. Marchuk's statement, which was obtained in breach of her s. 10(b) Charter rights. After noting that she would deal with whether the breach should result in a s. 24(2) Charter remedy in a subsequent ruling, she asked whether, assuming there were no Charter breaches, Constable Sylka had reasonable and probable grounds for the arrests.
- [16] To answer that question, the judge reviewed s. 495 of the Criminal Code, the positions of the parties, and the relevant jurisprudence. Then she turned to Constable Sylka's grounds for arrest. In conducting her analysis, she noted that Constable Sylka did not smell marijuana, but he believed anyone inside the car could smell it based on Ms. Marchuk's statement. Although she did not find either party could have smelled marijuana in the car, given Ms. Marchuk's statement she concluded that Constable Sylka had grounds to arrest her "based on s. 495(1)(b) 'finds committing' or 'apparently finds committing' on both a subjective and objective basis, looking at the totality of the circumstances of this case and all the observations of the officer".
- [17] The judge stated that the next stage would be "whether the statement leading to the arrest of the passenger, and whatever flows from the breach of her section 10(b) rights, ought to be excluded pursuant to s. 24(2) of the Charter". However, first she asked whether Constable

Sylka also had grounds to arrest Mr. Klassen based on Ms. Marchuk's statement. She held that admitting Ms. Marchuk's statement did not breach Mr. Klassen's Charter rights, and it was admissible against him for purposes of determining whether Constable Sylka found an offence apparently being committed. Then she said this:

- [121] The point of focus here is the observation of the officer, and whether the officer based on his observations, did find or apparently find the driver committing the offence of possession of marijuana both on a subjective and objective basis. The officer was present when he heard the statement there is "a joint" in the car, having already made other observations, namely, the slow driving and pulling in the dark alley, the newer plates, the multiple and ringing cell phone, the score sheet, and the fact that Mr. Klassen was the registered owner of the car. Based on all these observations, I find that the commission of the offence of possession by the driver would have been apparent not only to this officer, but also to a reasonable person placed in the circumstances of Cst. Sylka, and therefore Cst. Sylka did properly find or apparently find the driver committing the offence of possession of marijuana.
- [18] Based on her finding that Constable Sylka had reasonable grounds to arrest Mr. Klassen for possession of marijuana, the judge ruled that the search incidental to his arrest was lawful. She concluded her reasons by repeating that all s. 24(2) Charter arguments regarding s. 10(b) breaches would be made in a subsequent ruling.

Proceedings Following the First Voir Dire Ruling

- [19] The trial was adjourned to May 14 and 15, 2018 for continuation following the first voir dire ruling. However, Ms. Marchuk did not appear on the morning of May 14 and half a day of court time was lost. When court convened later that day, Mr. Klassen and Ms. Marchuk challenged the qualifications of the Crown's expert witness. On May 15, the judge ruled that the Crown expert was qualified and admitted her opinion evidence on dial-a-dope operations.
- [20] After the expert testified, Crown counsel advised the judge that the parties were ready to make submissions on s. 24(2) of the Charter. However, Mr. Klassen's trial counsel stated that, based on the judge's factual findings on the first voir dire, he would not be advancing a s. 24(2) Charter argument. Consequently, the judge heard submissions on the admissibility of the evidence under s. 24(2) from counsel for Ms. Marchuk alone.
- [21] On July 27, 2018, the judge ruled that Ms. Marchuk's statement to Constable Sylka was inadmissible due to the breach of her s. 10(b) Charter rights when he detained her for a drug investigation. However, she also ruled that the drugs Ms. Marchuk disgorged when Constable Sylka arrested her for possession of marijuana were admissible at the trial.

- [22] Immediately following delivery of the ruling, the drugs were admitted into evidence and the Crown closed its case. At that point, trial counsel advised the judge that he had been instructed to change Mr. Klassen's pleas to guilty on all three counts of the Information. The judge asked Mr. Klassen if that was correct and he replied "[y]es" to her question. No further plea inquiry was conducted and guilty pleas were recorded on all three counts.
- [23] The presumptive Jordan ceiling was reached on July 25, 2018, two days before Mr. Klassen entered his guilty pleas.

Proceedings Following Guilty Pleas

- [24] After Mr. Klassen entered his guilty pleas, the trial was adjourned to allow counsel for Ms. Marchuk to consider whether to call Mr. Klassen to testify. When it resumed on July 30, 2018, Mr. Klassen testified as a witness for the defence. In doing so, he acknowledged selling drugs on the night in question, but claimed that Ms. Marchuk was not involved and he was simply giving her a ride when Constable Sylka stopped them. Ms. Marchuk testified to generally similar effect.
- [25] On December 5, 2018, Ms. Marchuk completed her testimony and her counsel made final argument. On January 16, 2019, the judge delivered oral reasons for judgment. She rejected Mr. Klassen and Ms. Marchuk's testimony, found they were in joint possession of the drugs for the purpose of trafficking, and convicted Ms. Marchuk on all three counts.
- [26] On February 25, 2019, Ms. Marchuk brought an application seeking a stay of proceedings for unreasonable delay based on s. 11(b) of the Charter and the principles articulated in Jordan. On April 23, 2019, the judge sentenced Mr. Klassen to 15 months of incarceration. On June 21, 2019, she heard Ms. Marchuk's Jordan application. On September 16, 2019, she granted the application and stayed the proceedings.
- [27] In her ruling on Ms. Marchuk's Jordan application, the judge noted that the total delay from the date the Information was sworn (January 25, 2017) to the date the trial completed (January 16, 2019) was 23 months and 21 days, not accounting for defence delay or exceptional circumstances. In other words, the total delay under consideration was 171 days over the presumptive Jordan ceiling, which, as noted, was reached two days before Mr. Klassen entered his guilty pleas. After reviewing the history of the proceedings, noting that the original two-day trial estimate was inadequate, and attributing 91 days of delay to Ms. Marchuk, the judge expressly declined to speculate on "whether a decision could have been rendered by the court on July 30th if defence was able to make a decision on July 27 on calling a case". She also characterized the period from May 15, 2018 to July 30, 2018 as a discrete event and deducted 75 days as result. She concluded her ruling by finding that "[b]ased on the court's calculation this puts the case five days over the Jordan ceiling". That being so, she directed a stay of proceedings.

On Appeal

Fresh Evidence Application

- [28] In advancing his appeal, Mr. Klassen relies on two affidavits that he swore, two affidavits sworn by trial counsel, and their respective cross-examinations as fresh evidence. The first two affidavits were sworn and filed before the main factums were filed. The second two were sworn in response to a memorandum from the division originally assigned to hear the appeal. In the memorandum, the division noted that both parties acknowledged the presumptive ceiling in Jordan had passed when Mr. Klassen pleaded guilty and asked that they address the advice, if any, provided on the Jordan issue prior to entry of the pleas.
- [29] The parties agree that the fresh evidence is admissible based on the principles outlined in Wong (paras. 6, 19) and R. v. Ball, 2019 BCCA 32 (paras. 100-104).
- [30] In my view, Mr. Klassen and trial counsel were both straightforward, generally credible witnesses. Although their memories differed on some details, their accounts were substantially similar in most material respects. Based on their affidavits and their testimony, I would find the following facts:
- From the outset, Mr. Klassen instructed trial counsel to act in the manner most likely to ensure that Ms. Marchuk would not be convicted. This included instructing trial counsel that if his Charter argument was unsuccessful he would testify and assume sole responsibility for possession of the drugs.
 - Trial counsel advised Mr. Klassen that if his Charter argument was unsuccessful the most effective way of obtaining Ms. Marchuk's acquittal would be to plead guilty, testify on her behalf, and admit to possessing the drugs for the purpose of trafficking. He did not tell Mr. Klassen that he could testify and admit to having committed the offence without pleading guilty, and Mr. Klassen was unaware of that possibility.
 - After the judge ruled that Constable Sylka had reasonable grounds to arrest Mr. Klassen for simple possession, trial counsel advised him there was no point in participating in a s. 24(2) Charter argument seeking to exclude the drugs.
 - After the judge admitted the drugs, Mr. Klassen told trial counsel that he wanted to appeal the Charter rulings and trial counsel told him that pleading guilty would not affect his ability to do so.
 - When Mr. Klassen pleaded guilty, trial counsel knew that the presumptive Jordan ceiling had passed, but did not believe a Jordan application would succeed given the number of defence adjournments, the increasingly complicated nature of the case, and the fact that two accused were involved. It did not occur to trial counsel that if Mr. Klassen continued on with the trial rather than pleading guilty his chances of succeeding on a Jordan application brought later in the proceedings might improve.

- When Mr. Klassen pleaded guilty, trial counsel did not tell him that the presumptive Jordan ceiling had passed or discuss bringing a Jordan application at the time or later in the proceedings. In particular, he did not advise Mr. Klassen that he could seek a Charter remedy based on s. 11(b) and Jordan principles, but that he would lose the right to do so by entering the guilty pleas.
- Mr. Klassen entered his guilty pleas based on the information and advice he received from trial counsel.
- After he pleaded guilty, Mr. Klassen learned that Ms. Marchuk was seeking a stay based on Jordan principles. When he questioned trial counsel about the Jordan issue, trial counsel told him the Jordan clock had stopped running when he entered his guilty pleas.

Appellant's Position

- [31] Mr. Klassen contends that his guilty pleas were uninformed and trial counsel provided ineffective assistance which caused him serious prejudice. Properly advised, he says, he would not have pleaded guilty and the outcome of the proceedings probably would have been different. In these circumstances, Mr. Klassen submits, allowing his guilty pleas to stand would amount to a miscarriage of justice. In support of his submission, he relies on the principles articulated in *Wong, Ball, and R. v. Hamzehali*, 2017 BCCA 290.
- [32] According to Mr. Klassen, trial counsel made three consequential errors. First, he erred by advising that pleading guilty would not affect his ability to appeal the Charter rulings, which were flawed regarding Constable Sylka's grounds for arrest and the admissibility of the drugs. Second, he erred by failing to advise that he had a developing Jordan argument that would improve if he did not plead guilty and continued on with the trial. Third, he erred by failing to make a s. 24(2) argument for exclusion of the drugs based on the initial breach of his s. 10(b) Charter rights. Given the prejudicial effect of these errors on his decision to plead guilty and on the outcome of the proceedings, Mr. Klassen submits we should strike the guilty pleas, quash his convictions, and direct a new trial.

Respondent's Position

- [33] Crown counsel concedes that Mr. Klassen's guilty pleas were uninformed based on trial counsel's erroneous advice that pleading guilty would not affect his ability to appeal the Charter rulings. However, he says, even if Mr. Klassen might not have pleaded guilty but for that advice, he has not suffered irremediable prejudice. In the Crown's submission, this is because we can and should consider the merits of the proposed appeal and find that the judge did not err in holding Constable Sylka had reasonable grounds to arrest Mr. Klassen for possession of marijuana. In these circumstances, Crown counsel argues, although the guilty pleas were uninformed, allowing them to stand would not amount to a miscarriage of justice.

[34] The Crown also argues that trial counsel's failure to advise Mr. Klassen on the Jordan issue, while unfortunate, did not render the guilty pleas invalid, amount to ineffective assistance, or cause any prejudice. In his submission, Mr. Klassen's claim of prejudice is speculative. This is so, he says, because when Mr. Klassen pleaded guilty there was no reasonable prospect that he would obtain a Charter remedy based on Jordan principles. Further, if he had not pleaded guilty he likely would not have obtained a stay later because the trial likely would have completed promptly. In support of his submission, Crown counsel relies on several authorities, including Wong, R. v. Duong, 2006 BCCA 325 and R. v. Zaworski, 2022 BCCA 144, and emphasizes the public interest in preserving the finality of guilty pleas. As to trial counsel's failure to advance the proposed s. 24(2) Charter argument, Crown counsel submits the argument would have been futile, and therefore his failure to make it did not prejudice Mr. Klassen or result in a miscarriage of justice.

Issues

[35] The issues that emerge from the fresh evidence, the factums, and the oral arguments are:

- i. Were Mr. Klassen's guilty pleas uninformed and, if so, on what basis?
- ii. If Mr. Klassen's guilty pleas were uninformed, does the evidence establish a reasonable possibility that he would not have pleaded guilty had he been properly informed?
- iii. Has Mr. Klassen suffered prejudice such that allowing his guilty pleas to stand would amount to a miscarriage of justice?

Discussion

Legal Framework

Challenging a Guilty Plea on Appeal

- [36] As the Court emphasized in Wong, guilty pleas play a centrally significant role in the Canadian criminal justice system. For an accused, pleading guilty waives the right to require the Crown to prove its case beyond a reasonable doubt and surrenders the right to make full answer and defence, including by pursuing Charter-based arguments. For society, maintaining the finality of guilty pleas helps to ensure the stability, integrity, and efficiency of the administration of justice because most criminal cases are resolved by guilty pleas. Given their central significance for the criminal justice system as a whole, a court may accept a guilty plea only if it is "voluntary, unequivocal and informed": Wong at paras. 2-3, 43, 62; R. v. Hexamer, 2018 BCCA 142 at para. 57; s. 606(1.1), Criminal Code.
- [37] For a guilty plea to be informed, the accused must be aware of the nature of the allegations, and the effect and legal consequences of the plea. The consequences of the plea include those collateral consequences that flow from the conviction and bear on sufficiently serious legal interests of the accused: Wong at paras. 2-4, 43, 63, 96-97; R. v. Lam, 2020 BCCA 276 at paras. 7, 75, 79. For example, in Wong the guilty plea was uninformed because the appellant

was unaware of the legally relevant collateral consequences of his conviction and sentence in connection with immigration when he pleaded guilty. In *Lam*, the guilty plea was uninformed because the appellant was unaware that as a significant and direct legal consequence of his guilty plea he would forfeit his right to challenge the validity of a search warrant.

- [38] Canadian courts have also repeatedly found guilty pleas uninformed when the accused entered them based on a mistaken belief that doing so would not forfeit the right to appeal an adverse ruling on the admissibility of evidence: see, for example, *Duong*; *R. v. Chuhaniuk*, 2010 BCCA 403; *R. v. Fegan* (1993), 80 C.C.C. (3d) 356 (Ont. C.A.). In *Duong*, Justice Rowles explained the proper procedure for an accused to follow to preserve the right to appeal an adverse ruling on admissibility, namely, to admit the underlying facts and invite the judge to convict: at para. 8.
- [39] This Court has jurisdiction under s. 686(1)(a)(iii) of the Criminal Code to set aside a guilty plea if allowing it to stand would amount to a miscarriage of justice: *Wong* at para. 1. As Justice Fitch stated in *Lam*, s. 686(1)(a)(iii) concerns itself with the prejudicial impact of an event relating to a trial, and extends to events that lead to actual and apparent unfairness: at para. 78.
- [40] In *Zaworski*, the appellant asked this Court to set aside his guilty plea on the basis that the plea was equivocal and therefore invalid. In analysing that request, Justice DeWitt-Van Oosten identified the principal question as whether a proved irregularity associated with a guilty plea was serious enough to have rendered the trial unfair or created the appearance of unfairness. She also observed that a miscarriage of justice analysis under s. 686(1)(a)(iii) "is fact-intensive, undertaken on a case-by-case basis and 'sufficiently flexible' to account for a wide range of circumstances": at paras. 2-3, 58.
- [41] The *Wong* framework for striking an uninformed guilty plea involves a two-step analysis. First, the impugned plea must be shown to be legally invalid because the accused was misinformed about sufficiently serious information. Second, prejudice serious enough to constitute a miscarriage of justice must be shown. The first step - whether the unknown information falls within the scope of what an accused must know to give an informed plea - "objectively assesses the seriousness of the unknown legal consequence": *Wong* at para. 34. At the second step, the Court assesses whether there is a reasonable possibility the accused would have proceeded differently had they been aware of the legally relevant consequence, either by declining to plead guilty or by pleading guilty but with different conditions. In other words, the standard of proof is a "reasonable possibility" and the test for prejudice is purely subjective. Accordingly, unlike the objective approach adopted to assessing the quality of the unknown information when determining whether a guilty plea is uninformed, at the second step of the analysis the Court assesses prejudice by asking if the evidence establishes a reasonable possibility that this accused has suffered prejudice viewed exclusively from their subjective perspective: *Wong* at paras. 4-6; 26; 33-36; *Lam* at paras. 80, 87, 89, 93.

- [42] In *Wong*, the majority and minority divided on the proper approach to adopt in assessing prejudice in cases involving uninformed guilty pleas. In the view of the minority, whether an accused has shown prejudice giving rise to a miscarriage of justice should be determined by way of a modified objective analysis. The salient question in the minority's view was whether there is a "reasonable possibility that a similarly situated reasonable person would have proceeded differently if properly informed": at paras. 5, 80. In contrast, the majority held that the prejudice inquiry is purely subjective to the accused in light of the fundamentally subjective and deeply personal nature of a decision to plead guilty. However, it stated, the credibility of an accused's subjective claim may be assessed objectively: at paras. 6, 11, 12, 25-26, 36.
- [43] The majority in *Wong* went on to state that where the court accepts the veracity of an accused's claim that they would have pleaded differently armed with the relevant information, "the accused has demonstrated prejudice and should be entitled to withdraw his or her plea": at para. 20. It also observed that the accused "need not show a viable defence to the charge in order to withdraw a plea on procedural grounds" because the prejudice "lies in the fact that in pleading guilty, the [accused] gave up [the] right to a trial": at para. 23, citing *R. v. Rulli*, 2011 ONCA 18 at para. 2. In other words, the majority explained:
- [23] Requiring the accused to articulate a route to acquittal is antithetical to the presumption of innocence and to the subjective nature of choosing to plead guilty. An accused is perfectly entitled to remain silent, advance no defence, and put the Crown to its burden to prove guilty beyond a reasonable doubt. It does not make sense to let an accused proceed to trial at first instance without any defence whatsoever, but to insist on such a defence to proceed to trial when withdrawing an uninformed plea. Though the decision to go trial may be unwise or even reckless, we are not seeking to protect an accused from himself or herself. Rather, we seek to protect an accused's right to make an informed plea.
- [Emphasis added.]
- [44] In rejecting the minority rationale for adopting a modified objective approach to assessing prejudice, the majority discussed the Court's guidance in *R. v. Taillefer*, 2003 SCC 70. In doing so, it emphasized the nature of the salient prejudice in cases involving uninformed guilty pleas, namely, the impact of the misinformation on the accused's decision to plead guilty:
- [35] prejudice - that is, whether the accused's being uninformed impacted the plea - is assessed subjectively by considering whether the accused would have taken a meaningfully different course of action in pleading. This is entirely consistent with *Taillefer*, where prejudice was similarly assessed by considering whether the accused would have made the same plea. In particular, a subjective analysis conforms to the direction in *Taillefer* that "the breach must bear on the accused's decision to enter the guilty plea", that courts must assess "the impact of the unknown evidence on the accused's decision to admit guilt", and that the test is

whether "there was a realistic possibility that the accused would have run the risk of a trial, if he or she had been" informed (para. 90 (emphasis added))

[Emphasis in original.]

- [45] An appellant who challenges a guilty plea for the first time on appeal bears the onus of establishing valid grounds for the appellate court to set it aside and quash the convictions. Where the appellant claims that the guilty plea is invalid and should be set aside because it was uninformed, affidavit evidence to that effect is generally required for the appeal to succeed: Wong at paras. 6, 19, 30; Lam at paras. 88-90; Zaworski at paras. 4, 54.
- [46] When a guilty plea is challenged on appeal as uninformed and a resulting miscarriage of justice is alleged, the appeal should generally be resolved based on the Wong framework. In particular, in cases such as Wong where the appellant claims a guilty plea was uninformed, the framework for analysing ineffective assistance of counsel claims is irrelevant. As the majority and minority agreed, this is because the ineffective assistance of counsel framework focuses on the source of the erroneous or incomplete information, rather than on its existence and nature. However, "[a]ssessing whether prejudice arises from misinformation does not depend upon its source". Rather, the "miscarriage of justice engaged in [such a] case arises from the invalidity of [the accused's] plea". Accordingly, focusing on whether ineffective assistance was the source of the invalidity "only confuses the analysis": Wong at paras. 24, 60; see also, Lam at paras. 69-72 and Zaworski at para. 48.

Ineffective Assistance of Counsel

- [47] Although I believe this appeal can and should be resolved based on Wong principles, the parties' arguments focus primarily on the framework for analysing allegedly ineffective assistance provided by trial counsel. To assist in illuminating the distinction between the two frameworks, it is helpful to reproduce the summary of the ineffective assistance framework set out in Ball:
- [106] An accused who is represented by counsel is entitled to receive effective legal assistance. Our adversarial system operates on the premise that competent partisan advocacy will best expose the truth of a criminal allegation. Effective representation ensures that the prosecution case is tested and the defence case is advanced by a knowledgeable and skilled advocate performing these functions adequately. It also enhances the adjudicative fairness of the process by ensuring that the accused receives the full benefit of all available procedural protections: R. v. Joannis, [1995] O.J. No. 2883 (C.A.) at paras. 65-66. Both contribute to the fairness of a trial.
- [107] A claim of ineffective assistance of counsel has two distinct components, performance and prejudice. To succeed, the appellant must establish both that counsel's acts or omissions were incompetent (performance) and that, as a result, a miscarriage of justice occurred (prejudice). Professional incompetence is assessed on a standard of reasonableness and it must be proven on a balance of probabilities. A miscarriage of justice resulting from

professional incompetence must also be proven on a balance of probabilities and it may take many forms: *R. v. G.D.B.*, 2000 SCC 22 at paras. 26-28; *R. v. Dunbar*, 2003 BCCA 667 at para. 34.

- [108] The bar for establishing professional incompetence is high and surpassing it is challenging. It is strongly presumed that counsel's conduct fell within the wide range of reasonable professional assistance, deference will be accorded to counsel's strategic and tactical decisions and the "wisdom of hindsight" has no place in the analysis. Nevertheless, unreasonable acts or omissions by counsel might include a failure properly to challenge the Crown's case, bring a necessary application or make duly diligent efforts to adduce relevant defence evidence, any of which could amount to assistance so deficient that it was ineffective. Alternatively, unreasonable acts or omissions might include representing the accused while in a compromised state or failing to comply with instructions, both of which could deny real assistance altogether and thus taint the adjudicative process by which the verdict was reached: *Aulakh* at paras. 46-48; *G.D.B.* at paras. 27, 29.
- [109] On appeal, a court should analyze the prejudice component of an ineffective representation claim before the performance component. If prejudice is not proven to the requisite standard, the court should typically end the analysis. This is because grading counsel's performance is not the object of the exercise. As Justice Major pointed out in *G.D.B.*, that is a matter for the self-governing body of the legal profession, not the court: *G.D.B.* at paras. 27, 29; *Dunbar* at paras. 24-25.
- [110] The prejudice component of an ineffective assistance claim is established where the appellant proves that professional incompetence is linked to a miscarriage of justice. A miscarriage of justice can result where there is a reasonable probability that the outcome of the proceedings below would have been different but for the errors made by counsel. In *Joanisse*, Justice Doherty explained that a reasonable probability is a probability which is sufficient to undermine confidence in the reliability of the outcome and it "lies somewhere between a mere possibility and a likelihood": *Joanisse* at para. 82. Alternatively, a miscarriage of justice may result where the outcome was reached through an unfair process, regardless of the reliability of the outcome. In other words, professional incompetence may result in a miscarriage of justice by reason of procedural unfairness alone: *G.D.B.* at para. 28; *Dunbar* at para. 26.

Were Mr. Klassen's guilty pleas uninformed and, if so, on what basis?

- [48] The parties agree that Mr. Klassen's guilty pleas were uninformed based on trial counsel's erroneous advice that entering them would not affect his right to appeal the Charter rulings. In other words, they agree that Mr. Klassen was unaware of a direct and significant legal consequence of his pleas, namely, that he would be forfeiting his right to appeal the Charter rulings. Nor was he aware that he could testify and admit to possessing the drugs for the purpose of trafficking without pleading guilty.

- [49] Neither party focused on whether Mr. Klassen's guilty pleas were also uninformed on the basis that he was unaware pleading guilty would forfeit his right to pursue a Charter remedy based on Jordan principles. Instead, in addressing the Jordan issue, both structured their submissions around the ineffective assistance framework. However, as explained in Wong, asking whether ineffective assistance of counsel was the source of inaccurate or incomplete information when an accused entered a guilty plea "only confuses the analysis": at paras. 24, 60. In my view, the parties' submissions on this issue exemplify the problem with that approach.
- [50] In his submissions, Mr. Klassen notes that the presumptive Jordan ceiling had already passed when he pleaded guilty. However, based on the judge's subsequent findings on Ms. Marchuk's stay application regarding some of the pre-July 2018 delay, he concedes that a Jordan application brought at the time of the pleas probably would have failed. Nevertheless, he says, the Jordan argument was developing and, had he continued on with the trial, he probably would have obtained a stay for unreasonable delay later in the proceedings. Accordingly, he submits, by pleading guilty he lost the opportunity to obtain a Charter remedy based on s. 11(b) and Jordan principles, which constitutes prejudice in the requisite sense.
- [51] For his part, Crown counsel emphasizes trial counsel's belief that a Jordan application lacked merit when Mr. Klassen pleaded guilty. In his submission, that belief was reasonable at the time, as was trial counsel's tactical decision to attack the admissibility of evidence rather than advise Mr. Klassen to pursue a Jordan application that had little hope of success. As discussed below, Crown counsel also contends the prejudice Mr. Klassen alleges is speculative because, given the court time then available, after deducting defence delay it is unlikely that the Jordan ceiling would have been exceeded if he had not pleaded guilty, and therefore the outcome of the proceedings likely would not have been different. He contends further that Mr. Klassen's guilty pleas were not uninformed based on trial counsel's failure to advise him on his legal position based on s. 11(b) and Jordan principles.
- [52] I am unclear on the reasoning behind Crown counsel's submission that Mr. Klassen's guilty pleas were not uninformed even if he was unaware that the presumptive Jordan ceiling had passed and that he would forfeit his right to pursue a Charter remedy based on s. 11(b) and Jordan principles by pleading guilty. This is particularly so bearing in mind the Crown's argument in its main factum that when Mr. Klassen pleaded guilty he voluntarily gave up the right to raise Charter-based arguments "when it would have been apparent that the Jordan ceiling had been reached" and he decided "to instead appeal the Charter ruling" (emphasis added). In other words, prior to receiving this Court's request for submissions on the Jordan issue, the Crown relied on the assumption that Mr. Klassen knowingly chose to give up pursuit of a Charter remedy based on s. 11(b) and Jordan principles when arguing that he was not prejudiced by uninformed guilty pleas. In my view, in doing so the Crown was suggesting Mr. Klassen knew the Jordan ceiling had been reached and for that reason his pleas were not uninformed.

- [53] As I have explained, when an appellant asks this Court to set aside a guilty plea because it was uninformed there are two key questions for consideration: (i) whether the plea was uninformed and, if so, (ii) whether the appellant suffered subjective prejudice. The first question asks whether the appellant was aware of the legal effect and consequences of the plea, including those collateral consequences that bear on the appellant's sufficiently serious legal interests. The second question asks whether the appellant would have pleaded differently armed with the proper information. In most cases, determining the answers involves a straightforward assessment of the consequences in issue, the evidence, and the reasonable inferences to be drawn from the evidence. In contrast, determining whether trial counsel's performance fell within the range of reasonable professional assistance and whether any professional incompetence can be linked to a miscarriage of justice often involves a complex, multifaceted and nuanced analysis. However, where both key questions under the Wong analysis are answered affirmatively an ineffective assistance analysis is unnecessary and unhelpful because allowing the guilty pleas to stand would amount to a miscarriage of justice regardless of questions of professional competence.
- [54] For Mr. Klassen's guilty pleas to be informed he needed to know of their direct and serious legal consequences. Given that the presumptive Jordan ceiling had passed, in my view, one of the objectively serious legal consequences of pleading guilty of which Mr. Klassen was unaware was that he would forfeit the right to pursue a Charter remedy based on s. 11(b) and Jordan principles. This was so regardless of whether trial counsel's view of the strength of a Jordan argument was reasonable and regardless of whether a Jordan application, brought then or later, likely would have succeeded. In the circumstances, Mr. Klassen had a right to pursue a Charter remedy based on Jordan principles, and, as the Court stated in Wong, he was entitled to throw a "Hail Mary" if he wished to do so: at para. 20. In addition, and importantly, the decision on whether to plead guilty was his alone to make and he was entitled to make it based on proper information: Wong at paras. 2-4, 20, 33-35.
- [55] However, when he pleaded guilty Mr. Klassen was unaware that the presumptive Jordan ceiling had passed and he would be forfeiting the right to pursue a Charter remedy based on s. 11(b) and Jordan principles. I reach this conclusion based on his evidence, trial counsel's evidence, and the absence of a substantive plea-comprehension inquiry when he entered the pleas. As he testified, Mr. Klassen did not know that "18 months was a lot of time" and that he was forfeiting the right to pursue a remedy for unreasonable delay by pleading guilty. In these circumstances, as I see it, Mr. Klassen's guilty pleas were uninformed on that basis as well.
- [56] Finally, I note that this appeal serves as yet another reminder of the importance of plea-comprehension inquiries. As discussed in Lam and Zaworski, in deciding whether to accept a guilty plea as valid, a court is required to conduct a plea-comprehension inquiry in accordance with s. 606(1.1) of the Criminal Code to ensure that the accused understands the nature and consequences of the plea, even where, as here, the accused is represented by counsel. Counsel obviously play an essential role in ensuring that an accused knows what

they are giving up by pleading guilty, but that educational role is not always fulfilled adequately, as this case and others illustrate. While the level of necessary inquiry will vary depending on many factors, including the history of the proceedings, the conduct of the accused, and the statements of counsel, the inquiry is mandatory to the extent indicated by the circumstances of each case: Lam at paras. 98-103; Zaworski at paras. 75-77.

[57] Like Justice DeWitt-Van Oosten in Zaworski, I endorse Justice Fitch's comments in Lam with respect to plea-comprehension inquiries:

[102] In conducting the plea comprehension inquiry required by s. 606(1.1), it may be helpful for judges to confirm with the accused his or her understanding that a plea of guilty constitutes a waiver of the right to require the Crown to prove its case beyond a reasonable doubt and, concomitantly, a surrender of the right to make full answer and defence, including by pursuing Charter-based arguments seeking the exclusion of evidence in defence of the offences charged: Wong at para. 62, per Wagner J. (as he then was) dissenting in the result; R. v. Hexamer, 2018 BCCA 142 at para. 57.

I would add only that it may also be helpful for judges to confirm that the accused understands pleading guilty will forfeit their right to appeal all previous rulings associated with the case: R. v. Lopez-Restrepo, 2018 ONCA 887 at para. 24.

Does the evidence establish a reasonable possibility that Mr. Klassen would not have pleaded guilty had he been properly informed?

[58] I am satisfied that it is reasonably possible Mr. Klassen would not have pleaded guilty had he known that by doing so he would forfeit his right to appeal the Charter rulings and to pursue a Charter remedy based on s. 11(b) and Jordan principles. I reach this conclusion based on his evidence and trial counsel's evidence, considered in the overall context of the case.

[59] Specifically, I accept that while Mr. Klassen was willing to do whatever he could to help Ms. Marchuk obtain an acquittal, he was not, as he testified, "about to throw [himself] under the bus to get her off". Nor was it necessary for him to plead guilty to admit possessing the drugs for the purpose of trafficking in an effort to assist her. I also accept that Mr. Klassen intended to appeal the Charter rulings before he pleaded guilty, and believed he would be entitled to pursue that appeal when he entered his guilty pleas. Further, I am satisfied that, properly advised, Mr. Klassen would have been told the presumptive Jordan ceiling had passed and the chances of a Jordan application succeeding could improve if he continued on with the trial, but if he pleaded guilty he would forfeit the right to pursue a Charter remedy based on s. 11(b) and Jordan principles.

[60] Given this context, I am confident that it is reasonably possible Mr. Klassen would not have pleaded guilty had he known that by doing so he would forfeit his right to appeal the Charter rulings and to pursue a Charter remedy based on s. 11(b) and Jordan principles.

[61] Properly construed, this concludes the analysis of whether this Court should set aside Mr. Klassen's guilty pleas. Based on Wong principles, the guilty pleas should be set aside: they were uninformed and Mr. Klassen suffered prejudice giving rise to a miscarriage of justice because it is reasonably possible that he would not have pleaded guilty if he had been properly informed. However, as I have noted, the parties departed from the Wong framework in several of their submissions on the question of prejudice and miscarriage of justice. In my view, those submissions exemplify the risk of confusion associated with doing so. For that reason, I will address those submissions now.

Has Mr. Klassen suffered prejudice such that allowing his guilty pleas to stand would amount to a miscarriage of justice?

[62] According to Crown counsel, even if Mr. Klassen's guilty pleas were uninformed, he has not suffered irremediable prejudice. This is so, he says, because the appeal of the Charter rulings lacks merit and therefore allowing the pleas to stand would not amount to a miscarriage of justice. In Crown counsel's submission, if this Court proceeds with the appeal, Mr. Klassen will be in the same position he would have been in had he followed the Duong procedure correctly, namely, the merits of the appeal will be fully argued and determined. In these circumstances, he contends, the uninformed guilty pleas have not caused Mr. Klassen any prejudice.

[63] In advancing this submission, Crown counsel acknowledges that Mr. Klassen is not required to establish a viable defence to the charges to withdraw the pleas, as Wong clarified. However, he argues, this Court hearing the merits of an appeal to assess prejudice and whether there has been a miscarriage of justice is not tantamount to requiring an accused to articulate a route to acquittal. Rather, he says, determining the appeal of the Charter rulings on its merits is an appropriate means for assessing the true prejudicial effect of the uninformed nature of the guilty pleas.

[64] In support of his submission, Crown counsel argues there is a strong line of authority establishing that where the uninformed nature of a guilty plea relates to appeal rights the remedy is for the appellate court to examine the merits of the appeal to assess whether there has been a miscarriage of justice. For example, he notes, this was the approach adopted in Duong, Lopez-Restrepo, R. v. Carter, 2003 BCCA 632, and R. v. Hoang, 2003 ABCA 251. It was also the approach adopted in R. v. July, 2020 ONCA 492, which, he emphasizes, was decided well after Wong. According to Crown counsel, that July was decided after Wong reinforces his argument that the approach to assessing prejudice he advocates is valid despite the Court's decision in Wong.

[65] According to Crown counsel, the approach he advocates is consistent with the Court's analysis in Wong, where the prejudice was fundamentally different from the prejudice in this case. In particular, he submits, this case is distinguishable from Wong because in Wong the accused gave up his right to trial in exchange for the mitigating effect of a guilty plea without understanding the serious immigration consequences, and therefore he did not get

what he bargained for in pleading guilty. In contrast, he says, Mr. Klassen can get what he bargained for so long as this Court hears and determines the merits of the Charter rulings appeal.

- [66] Crown counsel also argues it is clear from Wong that the quality of the misinformation must be serious enough to amount to a miscarriage of justice. On the facts in Wong, he says, the potential immigration consequences were significant, permanent and could not be fully remedied by the appeal process; therefore, the prejudice was indisputably sufficient to constitute a miscarriage of justice. However, he submits, the principal focus of Wong was whether the accused would have pleaded guilty but for the misinformation, and the Court was not called upon to assess a case such as this where the potential loss of appeal rights is the prejudice in question. Furthermore, he says, in Zaworski this Court stated that a proved plea irregularity must be "severe enough to [have rendered] the trial unfair or to [have created] the appearance of unfairness" and a miscarriage of justice analysis involves a flexible, fact-intensive, case-by-case exercise: at paras. 2-3.
- [67] In Crown counsel's submission, the combined effect of Wong and Zaworski is that the Court must examine the quality of a problem with a guilty plea to determine whether allowing the plea to stand would rise to the level of a miscarriage of justice. In this case, he says, Mr. Klassen has failed to establish the alleged prejudice rises to that level on any of the bases upon which he relies. That is so, he submits, because this Court can and should conclude the judge did not err by upholding the search and admitting the drugs given that she understood Constable Sylka's evidence on his subjective grounds for arrest and applied the test in *R. v. Storrey*, [1990] 1 S.C.R. 241 correctly, and because the drug evidence was clearly admissible in light of her voir dire findings.
- [68] As to the Jordan issue, Crown counsel contends the prejudice Mr. Klassen alleges is speculative in nature because he has not established that he had or ever would have had a clear entitlement to a Charter remedy based on Jordan principles. Accordingly, he says, Mr. Klassen has not established there is a reasonable probability that the outcome of the proceedings would have been different had trial counsel advised him of his legal position under s. 11(b).
- [69] Mr. Klassen responds that he has established subjective prejudice, namely, that he would not have pleaded guilty had he known that by doing so he would forfeit his right to appeal the Charter rulings and pursue a Charter remedy based on s. 11(b) and Jordan principles. However, he also goes on to make lengthy submissions with respect to prejudice based on the ineffective assistance framework and the merits of the proposed appeal.
- [70] Specifically, Mr. Klassen submits that but for trial counsel's errors, he would have been able to pursue an arguable appeal on whether Constable Sylka had reasonable grounds to arrest him for simple possession. This is so, he says, because the judge misapprehended his evidence on Constable Sylka's subjective grounds, which she conflated with his grounds for undertaking the initial drug investigation. In addition, but for trial counsel's errors he would

have been able to pursue an arguable appeal on whether the drugs were inadmissible against him because his s. 10(b) Charter rights had been breached and the drug evidence was derivative of Ms. Marchuk's statement, which was obtained by infringing her Charter rights. Further, had trial counsel advised him properly on the Jordan issue he probably would have carried on with the trial rather than pleaded guilty, and, like Ms. Marchuk, would have benefited from a stay of proceedings. Accordingly, he submits, there is a reasonable probability that the outcome would have been different and therefore he was prejudiced.

- [71] I am not persuaded by Crown counsel's submissions. Nor do I find it helpful to apply the ineffective assistance framework when assessing the issue of prejudice in this case. On the contrary, as stated in *Wong*, applying the ineffective assistance framework when deciding whether to strike an uninformed guilty plea only confuses the analysis. It also requires the Court to engage with often complex and ultimately irrelevant questions on the merits of an intended appeal, the performance of counsel, and the likely outcome of proceedings had the appellant been competently advised.
- [72] In my view, in cases where a guilty plea is found to be uninformed the combined effect of *Wong* and *Zaworski* is not that the Court should examine the quality of the misinformation in assessing whether allowing the plea to stand would amount to a miscarriage of justice. As the majority made clear in *Wong*, the salient prejudice in such cases is the impact of the misinformation on the appellant's subjective decision to plead guilty. If the appellant would have pleaded differently armed with proper information on the legal consequences of pleading guilty, serious prejudice has been demonstrated because there has been a breach of procedural fairness such that allowing the plea to stand would amount to a miscarriage of justice. That is so regardless of whether the outcome of the proceedings may be legally justifiable.
- [73] As the majority in *Wong* also clarified, the quality of the unknown information is to be assessed objectively at the first step of the analysis, when the Court determines whether the plea was misinformed and thus legally invalid. Contrary to Crown counsel's submission, its relevance to the question of prejudice and whether a miscarriage of justice has been demonstrated is limited to the assessment of whether the appellant would have pleaded differently as a result of being aware of the unknown information.
- [74] I see nothing in *Zaworski* that modifies the *Wong* approach to assessing prejudice and whether allowing a guilty to plea to stand would amount to a miscarriage of justice in cases involving uninformed guilty pleas. In *Zaworski*, Justice DeWitt-Van Oosten simply emphasized the importance of context in a miscarriage of justice analysis and conducted her own analysis in a context that was significantly different from that at issue in this case, namely, an allegedly equivocal guilty plea ultimately found not to be so. Nor do case authorities that pre-date *Wong* provide support for the approach Crown counsel advocates. They have been overtaken by *Wong* and the guidance it provides on the nature and assessment of prejudice in cases involving uninformed guilty pleas. As to the import of *July*,

I note that it appears Wong was not brought to the attention of the Court, as the Court neither cites the case nor discusses its principles. I also note that in another post-Wong appellate case - R. v. Hunt, 2021 ABCA 49 - the Court stated that "holding an accused to a demonstrably suspect plea is a miscarriage of justice": at para. 47.

[75] To repeat, in this case Mr. Klassen was unaware of the direct and serious legal consequences of his guilty pleas and there is a reasonable possibility that he would have pleaded differently had he been aware of them. It follows that he has demonstrated subjective prejudice and that allowing his guilty pleas to stand would amount to a miscarriage of justice.

Conclusion

[76] For these reasons, I would set aside the guilty pleas, quash the convictions, allow the appeal, and direct a new trial.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Grauer"

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