
CANADA / JUDGMENT

R. v. Lam

2020 BCCA 276

COURT

British Columbia Court of Appeal

DECIDED

13 October 2020

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2020 BCCA 276 R. v. Lam

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lam,

2020 BCCA 276

Date: 20201013

Docket: CA46181

Between:

Regina

Respondent

And

Hoang Lam

Appellant

Corrected Judgment: The text of the judgment was corrected
at paragraph 87 on October 21, 2020.

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated

March 12, 2019 (conviction) (R. v. Lam, Richmond Docket 58357-1).

Counsel for the Appellant

via videoconference:

K.S. Westlake, Q.C.

D.J. Song

Counsel for the Respondent

via videoconference:

J.N. Walker

Place and Date of Hearing:

Vancouver, British Columbia

June 25, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 13, 2020

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant pleaded guilty to one count of possessing cocaine for the purpose of trafficking. He applied before the trial judge to strike the plea arguing that the appearance of justice was fatally compromised by ineffective legal assistance he received from former trial counsel. The judge found that trial counsel had provided ineffective assistance, and that the guilty plea was not "fully informed" because the appellant had not been advised that the ability to challenge the lawfulness of the search of his apartment and seek exclusion of the evidence thereby obtained would be forfeited upon entry of the plea. However, the judge held that the appellant failed to establish it would be unfair, in fact or in appearance, to permit the guilty plea to stand. Held: Appeal allowed, guilty plea set aside, conviction quashed, and a new trial ordered. Having concluded that the appellant's guilty plea was not informed by one of its most direct and most immediate consequences, the trial judge should have applied the test in *R. v. Wong*, 2018 SCC 25, and considered whether the evidence adduced on the strike plea application established a reasonable

possibility that the appellant would not have pleaded guilty had he known the effect of the plea. On the evidence adduced on the strike plea application and the findings of fact made by the judge, it can safely be inferred there is a reasonable possibility that the appellant would not have pleaded guilty had he understood the consequences of doing so.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellant, Hoang Lam, asserts that his guilty plea and subsequent conviction on one count of possession of cocaine for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA], constitutes a miscarriage of justice. He seeks the intervention of this Court pursuant to s. 686(1)(a)(iii) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], and orders under s. 686(2) allowing the appeal, quashing the conviction and directing a new trial.
- [2] The appellant made an unsuccessful application to the trial judge to strike the guilty plea. The primary argument advanced by the appellant in the court below (and in this Court) is that his former trial counsel, Lawrence Myers, Q.C. (hereinafter "trial counsel") provided ineffective legal assistance on so many issues leading up to and informing his decision to plead guilty that the appearance of fairness was fatally compromised.
- [3] The judge found that trial counsel failed to provide reasonable professional assistance to the appellant in several areas. She concluded, however, that the appellant failed to establish that it would be unfair, in fact or in appearance, to permit the guilty plea to stand.
- [4] Significantly, the judge concluded that the appellant's guilty plea was not "fully informed" because trial counsel failed to advise him that the ability to challenge the lawfulness of the search of his apartment and the admissibility of evidence thereby obtained, would be forfeited upon entry of the plea. Indeed, when he advised the appellant to enter the guilty plea, trial counsel understood that the appellant could seek to challenge the search warrant, even after the plea had been entered, in the context of a post-plea entrapment application.
- [5] Having concluded the appellant's guilty plea was not informed by one of its most direct legal consequences, the judge did not proceed to consider whether the evidence adduced on the strike plea application established a reasonable possibility that the appellant would not have pleaded guilty had he been aware that doing so would preclude a challenge to the search warrant.
- [6] That the judge did not embark on this further inquiry is an understandable by-product of the manner in which the strike plea application was framed. The judge appears to have understood the appellant to disclaim reliance on the notion that the plea was uninformed and on the framework developed in *R. v. Wong*, 2018 SCC 25, in favour of an argument that the appearance of justice was undermined by the ineffective assistance of counsel. As a result, she did not address whether it was reasonably possible the appellant would have

pleaded not guilty and opted for a trial had he known that it was the only context in which a challenge to the search warrant for the purpose of excluding evidence could be mounted.

- [7] In my respectful view, the judge had an independent obligation to consider whether the plea should be set aside upon determining it to be uninformed by one of its most direct legal consequences. Had the judge embarked on this analysis, I am satisfied she would have concluded, on the factual findings she made and on the evidence adduced on the strike plea application, that the appellant established a reasonable possibility that he would not have pleaded guilty had he been informed that doing so would bring to an end his ability to challenge the warrant. Given my conclusion that the appellant's guilty plea was invalid on the principles set out in Wong, I need not address the appellant's principal argument that a voluntary, informed and unequivocal guilty plea can be set aside on miscarriage of justice grounds where the failure of counsel to provide reasonable professional assistance gives rise to a proceeding that is unfair in appearance.
- [8] For reasons I will further develop, I would allow the appeal, set aside the appellant's guilty plea, quash the conviction and order a new trial.

II. Background

- [9] I will set out only so much of the unusual background of this case as is necessary to explain the disposition I propose.

1. The Charges

- [10] The appellant and Minh Tran were jointly charged with two counts of trafficking cocaine, contrary to s. 5(1) of the CDSA. The offences were alleged to have been committed on February 8 and 15, 2013 (Counts 1 and 2, respectively). The appellant was charged separately on the same Information with possessing cocaine for the purpose of trafficking. This offence was alleged to have been committed on February 19, 2013 (Count 3).
- [11] The appellant came to the attention of the police in the course of an undercover drug investigation that targeted Ms. Tran. On February 8 and 15, 2013, Ms. Tran sold cocaine to undercover officers. Based on further investigation, the police believed the appellant to be Ms. Tran's supplier. On February 19, 2013, the police executed a search warrant at the appellant's residence and seized over two kilograms of cocaine with a street value of between \$70,000 and \$110,000. In addition, the police seized \$47,000 in cash and other items they believed to be associated with the drug trade including a variety of different cutting agents.
- [12] Following a preliminary inquiry, Ms. Tran pleaded guilty and applied before Judge Romilly, a judge of the Provincial Court of British Columbia, for a judicial stay of proceedings alleging that she had been entrapped by the police. The appellant set his matter for trial in the Supreme Court of British Columbia.

[13] On December 18, 2015, in a related proceeding, Judge Galati quashed the same warrant that was used to search the appellant's apartment following a sub-facial challenge to its validity. The Information to Obtain ("ITO") was 421 pages in length and was characterized by Judge Galati as "unquestionably the most unwieldy affidavit I have ever had to review and try to understand": *R. v. Yee and Wong* (18 December 2015), Vancouver 217867 at para. 18 (B.C. Prov. Ct.). He concluded that "the material was stitched together with characterizations of the facts that the evidence did not support to create a substantially misleading impression of a much stronger case" (at para. 61). He determined that the material before the authorizing judge, as amplified on review, could not support issuance of the warrant. In the alternative, and even though he recognized the law in British Columbia to be unsettled on this point (see *R. v. Beaumont*, 2018 BCCA 342 at paras. 41-44; leave to appeal ref'd (2019), [2018] S.C.C.A. No. 448; *R. v. Thiessen*, 2020 BCCA 85 at paras. 59-66) Judge Galati would have exercised what is sometimes referred to as a residual discretion to set aside the search warrant to preserve the integrity of the application process (at para. 61).

2. The Appellant's Guilty Plea and the Post-Plea Applications

[14] On April 20, 2016, the appellant re-elected to be tried in the Provincial Court on the understanding that he would enter a plea of guilty to Count 3 and reserve the right to argue that proceeding against him would constitute an abuse of process. An abuse of process was claimed on grounds that the evidence the Crown would seek to adduce to establish the appellant's guilt was derived from the entrapment of Ms. Tran. The re-election and plea followed resolution discussions and an agreement by the Crown that it would stay proceedings on the other two counts and seek a three-year period of incarceration.

[15] On May 10, 2016, before judgment had been rendered on Ms. Tran's entrapment application, the appellant appeared before a judge of the Provincial Court and personally entered a plea of guilty to Count 3--possession of cocaine for the purpose of trafficking. The Crown stayed proceedings on the other two counts. Crown counsel asked the presiding judge not to enter a conviction to permit the appellant to apply for a stay of proceedings in the event that a favourable ruling was made by Judge Romilly on Ms. Tran's entrapment application.

[16] The appellant was "represented" when the plea was entered by an unsupervised articulated student whose attendance had been arranged by another lawyer engaged by trial counsel to act as his agent for this appearance. Rule 2-60 of the Law Society Rules 2015 prohibits an articulated student from appearing as counsel on an indictable proceeding without the student's principal or another practising lawyer in attendance and directly supervising the student: *The Law Society of British Columbia, Law Society Rules 2015*, Vancouver: Law Society of British Columbia, 2020, R. 2-60.

[17] The presiding judge did not conduct a plea comprehension inquiry as required by s. 606(1.1) of the Code before accepting the appellant's guilty plea.

- [18] On June 3, 2016, about three weeks after the appellant pleaded guilty, Judge Romilly ruled that Ms. Tran had been entrapped by the police. Proceedings against her were judicially stayed.
- [19] The appellant applied for an order that the Crown be estopped from proceeding against the appellant as a consequence of Judge Romilly's conclusion that Ms. Tran had been entrapped. As Judge Romilly had retired by then, the application was brought before Judge Craig, the trial judge. Citing *R. v. Mahalingan*, 2008 SCC 63, she rejected the appellant's argument, noting that the proceedings before her involved a different accused and a different offence.
- [20] The appellant then applied for a judicial stay of proceedings based on what trial counsel characterized as "derivative entrapment." The appellant did not argue that he was entrapped. Rather, he argued that the prosecution should not be permitted to use against him evidence obtained as a result of Ms. Tran's entrapment. The judge held that she was not bound by Judge Romilly's ruling in Ms. Tran's case and directed that an evidentiary hearing be held before her to determine whether Ms. Tran had been entrapped. The evidentiary hearing was set for dates in April 2017.
- [21] As the hearing approached, trial counsel realized he was double-booked and delegated to a junior associate the task of conducting the evidentiary portion of the entrapment hearing.
- [22] Trial counsel appeared before the judge to make submissions on the application in May 2017. He argued that the police entrapped Ms. Tran by inducing the offences. If Ms. Tran was entrapped, the appellant submitted it would be an abuse of process to permit the Crown to continue with the prosecution against him because the evidence incriminating him was derived from the investigation targeting her.
- [23] In the alternative, trial counsel sought to challenge the search warrant arguing that it was open to the judge to excise from the ITO evidence gathered during the investigation of Ms. Tran. He submitted that if the remedy of excision was granted, there was insufficient information left upon which the warrant could have been granted. In lengthy written submissions filed in support of the application, trial counsel expressed the appellant's alternative position in the following terms:

Alternatively, the evidence discovered as a result of the illegal investigation into Ms. Tran should be excised from the Information to Obtain. Without that information, the search warrant into Mr. Lam's residence would not stand. Therefore, the evidence obtained as a result of that search warrant should be excluded and Mr. Lam should be acquitted.

- [24] During trial counsel's submissions, the judge questioned the ability of the appellant to mount a Charter challenge to the validity of the search warrant after entering a guilty plea. The exchange between trial counsel and the judge on this issue is set out, in material part, below:

Trial Counsel: we say quite simply that in this type of a hearing the application for the search warrant would not have occurred because there wouldn't have been any evidence to make the application. There is some law that suggests that the remedy may be to excise those portions of the search -- of the Information to Obtain the Search Warrant, the affidavit, and therefore the court would look upon that which remains in terms of evidence or in terms of the information contained in the ITO and come to a determination as to whether a warrant would have issued and therefore whether the evidence which is obtained from Mr. Lam's apartment would be before the court. It's our position that there would be nothing left.

The Court: Well, that ship has sailed. Your client's plead[ed] guilty. There's not an issue on s. 8 in the hearing before me.

Trial Counsel: Well, there it is a road that we submit you can and should follow. It's not --

The Court: How?

Trial Counsel: Well, I'm going to tell you.

The Court: Okay.

Trial Counsel: The road is this, that it's -- it seems as though, and I may -- I may not -- I acknowledge that the law is somewhat confusing in this area, but we're in an expansive investigation in terms of what has occurred in terms of the conduct of the police. This has nothing to do with Mr. Lam, and so if you find that Ms. Tran was entrapped, and if you find that the evidence that was obtained by that is an abuse of process as it applies to Mr. Lam, then we say that is the end of the matter. Now, you can engage in, call it Charter examination, and it seems to overlap in law, Charter examination with the abuse of process or the entrapment principles and doctrines. So no -- I mean yes, you're quite right, we're not engaged in ... the formality of a voir dire to come to a determination as to whether there were reasonable and probable grounds to obtain the search warrant and therefore search Mr. Lam's house and therefore that evidence comes before you. That -- we're not engaged in the formality of that, but we -- there is [a] suggestion in the law that at this stage of the hearing you can engage those principles in excising the ITO and in coming to a determination as to whether the search could take place That's what we say the law is.

[25] Trial counsel was asked by the judge to provide authority for the proposition he was advancing. He replied:

Trial Counsel: perhaps I misspoke because I'm maybe distracting everyone, including myself, by suggesting that this is a Charter argument. It's not a Charter argument, it's just that those considerations -- there seems to be some law in the -- on the abuse of process that, in spite of the guilty plea having been entered, and your remarks quite appropriately that perhaps the ship has sailed, that you -- the court can seek different remedies -- or can find different remedies, depending on how egregious or how aggravated the conduct of the police or the obtaining of evidence was. So I don't know if that gives you any further direction, but I -- if you would allow me, I wouldn't give particular weight to my suggestion of the remedy of excising the warrant or

quashing the warrant, even though in effect that may be a consideration. I'm not sure that we -- we have no authority either way for the suggestions I am making.

[26] Judge Craig ruled the appellant had not established Ms. Tran had been entrapped by the police: *R. v. Lam* (24 May 2017), Richmond 58357-1 (B.C. Prov. Ct.). Even if she found that Ms. Tran was entrapped, the judge concluded it would not be an abuse of process to allow the proceedings against the appellant to continue. She noted that there was no evidence the appellant was induced to commit the offence. As for the appellant's alternative submission, the judge ruled that the appellant could not challenge the lawfulness of the search of his apartment and seek the exclusion of the evidence discovered therein pursuant to ss. 8 and 24(2) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, after pleading guilty to the offence.

3. The Strike Plea Application

[27] Following the judge's ruling but before sentencing, the appellant discharged trial counsel and retained new counsel. With the assistance of new counsel, the appellant sought to have his guilty plea set aside based on the alleged ineffective legal assistance of his trial counsel.

(a) The Evidence

[28] Affidavits sworn by the appellant and trial counsel were filed for use on the application and both of them were cross-examined.

[29] The appellant testified that he pleaded guilty in 2009 to possession of cocaine for the purpose of trafficking. He received a 12-month conditional sentence order for that offence.

[30] The appellant said he told trial counsel he did not want to plead guilty and repeatedly brought up challenging the search warrant. He said he asked counsel, "is there any other way?", "have you tried challenging the search warrant?", and "why don't we try -- why don't we [challenge] the search warrant?" He said trial counsel did not listen to him and said the "best way" and "only way" to "beat this" and "win" was to plead guilty "and fight the entrapment charge." The appellant agreed with a suggestion put to him in cross-examination that he knew pleading guilty would be "a monumental undertaking"; one that would have significant consequences for him if the entrapment argument was dismissed.

[31] The appellant testified that he was "really against pleading guilty", but trial counsel told him he had to plead guilty. The appellant testified that, "I trusted him [and] so I just went the way he had it planned out." Trial counsel confirmed in his evidence that the appellant appeared to have a great deal of confidence in him.

[32] In re-examination, the appellant gave this evidence:

Q The Crown said, and you agreed, that you knew the plan was to plead guilty once the case got back to provincial court, right?

A Yeah.

Q So did Mr. Myers ever tell you that by pleading guilty, you would lose the ability to challenge the search warrant?

A No, he didn't tell me that.

Q So the Crown got you to agree that you understood that pleading guilty would have significant consequences, you remember that?

A Yes.

Q Okay.

A I trusted Mr. Myers' judgment. I was really against pleading guilty but he said this is the best way -- this is the only way to win.

Q Okay, but I just wanna go through what this significant consequence meant to you. Did Mr. Myers ever tell you that by pleading guilty, you lose your right to a trial?

A No.

Q Did the articling student introduce himself to you as an articling student?

A I didn't even know he was a student [indiscernible].

Q Okay.

A I thought he was a lawyer.

Q Did he ever -- did that articling student ever review the consequences of entering a guilty plea?

A No, we didn't really talk.

[33] The appellant also testified that he was paying for the services of trial counsel and expected him to act on his behalf on the evidentiary portion of the entrapment hearing:

I was wondering where Mr. Myers was. I went there -- so I came to the courtroom looking for Mr. Myers and then this girl comes up to me and asked if I'm Hoang Nam Lam, and I was like, yeah, and then I was like, oh, where's Mr. Myers? And then she's like, oh, he didn't have to be here for this part, the beginning part of this. He was away doing a different case. A murder case. And then in my head, I was just like, I thought Mr. Myers would be here. He should be here.

[34] The appellant said that trial counsel never spoke with him about having someone else represent him on the evidentiary portion of the hearing, and he never authorized the attendance of junior counsel on the application.

[35] The lawyer who appeared for the appellant on the entrapment application had been called to the bar for about seven months at the time of the hearing. Trial counsel testified on the strike plea application that laying an evidentiary foundation for the derivative entrapment argument was not a complicated matter.

- [36] Trial counsel also testified on the strike plea application that he understood the appellant was prepared to do everything he could to avoid the jail sentence that would almost certainly be imposed for a second conviction.
- [37] Trial counsel made no notes of any phone calls or meetings he had with the appellant nor did he memorialize any of the instructions he said he received from the appellant. Specifically, he had no notes of his discussions with the appellant about pleading guilty and no notes demonstrating that the appellant authorized junior counsel to appear on the entrapment hearing. Trial counsel testified that "I don't usually put things in writing because I feel that the notes themselves are vulnerable." He testified that he does not keep notes of instructions given to him by clients as a matter of practice, but acknowledged that cross-examination on this point was causing him to rethink this approach. Later in cross-examination, trial counsel testified that in a case such as this where he did not expect the client to testify, there was no need for him to take notes of conversations with the client and that the absence of notes would "[give] both of us some flexibility since should something else arise, I didn't want him to be in a position of having -- giving me contradictory statements."
- [38] In his affidavit filed for use on the strike plea application, trial counsel deposed that "[t]he sole issue on the possession for the purpose of trafficking [the count to which the appellant pleaded guilty] was whether there was sufficient 'reasonable and probable grounds' to obtain the search warrant to enter and search Mr. Lam's residence." He further deposed that, "I had not resolved whether other related investigations might be relevant but [I] did not believe them to be."
- [39] In cross-examination, trial counsel confirmed that he was contemplating an application to challenge the search warrant executed on the appellant's apartment. To that end, he asked Crown counsel to arrange for the attendance of the affiant in court in the event his application for leave to cross-examine was granted. He testified that on a facial review of the ITO, the grounds for the issuance of the warrant appeared to be strong. He was not optimistic about the prospects for success on a challenge to the warrant. Nevertheless, he testified that "it's all that I had" and that he "was certainly going to exhaust that avenue."
- [40] Trial counsel never brought a Charter application challenging the validity of the warrant. He was unable to say when he abandoned the idea of challenging the warrant, other than to say that it was shortly before arrangements were made to have the appellant re-elect to be tried in the Provincial Court for the purpose of entering a guilty plea.
- [41] Trial counsel also acknowledged that he did not contact any of the defence counsel who successfully challenged the search warrant in the related proceedings before Judge Galati before abandoning the contemplated application. He agreed that it was something he should have done. Trial counsel further acknowledged that he did not obtain a copy of Judge Galati's ruling before deciding not to pursue the challenge. He did not read the ruling at the time and had not read it when he was cross-examined on the strike plea application. He appeared

to be unaware that, in addition to finding insufficient grounds upon which the warrant could have issued, Judge Galati opined that the warrant should be set aside on residual grounds to protect the integrity of the judicial authorization process.

- [42] Trial counsel testified that he obtained instructions from the appellant to have trial counsel's junior associate conduct the evidentiary portion of the derivative entrapment hearing. Trial counsel said those instructions were received during numerous phone calls with the appellant. Later, he said he "probably" received those instructions both by phone and during in-person discussions with the appellant but could not be certain of this.
- [43] Trial counsel testified that he confirmed the appellant's instructions that junior counsel represent him on the entrapment hearing in an email he sent to junior counsel. Trial counsel was repeatedly asked to produce this email, and other materials from the file, but did not do so. Trial counsel eventually testified that materials must have somehow gone missing from the file when it was transferred from his office to the lawyer acting for the appellant on the strike plea application. When he was asked to once again look for the missing documents near the end of his cross-examination, trial counsel described the request as "tedious" and said that while he "probably" had a problem with the request, he would nonetheless attempt to comply with it. No further materials were provided by trial counsel in response to requests made on the appellant's behalf.
- [44] Trial counsel agreed that it was important to obtain Judge Romilly's ruling on Ms. Tran's entrapment application before the appellant entered a plea of guilty. As noted earlier, the plea of guilty was entered by the appellant before Judge Romilly's ruling on this application. At one point, trial counsel testified that if Judge Romilly dismissed Ms. Tran's entrapment application, he would likely have the appellant plead guilty.
- [45] Trial counsel testified that he considered it to be open to the appellant to apply for any information derived from the entrapment of Ms. Tran to be excised from the ITO in the context of the post-plea derivative entrapment application. He testified that he never abandoned the idea of challenging the search warrant. He denied a suggestion put to him in cross-examination that the guilty plea precluded a challenge to the search warrant. He asserted that the application for a remedy would not be "a formal Charter" challenge to the search warrant itself, which he acknowledged was precluded by the guilty plea. Despite his submissions before the trial judge, he was unable to provide any authority in support of the proposition that an application to challenge a search warrant for the purpose of excluding evidence could be brought after the entry of a guilty plea. Nevertheless, trial counsel maintained the correctness of his position on the strike plea application stating, "I didn't think I was wrong then, and I don't think I'm wrong now."

(b) The Positions of Counsel

- [46] As noted earlier, the appellant's application to set aside the plea was framed primarily around an argument that the cumulative effect of the deficient professional assistance said to have been provided to him gave rise to a proceeding so unfair in appearance that permitting the plea to stand would give rise to a miscarriage of justice.
- [47] The appellant sought to distinguish the analytical framework set out in Wong, arguing that even if his guilty plea was valid in the sense that it was voluntary, informed and unequivocal, it was open to him to apply to have the plea set aside if it was established that the ineffective assistance of trial counsel would cause a reasonable person to conclude there was an appearance of unfairness in the proceedings. In support of his position that the court had the power to set aside an otherwise valid plea if such a remedy was required in the interests of justice, the appellant relied on *R. v. Hanemaayer*, 2008 ONCA 580 at paras. 19-20 (a case in which the appellant was shown to have pleaded guilty to a crime he did not commit), which was cited with approval in *R. v. Cherrington*, 2018 ONCA 653 at para. 29.
- [48] The appellant alleged that trial counsel provided ineffective assistance by: failing to review Judge Galati's ruling before abandoning a Charter-based challenge to the search warrant; having the appellant plead guilty before the release of Judge Romilly's ruling concerning the entrapment of Ms. Tran; having an unsupervised articulated student appear with the appellant when the plea was entered; allowing a junior lawyer to conduct the evidentiary portion of the derivative entrapment hearing without the agreement of the appellant; and, by advancing arguments that have no legal foundation, including an attempt to argue that the ITO could be excised of information derived from the entrapment of Ms. Tran and quashed even after the appellant had pleaded guilty.
- [49] The appellant asserted he had no obligation to demonstrate actual prejudice by showing that the outcome might have been different if trial counsel provided effective assistance. To strike the plea, he submitted it was enough to show that the appearance of justice had been seriously compromised.
- [50] But the appellant did not completely disclaim reliance on the Wong framework or on the notion that the plea was uninformed. At one point, the appellant said he was not arguing the plea was "completely uninformed". At the same time, the appellant relied on his evidence that he did not know entering a guilty plea would preclude him from challenging the search warrant. As the appellant's counsel put it:

if a lawyer of 40 years believed that Mr. Lam could enter a guilty plea and yet challenge the warrant, it goes too far for the State to expect Mr. Lam to have known he could not challenge the warrant after entering a guilty plea.

- [51] The appellant also addressed the second prong of the Wong inquiry arguing in writing and orally that the evidence established, at least inferentially, that he would not have entered a guilty plea had he received competent legal advice as to the effect and consequences of the plea. The appellant's counsel put the alternative position this way in his written argument:

While Mr. Lam submits that the requirement in Wong to establish subjective prejudice does not apply where he seeks to establish a miscarriage of justice based on the appearance of unfairness, there is little doubt that Mr. Lam would not have [pleaded] guilty had Mr. Myers advised him he had a valid defence in challenging the search warrant. Thus, even if Wong were to apply in these circumstances, the evidence establishes that Mr. Lam would have acted differently had he received competent advice.

[52] The Crown argued that the appellant failed to establish his guilty plea was uninformed. The Crown submitted it would "strain credulity" to accept that the appellant did not understand that by pleading guilty he gave up the right to have a trial and challenge the lawfulness of the search warrant and the admissibility of the evidence obtained thereby. Further, the Crown submitted that the appellant failed to establish any prejudice flowing from the manner in which he was represented.

[53] In his reply submissions, counsel for the appellant said, "this case is not about the underlying validity of Mr. Lam's guilty plea." Later, counsel said that whether the appellant's guilty plea was informed was not his "primary submission". Having made this point, he almost immediately returned to the question of whether the plea was informed. He submitted that it would not "strain credulity" to accept that the appellant did not know that entering a guilty plea would foreclose a challenge to the search warrant:

that representation does not hold water because it was Mr. Myers who thought he could challenge a warrant after a guilty plea and even in his evidence he maintained that he was of the view that he could still do that. His own lawyer thought he wasn't losing the right to challenge [the] warrant so it would be illogical to say that it strains credulity that Mr. Lam believed he did not lose a right to challenge the warrant after a guilty plea.

(c) The Ruling

[54] In reasons indexed as 2019 BCPC 29, Judge Craig began her analysis by noting that there are two components to the determination of an ineffective assistance of counsel claim: a performance component and a prejudice component (*R. v. G.D.B.*, 2000 SCC 22 at para. 26). She accepted, on established authority, that assessment of the performance of counsel should be avoided in cases where it is apparent that no prejudice has occurred: *G.D.B.* at para. 29. She also accepted that prejudice can be found in a trial that was in fact unfair as well as in a proceeding so unfair in appearance that permitting the result to stand would taint the administration of justice in the eyes of a reasonable and objective observer. I note that s. 686(1)(a)(iii) of the Code authorizes appellate intervention on miscarriage of justice grounds in both situations: *R. v. Khan*, 2001 SCC 86 at paras. 73, 84, per LeBel J.; *R. v. Davey*, 2012 SCC 75 at paras. 50-51.

- [55] The judge referred to *R. v. Stark*, 2017 ONCA 148 at para. 14, for the proposition that a miscarriage of justice can arise where it is shown that counsel's ineffective legal assistance undermined the appearance of the fairness of the trial, and *R. v. Hamzehali*, 2017 BCCA 290 at para. 43, leave to appeal ref'd (2018), [2017] S.C.C.A. No. 380, for the proposition that the performance and prejudice components cannot always be neatly isolated where the prejudice alleged is the cumulative effect of counsel's conduct.
- [56] She then set out her understanding of the position of the appellant on the strike plea application:
- [19] Mr. Lam does not argue that there is a reasonable probability that the outcome of the proceedings would have been different, but for the errors of counsel. Instead, he grounds his claim of a miscarriage of justice on procedural unfairness. He argues that the cumulative effect of Mr. Myers' conduct created an appearance of unfairness.
- [20] Mr. Lam does not challenge the validity of his guilty plea under the traditional test, as recently addressed in *R. v. Wong*, 2018 SCC 25. Instead, he relies upon the Court's residual discretion to set aside a guilty plea. The Crown accepts that the Court has a residual discretion to set aside a guilty plea in some circumstances, even where the plea is otherwise valid. This discretion was set out in *R. v. Cherrington*
- [26] The Crown argues that Mr. Lam has not established any prejudice, and the Court need not go further to address the allegations of ineffective assistance of counsel. The Crown argues that Wong makes it clear that an accused must establish prejudice on a subjective basis before a court will consider vacating a guilty plea.
- [27] Mr. Lam argues that he does not need to establish subjective prejudice as required in Wong because he alleges a miscarriage of justice based on the appearance of unfairness. He argues that the test for an appearance of unfairness is based upon the perspective of a reasonable objective observer.
- [28] The Court in Wong addressed an application to set aside a guilty plea on the basis that it was uninformed; the accused was uninformed of the collateral immigration consequences when he entered his guilty plea. The majority decision held that the test for whether the guilty plea was uninformed is an objective one, but the test for prejudice is to be assessed subjectively. The Court held that the ineffective assistance of counsel framework was not applicable to the case, because the source of the misinformation was not relevant (para. 24).
- [29] I agree with the defence that the circumstances and analysis in the case before me differ from those in Wong. I also agree that the analysis of prejudice in this case cannot be divorced from the performance analysis. The miscarriage of justice alleged arises from the cumulative effect of Mr. Myers' conduct on the appearance of unfairness. This prejudice cannot be fully assessed, without first addressing the alleged misconduct and its effect.

[Emphasis added.]

- [57] The judge was mindful of the need for caution in assessing after-the-fact allegations made by an appellant against trial counsel because of the risk they may be fabricated or distorted by the perspective of hindsight: see *R. v. Archer* (2005), 202 C.C.C. (3d) 60 at paras. 140-142 (Ont. C.A.).
- [58] Nevertheless, the judge found that trial counsel failed to provide reasonable professional assistance to the appellant in several ways.
- [59] She was befuddled, as I am, by trial counsel's considered decision not to take any notes of advice given or instructions received, and by his curious explanation for not doing so-- particularly after this Court's decision in *Hamzehali* in which trial counsel was admonished for failing to keep notes of plea discussions and instructions obtained in that context (at para. 76). The judge concluded that by taking no notes of critical discussions, trial counsel failed in his duty to his client and to the profession. She found that this failure hampered her ability to discover the truth and determine whether it would be a miscarriage of justice to allow the guilty plea to stand.
- [60] Second, having identified a Charter-based challenge to the search warrant as the "sole issue" which could give rise to a potential defence at trial (apart from a post-plea claim of entrapment), trial counsel failed to explore the viability of that strategy. He did not speak with any of the defence counsel who appeared before Judge Galati in the related proceeding, nor did he read Judge Galati's ruling setting aside the same warrant relied upon in the appellant's case, including on residual grounds.
- [61] Third, trial counsel failed to provide reasonable professional assistance by adhering to the view that he could mount a s. 8 Charter challenge to the search warrant after the appellant pleaded guilty and, consistent with that view, by failing to advise the appellant that a guilty plea would foreclose this option. On this issue, the judge made a number of findings, not all of which are easily reconciled:
- [70] I do not find that Mr. Myers' recommendation to his client to plead guilty and argue abuse of process was incompetent. I do, however, find that Mr. Myers failed to properly advise Mr. Lam of all of the consequences of pleading guilty. Mr. Lam wanted to challenge the warrant. Mr. Myers thought he could still challenge the warrant, even after Mr. Lam pleaded guilty. He failed to inform Mr. Lam that he would lose his ability to challenge the search warrant when he pled guilty. In this regard, he failed to provide reasonable professional assistance.
- [71] I have found that Mr. Myers did not provide reasonable professional assistance when he failed to review Judge Galati's decision and failed to advise Mr. Lam that he would lose his ability to challenge the search of his apartment by pleading guilty. I must next determine the effect of this conduct on the fairness, or appearance of fairness, of the proceedings.

- [84] Mr. Lam agreed that he had fulsome discussions with Mr. Myers about pleading guilty and agreed it was a "monumental undertaking". He understood there would be "significant consequences" to him if the abuse of process application failed. Mr. Lam was not asked about Mr. Myers' instructions regarding the risks of Supreme vs. Provincial Court, or the Crown's agreement to ask for 3 years' jail. So Mr. Myers' evidence on this point is not disputed.
- [85] I am satisfied from this evidence that Mr. Lam understood that he would proceed directly to sentencing if Judge Romilly found Ms. Tran had not been entrapped. In that sense, his guilty plea was informed. Mr. Lam was no stranger to the criminal justice system: *R. v. T. (R.)* [(1992), 10 O.R. (3d) 514 (C.A.)]. He had pleaded guilty to the same offence, possession for the purpose of trafficking, in 2007, and proceeded directly to sentencing, where he received a conditional sentence of 12 months.
- [86] Mr. Lam's guilty plea was not, however, fully informed. As I have already stated, Mr. Myers failed to inform Mr. Lam that he would lose his ability to challenge the search of his apartment when he plead guilty. I have dealt with this issue earlier in my reasons, and will address it again when considering the cumulative effect of Mr. Myers' failure to provide reasonable professional assistance.
- [115] Although Mr. Myers did not fully inform Mr. Lam of the consequences of pleading guilty, Mr. Lam has not shown he was prejudiced by his failure to be fully informed. Mr. Lam understood that he would be sentenced if Judge Romilly did not find Ms. Tran was entrapped. Understanding that, he still voluntarily agreed to plead guilty.
- [Emphasis added.]
- [62] Fourth, the judge rejected trial counsel's evidence that he obtained instructions from the appellant that junior counsel appear in his stead on the evidentiary portion of the entrapment hearing. The judge was satisfied junior counsel managed the hearing in a competent way and that the appellant was not actually prejudiced by trial counsel's decision to assign to her responsibility for this portion of the application. Nonetheless, she found that an appearance of unfairness arose from trial counsel's decision to have a junior lawyer appear on the entrapment hearing--a decision made without the appellant's knowledge or consent.
- [63] The judge acknowledged that trial counsel courted a risk by advising the appellant to plead guilty before Judge Romilly ruled on Ms. Tran's entrapment application. She concluded, however, that because Judge Romilly found Ms. Tran was entrapped, the risk taken had no impact on the actual fairness of the proceedings. Further, she concluded that the risk taken by counsel was a calculated one and made in good faith. She held that it was reasonable for trial counsel to regard the plea arrangement as being favourable to the appellant.

- [64] The judge agreed that it was the responsibility of trial counsel to ensure the appellant's guilty plea was "properly supervised." She declined, however, to find that trial counsel breached his professional obligations in this regard, noting that he retained a lawyer to act as his agent for the purpose of this appearance and expected the lawyer so retained to put in place "proper arrangements".
- [65] The judge found that trial counsel's conduct fell below the standard of reasonable professional assistance. The judge then turned to consider whether it would be a miscarriage of justice to allow the appellant's guilty plea to stand.
- [66] The judge concluded that neither trial counsel's failure to explore the effect of Judge Galati's ruling on a potential challenge to the search of the appellant's apartment nor his failure to advise the appellant that entering a plea of guilty would preclude such a challenge, established, on their own, a miscarriage of justice. The judge held that to establish a miscarriage of justice it was incumbent on the appellant to demonstrate that a potential challenge to the search warrant had merit. The judge's remarks on this issue, reproduced below, are not directed at the Wong framework for determining whether a guilty plea should be set aside, but are responsive to the appellant's primary argument that the provision of ineffective legal assistance undermined the appearance of fairness of the proceedings:
- [73] I accept that the defence does not need to show that the outcome would have been different when relying upon the argument based upon an unfair process, or the appearance of unfairness. But there must be some indication that a challenge to the search warrant has merit before a finding of unfairness or appearance of unfairness could be made.
- [74] In Khan, Justice LeBel stated that, when assessing a miscarriage of justice claim, the Court must look at the gravity of the irregularity, and whether it was central to the case, or peripheral. I accept that a challenge to the search of Mr. Lam's apartment could have been central to Mr. Lam's defence. But I am unable to assess the gravity of the failure to challenge the warrant without some evidence of some merit to a challenge. There must be some indication that the failure to challenge the search warrant could have influenced the verdict: Khan at para. 76. As noted by LeBel, J., "what matters most is the effect of the irregularity on the fairness of the trial and the appearance of fairness" (para. 84).
- [75] The defence has not shown that there was any basis to challenge the search of Mr. Lam's apartment. It is not enough to argue that Judge Galati found that the affiant subverted the prior judicial authorization process in relation to the search of Ms. Wong's apartment. Without any evidence linking these findings to the search of Mr. Lam's apartment, there is no basis to find that a [j]udge could have made similar findings in Mr. Lam's case.
- [67] The judge's determination that nothing in the performance of trial counsel caused the proceedings to be unfair in fact or in appearance was explained in the concluding paragraphs of her ruling:

- [113] I agree with the defence that, as an accused person facing serious criminal charges, Mr. Lam was in a vulnerable position. He had no legal expertise and placed complete reliance on Mr. Myers' advice. Mr. Lam was caught between a rock and a hard place when he started to have concerns about whether he was getting effective assistance from Mr. Myers; he had already given many thousands of dollars to Mr. Myers which he could not afford to simply give up and find a new lawyer, who would also require payment. He did not know that he could complain about Mr. Myers' conduct to the Law Society.
- [114] Mr. Lam paid significant legal fees to Mr. Myers and deserved much more for that investment than he received. Mr. Myers should have explored the effect that Judge Galati's decision could have on Mr. Lam's case. After 40 years of practice, Mr. Myers should have known that he could not challenge the search of Mr. Lam's residence after a guilty plea, and should have advised Mr. Lam of this before he pled guilty. Finally, Mr. Myers should not have substituted his representation with that of a newly minted lawyer without instructions from Mr. Lam. Mr. Myers' failure to make notes and keep proper records was further indication that he was not operating to the standards required of the legal profession.
- [115] Although Mr. Myers failed Mr. Lam several times, those failures did not, in my view, have a significant effect on the ultimate fairness of Mr. Lam's guilty plea. There was no evidence before me that Mr. Lam lost the opportunity to advance a viable defence. There were practical and legal difficulties with a challenge to the search of Mr. Lam's apartment. There were tactical reasons behind Mr. Lam's decision to re-elect to Provincial Court and plead guilty. Although Mr. Myers did not fully inform Mr. Lam of the consequences of pleading guilty, Mr. Lam has not shown he was prejudiced by his failure to be fully informed. Mr. Lam understood that he would be sentenced if Judge Romilly did not find Ms. Tran was entrapped. Understanding that, he still voluntarily agreed to plead guilty. He was not new to the criminal justice system. He pleaded guilty to the same offence in 2007. This time around Mr. Lam had 2 kilograms of cocaine in his apartment. Although he now clearly regrets his actions, he admitted committing the offence when he testified.
- [116] After balancing all of these considerations, I find that Mr. Lam has not established that it would be unfair, or appear to be unfair, to uphold his guilty plea. Mr. Lam has shown that Mr. Myers did not fully meet his professional obligations to him. And he has established that Mr. Myers' conduct reflects poorly on the legal profession. But, Mr. Lam has not established that the effect of this conduct was so serious that public confidence in the administration of justice would be shaken if his guilty plea is upheld. In fact, I believe the public confidence in the administration of justice would be shaken if I were to strike Mr. Lam's guilty plea.
- [117] It is understandable that Mr. Lam wishes to seek redress for Mr. Myers' failure to provide professional legal assistance. But that redress must be sought through the Law Society, not this Court. The application to strike the guilty plea is dismissed.

[Emphasis added.]

III. Grounds of Appeal

[68] The sole ground of appeal advanced by the appellant may be stated as follows:

Does the ineffective assistance provided by trial counsel give rise to an appearance of unfairness and a consequent miscarriage of justice requiring the intervention of this Court pursuant to s. 686(1)(a)(iii) of the Code?

[69] Like the strike plea application, the issue on appeal was framed primarily around a contention that the substandard performance of trial counsel gave rise to an appearance of unfairness and a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Code. The appellant says the judge erred in failing to come to this conclusion on the facts she found. At the same time, the appellant continued to engage aspects of the Wong analytical framework arguing, for example, that the judge erred in principle by finding he was required to demonstrate a "viable defence" despite entering an uninformed guilty plea.

[70] In advance of the hearing, the division assigned to hear this appeal informed counsel that, in addition to the arguments advanced in the factums, the Court would welcome submissions that clarify and address the implications of the finding made by the judge that the guilty plea was not "fully informed." Specifically, the Court invited counsel to address the validity of the guilty plea in light of the framework developed in Wong.

[71] I do not consider that this Court, by raising more pointedly the applicability of the Wong framework to the factual findings made below, introduced a new issue on appeal. I accept that Wong was not the focus of the appellant's submission in the trial court. I also accept that, at points in his argument in the court below, the appellant seemed to disclaim reliance on a submission that his plea was uninformed, only to resurrect the Wong framework, or aspects of it, later in the argument. The same may be said of the submissions made on the appellant's behalf in this Court. But the issue was raised below, albeit as an alternative and incompletely developed submission. I note, as well, that Crown counsel very fairly took no issue with the matter being raised by the Court in advance of the appeal and assured us that he was prepared to address the point.

IV. Analysis

[72] In my view, this case can be resolved on the application of Wong principles. We need not address in these reasons whether there are circumstances in which a voluntary, informed and unequivocal guilty plea may nonetheless be set aside on miscarriage of justice grounds, including where the miscarriage is alleged to stem from ineffective legal representation.

[73] The judge found that the appellant's guilty plea was not "fully informed" by one of its most direct and significant consequences--that it would preclude a Charter-based challenge to the search warrant with a view to testing the admissibility of evidence relied on by the prosecution in proving the offence. I make three points in relation to this finding.

- [74] First, the conclusion is one heavily rooted in the judge's findings of fact. The Crown does not suggest that this conclusion is tainted by an error in principle. Accordingly, it is entitled to considerable deference on appellate review.
- [75] Second, a guilty plea is, in law, either informed or it is not. A plea found not to be "fully informed" because the accused was not told of a direct and immediate legal consequence of pleading guilty is not an informed plea. There is no half-way house in the law that permits a distinction to be drawn between a plea that is not informed and a plea that is not fully informed, when what is at issue is a direct and immediate legal consequence of the plea. This is not to suggest that to be valid a guilty plea must be informed by every conceivable collateral consequence. The plea must, however, be informed by its immediate and direct legal consequences and by collateral consequences that bear sufficiently on the serious legal interests of the accused: Wong at para. 4.
- [76] Third, and most importantly, having found the plea to be uninformed, the judge ought to have considered whether the evidence established a reasonable possibility the appellant would not have pleaded guilty had he appreciated that by doing so he would forfeit his right (and desire) to challenge the validity of the search warrant. In my respectful view, it was an error in principle for the judge not to engage in this analysis. Had the judge embarked on this inquiry, I am satisfied that she would inevitably have concluded on the evidence before her not only that the plea was uninformed by a direct and significant consequence, but that a reasonable possibility exists the appellant would not have pleaded guilty had he understood the consequences of doing so. Upon coming to this conclusion, demonstration of the miscarriage of justice would have been complete. The appellant was not obliged to show, in addition, that he had a viable defence to the charge. The judge would have been required to set the guilty plea aside: Wong at para. 20.
- [77] To begin the analysis, I will briefly reiterate the Wong framework and the standard of review that governs this appeal.
- [78] An accused who is convicted following the entry of a guilty plea may appeal his or her conviction and assert that the plea is invalid and the underlying conviction the product of a miscarriage of justice. Section 686(1)(a)(iii) authorizes appellate intervention on any ground there was a miscarriage of justice. The provision concerns itself with the prejudicial impact of an event relating to the trial: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 at 220 (Ont. C.A.). As I have noted, it reaches all errors or events that result in a miscarriage of justice and extends to events that lead to actual unfairness as well as to the appearance of unfairness: Khan at para. 69.

- [79] In *Wong*, the Supreme Court of Canada confirmed that for a guilty plea to be valid, it must be voluntary, informed and unequivocal: at para. 3; see also *R. v. Taillefer*, 2003 SCC 70 at para. 85, quoting *R. v. T. (R.)* (1992), 10 O.R. (3d) 514 at 519 (C.A.). To be informed, the accused must be aware of the nature of the allegations, and the effect and legal consequences of the plea, including collateral consequences that flow from the conviction and seriously affect the accused's legal interests: *Wong* at para. 4.
- [80] In addition, an accused who seeks to withdraw a guilty plea on grounds that it was uninformed must establish subjective prejudice--that is, a reasonable possibility that they would have proceeded differently had they been informed of those consequences: *Wong* at paras. 25-26, 36.
- [81] A trial judge has the discretion to permit an accused person to withdraw a guilty plea. Provided the trial judge exercises the discretion judicially, an appellate court is unlikely to interfere: *R. v. Adgey* (1973), [1975] 2 S.C.R. 426 at 430; *R. v. Alec*, 2016 BCCA 282 at para. 74; *R. v. G.F.*, 2018 BCCA 81 at para. 32.
- [82] The judge found that trial counsel failed to inform the appellant he would lose his ability to challenge the search warrant and seek the exclusion of evidence thereby obtained upon pleading guilty. She concluded that trial counsel should have known the appellant could not mount a challenge to the warrant after entering a guilty plea. In coming to this conclusion, she rejected the Crown's position that the appellant knew he would be giving up a challenge to the warrant by pleading guilty. The judge concluded, therefore, that the plea was not "fully informed."
- [83] There is, in my view, an internal tension in the ruling that was not addressed satisfactorily by either counsel in argument. Even though the judge concluded that the plea was not fully informed by its legal consequences, she also said the appellant understood he would proceed to sentencing if Ms. Tran's entrapment application was dismissed. I have difficulty reconciling these two findings. There is a difference between: (1) failure on the part of counsel to inform an accused of a consequence flowing from a guilty plea that the accused nevertheless appreciates; and (2) failure on the part of counsel to inform an accused of a consequence the accused does not appreciate will flow from the plea. As the focus of the inquiry is on the validity of the plea and not the performance of counsel, it is only in the latter circumstance that the plea can be said to be uninformed.
- [84] The judge did not explicitly reject the appellant's evidence that he was unaware a constitutional challenge to the validity of the search warrant could not be brought after the guilty plea had been entered. Indeed, her finding that the plea was not fully informed appears to me to rest on acceptance of the appellant's evidence on this point.

- [85] Moreover, the Crown did not strenuously argue before us that the judge implicitly found the plea to be informed. Rather, the Crown--taking aim at the second prong of the Wong inquiry--argued the appellant had not adduced sufficient evidence to ground a finding that a reasonable possibility exists he would not have pleaded guilty had he known doing so would bar a subsequent challenge to the warrant.
- [86] I consider the Crown's position on this issue to be fair and principled. It would not be reasonable to attribute to the appellant knowledge of one of the consequences of the guilty plea that was not possessed by trial counsel. This is particularly so given the judge's conclusion that the appellant was facing serious criminal charges, was in a vulnerable position and placed complete reliance on trial counsel's advice.
- [87] In light of the Crown's position, I consider it to be appropriate for this Court to proceed on the footing that the plea was uninformed by a direct and significant consequence, and turn to consider whether the evidence supports a reasonable possibility the appellant would not have pleaded guilty had he understood doing so would foreclose a challenge to the search warrant.
- [88] The appellant's affidavit filed on the strike plea application was sworn before the Supreme Court of Canada released its decision in Wong. It is silent on what the appellant would have done had he known he could not bring a Charter-based challenge to the warrant after pleading guilty. In his evidence on the strike plea application, given very shortly after judgment in Wong was rendered, the appellant testified that he was "against pleading guilty" and repeatedly raised with trial counsel his desire to challenge the warrant. He said trial counsel told him the only way to "win" was to plead guilty. He testified trial counsel did not tell him that by entering a plea of guilty he would lose his right to a trial and the ability to challenge the warrant, with a view to excluding evidence the Crown sought to rely on to prove the offence. Further, he had no discussions about the consequences of entering a guilty plea with the articulated student who attended court with him on May 10, 2016. Trial counsel agreed the appellant wanted to do everything he could to avoid the substantial jail sentence that would almost certainly follow a second conviction for possessing a controlled substance for the purpose of trafficking. But the appellant was not asked whether he would have pleaded guilty had he been informed of the consequences of the plea. Once again, the failure to pose this question is likely attributable to the manner in which the strike plea application was framed.
- [89] In any event, I am of the view that the central issues to be decided by this Court are: (1) whether subjective prejudice of the kind contemplated by Wong can be inferred; and (2) if it can, whether it is appropriate for the Court to draw an inference in this case that the appellant would not have pleaded guilty had he been informed that it would foreclose a challenge to the search warrant.

- [90] The Crown does not suggest that an inference cannot be drawn about whether an accused would have pleaded guilty had the consequences of doing so been known. I made allowance for inductive reasoning in this context in my reasons in *R. v. Wong*, 2016 BCCA 416 at para. 69, aff'd 2018 SCC 25. Additionally, I note that *R. v. Zamiara*, 2020 QCCA 841, may be read as providing some support for the proposition that inferences respecting what an accused would have done had they been informed of the consequences of pleading guilty are permissible. There, the court appears to endorse the proposition that the formal requirements of the second prong of the *Wong* inquiry will be met where it is implicit in what an appellant has said that he or she would not have pleaded guilty had the consequences of doing so been known (at para. 70). I do not read the Supreme Court of Canada's judgment in *Wong* as foreclosing this approach.
- [91] The Crown submits, however, that the evidence called on the strike plea application does not support an inference that it is reasonably possible the appellant would not have pleaded guilty had he known such a plea foreclosed a challenge to the search warrant.
- [92] I recognize, of course, that the majority in *Wong* (SCC) emphasized that courts should carefully scrutinize a claim of subjective prejudice in this context by looking to objective, circumstantial evidence to test the veracity of the claim against the standard of reasonable possibility: at para. 26. With this in mind, it is to be expected that similarly situated appellants seeking to set aside a guilty plea pursuant to the framework developed in *Wong* will directly address the requirements of the subjective inquiry by saying what they would have done had they known the consequences of pleading guilty.
- [93] Recognizing the careful scrutiny required on this issue, I am nonetheless driven to the conclusion that an inescapable inference arises that there is at least a reasonable possibility the appellant would not have pleaded guilty had he been informed of the consequences of doing so. In my view, had the judge proceeded to the second stage of the *Wong* analysis, she would, on the facts she found, inevitably have come to this conclusion.
- [94] Applying the *Wong* framework, the guilty plea was demonstrated to be invalid on grounds that it was uninformed and should have been set aside.
- [95] The result I am proposing does not mean the appellant will escape prosecution. He will be required to answer to the charges. He will, however, have the opportunity to enter an informed plea and, if he pleads not guilty, mount whatever defence(s) to these charges he considers advisable.
- [96] In light of the conclusion I have reached on this issue, I need not address whether there are circumstances in which a voluntary, informed and unequivocal guilty plea may be set aside on grounds that the appearance of justice has been fatally compromised, including by the provision of ineffective legal assistance. Further, I make no comment on whether an accused or appellant seeking to withdraw a guilty plea on appearance of unfairness grounds must demonstrate a viable defence. Finally, I do not wish to be taken as endorsing the judge's suggestion that an admission of responsibility for the offence made in the context of

a strike plea application precludes judicial intervention on miscarriage of justice grounds.

- [97] While I have not analyzed this case on grounds engaging the appearance of justice, I am satisfied that the interests of justice are advanced by the disposition I am proposing in this disquieting case.
- [98] As a final point, I wish to underscore the importance of conducting the plea comprehension inquiry required by s. 606(1.1) of the Code in all cases, including when the accused is represented by counsel.
- [99] The court may accept a guilty plea only if it is satisfied, among other things, that the accused understands the nature and consequences of the plea. A decade ago, Justice Hall noted that it is "unfortunate" mandatory inquiries of this kind are not undertaken on a consistent basis: *R. v. Gates*, 2010 BCCA 378 at para. 21; see also *R. v. D.M.G.*, 2011 ONCA 343 at para. 42. Neither the desire to achieve efficiencies in busy trial courts nor the existence of the saving provision found in s. 606(1.2) justify a departure from the requirements of the Code.
- [100] It should be recalled that these provisions have their genesis in the Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer for Ontario, 1993). The Committee, chaired by the Honourable G. Arthur Martin, Q.C., recommended that the Code be amended to require judges to question the accused to ensure, among other things, that they appreciate the nature and consequence of a guilty plea. In support of its recommendation, the Committee said this at 318, 321-322:

It is central to the integrity of a resolution of a criminal prosecution agreed upon by the Crown and the defence that it be fully understood and agreed to by the accused person. No one is more directly affected by the outcome of a criminal prosecution than the accused, and, therefore, no one has a more compelling interest in understanding and agreeing to that outcome where it is reached through discussions, rather than through the conduct of a trial. For this reason, the Committee has recommended that the trial judge conduct an inquiry in open court and on the record as to the accused person's comprehension of the proposed plea of guilty.

The need for such an inquiry is plain when an accused is unrepresented, as he or she may not understand the nature and consequences of a plea of guilty, and has no counsel to turn to for an explanation. However, it is also the Committee's view that such an inquiry is salutary in all cases, even where the accused is represented.

The inquiry into the voluntariness and comprehension of a plea of guilty will provide evidence of the accused's informed satisfaction with the state of affairs represented by the plea. As such, it protects both Crown counsel and defence counsel from an unfounded subsequent allegation by the accused that either counsel used undue pressure to bring about a resolution agreement. The plea comprehension inquiry conducted by the sentencing judge also furnishes important evidence on the record in the event that an offender seeks to withdraw his or her plea of guilty on appeal. This can greatly facilitate the process of appellate review, and may well reduce the

number of appeals launched on this basis.

Further, the inquiry conducted in the manner recommended by the Committee would, in most cases, where the accused is properly advised about the proposed plea of guilty and its consequences, take very little court time to accomplish.

[101] The recommendations of the Committee were adopted and came into force through the Criminal Law Amendment Act, 2001, S.C. 2002, c. 13, s. 49 (effective September 23, 2002 (SI/2002-102 as amended by SI/2002-106)).

[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.

[103] Counsel also play an essential role in ensuring that an accused knows what he or she is giving up by entering a plea of guilty: R. v. Riley, 2011 NSCA 52 at para. 32. Regrettably, that educational role was not fulfilled by trial counsel in this case.

V. Disposition

[104] For the foregoing reasons, I would allow the appeal, set aside the guilty plea, quash the conviction and order a new trial.

[105] As noted earlier, upon entry and acceptance of the guilty plea, the Crown entered a stay of proceedings against the appellant on Counts 1 and 2--two counts of trafficking cocaine, contrary to s. 5(1) of the CDSA.

[106] Section 686(8) of the Code provides that where an appeal court orders a new trial, it may make any order, in addition, that justice requires. It is plainly in the interests of justice that the Crown and the appellant be restored to the positions they were in before the guilty plea was entered. Accordingly, I would lift the stay of proceedings on Counts 1 and 2 and order a new trial on all three counts that comprise the Information that was before the trial judge at the time of the plea: R. v. K. (S.) (1995), 99 C.C.C. (3d) 376 (Ont. C.A.).

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 29 October 2026 · Esheria