

IN THE SUPREME COURT OF CANADA

(On Appeal From the Court of Appeal for the Province of Alberta)

B E T W E E N :

HOANG ANH PHAM

*Appellant
(Appellant)*

- and -

HER MAJESTY THE QUEEN

*Respondent
(Respondent)*

- and -

**CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, CANADIAN ASSOCIATION
OF REFUGEE LAWYERS, CANADIAN COUNCIL FOR REFUGEES, BRITISH
COLUMBIA CIVIL LIBERTIES ASSOCIATION AND
CANADIAN CIVIL LIBERTIES ASSOCIATION**

Interveners

FACTUM OF THE INTERVENER

THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

P. ANDRAS SCHRECK

Schreck Presser^{LLP}

6 Adelaide Street East, 5th Floor

Toronto, Ontario M5C 1H6

Tel.: (416) 977-6268

Fax.: (416) 977-8513

E-mail: schreck@schreckpresser.com

BRIAN A. CRANE, Q.C.

Gowling Lafleur Henderson^{LLP}

160 Elgin Street, Suite 2600

Ottawa, Ontario K1P 1C3

Tel.: (613) 233-1781

Fax: (613) 563-9869

E-mail: Ed.VanBemmell@gowlings.com

APPLE NEWTON-SMITH

Berkes Newton-Smith

6 Adelaide Street East, 5th Floor

Toronto, Ontario M5C 1H6

Tel.: (416) 260-1410

Fax: (416) 977-6268

E-mail: apple@newtonsmith.com

Ottawa Agent for the Intervener,

Criminal Lawyers' Association of Ontario

*Of Counsel for the Intervener,
Criminal Lawyers' Association of Ontario*

ERIKA CHOZIK*Chozik Law*

662 King Street West, Suite 102

Toronto, Ontario M5V 1M7

Tel: (416) 986-5873

Fax: (416) 364-9705

E-mail: Erika@choziklaw.com*Of Counsel for the Appellant***RONALD C. REIMER***Public Prosecution Service of Canada*

700 EPCOR Tower 10423, 101st Street

Edmonton, Alberta T4H 0E7

Tel: (780) 495-4079

Fax: (780) 495-6940

E-mail: ron.reimer@ppsc-sppc.gc.ca*Of Counsel for the Respondent***JOHN NORRIS***Barrister & Solicitor*

116 Simcoe Street, Suite 100

Toronto, Ontario M5H 4E2

Tel: (416) 596-2960

Fax: (416) 596-2598

E-mail: john.norris@simcoechambers.com**MELINDA GAYDA***Refugee Law Office*

20 Dundas Street West, Suite 202

Toronto, Ontario M5G 2H1

Tel: (416) 977-8111

Fax: (416) 977-5567

E-mail: gaydam@lao.on.ca*Of Counsel for the Intervener,
Canadian Association of Refugee Lawyers***BARBARA JACKMAN***Jackman & Associates*

596 St. Clair Avenue West, Suite 3

Toronto, Ontario M6C 1A6

Tel.: (416) 653-9964

Fax: (416) 653-1036

E-mail: barb@barbjackman.com**HENRY S. BROWN, Q.C.***Gowling Lafleur Henderson ^{LLP}*

160 Elgin Street, Suite 2600

Ottawa, Ontario K1P 1C3

Tel: (613) 233-1781

Fax: (613) 788-3433

E-mail: henry.brown@gowlings.com*Ottawa Agent for the Appellant***FRANÇOIS LACASSE***Director of Public Prosecutions of
Canada*284 Wellington Street, 2nd Floor

Ottawa, Ontario K1A 0H8

Tel: (613) 957-4770

Fax: (613) 941-7865

E-mail: flacasee@ppcs-sppc.gc.ca*Ottawa Agent for the Respondent***MARIE-FRANCE MAJOR***Supreme Advocacy ^{LLP}*

397 Gladstone Avenue, Suite 1

Ottawa, Ontario K2P 0Y9

Tel: (613) 695-8855

Fax: (613) 695-8580

E-mail: mfmajor@supremeadvocacy.ca*Ottawa Agent for the Intervener,
Canadian Association of Refugee
Lawyers***MICHAEL BOSSIN***Community Legal Services - Ottawa Centre*

1 Nicholas Street, Suite 422

Ottawa, Ontario K1N 7B7

Tel.: (613) 241-7008

Fax: (613) 241-8680

E-mail: bossinm@lao.on.ca*Ottawa Agent for the Intervener,
Canadian Council for Refugees*

CAROLE SIMONE DAHAN

Refugee Law Office
20 Dundas Street West, Suite 202
Toronto, Ontario M5G 2H1
Tel: (416) 977-8111
Fax: (416) 977-5567
E-mail : dahancs@lao.on.ca

*Of Counsel for the Intervener,
Canadian Council for Refugees*

LORNE WALDMAN

Waldman & Associates
281 Eglinton Avenue East
Toronto, Ontario M4P 1L3
Tel.: (416) 482-6501
Fax: (416) 489-9618
E-mail: lorne@lornewaldman.ca

*Of Counsel for the Intervener,
British Columbia Civil Liberties Association*

D. LYNNE WATT.

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlings.com

*Of Counsel for the Intervener
Canadian Civil Liberties Association*

HENRY S. BROWN, Q.C.

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: henry.brown@gowlings.com

*Ottawa Agent for the Intervener,
British Columbia Civil Liberties
Association*

MATHEW S. ESTABROOKS.

Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Tel: (613) 786-0211
Fax: (613) 788-3573
E-mail:
mathew.estabrooks@gowlings.com

*Ottawa Agent for the Intervener,
Canadian Civil Liberties Association*

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**FACTUM OF THE INTERVENER
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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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PART I – STATEMENT OF THE FACTS**I. OVERVIEW OF THE INTERVENER’S POSITION**

1. On December 27, 2012, the Honourable Mr. Justice Cromwell granted the Criminal Lawyers’ Association of Ontario (“CLA”) leave to intervene in these appeals and to file a factum not to exceed 10 pages in length. The CLA’s request to present oral argument was deferred to a date following receipt and consideration of the written argument.

2. It is the Intervener’s position that collateral consequences of the commission of an offence, such as the effect on the offender’s immigration status, form part of the “circumstances of the offender” and must be considered in determining what sentence is fit in the circumstances of the particular case. The Respondent’s suggested approach, which is to first determine what the appropriate sentence should be and to then determine what effect, if any, collateral consequences should have, ought to be rejected. The appropriate sentence cannot be determined without considering *all* of the circumstances of the offender. It follows that the Respondent’s suggestion that immigration consequences can only have minimal effect on the ultimate sentence is incorrect. As with most factors considered on sentencing, the effect collateral consequences will have will depend on the circumstances of the case and is best left to the discretion of the sentencing judge.

II. STATEMENT OF FACTS

3. The Intervener accepts the statement of facts set out in the facta of the parties.

PART II – POINTS IN ISSUE

4. The CLA will restrict its submissions to the first issue raised by the Appellant:

How should a criminal (or appellate) court consider the “unintended” or “collateral” consequences of a criminal sentence, particularly consequences relating to the immigration status of an offender?

It is the intervener’s position that all such collateral consequences should be considered as part of the circumstances of the offender. What weight they should be given, and what effect they will have on the ultimate sentence, should not be the subject of any rigid rules and should be left to the discretion of the sentencing judge.

PART III – ARGUMENT***I. OVERVIEW – THE PURPOSES AND PRINCIPLES OF SENTENCING******A. The Fundamental Principles***

5. Section 718 of the *Criminal Code* provides as follows:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

10 (a) to denounce unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

20 (e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

Section 718.1 of the *Criminal Code* states: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” This section codifies the principle of proportionality and enshrines it as the fundamental principle of sentencing.

30 *R. v. Wust*, [2000] 1 S.C.R. 455 at ¶ 18;

R. v. Gladue, [1999] 1 S.C.R. 688 at ¶ 1, 37;

R. v. Malmo-Lavine, [2003] 3 S.C.R. 571 at ¶ 163-169

R. v. Nasogaluak, [2010] 1 S.C.R. 206 at ¶ 49-53

B. The Approach to Determining a Fit Sentence

6. The determination of the sentence which best accords with the principle of proportionality in a given case cannot be made in a vacuum. As pointed out by Doherty J.A., writing for the Ontario

Court of Appeal in *R. v. Hamilton*, it will depend on the individual facts of the case:

Sentencing is a very human process. Most attempts to describe the proper judicial approach to sentencing are as close to the actual process as a paint-by-numbers landscape is to the real thing. I begin by recognizing, as did the trial judge, that the fixing of a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender. [Emphasis added, citations omitted].

Thus, the principle of proportionality requires a consideration of *both* the circumstances of the offence and the circumstances of the offender.

R. v. Hamilton (2004), 72 O.R. (3d) 1 at ¶ 87 (C.A.)

7. A consideration of the circumstances of the offence requires the court to determine exactly what the offender did and the consequences of his having done it. These circumstances are static in that the offence is complete by the time of sentencing. However, the circumstances of the offender are not.

C. The Circumstances of the Offender

8. The circumstances of the offender involve broader considerations than the circumstances of the offence. The court must consider the offender's background in an effort to understand how and why he came to commit the offence. But the circumstances of the offence are not restricted to what led to the commission of the offence. They also include a consideration of the offender's behaviour between the time of the offence and the time of the sentence, as well as his prospects for the future.

9. Some of the sentencing objectives set out in s. 718 of the *Code* relate specifically to the circumstances of the offender at the time of sentencing and afterwards. Whether or not the offender will be deterred from committing further offences, his prospects for rehabilitation, and whether the

sentence will result in the promotion of a sense of responsibility are all questions which involve considerations peculiar to the particular offender before the court. All of them are factors which must be considered in arriving at a fit sentence.

II. COLLATERAL CONSEQUENCES AS PART OF THE CIRCUMSTANCES OF THE OFFENDER

A. Types of Collateral Consequences

10 10. As observed by Professor Manson,

Notwithstanding a need for denunciation, indirect consequences which arise from stigmatization cannot be isolated from the sentencing matrix if they will have bearing on the offender's ability to live productively in the community. The mitigation will depend on weighing these obstacles against the degree of denunciation appropriate to the offence.

Indirect or collateral consequences can take many forms. The offender may have been injured as a result of committing the offence. He or she may have been subject to pre-sentence custody, he may
20 lose employment, either because of the conviction or because of a sentence of imprisonment. He or she may suffer from a loss of reputation or stigma in the community. Or, as in this case, he may be subject to almost certain deportation without the opportunity of an appeal.

A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at p.137;
R. v. Bunn, [2000] 1 S.C.R. 183 at ¶ 23;
R. v. Gorman, [1971] O.J. No.1640 at ¶ 11 (C.A.);
R. v. Folino, [2005] O.J. No. 4737 at ¶ 29, 32 (C.A.)

11. There are several ways in which collateral consequences can have an effect on the principles
30 at play in sentencing a particular offender. The consequences may be such that the offender has “learned his lesson” and the need for specific deterrence is diminished. The consequences may have led to changes in the offender's character and accomplished the objective of rehabilitation before any sentence is imposed. Or it may be that the adverse consequences are so great that the consequences,

when considered together with the sentence that would be ordinarily imposed in similar cases, would offend the principle of proportionality. Put simply, there will be some cases where the offender has “suffered enough”. For example, if during the course of committing a break and enter, the offender falls off a ladder, breaks his spine and becomes a quadriplegic, a sentencing court may find it unnecessary to impose a sentence of imprisonment, even though such a sentence would otherwise be warranted. The court may reach this conclusion not only because imprisonment would be more difficult for this offender, but also because the extra-judicial consequences were so severe as to obviate the need for further judicially-imposed consequences.

10

B. Collateral Consequences and Sentencing Ranges

12. The circumstances of the offender, including any collateral consequences he has suffered, are part of the matrix that ultimately justifies a sentence that is fit and proportionate in the circumstances of the individual case. As Doherty J.A. observed in *Hamilton*, the proper judicial approach to determining a fit sentence is difficult to describe. It is a process in which there are limits but few clear lines. The clear lines that exist are those drawn by Parliament, such as maximum sentences, mandatory minimum sentences, offence-based conditional sentence limitations, and restrictions on the use of discharges. Apart from these, there are no rigid rules which sentencing judges must follow in determining a fit sentence. Rather, there are general guidelines arising from the jurisprudence, often in the form of sentencing ranges for particular types of offences.

20

13. Sentencing ranges are just that, general ranges of generally appropriate sentences. A sentencing range is not a judicially-created mandatory minimum. As noted by this Court in *Nasogaluak*:

The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred. [Emphasis added].

Whether or not a sentence is “within the range” is not, in and of itself, determinative of fitness. A sentence that is fit may be outside of the range because a sentence within the range would not accord with the principle of proportionality in the particular circumstances of the case.

R. v. Nasogaluak, *supra* at ¶ 44;
R. v. McDonnell, [1997] 1 S.C.R. 948 at ¶ 43

14. It follows from the foregoing that the existence of collateral consequences may affect not only *where* within the range a sentence should fall, but *whether* it should fall within the range at all. An adverse consequence of the offence apart from the sentence may, when considered together with the sentence, result in unfairness and offend the principle of proportionality.

15. For the same reason, a court may consider that the usual range does not apply in cases where there is a significant likelihood of deportation resulting from the imposition of a sentence within the range. Bill C-43, the so-called “*Faster Removal of Foreign Criminals Act*,” will lower the threshold for deportation without the possibility for an appeal to the Immigration Appeal Division from two years to six months. In the case of a fraud committed by a non-citizen who had lived in Canada since infancy and who was supporting a family, it would be open to a court to consider whether the

sentence imposed, when considered together with the severe adverse consequence of deportation, was proportionate to the gravity of the offence and the moral blameworthiness of the offender. In such a case, it would be open to a court to impose a sentence of less than six months for the simple fact that a longer sentence, when considered together with the severe adverse consequence that would ensue, would be disproportionate to the gravity of the offence and the moral blameworthiness of the offender.

C. The Respondent's Proposed Approach

16. The Respondent acknowledges that a sentencing court may consider collateral consequences,
10 but may not rely on them to reduce a sentence below some “dividing line” that the “crime clearly calls for”. The approach implicitly suggested by the Respondent is to first determine some appropriate range of sentence and then determine what sentence should be imposed within that range. This approach, it is submitted, is wrong. The determination of the appropriate range cannot be accomplished in a vacuum. What range applies, where in the range the appropriate sentence lies, and whether the range applies at all will necessarily depend not only on the offence, but on the circumstances of the offender as well.

17. It is submitted that it is unhelpful to distinguish adverse collateral consequences that may be labeled as “punishment” from those that cannot. The deportation consequences at issue in this
20 appeal are severe consequences that are a direct result of the conviction and sentence imposed. To exclude consideration of these consequences from the sentencing calculus because they are not properly defined as “punishment” is, to paraphrase what this Court said in *R. v. Wust*, an exercise in semantics that does not acknowledge the stark reality of being deported and the significant

hardship this entails.

R. v. Wust, supra at ¶ 39-42

III. THE NEED FOR INFORMATION

18. Information is critical to sentencing. A sentencing judge can only consider collateral consequences if he or she is made aware of them. In most cases, defence counsel will be in the best position to provide such information to the trial judge. However, there may be cases, such as the case at bar, where defence counsel fails to do so for some reason. In such cases, the existence of collateral consequences is no less relevant. Once the trial court, or an appellate court, is made aware of them, they should be considered.

19. It is submitted that the Respondent's suggestion that significant collateral consequences, such as virtually inevitable deportation, must be ignored by an appellate court, unless an offender can meet the high threshold of demonstrating that he was denied the effective assistance of counsel, creates an unnecessary impediment to a just result. An oversight by counsel that falls short of incompetence does not justify a court ignoring a fact that should otherwise be considered.

PART IV – COSTS

20. The Intervener does not seek costs and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

21. The Intervener takes no position on the disposition of this appeal.

22. The Intervener respectfully requests permission to make oral argument not exceeding 10 minutes.

10 ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

P. ANDRAS SCHRECK

Of Counsel for the Intervener

APPLE NEWTON-SMITH

Of Counsel for the Intervener

20

DATED at Toronto, this 11th day of January, 2012.

PART VI – TABLE OF AUTHORITIES***I. CASES******Paragraph(s):***

R. v. Bunn, [2000] 1 S.C.R. 183 10

R. v. Folino, [2005] O.J. No. 4737 (C.A.) 10

10 *R. v. Gladue*, [1999] 1 S.C.R. 688 5

R. v. Gorman, [1971] O.J. No. 1640 (C.A.) 10

R. v. Hamilton (2004), 72 O.R. (3d) 1 (C.A.) 6

R. v. Malmo-Levine, [2003] 3 S.C.R. 571 5

R. v. McDonnell, [1997] 1 S.C.R. 948 13

20 *R. v. Nasogaluak*, [2010] 1 S.C.R. 206 5, 13

R. v. Wust, [2000] 1 S.C.R. 455 5, 17

II. ACADEMIC TEXTS

A. Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) 10

PART VII - LEGISLATIVE PROVISIONS***Criminal Code***
R.S.C. 1985, c. C-46***Code criminal***
L.R.C. (1985), ch. C-46

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

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718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718. Le prononcé des peines a pour objectif essentiel de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant un ou plusieurs des objectifs suivants :

- a) dénoncer le comportement illégal;
- b) dissuader les délinquants, et quiconque, de commettre des infractions;
- c) isoler, au besoin, les délinquants du reste de la société;
- d) favoriser la réinsertion sociale des délinquants;
- e) assurer la réparation des torts causés aux victimes ou à la collectivité;
- f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes et à la collectivité.

.....

718.1 La peine est proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant.