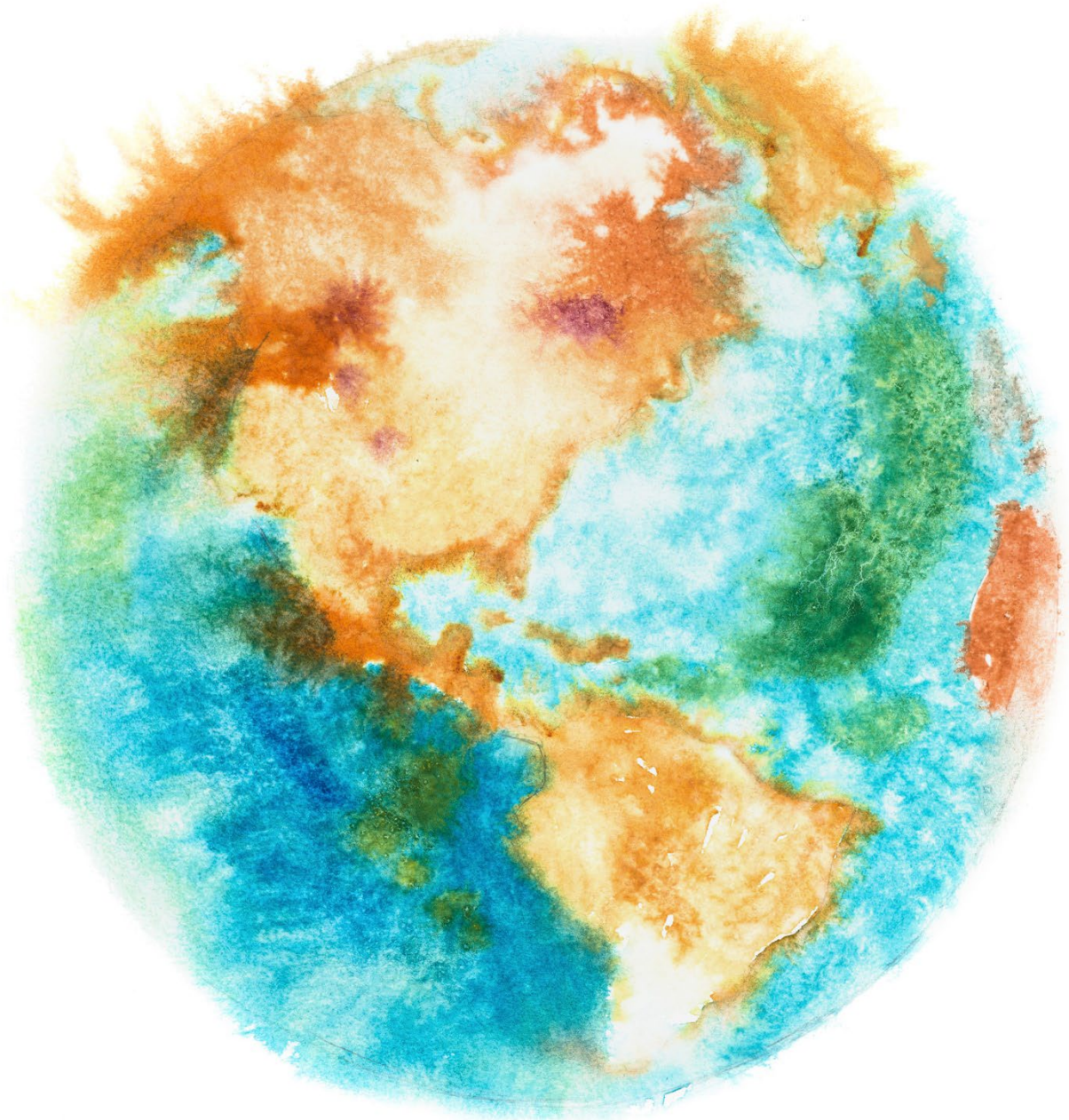


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Ineffective Assistance of Counsel in Immigration Law

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Legal and ethical issues may arise when a lawyer's poor judgment or inaction negatively affects the outcome of a client's matter. The ineffective assistance of counsel can endanger the immigration status of foreign nationals who face criminal charges, make claims for refugee status, or any other immigration application. These situations may result in a claim of ineffective assistance of counsel by a disgruntled client, which can be damaging to a lawyer's reputation or cause a liability insurance claim.

A lawyer is bound by a duty of competence.¹ The standard of a competent lawyer involves having the requisite skill and knowledge to undertake matters on behalf of a client. To remain competent, lawyers must continuously educate themselves on the state of the law. In representing a client in a matter without a sound understanding of the relevant law, a lawyer fails to uphold professional obligations.

United States Case Law

The United States Supreme Court dealt with the issue of ineffective assistance of counsel in *Strickland v Washington*.² In that case the petitioner pleaded guilty to three murder charges. His defence counsel relied on the accused's testimony in his sentencing hearing for character evidence. His attorney never requested a psychiatric evaluation or presentence report to argue that there were mitigating factors. There was no attempt to find character witnesses in preparation for the sentencing hearing. The petitioner sought relief for these omissions based on ineffective assistance of counsel. The court formulated a two-prong test for a defendant to establish ineffective assistance of counsel:

- 1) The defendant must show that counsel's representation fell below an objective standard of reasonableness, and
- 2) The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.³

This evaluation was composed of two elements: first, the performance of counsel, and second, the prejudice to the accused. The performance criterion is based on "a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance."⁴ The prejudice analysis involves the "reasonable probability" that but for attorney errors, a different outcome would have occurred, considering the totality of evidence.

In *Strickland*, the court held that Washington was not prejudiced, because the strategic decisions of his lawyer had met professional standards. While the Sixth Amendment to the United States Constitution⁵ provides the right to effective assistance of counsel, ineffectiveness is to be judged according to the standard by which it is found to render the outcome of a trial unreliable. On the facts of *Strickland*, it was found that even if the alleged prejudice existed, it would not have occurred at a sufficient level to mitigate a death sentence.

The scope of the *Strickland* doctrine was expanded by the United States Supreme Court in *Padilla v Kentucky*.⁶ In that case, a permanent resident faced deportation after pleading guilty to drug distribution charges. His attorney provided him with inaccurate legal advice that he should not be concerned about potential deportation. This was a failure to inform the client that deportation may be one consequence of entering a guilty plea. Padilla sought to rely on the Sixth Amendment's guarantee of effective assistance of counsel as grounds for post-conviction relief. The Kentucky Supreme Court denied this request because historically, the Sixth Amendment did not guarantee protection from incorrect deportation advice.

However, on appeal the court held that the Sixth Amendment requires that counsel inform clients of the possibility of deportation because of a criminal conviction. The Court applied the *Strickland* test for its analysis. Its rationale for broadening Sixth Amendment

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

⁶ 559 U.S. 356 (2010).

¹ Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2019 at s 3.1-2.

² 466 U.S. 668 (1984).

³ *Ibid* at 688; 694.

⁴ *Ibid* at 689.

⁵ U.S. Constitution Amendment VI "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

protection was that deportation was a fundamental part of the penalty and not a mere collateral consequence of a conviction. Under these circumstances, a petitioner must establish that the rejection of a plea bargain would have been a rational decision had the immigration consequences been known. Padilla's petition was successful, his prior guilty plea was vacated, and the matter was remanded for a new trial.

Canadian Legislation and Regulations

Similarly, criminal convictions may result in deportation as a collateral consequence under Canadian law.

Section 36 of the *Immigration and Refugee Protection Act*⁷ renders foreign nationals criminally inadmissible to Canada under two circumstances:

1. Inadmissibility for serious criminality results after a conviction for an indictable offence with a maximum prison term of 10 or more years.
2. Inadmissibility for criminality is triggered by a conviction for an indictable offence or for multiple, distinct, hybrid or summary offences.⁸

Criminal inadmissibility will result from applicable convictions that occurred outside of Canada if the offence is equivalent to an offence in Canada under any Act of Parliament. A permanent or a temporary resident may be deported if found criminally inadmissible.

In criminal proceedings, the *Superior Court of Justice Protocol – Allegations of Incompetence*⁹ provides guidelines to appellant counsel for raising an incompetence or ineffective assistance of counsel claim. Counsel must first satisfy themselves that there is a factual foundation to the allegation through investigation or personal inquiry. The regulations recommend that appellant counsel provide informal notice to trial counsel as to the nature of potential allegations. It subsequently explains the specific notification requirements and criminal procedure.

Canadian Case Law

The Supreme Court of Canada adopted the *Strickland* approach in *R v G.D.B.*¹⁰ The appellant sought a reversal of his criminal convictions on the grounds that a tape not introduced as fresh evidence resulted in a

miscarriage of justice. The Court held that the appellant has the onus to establish that prior counsel's actions lacked reasonable professional judgement. It additionally provided a test for a successful claim of ineffective assistance of counsel, where an appellant must establish that:

1. Counsel's acts or omissions constituted incompetence, and
2. A miscarriage of justice resulted.¹¹

A review of lawyer incompetence is conducted under a reasonableness standard under the *Strickland* performance presumption. Prejudice in the form of a "miscarriage of justice" may result in procedural unfairness or compromise the reliability of a trial's outcome. The Court held that the prejudice component precedes the performance analysis. Prejudice must first be established, otherwise the courts may find it undesirable to undertake a performance analysis. This is because it is the role of the legal profession regulators to assess lawyer performance, not that of the courts.

In *G.D.B.*, defense counsel had already satisfied the Court of Appeal that his performance was competent. Not introducing fresh evidence was a tactical decision unlikely to adversely affect the complainant's credibility. Not showing the tape preserved the credibility of the main defence witness. The appellant also failed to satisfy the court that a miscarriage of justice had occurred. The court held that the right to effective counsel is a principle of fundamental justice that is supported by case law and Sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.¹² The court clarified that the right to effective counsel is a constitutional right. This test is currently the standard to determine ineffective assistance of counsel.

In *Chen v Canada*,¹³ the applicant sought to appeal an Immigration and Refugee Board of Canada decision regarding her criminal inadmissibility. Chen was a Chinese citizen sponsored by her husband, who arrived in Canada as a permanent resident. She remarried, and her house was raided during an investigation into a marijuana grow operation criminal ring. Chen pleaded

⁷ *Immigration and Refugee Protection Act*, SC 2001, c 27.

⁸ *Ibid* at 36(1); 36(2).

⁹ Criminal Proceedings Rules for the Superior Court of Justice (Ontario), SI/2012-7.

¹⁰ 2000 1 SCR 520 § 24.

¹¹ *Ibid* § 26.

¹² *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11,

s 7 "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.", and s 11(d) "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

¹³ 2018 FCJ No 6.

guilty to several *Criminal Code*¹⁴ offences. She later claimed that her counsel was ineffective for not being independent from her husband, as both parties were represented by the same counsel. The application was dismissed due to insufficient evidence that the Board relied on facts that made its decision unreasonable. The appellant failed to meet the prejudice requirement to establish that a miscarriage of justice had occurred due to shortcomings in representation.

In *R v Wong*,¹⁵ the applicant was a permanent resident who pleaded guilty to drug trafficking. He was unaware that a plea could result in deportation without any right of appeal. The court referenced law society practice guidelines in conjunction with *Padilla* to express the importance of an informed guilty plea for sentences that may result in deportation. The majority held that an informed guilty plea requires that the defendant understands the collateral consequences. First, there is the objective question of whether the accused was uninformed. Second, is the subjective question of whether being uninformed impacted the guilty plea. On the balance of probabilities, a guilty plea will be rendered uninformed if the accused is unaware of legally relevant collateral consequences. To withdraw a guilty plea, the accused must establish subjective prejudice, that it would have resulted in a different course of action.

The Federal Court formulated a new interpretation of the *G.D.B.* analysis in *Sabitu v Canada*.¹⁶ That case involved a refugee application where the applicant had sickle cell anemia. Her legal counsel advised against including evidence of her medical condition and available doctor's notes for the hearings. The court set a more lenient "serious possibility" standard, rather than a "reasonable probability" to show ineffective assistance of counsel. This less onerous test was an accurate representation of the logic behind the *G.D.B.* analysis. The court held that counsel's initial failure to present evidence about the applicant's medical condition constituted incompetence. The decision was set aside, and the matter was sent back for reconsideration.

Conclusion

Lawyers must fully communicate the potential consequences for legal strategies to their clients. Enabling clients to make informed decisions is a component of professional competence. Legal counsel

must be familiar with the range of consequences that may impact their clients. Canadian courts have embraced *Strickland's* reasonableness standard of proof for ineffective assistance of counsel claims. An informed guilty plea requires a foreign national to be aware of deportation as a potential collateral consequence. Appellants must overcome difficult hurdles because the courts are weary to evaluate performance.

High standards are set for membership in the legal profession. The lawyer's duty is to provide representation that results in client satisfaction and upholds the reputation of the legal community. A foreign national that is not represented by a skilled practitioner experiences compounded effects of a criminal charge that imperil their immigration status.

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¹⁴ *Criminal Code*, RSC 1985, c C-46, s. 326(1)(a); s. 334, s. 465(1)(c); s. 467.1(1).

¹⁵ 2018 SCJ No 25.

¹⁶ 2021 FCJ 160.