

**Criminal**

## **New trial for permanent resident lesson in immigration consequences of guilty pleas: lawyer**

By **Terry Davidson**

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Defence lawyers representing permanent residents and other non-Canadian citizens accused of crimes need to be aware of immigration consequences their clients could face in pleading guilty, says a lawyer involved in a recent Ontario court ruling.

The Jan. 7 Court of Appeal for Ontario decision in *R. v. Asphall* 2022 ONCA 1 centred on Demaine Asphall, a 39-year-old longtime permanent resident who appealed his conviction of firearms offences after learning it would result the Canada Border Service Agency (CBSA) targeting him for deportation to his native Jamaica.

Asphall was successful in his appeal after arguing he was never advised that pleading guilty would, after the completion of his sentence, most certainly make him ineligible to remain in Canada and result in being removed from the country and separated from his eight children.

A new trial was ordered for Asphall, a Pickering resident who owns a landscaping business and lives with his common law spouse and their six children. (Asphall has two other kids from a previous relationship who live with

their mother.)

According to his affidavit filed to the Appeal Court, Asphall was as young as 9 when he arrived in Canada with his family. As the years went by, he came to consider Canada his home and never realized he needed to apply to become a Canadian citizen — he always thought of himself as Canadian, he states.

Asphall was arrested in downtown Toronto during the summer of 2014 after police allegedly discovered a banned gun in a backpack, his lawyer told *The Lawyer's Daily*. (He also confirmed Asphall had a criminal record prior to this, but said it was a minor one that would not cause immigration consequences such as this.)

Asphall was charged, but the matter would never get to trial.

In March 2015, he pleaded guilty to possessing a restricted firearm with readily accessible ammunition, carrying a concealed weapon and being in breach of a weapons prohibition. He received a jail sentence of two years less a day, plus 60 consecutive days for the weapons prohibition and 90 days running concurrent to his possession sentence.

Shortly after his release in January 2016, Asphall established Durham Property Solutions, a landscaping and snow removal business. He does not remember getting a visit from anyone with the CBSA at the time, nor does he recall receiving any paperwork.

But CBSA officials contacted Asphall's sister soon after his release in efforts to

find him. In March of that year, Asphall was contacted by the CBSA with a request for information. In 2017, he contacted the border agency to get an extension on sending them that information.

"I did not follow up or receive any information indicating that I was inadmissible to Canada," stated Asphall in his affidavit. "In 2018 I started my business. After that time I did not follow up with CBSA because of how busy I was with work and caring for my family."

But in October 2020, he was arrested by border officials and placed in immigration detention. He was released on immigration bail after five days and found out he was the subject of removal proceedings due to the firearms convictions.

After speaking with an immigration lawyer, Asphall also discovered that because his sentence was more than six months, he would not be able to appeal the removal order.

He then appealed his guilty pleas, arguing he had not been informed by the lawyer he used for his guilty plea that a conviction would mean deportation.

In his affidavit, Asphall states that he would have taken his chances at trial had he known this.

"My ability to stay in Canada and be with my family is the most important consideration that I have and would have been of the same importance in 2015," he states. "I would have elected to plead not guilty and proceed to trial

if I had known that it would lead to my deportation with no right to appeal.”

Appeal Court Justices Bradley Miller, Benjamin Zarnett and Steve Coroza granted the appeal, noting that there had been no plea inquiry for Asphall, and that his trial lawyer now says he “had no notes, no specific recollection, and did not have a uniform practice of advising clients of immigration consequences.”

The court also noted the Crown “now concedes” there is nothing to challenge Asphall’s “assertion that he was unaware of the immigration consequences of his guilty plea.”

“Furthermore, the appellant provided evidence that he faced prejudice from removal from Canada: he has lived in Canada since he was [9] years old and removal would disrupt his family life: he has [eight] children and has been living with his wife and [six] of those children for the past 12 years,” the court found.



Ben ElzingaCheng, Cooper Sandler Shime & Bergman LLP

A new trial was ordered for Asphall, who, according to his lawyer, Ben ElzingaCheng, is currently back in immigration detention.

ElzingaCheng calls the Appeal Court ruling a lesson for defence lawyers.

"I think it's a cautionary tale about a lot of different things," said ElzingaCheng, a lawyer with Toronto's Cooper Sandler Shime & Bergman LLP. "It is at a very busy trial court in downtown Toronto [and] Mr. Asphall was in custody, and so I can understand the pressures of dealing with matters, but I think it is a cautionary tale in making sure that you always know your client's immigration status. And if they are not a citizen, that you're making sure that they get a proper immigration opinion from an immigration counsel."

ElzingaCheng talked of the lack of inquiry into the consequences of Asphall's guilty plea.

"The problem ended up being that his trial counsel who assisted him to plead guilty, unfortunately, did not have a recollection or did not have any notes about discussing immigration consequences. It was important that counsel couldn't say, 'I discussed this with Mr. Asphall,' or that 'Mr. Asphall knew about this.' I think it is pretty clear from the jurisprudence that counsel should be canvassing and making sure that people know about immigration consequences if they are going to plead [guilty]."

ElzingaCheng acknowledged that with Asphall having already served a sentence, his client's "main goal is to stay in Canada with his children and his family."

A request for comment from appeal Crown Molly Flanagan was sent to Ontario's Ministry of the Attorney General, but a spokesperson said it would be inappropriate for her to provide comment, as the matter is before the courts.

*If you have any information, story ideas or news tips for [The Lawyer's Daily](#), please contact Terry Davidson at [t.davidson@lexisnexis.ca](mailto:t.davidson@lexisnexis.ca) or call 905-415-5899.*

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