File No. 36410

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N:

MATTHEW JOHN ANTHONY-COOK

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

-and-

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PART I: OVERVIEW AND STATEMENT OF THE FACTS

1. Full adversarial trials in criminal cases have become the exception rather than the rule. Less than 10 per cent of criminal charges are resolved by trial. The remaining 90 per cent are disposed of through withdrawals, stays and guilty pleas.[1] Nevertheless, difficulties in bringing accused to trial within a reasonable time – and the attendant s. 11(b) applications – persist. In these circumstances, "[i]t is probably fair to say that without resolutions short of trial, our system of criminal justice would collapse under its own weight."[2]

2. Resolutions are reached in large part because of meaningful discussions and agreements between Crown and defence counsel. The standard to be applied by sentencing justices in determining whether to accept or reject a joint sentencing submission made as a result of such agreements must be informed by the essential role plea bargaining plays in the efficient and effective administration of justice.

3. This Court has previously acknowledged that plea bargaining makes our criminal justice system function. In *R. v. Nixon*, the Court recognized the "vital" importance of Crown counsel honouring plea agreements as both "ethically imperative" and a "practical necessity." Noting that resolution agreements help to resolve the "vast majority" of criminal cases in Canada, the Court found the *binding effect* of plea agreements to be "a matter of utmost importance to the administration of justice."[3]

4. The policy concerns at play in *Nixon* must similarly inform the standard to be articulated by the Court in this case. The CLA asks the Court to adopt a "public interest" standard, one that permits a sentencing judge to depart from a joint submission only where imposing it would be contrary to the public interest or bring the administration of justice into disrepute. This standard best serves and is most consistent with the interests of justice; both the proper and efficient administration of justice and the procedural and substantive rights of accused individuals.

5. The CLA makes no submissions on the facts of this appeal.

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[1] Jennifer Thomas, "Adult Criminal Court Statistics, 2008/2009" (2010), 30:2 *Juristat* 13 (online: http://www.statcan.gc.ca/pub/85-002-x/2010002/article/11293-eng.pdf)
[2] *R. v. Delchev*, 2012 ONSC 2094 at para. 35 rev'd 2015 ONCA 381 (not on this ground); See also, Milica Potrebic Piccinato, *Plea Bargaining* (2004) Department of Justice at 5
[3] *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566 at paras. 46-48

PART II: POSITION ON QUESTIONS IN ISSUE

6. The CLA was granted leave to make submissions on the standard to be applied by a sentencing judge in deciding whether to accept or reject a joint sentencing submission. In relation to this issue, the CLA submits as follows:

i) The "public interest" and the "fitness" standards are distinct;

ii) The public interest standard serves the administration of justice by increasing certainty in the outcome of negotiated guilty pleas and thus promotes the efficient resolution of criminal charges;

iii) The rigorous public interest standard properly reflects the significant waiver of rights accused individuals make in entering guilty pleas;

iv) All aspects of a joint submission are entitled to the same level of deference; and

v) The same standard applies whether a sentencing judge is considering "jumping" or "undercutting" a joint submission, but how the standard is applied will vary.

PART III: STATEMENT OF ARGUMENT

A. Form *and* Substance Matter

7. The Respondent argues that the varying articulations of the standard at issue in this case are "really a question of form over substance" and that there is "no real difference" between the public interest and the fitness tests.[4] At the same time, the Respondent asks this Court to adopt the fitness standard. The CLA submits that there *is* a difference between the two standards and that the fitness standard does not express the appropriate degree of deference that ought to be given to joint submissions.

8. Prowse J.A., writing for the Court of Appeal for British Columbia in *R. v Bezdan*, expressed general agreement with the "sentiments" expressed by the Court of Appeal for Ontario in *R. v. Cerasuolo*,[5] but specifically declined to adopt the "public interest" standard articulated in that case:

> I would not go so far as to say that a sentencing judge can only depart from the sentence suggested in the joint submission if he or she is satisfied that the proposal is contrary to the public interest, or that the sentence proposed would bring the

[4] Respondent's Factum at paras. 18 and 38
[5] *R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445 (Ont. C.A.)

> administration of justice into disrepute. *It is not clear to me that these two circumstances cover all situations in which a sentencing judge might conclude that the sentence proposed was "unfit."*[6]

9. CLA submits that Justice Prowse was right: the "fitness" standard is broader than the "public interest" standard; it permits departure from a joint submission in more cases. The CLA submits, however, that the strict nature of the "public interest" standard is precisely what makes it the most practical and theoretically sound.

10. Joint submissions on sentence are a product of informed negotiations between "two independent professionals and key participants in a system of administering justice."[7] The *Martin Report*, relied on by both parties, stressed this feature of resolution agreements. The Martin Committee remarked that "counsel's responsibility as officers of the Court makes them more than simply representatives of a particular interest or set of interests. They are not merely agents." [8] It is the ethical and professional obligations of the defence and Crown that enable the vast majority of cases in the criminal justice system to be fairly disposed of after full disclosure is made but before a trial is held.

11. A joint submission, undertaken in this context, is entitled to significant deference. One of the advantages of the public interest standard is that the "form" of the standard explains the reason for rejecting a joint submission in a particular case. The judge does not reject the proposed sentence because he or she believes a different sentence would be more appropriate, or more "fit." Instead, the judges depart only in those unusual circumstances where the proposed sentence defeats the very purpose of the resolution process; that is, where it is contrary to the public interest or otherwise brings the administration of justice into disrepute.

12. An unfit sentence does not necessarily bring the administration of justice into disrepute. In the *Charter* context, the jurisprudence regarding gross disproportionality accepts that unfit

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[6] *R. v. Bezdan*, 2001 BCCA 215 (emphasis added)
[7] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions* (Chair G.A. Martin) (Toronto: Ontario Ministry of the Attorney General, 1993) at 33 [*Martin Report*]
[8] *Ibid.* See also Canada. Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook*, Part 3.7, "Resolution Discussions", 2014 (online: http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch07.html): "The unique role of Crown counsel as both advocate and minister of justice means that they must represent the interests of the Crown as knowledgeable and effective negotiators while ensuring that the accused is treated fairly and according to the law."

sentences, even *manifestly* unfit sentences, are not constitutionally infirm and do not violate the principles of fundamental justice. This jurisprudence demonstrates that there are "degrees of unfitness" and that some level of unfitness will be tolerated, in particular circumstances, in order to achieve other goals or objectives. In the case of mandatory minimum sentences, fitness may be sacrificed in accordance with the will of Parliament to achieve the goal of denunciation. In cases involving joint submissions, a court may accept an "unfit" sentence, where it does not rise to the level of being contrary to the public interest, in order to promote certainty and, accordingly, the efficient and effective resolution of cases.

13. The Respondent argues that the articulation of the test matters less than "the methodology" followed by a sentencing judge.[9] The CLA submits that the manner in which the standard is articulated will inform the way in which the standard is applied. The prescriptive quality of the public interest standard communicates a level of deference and a respect for the utility of resolution agreements that the fitness standard cannot match.

14. That said, the public interest standard does not require a judge to accept a joint submission. It does, however, require the sentencing judge to give the submission serious consideration. More specifically, the sentencing judge must 1) acknowledge the high threshold for rejecting a joint submission; 2) inform counsel that the court is disinclined to accept a joint submission; and 3) afford counsel the opportunity to adduce additional materials and make additional submissions to address the concerns expressed by the sentencing judge. If the judge nonetheless imposes a sentence at variance with the proposal of counsel, the reasons for sentence must explain why the joint submission would bring the administration of justice into disrepute.

15. There is some division in the case law as to whether these steps are mandatory or merely recommended.[10] The CLA submits that a sentencing judge who fails to follow this methodology will commit an error justifying appellate intervention. As the Respondent acknowledges, these guidelines have been identified by multiple provincial appellate courts as necessary to give meaningful effect to joint submissions.[11] Additional steps, including engaging in an in-chambers

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[9] Respondent's Factum at para. 19
[10] See, *e.g.*, discussion in *R. v. Wickstrom*, 2011 BCSC 745 at paras. 20-29
[11] Respondent's Factum at para. 20

judicial pre-trial or providing counsel with an opportunity to make an application to withdraw the guilty plea, while not mandatory, may be reasonable and of assistance in some cases.

B. The Policy and Practical Advantages of a Stringent Standard

i) Certainty and Efficiency

16. When properly conducted, resolution agreements benefit not just (or even primarily) accused individuals. Plea bargains work in favour of all participants in the criminal justice system: the Crown, victims, witnesses, the police and the public at large. The Crown is relieved of its burden to prove guilt beyond a reasonable doubt and the costs associated with that endeavor; stress, inconvenience and anxiety are reduced for complainants and witnesses; and the repute of the justice system is enhanced by the prompt and just resolution of difficult cases.[12]

17. The public interest standard recognizes these benefits and the fact that individuals are more likely to waive their right to a trial, and the incumbent protections of the trial process, where the outcome of the decision to plead guilty is a known quantity.[13] When sentencing judges too readily reject joint submissions, certainty suffers. In this way, departing from the public interest standard would, in itself, be contrary to the public interest. A stringent test for rejecting joint submissions promotes the efficient resolution of criminal charges by instilling a measure of confidence in accused individuals who enter guilty pleas.[14]

ii) All Relevant Factors are Considered

18. The public interest standard ensures all relevant factors are taken into account in fashioning the appropriate sentence. In determining a "fit" sentence, judges are directed to consider the circumstances of the offender and the circumstances of the offence.[15] A joint

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[12] Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" (2005), 50 Crim LQ 14 at 31-32. See also: Nova Scotia, Public Prosecution Service, *DPP Directive* "Resolution Discussions and Agreements", Last Updated July 21, 2015 (online: https://novascotia.ca/pps/publications/ca_manual/ProsecutionPolicies/ResolutionDiscussionsandAgreements.pdf); Ontario. Ministry of the Attorney General, *Crown Policy Manual*, "Resolution Discussions", 2005 (online: https://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/ResolutionDiscussions.pdf); British Columbia, Ministry of Justice, Criminal Justice Branch, *Crown Counsel Policy Manual*, "Resolution Discussions and Stays of Proceedings", July 23, 2015 (online: http://www.ag.gov.bc.ca/prosecution-service/policy-man/pdf/RES1_ResolutionDiscns_SOPs.pdf) [BC *Crown Counsel Policy Manual*]

[13] *Martin Report*, *supra* at 328-329 (Recommendation 58)

[14] This Court has already recognized that, "the *binding effect* of plea agreements [on the Crown] is a matter of utmost importance to the administration of justice" because of their practical necessity. *R v. Nixon*, *supra* at para. 47.

[15] *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206

submission may be arrived at in consideration of issues that fall outside the scope of these categories. For example, in agreeing to what appears to be a lenient sentence, the Crown may consider the length of time the specific matter has been awaiting trial or more generally, the fact of systemic delay within the Crown's particular courthouse or jurisdiction. A delay in bringing a matter to trial does not bear on the offender's culpability or the circumstances in which the offence was committed. Nevertheless, it remains an appropriate consideration during resolution negotiations.[16]

19. In a similar vein, the factors that inform a joint submission may be difficult, or even inappropriate, to describe "on the record" in sentencing proceedings. Such factors might include weaknesses in the Crown's case, problems with the credibility of Crown witnesses, the existence of potentially meritorious *Charter* arguments or the accused's cooperation with the authorities. The Respondent's suggestion that when the joint submission is presented to the sentencing judge, the negotiations between the Crown and defence "should be revealed" is not supported by the case law:

> The requirement to inform the sentencing judge of all of the circumstances guiding the joint submission was not intended to be taken as a direction that counsel must reveal their negotiating positions or the substance of their discussions leading to the agreement. These are private negotiations which need not, and normally should not, be disclosed to the court.[17]

20. Certainly the parties must be prepared to justify the end result; to explain to the sentencing judge the rationale for the joint submission. That does not require revealing every detail or factor that contributed to the resolution agreement. Indeed, one reason the threshold for rejecting a joint submission is necessarily high is precisely because "even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation." [18]

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[16] See, *e.g.*, BC *Crown Counsel Policy Manual*, *supra* at 2: "the Crown's recommendation on sentence may also take into account section11(b) of the Canadian Charter of Rights and Freedoms and the length of time that the matter has been awaiting trial."

[17] *R. v. Tkachuk*, 2001 ABCA 243 at para. 34

[18] *R. v. MacIvor*, 2003 NSCA 60, 176 C.C.C. (3d) 420 at para. 32

C. The Public Interest Standard is the Most Analytically Sound

21. A stringent threshold for departing from joint submissions properly reflects both 1) the non-adversarial nature of plea proceedings that follow a resolution agreement and 2) the accused person's waiver of significant constitutional rights.

22. The first point is related to the pragmatic reasons for establishing a standard that goes beyond "fitness." The features of the adversarial system aimed at arriving at a fit sentence are not at play where a joint submission is made. The adversarial nature of a contested sentencing hearing works to ensure the court is made aware of all relevant factors and arguments. The same cannot be said where there is a joint submission. The advantaged position of counsel is one of the principal reasons why joint submissions are entitled to significant deference. This was noted by the court in *R. v. Bracken*, which referred to the importance of deference to the judgment of the Crown in particular:

> In a case of this kind, Crown counsel will almost invariably be in a better position than the Court to weigh and assess the myriad factors, including reservations about the enduring strength of its case, that ultimately inform how the public interest is best reflected in a proposed disposition.[19]

23. A limited discretion to reject joint submissions properly balances the need for the judiciary to remain the ultimate adjudicators of appropriate sentences with the realities of the informational disadvantages experienced by sentencing judges presented with joint submissions.[20]

24. The second point is tied to the inherently disadvantaged position accused individuals occupy in plea negotiations. Critics who view plea bargaining as unfair to accused individuals cite the power imbalance between state actors and those charged with offences. They note that because innocent accused likely have the most compelling defences, they will generally be offered the most attractive plea agreements. These "deals" can operate coercively where the risk of being found guilty after trial means a substantially higher sentence. Noting the "stark

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[19] *R. v. Bracken,* 2012 BCSC 1084 at para. 30

[20] See, *e.g.*, *R. v. Power*, [1994] 1 S.C.R. 601 at 625-627 where Justice L'Heureux-Dubé acknowledged that given the myriad of factors that can influence a prosecutor's discretion relating to resolution agreements (and other matters), "courts are ill-equipped to evaluate those decisions." On this point, Justice L'Heureux-Dubé went on to endorse a passage from the judgment of Kozinski J. in *United States v. Redondo–Lemos* 955 F.2d 1296 (9th Cir. 1992), at p. 1299: "Such decisions [to charge, to prosecute and to plea–bargain] are normally made as a result of a careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the possible deterrent effect on the particular defendant and others similarly situated."

imbalance of power" between the involved parties, these commentators suggest that the term plea "bargaining" is a misnomer.[21]

25. The CLA recognizes both the potentially coercive elements of resolution agreements but also the integral role they play in our criminal justice system. A system that relies heavily on guilty pleas as a method of efficient case disposition must ensure that these pleas are conducted in a manner that promotes and respects the rights of accused individuals. All plea bargains involve a *quid pro quo*. In every case, the accused person makes a material concession: he or she gives up the presumption of innocence and the right to a trial. That, at minimum, is "the *quid*." The "*quo*" is a favourable position on sentence from the Crown. The rigorous public interest standard is most capable of acting as a counterweight to the power disparity inherent in resolution discussions and the significant waiver of rights made by an accused who forgoes the presumption of innocence and the right to a trial.

D. All Aspects of a Joint Sentencing Submission are Entitled to Deference

26. A joint submission often includes an agreement about matters beyond the length of the appropriate custodial sentence. The length of probation (and whether it ought to be imposed at all), the amount of a fine and the imposition of a firearms or driving prohibition are all frequently the subject of resolution negotiations. For many accused, the consequences of these judicial orders are equally if not more significant than the length of the jail sentence imposed.

27. Where a probation order, or any auxiliary order (or lack thereof), is presented as an element of the joint submission, the sentencing judge should accede to the position unless it is contrary to the public interest or brings the administration of justice into disrepute. The same standard must apply to all aspects of the sentencing package.

28. Appellate courts reviewing departures from joint submissions have consistently applied the same analysis whether considering custodial or non-custodial elements of a sentence. Appellate courts have, for example, restored specific terms of probation,[22] vacated probation

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[21] See, *e.g.*, Richard Ericson & Patricia Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982) cited in Simon Verdun-Jones & Alison Hatch, *Plea Bargaining and Sentencing Guidelines* (Ottawa: Minister of Supply and Services Canada, 1988) at 1.

[22] *R. v Landry*, 2016 ONSC 616

orders not contemplated by the joint submission,[23] set aside firearms prohibitions not part of the joint position,[24] reduced the length of driving prohibitions,[25] restored fines and varied the terms of conditional sentences to reflect those proposed in the joint submission.[26]

29. The decision in *R. v. Wickstrom* is illustrative. In that case, defence and Crown counsel jointly submitted that a 90-day sentence was appropriate for a breach of probation. The sentencing judge imposed 90 days in jail but also placed the offender on three years' probation. The appellate court concluded that the trial judge erred by departing from the joint submission:

> It must be presumed that if Crown counsel's view of this matter was (a) that a probation order was a necessary and appropriate aspect of the sentence, and (b) that the prosecution's case was solid, then a probation order would have been a non-negotiable aspect of any plea agreement. The Crown is in a unique position to make an informed decision in these matters.[27]

30. Joint submissions include the sentence components requested, but also by implication exclude those not requested. The exclusion of a particular order, term or prohibition is as much as part of the joint submission as the elements the parties seek to have imposed.

E. "Jumping" versus "Undercutting" a Joint Submission

31. The *standard* governing when a sentencing judge can properly reject a joint submission does not depend on whether the judge intends to "jump" or "undercut" the proposed sentence. The *application of that standard*, however, will differ depending on whether the sentencing judge is inclined to go above or below the sentence proposed in the joint submission.

32. The factors relevant to determining whether a joint submission is contrary to the public interest vary depending on the circumstances. Most obviously, "concerns about the accused's fair trial rights are not in play if the trial judge is considering imposing a sentence that is lower than the agreed-upon sentence."[28] On the other hand, where a judge is considering exceeding the joint submission, issues of fairness will be a key factor. To state the obvious, an accused who has reached an agreement through a plea bargain gives up the presumption of innocence and right to

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[23] *R. v. Wickstrom*, 2011 BCSC 745
[24] *R. v. Lyver*, 2012 NLTD(G) 40
[25] *R. v. Milijanovic*, 2012 ONCA 647
[26] *R. v. Webster*, 2001 SKCA 72
[27] *R. v. Wickstrom*, *supra* at para. 33
[28] *R. v. DeSousa*, 2012 ONCA 254, 286 CCC (3d) 252 at para. 23

trial. The Crown does not similarly forgo a constitutional entitlement. Instead, it primarily "gives up" the ability to seek a higher sentence.[29]

33. Moreover, the policy justifications for the "public interest" standard do not apply equally when the rejection of a joint submission results in a more lenient sentence. While the Crown and, by extension, the police, victims of crime and the public more generally, benefit from the certainty of joint positions, the lack of certainty more directly effects offenders who are the subject of whatever sentence is ultimately imposed.

PART IV: SUBMISSIONS ON COSTS

31. The CLA makes no submissions regarding costs.

PART V: ORDER REQUESTED

32. The CLA requests permission to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this th day of March 2016.

Joseph Di Luca per JC.

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Erin Dann per JC.

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[29] Resolution negotiations may also, of course, involve charge and fact bargaining. These factors too are ultimately concerned with the form and quantum of sentence.

PART VI: TABLE OF AUTHORITIES

Case Law

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Crown Prosecution Policies

Article or Report	**Paragraph No.**
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