**File No.: 39599**

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

**BETWEEN:**

**KERRY ALEXANDER NAHANEE**

**APPELLANT**
**(APPELLANT)**

**AND**

**HER MAJESTY THE QUEEN**

**RESPONDENT**
**(RESPONDENT)**

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# APPELLANT'S FACTUM

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

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**Counsel for the Appellant:**

**Hollis Lucky**
**James Nadel**
**Michael J. Sobkin**
Jabour Sudeyko Lucky
200 – 92 Lonsdale Avenue
North Vancouver, B.C. V7M 2E6
Telephone: (604) 986-8600
Facsimile: (604) 986-4872
Email: hollis@luckylaw.ca

**Agent for the Appellant:**

**Michael J. Sobkin**
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8
Telephone: (613) 282-1712
Facsimile: (613) 288-2896
Email: msobkin@sympatico.ca

**Counsel for the Respondent:**

**Mila Shah**
Ministry of Attorney General
Criminal Appeals and Special Prosecutions
600 – 865 Hornby Street
Vancouver, B.C. V6Z 2G3
Telephone: (604) 660-1126
Facsimile: (604) 660-1133
Email: mila.shah@gov.bc.ca

**Agent for the Respondent:**

**Matthew Estabrooks**
Gowling WLG (Canada) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Telephone: (613) 233-1781
Facsimile: (613) 563-9869
Email: matthew.estabrooks@gowlingwlg.com

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

[1] This appeal requires the Court to consider whether the high protection afforded to joint sentencing submissions – a submission where the Crown and defence agree to recommend a particular sentence in exchange for the accused entering a plea of guilty – should also apply to plea resolutions where the accused agrees to plead guilty and the Crown agrees to request a particular sentencing range.

[2] In *R v Anthony-Cook*,[1] this Court confirmed the stringent public interest test is the correct test to apply when a sentencing judge is presented with a joint submission. That test provides that a joint submission should not be rejected unless it is "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down."[2] This is a "high threshold" given the importance of plea resolutions to the proper functioning of the administration of justice.[3]

[3] The Court also provided guidance to trial judges as to the approach to follow when considering whether to reject a joint submission. In that situation, the trial judge "should notify counsel that he or she has concerns, and invite further submissions on those concerns, including the possibility of allowing the accused to withdraw his or her guilty plea."[4] This ensures that joint submissions are given proper consideration and that accused persons are treated fairly.[5]

[4] This appeal raises two issues with respect to sentencing proceedings: 1) does the public interest test articulated in *Anthony-Cook* apply to plea resolutions that reflect partial agreement or an agreed upon sentencing range; and 2) does the failure of a sentencing judge to alert counsel that they intend to exceed the sentencing range proposed by Crown amount to an error in principle resulting in procedural unfairness?

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[1] *R* v *Anthony-Cook*, 2016 SCC 43 ("*Anthony-Cook*") at para 31.
[2] *Anthony-Cook* at para 34.
[3] *Anthony-Cook* at para 35.
[4] *Anthony-Cook* at para 58.
[5] *Anthony-Cook* at para 50.

[5] The appellant submits that both questions should be answered in the affirmative.

[6] The majority of criminal cases resolve as a result of guilty pleas.[6] Guilty pleas are often the result of resolution discussions between Crown and defence counsel. On some occasions, resolution discussions result in counsel presenting a joint submission to the sentencing judge. On other occasions, resolution discussions result in an accused agreeing to enter a guilty plea and forego their right to a trial in exchange for a benefit from the Crown. Resolution discussions "help to resolve the vast majority of criminal cases in Canada and, in doing so, contribute to a fair and efficient criminal justice system."[7] Indeed, it has been observed that without plea resolutions, the criminal justice system would "grind to a halt".[8]

[7] Given the importance of plea resolutions and the securing of guilty pleas, the *Anthony-Cook* test should apply whether or not the defence and Crown agree on the exact sentence that should be imposed. As long as the Crown agrees to seek a particular sentence range and the accused agrees to plead guilty, the administration of justice benefits and the court should not exceed the range proposed by the Crown unless the public interest test is met.

[8] On the second question, where a judge is considering "jumping" the range proposed by Crown counsel, notice should be provided to the parties so that they can make further submissions in support of the plea resolution. In *Anthony-Cook*, this Court said this was a matter of "fundamental fairness" to the parties where the judge intends to depart from a joint submission.[9] Fairness dictates the same result where the judge intends to depart from the sentencing range proposed by the Crown as part of a plea resolution.

[9] These questions arise in the context of sexual assault proceedings against the appellant in

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[6] Milica Potrebic Piccinato, *Plea Bargaining* (2004) Department of Justice Canada at p. 6 (Piccinato, "Plea Bargaining"). In 1998, 91.3% of adult criminal cases in Ontario were resolved without the necessity of a trial. Anthony N. Doob & Cheryl Marie Webster, "Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century*"* (2016) 45 Crime and Justice 359 at 364 (Appellant's Book of Authorities ("ABA"), Tab 2). In 2014, 94.9% of adult criminal cases in Ontario were resolved without the necessity of a trial.

[7] *R* v *Nixon*, 2011 SCC 34 at para 47.

[8] Piccinato, Plea Bargaining, at page 6, referring to the Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (1993) pages 1-523, at page 277 (the "Martin Report").

[9] *Anthony-Cook* at para. 58.

which he pled guilty to offences against S.R. and E.N. Leading up to the trial in relation to E.N., extensive plea resolution discussions occurred between Crown and the appellant with respect to both S.R. and E.N. These discussions culminated on November 21, 2019, when two experienced Crown counsel co-authored a seven-page resolution proposal detailing that they would seek a global sentence of 4-6 years' jail with respect to S.R. and E.N. if the appellant were to enter a guilty plea as against E.N. in advance of trial (the appellant had previously pled guilty to the offence against S.R.).[10] The appellant had multiple meetings with his counsel to discuss the Crown's proposal and was also provided with a copy of the Crown's seven-page resolution proposal. In exchange for the understanding the Crown would seek a global sentence of 4-6 years' jail with respect to both offences, on December 10, 2019, approximately seven weeks in advance of trial,[11] the appellant pled guilty to sexually assaulting E.N.

[10] On January 23, 2020, a sentencing hearing took place with respect to the offences. As per the resolution proposal, the Crown sought a global sentence of 4-6 years incarceration. As part of their sentencing submissions, the Crown acknowledged the amplified value of the appellant's guilty pleas by sparing two vulnerable victims (and the public purse) from two separate trials. The Crown stressed the frail nature of both victims, with an emphasis on S.R. whom the Crown considered to be a witness of such "extreme fragility" that hypothetically "even a guilty plea the day before trial is a significant mitigating factor" as the Crown had "seen the impact of a potentially imminent trial date on this young witness."[12] The appellant sought a sentence of 3-3.5 years incarceration in totality.

[11] On February 7, 2020, Judge Smith sentenced the appellant to four years' incarceration with respect to the offence against S.R., and six consecutive years' incarceration with respect to the offence against E.N. for a total of 10 years' incarceration. This was reduced based on the totality principle to eight years' incarceration. Judge Smith never alerted counsel that she intended to exceed the range proposed by Crown. The first time either Crown or defence became aware of the judge's sentence was as she was reading her decision from the bench and indicated that "I do not agree with either position [of counsel]".[13]

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[10] Appellant's Record ("AR"), Vol. I, Tab 8, pp. 66-72.
[11] Sentencing Judge's Reasons of Sentence ("RFS"), at para 3, AR Vol. I, Tab 1, 2.
[12] Proceedings at Sentence, January 23, 2020, p. 25 line 42 – p. 26 line 4, AR, Vol. II, pp. 34-35.
[13] RFS at para 52, AR Vol. I, Tab 1, p. 12.

[12] The appellant submits Judge Smith erred by exceeding the range proposed by both the appellant and the Crown on the basis that she simply did not agree with the parties' positions. A sentencing judge should not exceed the Crown's sentencing position where it is a result of extensive resolution discussions between counsel unless the proposed sentence is contrary to the public interest. The sentencing range proposed by the Crown did not meet the "high threshold" for rejection articulated in *Anthony-Cook*. Moreover, Judge Smith "jumped" the Crown range without notifying the parties or providing further opportunity to make submissions as to why their positions were appropriate, resulting in a denial of procedural fairness to the appellant.

[13] The Court of Appeal dismissed the appeal. It concluded that it was bound by its previous decision in *R v R.R.B* in which the court held that a sentencing judge does not have to advise counsel that he or she intends "to impose a greater period of imprisonment than that proposed by them and to then give them the opportunity to make further submissions."[14] The Court of Appeal acknowledged that there was "some merit" to the argument that "the logic in *Anthony-Cook* in support of affording counsel a right to make informed submissions before departing from a joint submission, is as applicable where the court is considering a sentence in excess of that sought by the Crown on a guilty plea."[15] However, it did not consider that *R.R.B.* had been overturned or overtaken by *Anthony-Cook*.

[14] This Court is not bound by *R.R.B.* and it is submitted that it should decline to follow it. Fundamental fairness dictates that an accused must be given an opportunity to provide further submissions if the court intends to depart from the range proposed by the Crown.

## B. Statement of Facts

*(i) The offences*

[15] E.N. and S.R. are first cousins, and the nieces of the appellant. E.N. moved into the home of her maternal grandparents (the appellant's parents) in 2010 when she was 13 years old. Within approximately five months, the appellant, who was 19 years old, began digitally penetrating E.N. while she was asleep. After E.N. turned 14, the assaults escalated to include vaginal intercourse.

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[14] *R* v *R.R.B.*, 2013 BCCA 224 at para. 24.
[15] Court of Appeal Reasons for Judgment ("BCCA RFJ") at para 53.

E.N. estimated approximately 10-15 assaults occurred, about eight of which involved intercourse. The assaults stopped when E.N. left her grandparents' home after graduating high school in 2014. A final incident occurred in the early morning of July 7, 2018, when E.N. was visiting her grandparents' home. E.N. and her boyfriend slept on an air mattress in the living room, having been at a party the preceding evening. E.N. awoke while the appellant was kneeling beside her trying to remove her underwear. She kicked him away and moved closer to her boyfriend.[16]

[16] The offence against S.R. occurred on July 12, 2018. On this date, S.R was 15 years old and the appellant was 27. S.R. spent the preceding evening drinking with friends in North Vancouver. She spent the night at her grandparents, where the appellant resided, arriving at around midnight. She awoke to the appellant digitally penetrating her. The appellant then got on top of S.R. and had vaginal intercourse with her. Afterward, the appellant left the room. S.R. left her grandparents' home and reported the assault to police. She was transported to Vancouver General Hospital where a DNA sample (later confirmed to be the appellant's) was obtained from a vaginal swab.[17] The appellant was arrested in relation to the offence against S.R. that day and he was released with a first court appearance date in December 2018.

[17] E.N. disclosed the assaults against her in August 2018 upon learning the appellant had assaulted her cousin S.R.[18] On September 25, 2018, the appellant reattended the local police detachment and was arrested and released with a first court appearance in December 2018.

*(ii) The respective sentencing positions*

[18] On January 20, 2019, the appellant pled guilty to one count of sexual assault against S.R. contrary to section 271 of the *Criminal Code*.

[19] With respect to E.N. the matter was initially set for trial. Leading up to the trial, extensive plea resolution discussions occurred between Crown and the appellant with respect to both S.R. and E.N. This culminated on November 21, 2019, when two experienced Crown co-authored a seven-page resolution proposal. This proposal included:

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[16] RFS at paras 9-11, AR Vol. I, Tab 1, pp. 3-5.
[17] *Ibid* para 14, AR Vol. I, Tab 1, at pp. 5-6.
[18] *Ibid* para 12, AR Vol. I, Tab 1, at p. 5.

A. A detailed post-conviction sentencing position (7-9 years' jail globally);

B. A detailed pre-trial sentencing position (4-6 years' jail globally);

C. A draft set of admissions for use at the sentencing with respect to both offences;

D. A detailed list of aggravating factors with respect to the offences;

E. A list of mitigating factors with respect to the offender;

F. *Gladue* considerations with case law references;

G. A review of sentencing principles in sexual assault cases, including reference to and summaries of case law;

H. A conclusion of Crown's sentencing position with additional reference to case law and an indication that Crown was not requiring a joint submission from defence on sentence; and

I. A list of the ancillary orders Crown would seek.[19]

[20] The appellant was provided a copy of the Crown's seven-page proposal and met with his counsel on two separate occasions so that the proposal could be reviewed. On December 4, 2019, defence counsel informed Crown that the appellant had a copy of their proposal and that it had been discussed with the appellant, but a follow up appointment was needed based on the magnitude of the appellant's decision. Crown replied and acknowledged the significance of the appellant's decision.[20]

[21] In December 2019 the appellant instructed his counsel that he wished to enter a guilty plea as against E.N. with the knowledge that Crown would be seeking a global jail sentence of 4-6 years with respect to both offences.

[22] On December 10, 2019, on Indictment 66435-2-C, the appellant appeared before Judge Smith and pled guilty to sexually assaulting E.N. contrary to s. 271 of the *Criminal Code*. Before

[19] AR Vol. II, pp. 66-72.
[20] *Ibid*, pp. 73-74.

entering his plea, Judge Smith was advised that "[t]hrough extensive resolution discussions with [Crown], including quite a thorough statement of facts and Crown's sentencing [position] which was provided by [the Crown] office, and a copy has been provided to [the appellant]", the appellant wished to enter a guilty plea to the single count negotiated with the Crown.[21] Following the entry of the plea, a presentence report with a *Gladue* component was ordered along with a psychiatric assessment. Independently, the appellant also arranged for his own full *Gladue* Report from Legal Aid.

[23] The global sentencing hearing occurred on January 23, 2020 in front of Judge Smith. The two Crown counsel who had been separately assigned to prosecute charges regarding E.N. and S.R. made submissions on the facts and case law in support of the Crown's position. The Crown reminded Judge Smith that the guilty plea as against E.N. leading to the global sentencing hearing was a result of "…lengthy discussions between Crown and defence [and] that matter was called ahead for the purposes of the accused entering a guilty plea."[22] As per their resolution proposal from November 21, 2019, the Crown's position was that a 4–6-year global sentence was fit and proper:

> The Crown will be asking Your Honour to consider a global sentence of four to six years of incarceration, with respect to both files. Disposition is based on aggravating facts of each count; the mitigation of Mr. Nahanee's guilty pleas; the primary sentencing considerations of denunciation and deterrence set out in the *Criminal Code*, and sentencing precedents.
>
> In the Crown's view a three to five year sentence of incarceration is an appropriate sanction for each offence individually, but that globally, taking into account the principle of totality, a four to six year sentence is fair and meets the primary sentencing objectives of denunciation and deterrence, while not losing sight of Nahanee's rehabilitation. This is not a joint position, Your Honour. I anticipate that my friend will ask Your Honour to consider a shorter period of incarceration.[23]

[24] As part of their sentencing submissions, the Crown acknowledged the amplified value of the appellant's guilty pleas by sparing two vulnerable victims from two separate trials:

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[21] Proceedings (Plea), December 10, 2019, p. 1 lines 21-26, AR, Vol. II, p. 3.
[22] Proceeding at Sentence, January 23, 2020, p. 3, lines 21-28, AR, Vol. II, p. 12.
[23] *Ibid* p. 4 lines 24-42, AR, Vol. II, p. 13.

> Significantly, he entered an early guilty plea with respect to File 66176 at the arraignment stage, with respect to the complainant S.R. And it's also significant that he entered a guilty plea on Information 66435-2C as it was prior to the commencement of trial. In the Crown's view these guilty pleas are a significant, mitigating factor as they prevented any further trauma to the victims that may have occurred through the court process. As Your Honour knows, a guilty plea is also an indication of remorse and an acceptance of responsibility.[24]

[25] The Crown stressed the frail nature of both victims, with an emphasis on S.R. who the Crown considered to be a witness of such "extreme fragility" that, hypothetically, "even a guilty plea the day before trial is a significant mitigating factor."[25] Both Crowns maintained this position in response to a pointed question about the value of a guilty plea in light of the DNA evidence that strengthened the Crown's case in relation to S.R.:

> And yes, certainly the case with respect to S.R. was a stronger Crown case in the fact that the DNA evidence -- it was an earlier plea in that regard. That being said, the trial process is a challenging process and that the guilty plea is, I think, certainly something that eased the minds of both S.R. and E.N.[26]
>
> The fact that the guilty plea came in, whether it came in after the DNA, before the DNA, in Crown's view, it ought to be considered significantly mitigating.[27]

[26] The Crown also justified their position with a review of sentencing precedents, at one point referencing a recent ruling with an "extensive" appendix of sentencing decisions that they found "very helpful in terms of trying to establish what might be the appropriate range".[28] When asked by Judge Smith what the appropriate sentence was for each respective file the Crown stated three to five years' jail,[29] and that the final sentence must be adjusted for totality.[30] Ultimately, the Crown concluded that, "[e]very case is going to have its distinctions. These cases were the best we could come up [with] to assist with an appropriate range of sentence and to give some examples

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[24] *Ibid* p. 22 line 44 – p. 23 line 8, AR, Vol. II, pp. 31-32.
[25] *Ibid* p. 25 lines 38-40, AR Vol. II, p. 34.
[26] *Ibid* p. 24 line 46 – p. 25 line 5, AR Vol. II, pp. 33-34.
[27] *Ibid.*
[28] *Ibid* p. 47 lines 18-25, AR, Vol. II, p. 56. The Crown also relied on a case for analogous reasoning—albeit with fewer aggravating factors than in the appellant's case—where the sentencing judge imposed two concurrent sentences of two-years-less-a-day against two separate complainants [Proceedings at Sentence, January 23, 2020, p. 44 lines 16-45, AR, Vol. II, p. 53].
[29] *Ibid* p. 50 line 4, AR, Vol. II, 59.
[30] *Ibid* p. 49 lines 41-43, AR, Vol. II, 58.

where cases had fallen within that range".[31] Judge Smith made no further inquiry of the Crown regarding the specific quantum of jail that ought to be attributed to each respective offence.

[27] The appellant argued in favour of a global 3–3.5-year sentence. In advocating for this sentence, counsel outlined the circumstances of the appellant gleaned during preparatory meetings with him and his family, synthesized the relevant portions of the sentencing reports, and recommended a specific facility where the sentence could be served given the *Gladue*-centric treatment and programming that was available.[32]

[28] At no point during the full day sentencing hearing did Judge Smith express any reservations about the range of sentence sought by the Crown, nor did she suggest any possible intention to exceed the sentencing range proposed by the Crown.[33]

*(iii) The appellant's circumstances*

[29] The appellant was born on April 25, 1991; he was between the ages of 19 and 27 at the time of the offences, and 28 years of age at the time of sentencing.[34] He was raised on Squamish Nation land within the district of West Vancouver, and was connected to his First Nations community, volunteering there, and desired to become further engaged with his Squamish heritage.[35]

[30] But for the offences at issue in this appeal, the appellant had no criminal record or history of involvement in the criminal justice system.[36] At the time of sentencing, the appellant had dutifully obeyed a restrictive bail order that prohibited contact with his father for 18.5 months.[37] He had a supportive family to assist him in rehabilitative efforts during and after his incarceration,[38] and who would provide employment on his release so he could productively rejoin society.[39]

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[31] *Ibid* p. 50 lines 7-13, AR, Vol. II, 59.
[32] *Ibid* p. 52 lines 13-33 and p. 62 lines 4-36, AR, Vol. II, pp. 61 and 71.
[33] *Ibid* p. 85 line 41, AR, Vol. II, p. 94.
[34] *Ibid* p. 52 lines 34-43, AR, Vol. II, p. 61.
[35] *Ibid* p. 54 lines 9-42, AR, Vol. II, p. 63.
[36] *Ibid* p. 55 lines 31-37, AR, Vol. II, p. 64.
[37] *Ibid* p. 53 lines 18-43 and p. 55 lines 24-31, AR, Vol. II, pp. 62, 54.
[38] *Ibid* p. 53 lines 36-47 – p. 54 lines 1-8, AR, Vol. II, pp. 62-63.
[39] *Ibid* p. 55 lines 12-23, AR, Vol. II, p. 64.

[31] The effects of colonialism and the Indian Residential School system injured the appellant's parents,[40] and their decade-long housing problem required the appellant to reside with his grandparents, where the offences occurred.[41] While the appellant self-reported a positive upbringing, he witnessed violence in his community during his youth,[42] and his mother reported that he mentally blocked out other trauma.[43]

[32] The appellant had an ability to maintain long-term interpersonal relationships,[44] as well as a positive work history with long-term employers.[45] The appellant fully cooperated with the authors of the pre-sentence reports,[46] during which interviews he personally assumed responsibility for the offences,[47] and acknowledged the effects these offences have on their victims generally, and expressed his regret about causing pain and trauma to both E.N. and S.R.[48] He also expressed a desire to enter treatment and rehabilitate himself.[49]

### C. The Decisions Below

*(i) Judge Smith's reasons*

[33] On February 7, 2020, the sentencing judge provided her reasons for sentence. She reviewed the position of the Crown[50] and defence[51] early on. Midway through her reasons, she rejected the parties' respective positions, particularly with respect to E.N. She stated, "I do not agree with either position",[52] signalling for the first time at the half-way point of her judgment[53] that she may exceed the position of the Crown. Ultimately, Judge Smith ruled that the appropriate sentences were six

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[40] *Ibid* p. 54 lines 24-31, p. 57 lines 37-47, p. 58 lines 1-20, AR, Vol. II, pp. 63, 66, 67.
[41] *Ibid* p. 53 lines 2-8, AR, Vol. II, p. 62.
[42] The statement of the offender's brother, Blake Nahanee, also demonstrates that the appellant's own brother had become involved in the criminal justice system, and had himself been incarcerated, as well as many of his friends: Transcript of Proceedings, 7 February 2020, p. 1 lines 42-45, AR, Vol. II, p. 99.
[43] Proceeding at Sentence, January 23, 2020, p. 57 lines 8-13, AR, Vol. II, p. 66.
[44] *Ibid* p. 56 lines 17-32, AR, Vol. II, p. 65.
[45] *Ibid* p. 55 lines 3-23 and p. 56 lines 26-32, AR, Vol. II, pp. 67-68.
[46] *Ibid* p. 64 lines 1-5, AR, Vol. II, p. 73.
[47] *Ibid* p. 58 lines 21-43, AR, Vol. II, p. 67.
[48] *Ibid* p. 58 lines 21-47 – p. 59 lines 1-15, AR, Vol. II, pp. 67-68.
[49] *Ibid* p. 54 lines 34-42, AR, Vol. II, p. 63.
[50] RFS at para 6, AR, Vol. I, Tab 1, p. 2.
[51] *Ibid* at para 7, AR, Vol. 1, Tab 1, p. 3.
[52] *Ibid* at para 52, AR, Vol. I, Tab 1, p. 12.
[53] *Ibid* at page 12 of 25, AR, Vol. I, Tab 1, p. 12.

year's jail for the offence against E.N.,[54] and four years' jail, consecutive, in respect of S.R.[55]

[34] In the result, Judge Smith concluded that a sentence of 10 years' jail was appropriate; she adjusted this to a global sentence of eight years' incarceration considering the principle of totality.[56]

*(ii) The Court of Appeal's reasons*

[35] The British Columbia Court of Appeal dismissed the appellant's appeal from sentence, holding that the sentencing judge did not err in failing to notify the parties of her intention to exceed the Crown's sentencing position. With respect to non-joint submissions, the Court considered itself bound by its previous decision in *R.R.B.* which held that in British Columbia no notice to the parties is required where the sentencing judge intends on exceeding the position of the Crown. The Court held that *Anthony-Cook* did not expressly overrule the reasoning in *R.R.B.*, and as a panel of three justices they were bound by this decision, remarking that the Supreme Court of Canada could address the issue.[57]

[36] The Court of Appeal also rejected the appellant's argument that "the standard of review" for departing from a sentencing range proposed by the Crown should be the same as in cases of joint submissions.[58] It held that "the decision [in *Anthony-Cook*] does not fundamentally undermine the decision of this Court in *R. v. R.R.B.*"[59]

[37] The Court of Appeal held that the sentencing judge should carefully consider submissions concerning plea bargaining, but is free to ignore them if he or she disagrees with them as it is "the judge who ultimately makes the decision as to what constitutes a fit sentence, not counsel."[60] In affirming *R.R.B.* after noting that *Anthony-Cook* does not address non-joint submission situations, the Court held that mere disagreement with the proposed sentence, and not the "public interest" test from *R v Anthony-Cook*, determines whether a departure is acceptable in plea bargaining

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[54] *Ibid* at para 84, AR, Vol. I, Tab 1, p. 19.
[55] *Ibid* at para 106, AR, Vol. I, Tab 1, p. 23.
[56] *Ibid* at para 108, AR, Vol. I, Tab 1, p. 23.
[57] BCCA RFJ at para 53, AR, Vol. 1, Tab 2, p. 42.
[58] BCCA REF at para. 42.
[59] BCCA RFJ at para 43.
[60] *R.R.B.* at para 23, quoted at BCCA RFJ at para 40.

situations where the parties are not *ad idem* on all aspects of the disposition.

## PART II – QUESTIONS IN ISSUE

[38] The issues on appeal are as follows:

A. Are the considerations set out in *Anthony-Cook* applicable to non-joint submissions where the Crown and the accused negotiate sentencing positions that reflect partial agreement or an agreed upon range?

B. Is the failure of a trial judge to alert counsel that they intend to exceed the sentencing ceiling proposed by Crown an error in principle resulting in fundamental unfairness and warranting appellate intervention?

## PART III – ARGUMENT

### A. The considerations set out in *Anthony-Cook* should apply to plea agreements that are not joint submissions.

[39] The test in *Anthony-Cook* should apply to situations where defence and Crown enter into resolution discussions that result in Crown agreeing to seek a certain sentence or range of sentence in exchange for the accused entering a guilty plea. The benefits of resolution discussions as outlined in *Anthony-Cook* apply as equally to negotiated non-joint submissions as they do to joint submissions. What is essential in order to realize the benefits as described in *Anthony-Cook* is a plea agreement. What is not essential is a joint submission.

*(i) The nature and importance of plea resolutions*

[40] Resolution discussions have been defined as:

> ...proceeding[s] whereby competent and informed counsel openly discuss the evidence in a criminal prosecution with a view to achieving a disposition which will result in the reasonable advancement of the administration of justice.[61]

[61]Zina Lu Burke Scott, An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada (2018) 81:1 *Saskatchewan Law Review* 53, 2018 CanLII Docs 372 at p. 3, referring to D.W. Perras, "Practice Note: Plea Negotiations" (1979-80) 44:1 Sask L Rev 143 at 143.

[41] When resolution discussions are "properly conducted [they] benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally."[62]

[42] Ferguson and Roberts describe three requirements for plea resolutions: 1) there must always be a plea of guilty to one or more charges; 2) the benefit offered to the accused will only be granted if the accused agrees to plead guilty; and 3) the benefit must result from express or overt negotiation.[63]

[43] The range of benefits to an accused in exchange for a guilty plea is broad.[64] Often, the benefit to the accused is a reduction in the charge or a withdrawal of charges, a reduction in the severity of sentence that Crown will propose, or an agreement to not lead certain facts at the sentencing hearing.

[44] As this Court stated in *Anthony-Cook*, resolution discussions are not only commonplace in the criminal justice system, they are essential. Properly conducted, they permit the system to function smoothly and efficiently.[65] Plea resolutions help to resolve the vast majority of criminal cases in Canada and, in doing so, contribute to a fair and efficient criminal justice system.[66]

*(ii) The role of crown and defence counsel in resolution discussions*

[45] As plea resolutions perform a sentencing function, they must accord with accepted sentencing standards.[67] A heavy onus is placed on Crown and defence counsel to conduct resolution discussions competently and ethically in order to ensure that the accused, who relies on their legal expertise, is not misled regarding what the sentencing judge might do. Among other things, the prosecution and the defence must therefore know the principles of sentencing and the ranges of sentence established by the courts of appeal.[68]

[46] As quasi-judicial officers, Crown are expected to represent the public interest in the broad

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[62] *Anthony-Cook* at para 35.
[63] Gerard A. Ferguson & Darrell W. Roberts, Plea Bargaining: Directions for Canadian Reform (1974), 52:4 Can. B. Rev. 498. 497-576 (Ferguson, "Plea Bargaining") at 509.
[64] *Ibid* at 513.
[65] *Anthony-Cook* at para 1.
[66] *Anthony-Cook* at para 2.
[67] Ferguson, Plea Bargaining at p. 526.
[68] Piccinato, Plea Bargaining at p. 8.

sense of the term and must see that justice is properly done.[69] They must execute their duty based on the principles of fairness, openness, accuracy, non-discrimination and the public interest in the effective and consistent enforcement of criminal law.[70] Crown can be expected to present a sentencing submission to the court that is in line with existing case law, considers the aggravating and mitigating facts of the case, and considers the specific circumstances of the offender. Similarly, defence counsel are expected to review a resolution proposal through a realistic lens after also considering case law precedents, the specific facts of the case, and the circumstances of their client. A proposal seemingly too good to be true, and clearly out of step with existing case authorities, should be viewed by defence counsel with skepticism; and confidence that a sentencing judge will accede to such a proposal should be lowered.

*(iii) A quid pro quo does not exist only where there is a joint submission*

[47] In *R. v. Scott*, the Newfoundland and Labrador Court of Appeal divided on the question of whether non-joint submissions could result in a *quid pro quo.* For the majority, Rowe J.A. (as he then was) gave as an example the case where an accused agrees to tell the police where drugs are hidden. However, there was no joint submission because the accused wished to argue for a sentence less than what the Crown was seeking. In his view, there was a *quid pro quo* in that scenario.[71] Justice Rowe considered that there could be "a variety of other scenarios" where the trial judge might not learn about the rationale for the arrangement between Crown and defence.[72] He concluded: "The ability of Crown and Defence counsel to pursue such arrangements is critical to maintaining a flow of cases through the courts."[73]

[48] Hoegg J.A., dissenting in part, acknowledged that there are benefits to joint submissions:

> A joint sentencing submission involves a defendant entering a guilty plea in exchange for a joint recommendation to the judge for a sentence that is lower than what would otherwise have been sought by the Crown. Such a submission relieves the Crown from the burden of proving the defendant's guilt beyond a reasonable doubt, thereby alleviating the stress and strain on witnesses and judicial and court

[69] *Ibid* at p. 6.
[70] *Ibid*.
[71] *R. v. Scott*, 2016 NLCA 16 ("*Scott*") at para 19.
[72] *Scott* at para 22.
[73] *Scott* at para 23.

> resources while giving the defendant a good chance at receiving the recommended sentence. These mutual benefits are commonly referred to as *quid pro quo*.[74]

[49] However, Hoegg J.A. concluded "there is no *quid pro quo* in different sentencing submissions."[75] With respect, this is an overly narrow view of the exchange of benefits that the parties and legal system can acquire short of a joint submission.

[50] The benefits are not the exclusive result of a joint submission. The benefits are the guilty plea before trial and the resolution of the matter. Crown still obtains the certainty of conviction. The accused still obtains some certainty as to outcome. The justice system still obtains a savings of resources and time. A vulnerable victim is still spared the trauma of testifying. All these benefits are as a result of the negotiated guilty plea itself – not a joint submission.

*(iv) The test as established in Anthony-Cook should apply to negotiated non-joint submissions*

[51] The benefits of plea resolutions as described in *Anthony-Cook* are based on the resolution of a case without a trial. Those benefits exist independently of whether or not counsel present a joint submission to the court. The efficient functioning of the justice system does not depend on the creation of a joint submission, but rather on properly conducted resolution discussions. Joint submissions are not the exclusive or natural fruit of resolution discussions: they are a subcategory of plea resolution agreements.[76] As it is the resulting negotiated resolution that is key to unlocking the benefits as described in *Anthony-Cook*, it follows that these forms of negotiated resolutions should be afforded the same deference and protection as true joint submissions.

[52] By substituting the words "joint submissions" with "plea negotiations", it is clear that the principles in *Anthony-Cook* apply equally to both situations: In addition to the many benefits that plea negotiations offer to participants in the criminal justice system, they also play a vital role in contributing to the administration of justice at large. The prospect of certainty as to worst case outcomes encourages accused persons to enter a plea of guilty. Guilty pleas save the justice system precious time, resources, and expenses. To the extent that they avoid trials, plea negotiations that lead to guilty pleas permit our justice system to function more efficiently. Without plea

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[74] *Scott* at para 45.
[75] *Scott* at para 50.
[76] *Anthony-Cook* at para 2.

negotiations, our justice system would be brought to its knees, and eventually collapse under its own weight.[77]

[53] Further, in the case of negotiated plea resolutions that do not result in joint submissions, the rationale and practical benefits outlined in *Anthony-Cook* are shared:

A. Crown and defence counsel are highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions, and are entirely capable of arriving at resolutions that are fair and consistent with the public interest;[78]

B. The Crown agrees to recommend a sentence that the accused is prepared to accept;[79]

C. Certainty for the accused as to the outcome is increased;[80]

D. Guarantee of a conviction that comes with a guilty plea makes resolution desirable to the Crown;[81]

E. The Crown's case may suffer from flaws, such as an unwilling witness, a witness of dubious worth, or evidence that is potentially inadmissible — problems that can lead to an acquittal;[82]

F. The accused may have information or testimony to offer the Crown that can prove invaluable to other investigations or prosecutions;[83]

G. The Crown may consider it best to resolve a particular case for the benefit of victims or witnesses, sparing them "the emotional cost of a trial";[84]

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[77] *Anthony-Cook* at para 40.
[78] *Anthony-Cook* at para 44, citing Martin Report, at p. 287.
[79] *Anthony-Cook* at para 36.
[80] *Anthony-Cook* at para 36.
[81] *Anthony-Cook* at para 39, citing Martin Committee Report, at pp. 285-86.
[82] *Anthony-Cook* at para 39.
[83] *Anthony-Cook* at para 39.
[84] *Anthony-Cook* at para 39.

H. Guilty pleas offer an opportunity to begin making amends;[85]

I. Victims may obtain some comfort from a guilty plea, given that it "indicates an accused's acknowledgement of responsibility and may amount to an expression of remorse";[86]

J. The stress and legal costs associated with trials are minimized,[87] and

K. Guilty pleas save the justice system precious time, resources, and expenses, which can be channeled into other matters, permitting our justice system to function more efficiently.[88]

[54] Although referring to joint submissions, the Martin Report's commentary following recommendation 58 regarding the importance and benefit of plea resolutions applies just as equally to non-joint submissions:

> The Committee recognizes that an important, sometimes the most important, factor in counsel's ability to conclude resolution agreements, thereby deriving the benefits that such agreements bring, is that of certainty. Accused persons are, in the Committee's experience, prepared to waive their right to a trial far more readily if the outcome of such a waiver is certain, than they are for the purely speculative possibility that the outcome will bear some resemblance to what counsel have agreed to….
>
> …Since certainty of outcomes facilitates resolution discussions and agreements, and since resolution agreements, as the Committee views them, are beneficial and fair, it follows, in the Committee's view, that certainty in outcomes of resolution discussions should be promoted.[89]

[55] The justice system acknowledges and encourages resolution discussions and must show some resistance to undoing a bargain.[90] Discussions between the prosecution and the defense that precede a guilty plea are a daily part of the administration of criminal justice. The importance attached to these discussions by all stakeholders is clear if we consider that the vast majority of

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[85] *Anthony-Cook* at para 36.
[86] *Anthony-Cook* at para 39.
[87] *Anthony-Cook* at para 36.
[88] *Anthony-Cook* at para 40.
[89] Martin Report at p. 328.
[90] *R* v *Closs,* 1998 CanLII 1921 (Ont. C.A.).

cases end with the withdrawal of one or more charges, consent to a guilty plea to a reduced charge, or a guilty plea on the original charges.[91] If there is no procedural protection afforded to resolution discussions that lead to negotiated guilty pleas, there is limited incentive to enter into such discussions. An effective system of plea negotiation depends on its ability to provide substantial assurance that a plea of guilty will alter the resolution in a manner that benefits the defendant.[92] The resolution process is undermined if the resulting agreement recommendation is too readily rejected by the sentencing judge.[93]

[56] As the Manitoba Court of Appeal remarked in *R v Beardy*, "[t]ypically, the Crown's position will represent the upper limit of any sentence an accused can expect to receive from the sentencing judge."[94]

[57] Indeed, a number of Canadian courts have already held that there needs to be cogent reasons for imposing a sentence in excess of that sought by the Crown. In *R v Winn*, for example, an Ontario court agreed that:

> More recently, it has been stated that a joint submission can properly be rejected only where a court is of the view that the proposed sentence is so unreasonable or contrary to the public interest that its acceptance would bring the administration of justice into disrepute: see, for example, *R. v. Kirisit* (Ont. C.A., August 9, 1993, unreported) and *R. v. Bosklopper* (Out. C.A., January 18, 1995, unreported). I accept as well the principle that a trial court should not impose a sentence which exceeds that sought by the Crown unless there is a valid and compelling reason to do so: see *R. v. Farizeh* (Ont. C.A., November 16, 1994, unreported).[95]

[58] In *R v J.K.F.*[96] the Ontario Court of Appeal allowed a sentence appeal where there was not a joint submission and the trial court exceeded the Crown's sentencing range. The court held that exceeding the Crown's submission without an adequate evidentiary foundation constituted an error in principle.[97] The court found the Crown's range of four to six months imprisonment to be

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[91] *Canada (Procureur général) c. Obadia*, 1998 CanLII 13044 (Qc. C.A.).
[92] Albert Alschuler, "The Trial Judge's Role in Plea Bargaining, Part I" (1976) 76: 7 Colum L Rev 1059 (HL) (Alschuler "Trial Judge") at 1063 (ABA, Tab 1).
[93] *R v Pashe*, 1995 CanLII 6256 (Man. C.A.) at para 11. Although the Court was dealing with joint submissions, the appellant submits that the rationale is the same in negotiated resolutions.
[94] *R v Beardy*, 2014 MBCA 23 ("*Beardy*") at para 6.
[95] *R. v Winn*, 1995 CanLII 10650 (Ont. Ct. Prov. Div.) at para 19.
[96] *R. v J.K.F.*, 2005 CanLII 5398 (Ont. C.A.) ("*J.K.F.*").
[97] *J.K.F.* at para 3.

reasonable and substituted a sentence of four months imprisonment.[98]

[59] In *R v Ehaloak,* Justice Grist sitting as a single judge on a summary conviction appeal in the Nunavut Court of Appeal held that:

> The danger associated with exceeding the ranges indicated by counsel is the impact this may have on counsel's efforts to resolve disposition of cases before the courts. Responsible counsel will, in the course of considering disposition by a guilty plea, consult on the range of sentence to be recommended and secure assurances in this regard. This is a useful exercise even if complete agreement cannot be finalized by way of a joint submission. The importance of supporting this process, targeted on disposition, has been the subject of numerous judicial comments and the process is one particularly valuable to the Northern Courts.[99]

[60] The "high threshold" protection that is given to joint submissions "is intended to foster confidence in an accused, who has given up his right to a trial, that the joint submission he obtained in return for a plea of guilty will be respected by the sentencing judge."[100] This fostering of confidence should extend to an accused who has given up his right to a trial in exchange for a sentence he is prepared to accept. What the accused gives up is of significant magnitude: his right to a trial. Whether the accused receives in exchange a less severe sentencing proposal from Crown or the offer of a joint submission matters not. What matters is that he has considered the Crown's sentence proposal and is agreeable to entering a guilty plea in exchange for it.

[61] As per this Court in *Anthony-Cook*, if, for example, a judge is presented with a joint submission for 12 months jail with respect to an offence, a judge should not depart from that joint submission unless the sentence would be contrary to the public interest. Is the situation so fundamentally altered, and consideration for the efforts of counsel to be disregarded, where defence and Crown counsel have detailed and extensive resolution discussions that result in the Crown seeking a sentence of 12 months jail and defence counsel seeking a sentence of eight months jail? To answer "yes" would ignore the benefits that negotiated guilty pleas have in the criminal justice system.

[62] Crown and defence have cooperated in fostering an atmosphere where the parties are

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[98] *J.K.F.* at para 4.
[99] *R v Ehaloak*, 2017 NUCA 4 at para 33.
[100] *R v Cerasuolo*, 2001 CanLII 24172 (Ont. C.A.) ("*Cerosuolo*") at para 8.

encouraged to discuss the issues in a criminal trial with a view to shortening the trial process. This includes bringing issues to a final resolution through plea bargaining. This laudable initiative cannot succeed unless the accused has some assurance that the trial judge will in most instances honour agreements entered into by the Crown.[101]

[63] For an accused, the most important aspect of plea discussions is some certainty of outcome. If that certainty cannot be provided, then the incentive to reach a plea resolution short of a joint submission is significantly reduced with the result that the number of trials will increase.

*(v) Maintaining the independence of the judiciary*

[64] The ability to maintain both judicial independence and effective plea resolutions will be promoted if the *Anthony-Cook* test is extended to resolution proposals. It will allow Crown and defence counsel to enter into resolution discussions with the confidence that any resolution reached will be given deference by the sentencing judge. However, it will also ensure that the sentencing judge has discretion to exceed the Crown's proposed sentence if not doing so would be contrary to the public interest.

[65] The proposal advanced here will not result in the imposition of unacceptably low sentences. Be it a joint submission or a negotiated agreement as to sentencing range, the judge will always retain discretion to reject counsel's proposal if it is contrary to the public interest. That is why the public interest test in *Anthony-Cook* works: effectively balancing the importance of respecting the resolution efforts of counsel, but at the same time affirming the judiciary's role in supervising the justice system.[102]

*(vi) Application of the public interest test to the case at bar*

[66] The appellant submits that if the trial judge had applied the *Anthony-Cook* principles to the case at bar, she would not have exceeded the Crown's sentencing range (four to six years' jail) as such a sentence would not be contrary to the public interest.

[67] In presenting the positions of the Crown and defence, counsel referred to all but one of the

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[101] *Cerosuolo* at para 9.
[102] *R v Kritaqliluk*, 2021 NUCA 4 at para 21.

*Anthony-Cook* considerations.[103] Resolution discussions occurred between defence counsel and two experienced Crown prosecutors and their seven-page proposal clearly demonstrates they were "well placed to arrive at a [resolution] that reflects the interests of both the public and the accused".[104] When the appellant entered his guilty plea as against E.N., the sentencing judge was advised again that the plea was a result of extensive resolution discussions.[105] During the guilty plea and report-preparation process, the appellant commenced his attempt to make amends by expressing his remorse for his actions, and a desire to be rehabilitated.[106] This provided at least some comfort to E.N., who despite being traumatized, "indicated very clearly to Crown that she hopes Mr. Nahanee gets the help that he needs".[107] Two complainants were spared the ordeal of testifying, which "prevented any further trauma to the victims that may have occurred through the court process."[108] Finally, sexual assault offences involving young witnesses are invariably amongst the more time-consuming, resource-heavy, and stressful trials to run, given the need for testimonial aids, support persons, and specific technologically-equipped rooms. The resolution of this matter conserved court time, judicial resources, and public expense.

[68] The appellant's decision to plead guilty involved a clear *quid pro quo*: in exchange for a guilty plea entered before trial with respect to E.N. the Crown would seek a significantly lower global jail sentence with respect to both S.R. and E.N.: 4-6 years jail globally if he pled prior to trial and 7-9 years jail globally if found guilty after a trial.[109] The Crown also indicated that it would seek a concurrent sentence if the appellant pled guilty prior to trial and would seek consecutive sentences if found guilty after trial.[110] In addition, when the appellant entered his guilty plea as against E.N., he had been provided with a copy of the fulsome resolution proposal authored by Crown.

[69] The appellant submits that as the trial judge was troubled as to the range proposed by

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[103] The accused may have information or testimony to offer the Crown that can prove invaluable to other investigations or prosecutions: *Anthony-Cook* at para 39.
[104] *Anthony-Cook* at para 44.
[105] Proceedings at Sentence, January 23, 2020, p. 3 lines 21-28, AR, Vol. II, p. 12.
[106] *Ibid* p. 58 lines 44-47 – p. 59 lines 1-15, AR, Vol. II, pp. 67-68; *Anthony-Cook* at paras 36 and 39.
[107] Proceedings at Sentence, January 23, 2020, p. 17 lines 17-19, AR, Vol. II, p. 26; *Anthony-Cook* at paras 36 and 39.
[108] Proceedings at Sentence, January 23, 2020, p. 23 lines 2-6, AR, Vol. II, p. 32.
[109] AR, Vol. I, Tab 8, pp. 66-72.
[110] *Ibid.*

counsel, she was required to follow the guidance as provided by this Court in *Anthony-Cook* and ask whether the upper end of the range (six years' jail) was so unhinged from the circumstances of the offence and the offender that its acceptance would lead a reasonable and informed person, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.[111]

[70] The range of sentence for sexual assault varies considerably. This Court has confirmed that sentencing courts must impose sentences that are commensurate with the gravity of sexual offences against children and that reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities.[112]

[71] The facts of the offences are serious. However, they are not so egregious as to warrant a custodial sentence higher than the upper end of the range recommended by Crown.

[72] The appellant was a first-time offender. He was under strict bail conditions for 18 months with no suggestion of breach. He is a First Nations young man with connections to his community. He entered a guilty plea as against S.R. within two months of being charged. He entered a guilty plea as against E.N. seven weeks prior to trial. He expressed remorse and took responsibility for his offences. He was open and agreeable to counselling and treatment. He was otherwise a productive member of society.

[73] Both Crown and defence counsel provided Judge Smith with case authorities to justify their sentencing positions. The appellant's counsel conducted a review of case law endorsing sentences ranging from a two-year conditional sentence order[113] to nine-months' jail,[114] one year of custody,[115] 20 months' jail[116] after trial, two years' jail,[117] two-years-less-a-day,[118] twenty-two

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[111] *Anthony-Cook* at para 34.
[112] *R v Friesen*, 2020 SCC 9 ("*Friesen*") at para 76.
[113] Proceedings at Sentence, January 23, 2020, p. 72 lines 28-42, AR, Vol. II, p. 81.
[114] *Ibid* p. 73 lines 3-14, AR Vol. II, p. 82.
[115] *Ibid* p. 68 lines 16-29 and 30-45, and p. 72 lines 3-14, AR, Vol. II, pp. 77 and 81.
[116] *Ibid* p. 67 lines 7-15, AR, Vol. II, p. 76.
[117] *Ibid* p. 67 lines 16-46, AR, Vol. II, p. 76.
[118] *Ibid* p. 67 lines 43-46, p. 75 lines 5-17, p. 82 lines 21-47and p. 83 lines 1-5, AR, Vol. II, pp. 76, 84, 91, 92. Submissions p. 82.

months,[119] and three years' jail.[120] Crown counsel included authorities endorsing sentences ranging from two years' jail[121] to three years' jail,[122] four years' jail,[123] a range of two to six years jail,[124] a global sentence of five years' jail for two sexual assaults against stepdaughters,[125] and a global sentence of six years for one count of sexual assault and one count of sexual interference.[126]

[74] Had the trial judge imposed a sentence within the range proposed by counsel the sentence would not have been demonstrably unfit. However, that is not the question asked by *Anthony-Cook*. Rather, the question is whether the sentencing proposal for this specific offender for these specific offences was so unhinged as to lead a reasonable informed person to believe that the justice system had broken down. Based on the above, the answer is "no."

**B. The failure of the trial judge to alert counsel that she intended to exceed the sentencing ceiling proposed by Crown was an error in principle resulting in fundamental unfairness warranting appellate intervention.**

[75] The appellant submits that regardless of whether the *Anthony-Cook* test applies to non-joint submissions, where a judge is inclined to exceed the Crown's range on sentence, the judge should notify counsel that she has concerns, and invite further submissions regarding those concerns, and possibly allow the accused to withdraw his or her guilty plea.[127] Fundamental fairness dictates that an opportunity be afforded to counsel to make further submissions in an attempt to address the judge's concerns before the sentence is imposed.[128]

[76] This issue has divided appellate courts across the country. This case provides this Court with an opportunity to resolve this important controversy.

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[119] *Ibid* p. 68 lines 2-15, AR, Vol. II, p. 77.
[120] *Ibid* p. 75 lines 5-47 – p. 76 lines 1-47, AR, Vol. II, pp. 84-85.
[121] *Ibid* p. 32 lines 21-29, AR, Vol. II, p. 41.
[122] *Ibid* p. 21 lines 4-45, AR, Vol. II, p. 30.
[123] *Ibid* p. 49 lines 4-9, AR, Vol. II, p. 58
[124] *Ibid* p. 21 lines 21-34, AR, Vol. II, p. 30.
[125] *Ibid* p. 49 lines 17-39, AR, Vol. II, p. 30.
[126] *Ibid* p. 47 lines 8-14, AR, Vol. II, p. 56.
[127] *Anthony-Cook*, at para 58.
[128] *Ibid*.

*(i) The divergent approaches in the appellate jurisprudence*

[77] Appellate courts across the country have reached opposing conclusions regarding the necessity of notifying counsel when a judge intends on exceeding the sentencing position of the Crown. Some courts hold that failure to alert counsel and seek further submissions on fitness of sentence is an error requiring appellate intervention; other courts hold that no error is made in those circumstances. However, all appellate courts agree that it is undoubtedly *preferable* for a sentencing judge to alert counsel before imposing a harsher sentence than is sought by the Crown.

[78] As noted above, in considering the issue in the case at bar, the British Columbia Court of Appeal deferred to its prior ruling in *R.R.B.* that while it is preferable for a judge to canvas their disagreement with the sentencing range(s) proposed by counsel, "failure to do so does not amount to an error of law or principle."[129] This remains the leading authority in British Columbia.

[79] In *R v Keough*, the Alberta Court of Appeal held, "neither exceeding the recommended range, nor failing to give counsel notice of intention to exceed the range, is, without more, reviewable error".[130] Shortly thereafter, in *R v Burback*, the Alberta Court of Appeal elaborated further that while a sentencing judge *ought* to notify counsel of their intention to sentence outside the range,

> such a failure does not mean that the sentence is automatically reversible. What, then, is the remedy? Any procedural unfairness arising from a failure to give notice can be cured on appeal by giving the parties the opportunity to make the full argument they were denied in the court below.[131]

[80] In *Gabriel c. R.*, the Quebec Court of Appeal held "a sentencing judge is not bound by the Crown's submissions, and ultimately the judge has the last and definitive word (subject, of course, to variation on appeal)."[132]

[81] Even within the British Columbia jurisprudence, however, there is discord. In *R v Spencer-Wilson*, the court stated:

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[129] *R.R.B.* at paras. 22-24.
[130] *R. v Keough*, 2012 ABCA14 at para 20.
[131] *R. v Burback*, 2012 ABCA 30 at para 15.
[132] *Gabriel c. R.*, 2015 QCCA 1391 at para 34.

> I wanted to give counsel every opportunity to explain to the court the reasons they took the sentencing positions they did. I accept that even in the absence of a joint submission, procedural fairness requires I advise counsel I was inclined to impose a sentence which was significantly higher than the range they had proposed and afforded them an opportunity to make further submissions to alleviate my concerns: *R. v. Abel*, 2011 NWTCA 4; and *R. v. Burback*, 2012 ABCA 30 (CanLII), para. 13.[133]

[82] In *Ehaloak* referred to above, Justice Grist also considered the applicability of the *Anthony-Cook* test to non-joint submissions. In finding that negotiated resolutions that did not result in joint submissions were not far different from that of a court presented with a joint submission, he concluded that the procedure for dealing with both of these sorts of presentations should be similar. Counsel should be informed the court sees qualities of the case that may prompt a more stringent range of sentence than presented by the Crown. Submissions should be requested from counsel; and, in appropriate cases, there may be cause for withdrawal of the plea.[134]

[83] In *R v Parr*, the Nunavut Court of Appeal held that a practice of failing to advise counsel that the court is contemplating a sentence well over the sentence sought by the Crown is to be highly discouraged:[135]

> While the failure of a sentencing judge to flag an intention to sentence outside the recommended range is strongly discouraged, when this does occur, the question for the appellate court is whether the sentence imposed is unfit: ***R v Ehaloak***, 2017 NUCA 4, paras 34-39. However, the accused must be given fair notice of the case he has to meet. While Mr Parr was aware of the Crown's position on sentence, the trial judge never warned him that there were other concerns at issue. The trial judge could have easily advised counsel that he thought their ranges of sentence were low. He could also have warned the parties that he was aware of cases that he thought gave a different range.[136]

[84] The Nunavut Court of Appeal again dealt with the issue in *R v Kritaqliluk* and referring to *Parr*, held that a sentencing judge has a duty to signal to counsel that they are having some difficulties with what was being proposed and a failure to do so results in inherent unfairness to

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[133] *R. v Spencer-Wilson*, 2020 BCPC 140 at para 127.
[134] *Ehaloak* at para 36.
[135] *R v Parr*, 2020 NUCA 2 at para 52.
[136] *Ibid at* para 54.

the accused.[137]

[85] In *R v Beardy*, the Manitoba Court of Appeal commented that:

> In the same way that a sentencing judge, who is thinking of "jumping" a joint submission, should inform counsel of his/her concerns and provide them with an opportunity to present further submissions or authority, so should a judge who is contemplating sentencing an accused to a sentence that is much harsher than what the Crown is recommending. It is the fair thing to do.[138]

[86] The Ontario Court of Appeal has repeatedly indicated that such a failure by the trial judge is an error resulting in fundamental unfairness and warranting appellate intervention. In *R v Hagen* the court held:

> In our view, where the trial judge intends to jump the Crown on sentence, particularly by a significant amount, as here, the judge should advise counsel and give them the opportunity to make submissions and provide further authorities, if so advised.[139]

[87] In *R v R.B.* the Ontario Court of Appeal held that:

> …[t]here is no question that the trial judge imposed a sentence that exceeded the Crown's position. **A trial judge's failure to provide the parties with an opportunity to make further submissions in such an instance is an error in principle.** Ideally, if the trial judge does impose a sentence in excess of the Crown's position, the trial judge should explain the reason for doing so. Here he did not. See *R. v. Hagen*, 2011 ONCA 749 (Ont. C.A.), at para.5; *R. v. Menary*, 2012 ONCA 706, 298 O.A.C. 108 (Ont. C.A.), at para. 3, *R. v. Grant*, 2016 ONCA 639, 351 O.A.C. 345 (Ont. C.A.), at paras. 164-167.
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> **Clearly the error in principle resulted in procedural unfairness and also had an impact on the sentence such that appellate intervention is justified.** See *R. c. Lacasse*, [2015] 3 S.C.R. 1089 (S.C.C.). Having regard to the trial judge's error in principle, this court is entitled to reassess the sentence imposed and to impose a fit sentence.[140] [Emphasis added.]

[88] Recently, in *R. v Blake-Samuels*, the Ontario Court of Appeal held that:

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[137] *Kritaqliluk* at para 16.
[138] *Beardy* at para 6.
[139] *R. v Hagen*, 2011 ONCA 749 at para 5.
[140] *R. v R.B.*, 2017 ONCA 74 at paras 19-20.

> [32] Fundamental fairness requires the parties to be permitted to make further submissions if the sentencing judge intends to exceed the sentence proposed by the Crown and clear and cogent reasons are required if the judge, having heard additional submissions, still believes it necessary to go beyond the Crown's position.
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> [33] **More than a recommendation that sentencing judges follow this procedure is required. It is not appropriate to deny procedural fairness during the sentencing process with the expectation that any error can be cured on appeal.** It is contrary to the commitment to access to justice, contrary to natural justice, and contrary to a commitment to judicial economy to permit sentencing judges to go beyond counsel submissions and force offenders to rely on the appeal process to ensure fairness. Fairness should be afforded at all steps.[141] [Emphasis added.]

[89] Even more recently, the Ontario Court of Appeal stated:

> The sentencing judge did not give the parties a chance to address a sentence seven months longer than what the Crown proposed. It is impossible to say that the sentence was not impacted by the unavailability of submissions.[142]

[90] Beyond the procedural fairness guaranteed by mandatory notice, the Ontario line of authorities promotes the efficient use of judicial resources in line with recent pronouncements of this Court:

> Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).[143]

This approach cannot be followed where an appellate court is required to sentence afresh because the trial judge failed to give notice of an intention to exceed the range proposed by the Crown.

[91] The Saskatchewan Court of Appeal has endorsed the Ontario Court of Appeal's holding in *R v Hagen*, stating,

> Nevertheless, the sentencing judge's decision to depart from the range put forward by counsel without seeking submissions from counsel, in a general sense, is fraught

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[141] *R. v Blake-Samuels*, 2021 ONCA 77 at para 32-33.
[142] *R. v Mohiadin*, 2021 ONCA 122 at para 10.
[143] *Friesen* at para 25.

> with potential problems. Sentencing judges must proceed cautiously when stepping outside the recommendations of counsel. In this regard, see *R. v Burback*, 2012 ABCA 30 at para 15, 522 AR 352, and *R. v Hagan*, 2011 ONCA 749, at para 5.[144]

[92] The Court of Appeal for the Northwest Territories has held that notice to counsel is mandatory:

> We agree with the appellant that when a sentencing judge proposes to give a sentence outside the ranges submitted by counsel she must inform the parties of her intention and give them an opportunity to respond. This is the obligation when there is a joint submission on sentence, and a similar obligation arises when the judge is considering a sentence outside the range proposed by counsel for each of the parties.[145]

[93] In *R v Jacobson* the court held that a judge can disagree with ranges proposed by counsel as long as notice is given."[146]

[94] Following a thorough review of the case law as it existed in 2016, the Newfoundland and Labrador Court of Appeal in *Scott* held that the ability of Crown and defence counsel to pursue plea negotiations is critical to maintaining a flow of cases through the courts, and such practical arrangements between defence and Crown should be facilitated and not undermined. The court concluded that to that end, the arguments of fairness and practicality merge. Requiring a judge to advise counsel if he or she is considering imposing a sentence higher than that sought by the Crown offends no principle and adds no significant burden to the task of the sentencing judge.[147]

[95] Clayton C. Ruby in his text on sentencing stresses the *Charter* dimension to the obligation to provide the defence with an opportunity to be heard where the judge is contemplating a departure from the range proposed by the Crown:

> A trial judge is entitled to impose a sentence outside the range recommended by counsel, but it is important that he gives counsel a fair warning….Section 7 of the *Charter* would seem also to impose this principle upon all sentencing hearings…[In *R* v *Keough*] [t]he Court of Appeal dismissed the appeal because although an opportunity to be heard was not afforded to counsel, which was wrong, the sentence was nonetheless within the proper range. This is a principle that governs the fitness

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[144] *R. v Burke*, 2016 SKCA 100 at para 7.
[145] *R. v Abel*, 2011 NWTCA 4 at para 23.
[146] *R v Jacobson*, 2019 NWTSC 9 at para 28.
[147] *Scott* at para 25.

> of a sentence. But it seems inappropriate when we do not know where on the proper range the sentence would have been fixed if the judge had heard effective submissions. In any other legal context, including that of a criminal trial, failure to afford the parties an opportunity to be heard fully calls for a reversal and a retrial or, in this case, a fresh re-sentencing. A judge who does not accept Crown submissions is obliged to permit counsel to respond by advising them that he is considering a sentence outside the range suggested… this is a matter of the right to be heard and the *audi alteram partem* principle which is enshrined in Section 7 of the charter and must therefore, if breached, result in a remedy. The obvious remedy is a re-hearing.[148]

[96] In the United States, Rule 11 of the *Federal Rules of Criminal Procedure* govern plea agreements between the accused and the prosecutor.[149] Pursuant to Rule 11(c)(1)(C), as part of a plea agreement the prosecutor may agree to propose a certain sentence or range of sentence. Pursuant to Rule 11(d)(2)(A) an accused is permitted by right to withdraw a guilty plea if the sentencing judge advises the accused that they intend to reject the plea agreement. This statutory right to withdraw a guilty plea based only on the fact that the trial judge intends on rejecting the prosecutor's sentence underscores the importance of procedural fairness to an accused during a sentencing hearing.

*(ii) Procedural fairness should be fortified across Canada*

[97] The rationale underlying the Court of Appeal's comment in this case and other appellate courts' comments that it is undoubtedly preferable to notify counsel prior to deviating from their sentencing positions militates in favour of making this step of procedural fairness a mandatory rule.

[98] As noted in *R v G.W.C.*, endorsed in *Anthony-Cook*, even in situations where lengthy submissions are initially made, "the principle of *audi alteram partem* should be followed where concerns remain with the sentencing judge."[150]

[99] Beyond ensuring fairness of the hearing, notice increases efficiency within the criminal justice system. The Ontario Court of Appeal has made it clear that it is an error in principle to fail

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[148] Clayton C. Ruby, *Sentencing*, 10th ed. (LexisNexis, 2017), at 3.92 (ABA, Tab 3).
[149] *United States Federal Rules of Criminal Procedure*.
[150] *R v G.W.C.*, 2000 ABCA 333 at para 26; *Anthony-Cook* at para 58.

to alert counsel that the court is intending on exceeding the Crown's range. Appellate intervention on sentence is warranted if the sentencing judge made an error in principle and that error affected the sentence.[151] It is impossible to say that a sentence was not impacted by the unavailability of submissions. A finding on appeal that a sentence was fit despite there having been no opportunity for submissions is inappropriate when the panel cannot know where on the proper range the sentence would have been fixed if the sentencing judge had heard effective submissions.[152] As such, appellate intervention is warranted and a new sentencing takes place afresh with no deference to the sentencing judge's sentence.[153] The sentencing hearing is essentially duplicated.

[100] The fact the trial judge's sentence might have fallen within the range is thus no longer relevant and the fitness of the trial sentence is no longer a consideration.[154] The appeal court reviews the facts at sentence, the position of counsel as to a fit and proper sentence, and imposes their own sentence without deference to the sentencing judge.

[101] The foregoing inefficiencies may be contrasted with the simplicity and effectiveness of the solution: requiring a sentencing judge to notify the parties and hear submissions if concerns with the parties' sentencing positions persist. Advising counsel of the court's reservations does not complicate the sentencing judge's task and requires at most a recess or adjournment to consider the initial hearing, invite further submissions, and/or receive them. It adds no significant burden to the task of the sentencing judge,[155] reduces the likelihood of related appeals, increases access to justice, and eases the strain on our overworked criminal justice system.[156] At present, an offender in British Columbia is not afforded this fundamental and procedural fairness.

*(iii) Application to the case at bar*

[102] Particularly compelling in this case is the extent of the resolution discussions engaged in by counsel. Judge Smith was notified of those efforts. By failing to give notice to counsel of her intention to exceed the Crown's sentence, Judge Smith denied the appellant his right to procedural

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[151] *B(R)* at para 20.
[152] *Blake-Samuels* at para 38; *Mohiadin* at para 10.
[153] *B(R)* at para 20**;** *Blake-Samuels* at para 39**;** *Mohiadin* at para 11.
[154] *Blake-Samuels* at para 39**;** *Mohiadin* at para 11.
[155] *Scott* at para 25.
[156] *Blake-Samuels* at para 33.

fairness. It is impossible to determine where on the spectrum her sentence would have landed if she had given counsel notice of her intention to exceed the Crown and had heard effective submissions in response. If this Court does not allow the appeal on the basis that the range of sentence proposed by the Crown was not contrary to the public interest test set out in *Anthony-Cook*, it should allow the appeal on the basis that the appellant was denied procedural fairness and a new sentencing hearing should take place afresh.

## PART IV – SUBMISSIONS AS TO COSTS

[103] The appellant does not seek costs and asks that no costs be awarded against him.

## PART V – NATURE OF THE ORDER SOUGHT

[104] The appellant seeks the following order:

A. That his appeal be allowed and that this Honourable Court impose a sentence consistent with Crown and defence counsel's sentencing recommendations.

B. In the alternative, that his appeal be allowed and the matter be referred back to the British Columbia Court of Appeal for a full and fresh sentencing hearing in accordance with the reasons for judgment of this Court.

## PART VI – SUBMISSIONS ON IMPACT OF PUBLICATION BAN

[105] There is a publication ban prohibiting the publication of any information that would identify the witnesses S.R. and E.N. It is not anticipated that this publication ban will have an impact on the Court's reasons.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,** this 22nd day of October, 2021 at the City of North Vancouver, British Columbia.

Hollis Lucky

**Hollis A. Lucky**
Counsel for the Appellant
Kerry Alexander Nahanee

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