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)

-and-

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PART I – STATEMENT OF FACTS

A. Overview

1. This court decided in *Anthony-Cook* that a sentencing judge must accept a joint submission unless the proposed sentence would be contrary to the public interest. The appellant says that if a sentencing judge disagrees with the Crown's position on a contested sentencing, he must treat it as a joint submission. The respondent disagrees.

2. This court has long recognized that most criminal cases end in a guilty plea and that sentencing is usually the only significant decision the criminal justice system has to make. The judge should make it, not the Crown. If the public interest test is held to be of general application, the exigencies of resolution will change and the responsibility to determine a fit sentence will shift towards the Crown. This profound alteration to sentencing would be contrary to Parliament's explicit assignment of that role to the court.

3. The "stringent" public interest test presents an "undeniably high threshold" of deference to a specific sentence that is jointly proposed by the parties. It does so both to create the certainty of outcome the parties want so they do not prefer to risk a contested sentencing, and to draw the judge's attention away from what the judge thinks would be a fit sentence and toward the "unique considerations that apply when assessing the acceptability of a joint submission".[1]

4. This test should not apply merely because an accused enters a guilty plea informed by knowledge of the Crown's sentencing position and a contested sentencing follows, as happened here and which does not engage considerations "unique" to joint submissions or obtain the same benefits to the same degree for the criminal justice system and the parties. It is illogical to apply a test whose rationale contrasts joint submissions and contested sentencings to both. It is also unnecessary and would be counterproductive to apply the public interest test to support resolution generally, leading to fewer joint submissions and less agreement to preserve space for judicial discretion.

[1] *R. v. Anthony-Cook*, 2016 SCC 43, paras. 31, 34, 41, 48.

5. The Crown provides a principled sentencing position in contemplation of a mitigating guilty plea in virtually every case and doing so does not create a meaningful *quid pro quo*. Where negotiation results in the Crown taking a more lenient sentencing position, reserving the public interest test for joint submissions encourages the parties to reach full agreement while allowing them to negotiate for a non-binding but still valuable sentencing recommendation by the opposing party.

6. Sentencing judges should be required to advise the parties and invite further submissions before exceeding the Crown's recommendation or undercutting the defence. It is the fairest and ultimately the most efficient thing to do, ensuring that all relevant information the parties wish to provide is before the sentencing judge.

7. If the judge fails to invite further submissions, appellate intervention is justified if the failure had an impact on the sentence, which will not always be the case. Here the court of appeal determined based on fresh evidence that nothing substantively new would have been put before the judge; the parties had provided the relevant information advanced as fresh evidence, including that they had discussed the case and that the Crown had communicated its sentencing position on a guilty plea. In a case unlike this one, where relevant new information would have been provided, the appellate court may still be able to determine that it would not have impacted the sentence, as contemplated by the *Lacasse* standard of review.[2]

8. The sentencing judge in this case exercised her discretion to impose a fully justified sentence which anticipated this court's decision in *R. v. Friesen* less than two months later, in which this court expressed its determination to ensure that courts impose sentences that accord with a modern understanding of the gravity of sexual offences against children as exploitative violent crimes that profoundly harm victims, families and communities.[3]

9. The appellant did not allow his nieces to enjoy a "childhood free of sexual violence".[4] He took advantage of his position of trust and exploited them while they were vulnerable and in a place that was supposed to be safe for them. E.N. moved in with her grandparents at age 13 because

[2] *R. v. Lacasse*, 2015 SCC 64, para. 44.
[3] *R. v. Friesen*, 2020 SCC 9, paras. 107, 114.
[4] *Friesen* para. 1.

her mother was unable to care for her, and the appellant sexually assaulted her so many times over the next five years that she lost count.[5] When 15-year-old S.R. came to stay for a night, she woke up to find the appellant brazenly assaulting her while her three young cousins slept nearby.[6] The assaults against both complainants included sexual intercourse without a condom. The offences had a significant impact on the victims and their family. The eight-year sentence was imposed for good reason.

B. Factual background

(i) The offence against E.N.

10. E.N. moved in with her grandparents when she was 13 because her mother was struggling with addiction issues. Her uncle, the appellant, then 19, lived there too. Over the next five years, on many occasions, he visited E.N.'s bedroom at night to sexually assault her, including by digital penetration and intercourse without a condom. He did not stop until she graduated from high school and moved out. E.N. had nowhere else to go and did not disclose the abuse, despite its physical and emotional toll, for fear that it would tear her family apart, until after she learned the appellant had also assaulted S.R. She was right: the appellant's conduct significantly impacted familial relations for E.N.[7]

11. The appellant also admitted a sexual assault on E.N. that fell outside the timeframe of the count to which he pleaded guilty. When she was 21, she came to visit her grandparents. She awoke to find the appellant kneeling on the ground beside her. He put his hands under her shorts and tried to remove her underwear. She kicked him away.[8]

(ii) The offence against S.R.

12. Five days after the uncharged assault on E.N., the appellant sexually assaulted his other niece, S.R. She was 15. She was staying with her grandparents for the night because she had been out drinking with her friends and her mother thought it would be safer for her to stay there rather than go home by public transit. Asleep in the living room with three young cousins nearby, she

[5] Reasons for Sentence, Appellant's Record, Volume I, Tab 1 ("RFS"), paras. 9-11.
[6] RFS para. 91.
[7] RFS paras. 9-13, 23.
[8] RFS para. 11.

awoke to find the appellant, now 27, pushing his fingers inside her vagina. He then had unprotected sexual intercourse with her. The assault had immediate and long-term physical and emotional effects on S.R. and effects on her relationship with her family and community. She suffered flashbacks and night terrors and thought about suicide. She feared for the other children living in her grandmother's home.[9] The appellant admitted at sentencing that S.R. "had told her grandmother about past assaults by her uncle" but had not been believed.[10] The Court of Appeal held that this amounted to an admission that there had been prior uncharged assaults that S.R. had reported to her grandmother, who had not believed her.[11]

C. The guilty pleas and the Crown's sentencing position letter

13. On August 24, 2018, the appellant was charged with one count of sexually assaulting S.R. and one count of touching her for a sexual purpose.[12] On December 6, 2018, he was charged with two counts of sexually assaulting E.N. and one count of touching her for a sexual purpose.[13]

14. On January 30, 2019, the appellant entered an early guilty plea to sexually assaulting S.R.[14] There is nothing in the record to indicate that this guilty plea was the result of any *quid pro quo* between Crown and defence. Strongly inculpatory DNA evidence had been obtained.[15]

15. Some nine months later, on November 21, 2019, the Crown sent a letter to defence counsel setting out the Crown's sentencing position would be in two different scenarios. If the offence against E.N. proceeded to trial, the Crown would seek 3-4 years' imprisonment for the offence against S.R., given the early guilty plea, and 4-5 years for the offence against E.N., to be served consecutively. If the appellant pleaded guilty to the offence against E.N., the Crown would seek 4-6 years in relation to each complainant, to be served concurrently.

16. The letter set out a "detailed analysis of the Crown's reasoning", making clear that the Crown's position was based on a consideration of the circumstances of the offences, the

[9] RFS paras. 14, 23; Appellant's Record, Volume II, p. 17.10-18; p. 19.2 – p. 20.31.
[10] BCCA Reasons paras. 10, 66ff.
[11] BCCA Reasons paras. 66-68.
[12] Appellant's Record, Volume I, Tab 6, p. 64.
[13] Appellant's Record, Volume I, Tab 7, p. 65.
[14] RFS para. 2.
[15] RFS para. 14(v).

aggravating and mitigating factors including the guilty plea—noting that a guilty plea is "always considered a mitigating factor"—*Gladue* considerations, sentencing principles including the principle of totality, and relevant case law. It also made clear that the Crown was not proposing a joint submission and made no reference to any *quid pro quo*. [16]

17. On December 10, 2019, about seven weeks before the scheduled trial, the appellant pleaded guilty to sexually assaulting E.N.[17] Defence counsel told the court that there had been "extensive resolution discussions" with the Crown, including a "thorough statement of facts" and the "Crown's sentencing decision". The judge confirmed that counsel had reviewed s. 606(1.1) of the *Criminal Code;* counsel said he had and had also received written instructions incorporating the "606 requirement". The judge went on to confirm with the appellant herself that he understood she was not bound by counsel's positions: "it's the sentencing judge who has to make the ultimate decision and the judge isn't bound by what the lawyers say".[18]

D. The sentencing hearing

18. The sentencing hearing took place on January 23, 2020. The Crown's position was that a three to five year sentence was appropriate for each offence individually, but that taking the totality principle into account, a global sentence of 4-6 years' imprisonment should be imposed, consistently with the sentencing position communicated in its letter.[19] The Crown recognized that the guilty pleas were highly mitigating, but emphasized the aggravating factors, which included the abuse of trust, the victims' young ages and vulnerability, the age difference between the appellant and S.R., the fact that the assaults included unprotected intercourse, the number of incidents, the fact that the appellant tried to blame S.R. when questioned by the police, that S.R. suffered physical injuries, and the profound impact of the offences on the victims including familial alienation.[20]

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[16] Appellant's Record, Volume I, Tab 8, pp. 66-72.
[17] RFS para. 3.
[18] Reasons for Judgment of the British Columbia Court of Appeal, Appellant's Record, Volume 1, Tab 2 ("BCCA Reasons"), paras. 2-3; Transcript of Proceedings (Plea), Appellant's Record, Volume II, p. 3-4.
[19] RFS para. 6; BCCA Reasons para. 11.
[20] BCCA Reasons para. 12.

19. Defence counsel emphasized the mitigating effect of the guilty pleas and argued that the offences were not as egregious as the offences in the cases relied on by the Crown.[21] The defence sought a global sentence of 3-3.5 years' imprisonment.[22]

20. During colloquy with defence counsel, the judge showed some signs of discomfort with the parties' recommendations. She pointed out that if the Crown range of 3 to 5 years for each offence was correct, there was a difficulty with the defence position that 3.5 years was a fit global sentence for both, because the appellant's two offences together would warrant a global sentence of six to 10 years: "I can't see why they wouldn't be consecutive, or it would—you know, I would want to hear submissions on concurrent".[23] She did not tell the parties that she was considering a sentence in excess of the top of the Crown's four to six year range.

21. Extensive materials were filed for the judge's consideration, including statements of fact, a pre-sentence report, an addendum to the pre-sentence report, a *Gladue* report, a pre-sentence psychological report, and sentencing authorities. Neither party suggested that their sentencing positions were the result of a compromise or *quid pro quo*.

E. The decisions of the courts below

(i) The sentencing decision (2020 BCPC 41)

22. The sentencing judge's decision on February 7, 2020, began with the recognition that she was not presented with a joint submission.[24] She considered the circumstances of the offences, the impact of the offences on the victims, the circumstances of the appellant, the materials filed at sentencing, the sentencing objectives and principles, the aggravating factors, and the mitigating factors, "particularly the guilty plea"[25].

23. She concluded that with respect to the offence against E.N. she did not agree with either party's position.[26] She determined that the appropriate sentence for that offence was six years. For

[21] BCCA Reasons para. 15.
[22] RFS para. 7; BCCA Reasons para. 20.
[23] Appellant's Record, Volume II, p. 73.47 – 74.22.
[24] RFS para. 5.
[25] RFS para. 84
[26] RFS para. 52.

the sexual assault of E.R. she found four years was appropriate. The sentences were to be served consecutively. Applying the principle of totality, she reduced the total sentence to 8 years.[27]

(ii) The appeal decision (2021 BCCA 13)

24. On appeal, the appellant argued that the sentencing judge erred by failing to alert the parties that she intended to impose a sentence above the range proposed by the Crown. The Court of Appeal recognized that there was merit to the argument that notice should be required, as some other courts have concluded. But its own precedent in *R.R.B.* held that while it is preferable for the judge to advise counsel of an intention to impose a sentence outside the proposed range, it is not on its own an error of law or principle to fail to do so—though it may lead to error, such as failing to consider a material fact or principle. The court considered itself bound to follow its own precedent.[28]

25. Although, in its view, the sentencing judge had not erred, the court nevertheless considered the impact of her failure to alert counsel of her intention to exceed the Crown's sentencing recommendation and invite further submissions. The court concluded that it had no impact on the sentence. The sentencing judge had all of the relevant information, including the fact that the appellant had relied upon the Crown's sentencing position in entering his guilty plea. The appellant's fresh evidence spoke only to information that was already before the judge.[29]

PART II – RESPONDENT'S POSITION ON QUESTIONS IN ISSUE

26. The public interest test for departing from a joint submission should not apply to exceeding the Crown's sentencing recommendation. Absent a joint submission, sentencing is in the broad discretion of the court and it is the judge's obligation to craft a fit sentence that is proportionate to the gravity of the offence and the offender's degree of responsibility.

27. A judge who is considering imposing a sentence above the recommendation of the Crown or below the recommendation of the defence should be required to alert the parties and hear further

[27] RFS paras. 107-108.
[28] *R. v. R.R.B.*, 2013 BCCA 224; BCCA Reasons paras. 46-54.
[29] BCCA Reasons, at paras. 55-56.

submissions. If the judge fails to do so, the focus on appeal, per *Lacasse*, should be on whether that error had an impact on the sentence imposed.[30]

PART III – STATEMENT OF ARGUMENT

I. The public interest test should be reserved for joint submissions

28. The public interest test developed in *Anthony-Cook* should be reserved for joint submissions. It should not apply whenever an accused pleads guilty with knowledge of the Crown's sentencing position but a contested sentencing follows.[31] The respondent will address differences in the quality and degree of the benefits obtained for the parties and the criminal justice system; the undesirable effects applying the public interest test more generally would have on resolution discussions; the absence of a meaningful *quid pro quo* where the Crown's principled sentencing position simply reflects the law that a guilty plea is mitigating; and the negative impact a more general application of the test would have on the role of the sentencing judge as the person responsible for crafting a fit sentence.

A. The unique benefits of a joint submission

29. The "stringent" public interest test is suitable for joint submissions because "it best reflects the many benefits that joint submissions bring to the criminal justice system and the corresponding need for a high degree of certainty in them".[32]

30. The appellant says all that is really necessary to obtain those benefits is a guilty plea before trial, so the same test should apply whenever that occurs.[33] This overlooks the "unique" considerations arising in the case of a joint submission.[34] The public interest test is intended to make joint submissions possible lest the parties, insufficiently confident that an agreement would be accepted, "choose instead to accept the risks of a trial or a contested sentencing hearing".[35] A

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[30] *Lacasse* para. 44.
[31] Appellant's Factum para. 60.
[32] *Anthony-Cook* para. 3.1
[33] Appellant's Factum paras. 50-51.
[34] *Anthony-Cook* para. 31.
[35] *Anthony-Cook* para. 41.

joint submission is worth promoting over a contested sentencing because the latter does not offer the same unique combination of benefits to the parties or to the criminal justice system.

31. First, the "most obvious" benefit of a joint submission for the parties is lacking: a sentence that both parties are prepared to accept, likely a more lenient one than the accused could otherwise have expected after either a trial or contested sentencing, but which remains acceptable to the Crown.[36]

32. Second, the certainty which is what both parties want from a joint submission is also lacking at a contested sentencing. It benefits the Crown because there is less risk that what it sees as an appropriate resolution of the case will be undercut, and for many accused "maximizing certainty as to the outcome is crucial". On a joint submission, both parties therefore sacrifice an opportunity to seek a different sentence in exchange for certainty of an outcome they can live with. At a contested sentencing each party risks an outcome to which it is not prepared to agree.[37] The bargain for a near-certain outcome that is acceptable to both parties is absent. That is the bargain that the stringent public interest test is meant to enable and support.

33. Third, while an early guilty plea is always accompanied by a savings of resources, a guilty plea followed by a contested sentencing is a less significant boon to judicial economy than a joint submission. The process that results in a joint submission takes place almost entirely outside of court. The resources devoted to reaching advance agreement on sentence are those of the parties, not the court. When the case comes before a judge, a joint submission is usually approved without difficulty.[38] Typically neither party initiates a sentence appeal, so finality is achieved immediately. By contrast, at a contested sentencing, the parties draw more on the court's resources: the judge must hear and consider more extensive submissions and authorities; may have to receive evidence and make factual findings; reports are more often ordered, prepared, and considered; and the judge must deliberate and then give reasons. The sentence may be further contested on appeal, delaying finality and consuming more resources.

[36] *Anthony-Cook* para. 36, 38
[37] *Anthony-Cook* para. 36, 38, 41
[38] *Anthony-Cook* para. 25.

34. A guilty plea invariably brings certain benefits and the public interest test, insofar as it enables the possibility of resolution by joint submission, also tends to promote those important but generic benefits. Guilty pleas save trial resources, spare victims, and serve finality. But these are not relevant solely as systemic benefits to be borne in mind when considering the acceptability of a joint submission, and applying a public interest test is not the only way to take them into account or "unlock" them.[39] For the same reasons, and as a reflection of remorse and a step towards rehabilitation, a guilty plea is a recognized mitigating factor on sentence. The mitigating effect will be reflected in both parties' sentencing recommendations to the judge, whose failure to consider it can be an error in principle. The degree to which a guilty plea is mitigating can vary with the circumstances, but the prospect of a more lenient sentence itself generally promotes resolution. The public interest test is intended to apply in a specific context to support a specific form of resolution with a particular blend and degree of benefits to the parties and the system.[40]

B. Certainty in resolution discussions

35. The appellant argues that if a judge can exceed the Crown's sentencing proposal without applying the public interest test, the criminal justice system will collapse under the weight of unresolvable cases.[41] Yet no court has ever applied the public interest test that way, and for 40 years this court has recognized that the vast majority of cases end in a guilty plea.[42]

36. It is unnecessary, and would be counterproductive, to apply the public interest test at a contested sentencing, for three reasons.

37. First, the accused is not without "some certainty" as to his probable worst-case scenario.[43] He has a degree of certainty commensurate with the accepted risks of a contested sentencing, and which engenders enough confidence in the parties that almost all criminal cases do resolve. It is

[39] Appellant's Factum para. 51.
[40] *Anthony-Cook* para. 48.
[41] Appellant's Factum paras. 52-55.
[42] *R. v. Gardiner*, [1982] 2 S.C.R. 368, p. 414; *R. v. Wong*, 2018 SCC 25, para. 3. The same may well have been true much earlier; see for example Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution? A Review of Plea Bargaining in Canada" 2005 50 C.L.Q. 14, Respondent's Book of Authorities, Tab 2, pp. 6, 13.
[43] Appellant's Factum paras. 52, 63.

doubtful that more than 90% of cases would end in a guilty plea if experience taught counsel that each sentencing hearing was a roll of the dice.[44]

38. At a contested sentencing, the parties are on notice that the decision is in the discretion of a judge who is not legally constrained by their recommendations or by the test that would apply if they were presenting a joint submission.[45] They nevertheless generally anticipate that the sentence imposed will fall within the boundaries staked out by their positions.[46] The respective roles, responsibilities, expertise and experience of counsel and the judge act in a mutually reinforcing way to ensure that this is generally the case. Counsel are familiar with the circumstances of the offence and the offender and with the applicable sentencing principles and authorities. They have their respective duties to the accused and the public and a common duty to assist the court. Far from simply being "disregarded" by the court absent agreement, their sentencing recommendations will tend to converge and their submissions to considerably assist the judge in reaching an appropriate discretionary decision without error.[47] A sentencing judge has broad powers to obtain all the information necessary to craft a fit sentence, but in most cases acts as a relatively passive arbiter of the respective merits of competing positions developed and presented by adversarial parties.[48] The less that is in dispute—the closer the parties are—the truer this is.

39. All of this affords the accused some assurance that the Crown's position on sentence represents his probable worst-case jeopardy. Nevertheless, absent a joint submission, the judge is not relieved of the obligation to consider the circumstances and balance myriad factors, objectives, and principles, and one of the accepted risks of a contested sentencing is that this exercise will lead the judge to a different conclusion than either party.

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[44] Appellant's Factum para. 6, note 6, citing Ontario statistics.
[45] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 606(1.1), 718.3(1); Transcript of Proceedings (Plea), Appellant's Record, Volume II, p. 3-4.
[46] *R. v. Scott*, 2016 NLCA 16, paras. 17-18, 23; *R. v. Keough*, 2012 ABCA 14, paras. 19-20 (note that Keough did not involve guilty pleas but convictions after trial); *R. v. Beardy*, 2014 MBCA 23, para. 6.
[47] Appellant's Factum paras. 45-46, 61; *Anthony-Cook* para. 44.
[48] *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (Ont. C.A.), paras. 66-68.

40. Second, if sentencing judges are required to warn the parties and hear further submissions before exceeding the Crown's position, as the respondent agrees they should be, that procedural requirement will itself contribute a degree of certainty.

41. Finally, if the public interest test applies at a contested sentencing, it could adversely affect resolution discussions. The public interest test encourages the parties to reach an agreement they can be sure will be respected. If the Crown's sentencing position on a guilty plea effectively becomes a case-specific maximum, the accused may always prefer to seek a lower sentence at a contested sentencing, no matter how reasonable the Crown's position. The appellant suggests that if the Crown's sentencing proposal seems "too good to be true, and clearly out of step with existing case authorities", the accused should have less confidence that a sentencing judge will accede to it.[49] But it is the too good to be true, out of step with authority, and perhaps even demonstrably unfit proposals that the "undeniably high threshold" of the public interest test is designed to uphold, because anything less would be an insufficient guardrail for joint submissions.[50] If the parties feel the public interest test closing in around them, they may prefer to leave maximum scope for judicial discretion.

C. The existence of a *quid pro quo*

42. A *quid pro quo* is the *sine qua non* of a true joint submission. The appellant says "a *quid pro quo* does not exist only where there is a joint submission",[51] refers throughout his factum to "negotiated guilty pleas" and "negotiated resolutions", and says the courts "must show some resistance to undoing a bargain".[52] He acknowledges that such a plea resolution "must result from express or overt negotiation".[53]

43. Despite that language, the appellant's core position is that the public interest test is engaged whenever an accused's guilty plea is informed by knowledge of what the Crown's sentencing

[49] Appellant's Factum para. 46
[50] *Anthony-Cook* paras. 34, 47.
[51] Appellant's Factum p. 14.
[52] Appellant's Factum para. 55.
[53] Appellant's Factum para. 42.

position will be.[54] He articulates no principle by which one could or should distinguish cases involving a meaningful *quid pro quo* from the ordinary contested sentencings the public interest test is meant to disfavour vis-à-vis joint submissions.

44. At the outset of a prosecution the Crown routinely formulates an initial sentencing position that takes the mitigating effect of a guilty plea into account and communicates it to counsel for the accused. On the best approach to resolution this is "not an opening gambit, but a genuine and straightforward statement of the Crown's position" based on a consideration of the circumstances and the purposes and principles of sentencing, including the contemplated guilty plea and any information provided by defence counsel (for example, information about the circumstances of the accused).[55] Arguably, knowledge of the Crown's sentencing position is relevant to whether the plea is informed, though the accused must also understand that the judge is not bound by the parties' recommendations.[56] Defence counsel seek this information as a matter of course and "few accused plead guilty without having at least ascertained what sentence the Crown will seek if they do".[57] Something the Crown does in every case, and which it is arguably obligated to do, cannot be said to result from "express or overt negotiation".[58] Nor can it form the basis of a *quid pro quo* setting a given case apart from others. If knowledge of the Crown's sentencing position were enough to attract the public interest test, a test meant to reflect "unique considerations" would apply in every case.

45. It is neither necessary nor possible to support or protect every conceivable *quid pro quo* in a criminal case by applying the public interest test to the Crown's sentencing recommendation. Many different agreements are possible. Not all relate to sentencing quantum and quite a few do not require the judge's involvement or approval. For example, the Crown may agree to reduce the

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[54] Appellant's Factum para. 60. Even knowledge of the Crown's sentencing position may not be necessary, on the appellant's view, since his primary logic is based on the generic benefits of a guilty plea.

[55] Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining" (2018), 63:1 *McGill Law Journal* 45, 2018 CanLIIDocs 324, pp. 83-84; "Resolution Discussions", British Columbia Prosecution Service Crown Counsel Policy Manual.
[56] *Beardy* para. 6; *Criminal Code*, s. 606(1.1).
[57] *R. v. Jacobson*, 2019 NWTSC 9, para. 34.
[58] Appellant's Factum para. 42; Di Luca, "Expedient McJustice", p. 4.

charges; to withdraw or stay certain charges; to proceed summarily rather than by indictment; not to charge specific other people; not to allege certain facts; not to allege a criminal record; not to serve notice of greater punishment; not to initiate dangerous offender proceedings; or not to appeal the sentence imposed.[59] Applying the public interest test to the Crown's sentencing position in such cases would have nothing to do with enabling or honouring any agreement and no bargain between the Crown and the accused is undone if the judge exceeds or undercuts the parties.

46. Express or overt negotiation can result in a principled change to the Crown's initial sentencing position on a guilty plea: for example, if the accused agrees to provide testimony or other information or evidence, his cooperation may legitimately be considered in further mitigation of sentence. Reserving the public interest test for joint submissions encourages the parties to reach agreement in such cases.[60] It also allows the parties to come partway by negotiating for sentencing positions which, while understood not to provide the certainty that a joint submission would or fetter the judge's discretion, are far from worthless for reasons explained above (see paras. 35-41). The accused's position is improved when the Crown agrees to advocate for a more lenient sentence than it otherwise would.

47. This would be comparable to the situation under the *United States Federal Rules of Criminal Procedure*, to which the appellant refers in support of his position but which, as interpreted, recognize that a Rule 11(c)(1)(B) agreement that the prosecutor will recommend a certain sentence is honoured when the prosecutor recommends that sentence, even if the court exceeds the recommendation. Under the American federal system's elaborate plea-bargaining structure, plea agreements are in writing, essentially subject to contract principles, and a Rule 11(c)(1)(C) agreement, the equivalent of a joint submission, is binding on the court and accompanied by procedural protections in the event the court does not accept it.[61]

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[59] Di Luca, "Expedient McJustice", pp. 4-5; Zina Lu Burke Scott, "An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada" (2018), 81:1 *Saskatchewan Law Review* 53, 2018 CanLIIDocs 372.
[60] *Anthony-Cook* para. 47.
[61] *Federal Rules of Criminal Procedure*, Rule 11(c) and (d); *United States v. Henderson*, 565 F. 2d 1119 (1977) (United States Court of Appeals, Ninth Circuit); see also *Santobello v. New York*, 404 U.S. 257 (1971) (Supreme Court of the United States) and, generally, Shayna Sigman, "An

D. The role of the sentencing judge

48. Most criminal cases end in a guilty plea, and sentencing is usually "the only significant decision the criminal justice system is called upon to make".[62] Parliament has explicitly vested that decision in the discretion of the court, not the Crown.[63] The judge and the prosecutor play "distinct roles in the sentencing process. It is *the judge's* responsibility to impose sentence; likewise, it is *the judge's* responsibility, within the applicable legal parameters, to craft a proportionate sentence".[64] While the prosecutor makes many decisions affecting an accused's jeopardy, sentencing is "inherently a judicial function", the job of "one person alone—the sentencing judge".[65]

49. Sentencing decisions are important not only to the parties and the victims in a particular case: the "credibility of the criminal justice system in the eyes of the public defends on the fitness of sentences imposed on offenders. A sentence that is unfit, whether because it is too harsh or too lenient could cause the public to question the credibility of the system in light of its objectives". Further, "sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice".[66]

50. This court has characterized sentencing as "one of the most delicate stages of the criminal justice process in Canada".[67] It is governed by the objectives and principles of sentencing in sections 718 to 718.2 of the *Criminal Code,* codified in order to "bring greater consistency and clarity to sentencing decisions".[68] It is, however, "[m]ore of an art than a science", a "discretionary exercise for sentencing courts in balancing all relevant factors to meet the basic objectives of sentencing" and impose a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender".[69] Section 718.3(1) codifies the court's discretion to

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Analysis of Rule 11 Plea Bargain Options" (1999), 66:4 University of Chicago Law Review, pp. 1321, 1330, and generally; Di Luca, p. 8.
[62] *Gardiner* p. 414.
[63] *Criminal Code*, s. 718.3(1); *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, para. 90.
[64] *R. v. Anderson*, 2014 SCC 41, para. 25 (emphasis in original).
[65] *R. v. Nur*, 2015 SCC 15, paras. 87, 98.
[66] *Lacasse* paras. 3, 12.
[67] *Lacasse* para. 1.
[68] *R. v. Nasogaluak*, 2010 SCC 6, para. 39.
[69] *R. v. Parranto*, 2021 SCC 46, para. 9; *Criminal Code,* s. 718.1.

determine the appropriate degree and kind of punishment, reflecting the sentencing judge's role as the ultimate arbiter of sentence.[70] It confers a "broad discretion to impose the sentence [the judge] considers appropriate within the limits established by law".[71]

51. When a judge is presented with a joint submission, however, the approach to sentencing is modulated accordingly. The judge is required to pose a single question about the sentence the parties have unanimously proposed, exactly as they have proposed it: whether reasonable and informed persons would view it as a breakdown in the proper functioning of the justice system, taking into account the systemic benefits of joint submissions.[72] While some comparison with the historical sentencing range may be inevitable or implicit,[73] it would be a mistake for the judge to conflate this question with the question of what a fit sentence would be or "reverse engineer" the joint submission.[74]

52. If the appellant's approach is adopted, sentencing will become a confusing and impractical hybrid of these different approaches. On one hand, in the absence of a joint submission the judge would not be relieved of the obligation to weigh and balance all relevant considerations and determine a fit sentence in the exercise of her broad discretion; on the other hand, if the judge determines that a proportionate sentence exceeds the Crown's recommendation, the Crown's contested position must then be subjected to an analysis meant to "center the policy considerations unique to...the context of a joint submission",[75] namely the very systemic considerations and benefits that judges at conventional sentencings, according to *Anthony-Cook*, "are not asked to consider".[76] Nothing would be gained for judicial economy, clarity or consistency by this approach. Moreover, a judicial decision to the effect that a judge cannot impose a sentence equal to the gravity of the offence and the offender's blameworthiness because the prosecutor's recommendation would not be "unhinged" if it were a joint submission would not enhance the credibility of the criminal justice system.

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[70] *M. (C.A.)* para. 90; *Parranto* para. 13.
[71] *Lacasse* at para. 39.
[72] *Anthony-Cook* paras. 46, 48
[73] See for example the discussion in *R. v. C.R.H.*, 2021 BCCA 183, paras. 42ff.
[74] *Anthony-Cook* para. 48; *R. v. Cheema,* 2019 BCCA 268, para. 22.
[75] *C.R.H.* para. 82
[76] *Anthony-Cook* para. 48.

53. Because the fitness of a sentence imposed under the public interest test is not directly assessed either by the sentencing judge or the court of appeal, it has little or no value as a comparator in other cases.[77] To the extent that the exigencies of resolving cases under the public interest test without needing to reach agreement were to result in the routine imposition of sentence under that test instead of following a fitness determination, the "historical portrait" of accumulated judicial wisdom provided by sentencing ranges would become increasingly pixelated.[78] The ability of appellate courts to supervise sentencing ranges and provide quantitative guidance would diminish. Divergent tracks of sentencing precedents could emerge: those approved by the Crown and not found to bring the administration of justice into disrepute, and those found fit by a sentencing judge or appeal court.[79] Consistency and clarity in sentencing would not be improved.

54. The appellant refers to no authority that endorses the illogic of applying the public interest test as he proposes. In *J.K.F.* the sentencing judge exceeded the Crown's recommendation in the "hope" that sex offender treatment would be available, without any evidence that it would be or of the length of sentence required if it was, and this was simply an error.[80] *Beardy* endorsed a notice requirement partly because the Crown's position will "typically" represent the upper limit of what the accused can expect, but expressly recognized that the "Crown's position cannot bind the discretion of the sentencing judge".[81] Similarly, *Ehaloak* endorsed a notice requirement as supporting counsel's ability to resolve cases but recognized that it remained the sentencing judge's obligation to impose a fit sentence.[82] *Farizeh,* cited in *Winn,* was a short fact-based endorsement; *Winn* itself was a full joint submission (which the judge exceeded) and the judge's comment relied on by the appellant would appear to be *obiter*.[83]

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[77] *Anthony-Cook* para. 48; *R. v. MacLeod,* 2018 SKCA 1 para. 21; *R. v. Buffone,* 2021 ONCA 825, paras. 29-30; *R. v. Belakziz,* 2018 ABCA 370, para. 21; *R. v. Mantla,* 2020 NWTCA 6 para. 22.
[78] See *Lacasse* para. 57 and *Parranto* para. 17.
[79] *Belakziz* para. 21.
[80] *R. v. J.K.F.,* 2005 CanLII 5398 (Ont. C.A.); Appellant's Factum para. 58.
[81] *Beardy* para. 6; Appellant's Factum para. 56.
[82] *R. v. Ehaloak,* 2017 NUCA 4, paras. 33-39; Appellant's Factum para. 59.
[83] *R. v. Farizeh,* (16 November 1994) CA17409 (Ont. C.A.), Respondent's Book of Authorities, Tab 1; *R. v. Winn,* 1995 CanLII 10650 (Ont. S.C.); Appellant's Factum para. 57.

55. In *Blake-Samuels,* the appellant argued that the public interest test should apply to exceeding the range proposed by counsel; the court, noting that there was "no dispute that a sentencing judge retains discretion to exceed the Crown's position on sentencing", allowed the appeal on the procedural issue.[84] The same argument was made in *Jacobson,* a summary conviction appeal decision of the Supreme Court of the Northwest Territories. In that case the Crown communicated its sentencing position on an early guilty plea to the appellant by letter. The appellant pleaded guilty and sought a slightly lower sentence. The judge exceeded the Crown's sentencing recommendation. On appeal, the appellant argued that pleading guilty on the basis of the Crown's initial sentencing position resulted in the very type of *quid pro quo* that justified the application of the *Anthony-Cook* test. The court disagreed: if that argument prevailed, "the discretion that sentencing judges have in imposing sentence would disappear almost entirely. The responsibility to determine a fit sentence would, in effect, shift to the Crown".[85] The respondent agrees that, certainly over time, that is the likeliest result.

II. A judge should advise the parties before imposing a sentence above or below their sentencing recommendations

56. A judge considering a sentence above the Crown's recommendation or below the recommendation of the defence should be required to advise the parties and invite further submissions. It is the fairest and ultimately the most efficient approach. If the judge fails to do so, appellate intervention may be justified if the failure had an impact on the sentence—but that will not invariably be so.

A. Notice is fair, prudent and efficient

57. For three essential and related reasons, appellate courts nationwide have recognized the desirability of notifying the parties before exceeding the Crown's sentencing recommendation.

58. First, it is "the fair thing to do."[86] As discussed above (see paras. 35-41), the parties know that sentencing is in the judge's discretion, but generally anticipate that the sentence imposed will fall within the parameters of their competing positions. The accused can reasonably believe that

[84] *R. v. Blake-Samuels,* 2021 ONCA 77, para. 29
[85] *Jacobson* para. 35.
[86] *Beardy* para. 6.

the Crown's position on sentence at least approximates his worst-case scenario and may harbour a feeling of unfairness if a higher sentence is imposed without warning.[87] Indeed, both parties may be caught by surprise if the judge sentences above or below their recommendations and deserve an opportunity to make submissions informed by knowledge of the judge's concerns.

59. Advising counsel would also give the accused an opportunity to apply to withdraw his guilty plea, in rare cases where that might be appropriate despite the notice provided by the s. 606(1.1) procedure that, as the judge put it in this case, it is "the sentencing judge who has to make the ultimate decision and the judge isn't bound by what the lawyers say".[88] Whether the accused should ever be permitted to withdraw a guilty plea if the judge intends to exceed the Crown, and under what circumstances, are issues unconnected to any relief sought on this appeal or ever sought by the appellant. As in *Anthony-Cook*, the circumstances in which a plea may be withdrawn need not be settled here—and, the respondent submits, should not be. [89]

60. Second, giving notice and seeking further submissions before departing from the range put forward by counsel seeks to "ensure the sentencing judge has before him or her all relevant considerations before he or she exercises his or her discretion in imposing sentence". If the judge fails to do so "there may well be instances where facts warranting consideration by the judge are not placed before the court".[90]

61. Courts no doubt expect counsel at a contested sentencing to advance their most persuasive arguments,[91] and counsel generally try to do so without being warned that the judge may not be on board. But even at a contested sentencing, where the parties are presumably saying everything that can be said in favour of their respective positions, it remains true that they may "be directing argument primarily to the positions taken by the opposing party. Generally the points of

[87] *Keough* paras. 19-20; *R. v. Burback*, 2012 ABCA 30, paras. 13-14; *R. v. Parr*, 2020 NUCA 2, para. 54; *United States v. Henderson*, p. 1123.
[88] Reasons for Judgment of the British Columbia Court of Appeal, Appellant's Record, Volume 1, Tab 2 ("BCCA Reasons"), paras. 2-3; Transcript of Proceedings (Plea), Appellant's Record, Volume II, p. 3-4.
[89] See *Anthony-Cook* at para. 59.
[90] *Scott* paras. 15, 24 (original emphasis).
[91] See, for example, *R. v. Burke*, 2015 SKPC 173 paras. 58-69, aff'd 2016 SKCA 100.

disagreement between the parties on sentence form the basis of their submissions".[92] Informed that the judge has concerns, the parties may provide further useful information.

62. For example, if the judge is considering a sentence below the defence recommendation, the judge may learn that there was a reason the accused did not seek a lower sentence; similarly, if considering a sentence above the Crown recommendation, the Crown may provide useful information as to the reasons for its submission.[93] Either party may seek to provide further information, evidence or argument to address the judge's concerns, or provide additional authorities not previously brought to the judge's attention.[94] If a higher sentence would or could trigger a collateral consequence, that can be brought to the judge's attention. If there is a negotiated element to the parties' positions involving a *quid pro quo* that the parties have, for whatever reason, chosen not to explain, being advised that the judge is considering a higher or lower sentence provides them the opportunity to put all their cards on the table, should they so wish.[95]

63. In short, failing to notify counsel runs the risk that the judge will sentence without all the relevant information that might have been provided. It can "make it more likely that the trial judge may overlook or overemphasize the relevant factors, rely on an irrelevant factor, impose a sentence based on an error in principle, or commit some other reviewable error".[96] For these reasons, departing from the range advanced by counsel without hearing submissions first is "fraught with potential problems".[97]

64. Third, it is efficient. Requiring that judges advise counsel that they are considering a sentence outside the parameters established by the parties' recommendations is a "simple procedural step" designed to "ensure that all relevant facts are before the judge before he or she imposes sentence after a guilty plea".[98] "Providing such an opportunity is not an onerous obligation, and would naturally occur in the vast majority of cases" during colloquy between

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[92] *Burback* para. 13.
[93] *Burback* para. 14
[94] *Ehaloak* para. 37
[95] *Scott*, paras. 15-22; *Burback*, para. 17.
[96] *Keough* para. 20.
[97] *Burke (SKCA)*, para. 7.
[98] *Scott* para. 18

counsel and the judge.[99] True, some procedural complications could result: to provide a reasonable opportunity for counsel to address the judge's concerns it might be necessary to adjourn the sentencing hearing or reconvene after the hearing was thought to be complete (for example, if the judge only realizes later that a higher or lower sentence might be required). But this will not always be so—counsel may have the necessary information, evidence, authorities, or submissions at the ready; may require only a brief recess; or there may be nothing further to say. If there *is* more to be said that is relevant, it is still more efficient overall to say it to the sentencing judge after an adjournment than to the court of appeal sometime after the imposition of sentence. And knowing that they will have an opportunity to address any concerns the judge has about sentencing within the parties' range permits them to focus their preparation and submissions on the points of difference between them and in favour of their own recommendations, without feeling bound to fend off the surprise imposition of a sentence neither party had contemplated.

65. In the end, "the arguments of fairness and practicality merge" in support of giving notice to counsel before departing from the range of sentence demarcated by their positions.[100] While not all Canadian appellate courts have required such notice, all recognize the prudential wisdom of this approach. The respondent agrees that "more than a recommendation" would best promote the ends of fairness and judicial economy.[101]

B. Failing to notify the parties is not necessarily an error with an impact on sentence

66. Where a sentencing judge imposes a more stringent sentence than sought by the Crown without providing an opportunity for submissions first, a sentence appeal is the forum which gives the parties the opportunity to make the full argument they were denied in the court below.[102] Canadian appellate courts generally agree that the *impact* of failing to give notice becomes the

[99] *Burback* para. 14
[100] *Scott* para. 25.
[101] *Blake-Samuels* para. 33.
[102] *Burback* para. 15.

focus on appeal. That is true of those courts that do not make notice a requirement[103] and of those that do.[104]

67. The respondent says this approach is correct. Sometimes "the failure to warn counsel that the sentencing judge is considering exceeding the recommended range may have no practical effect".[105] In the absence of an impact on the sentence that was imposed, fairness does not require the appeal court to redo the entire exercise from scratch.

68. The contrary approach endorsed by the appellant, on which the failure to give notice would always by itself warrant sentencing afresh, would work against judicial economy and be inconsistent with the general principle that a sentencing judge's error justifies appellate intervention only where it appears from the decision that the error had an impact on the sentence.[106] It would also be inconsistent with the way other procedural deficiencies in the sentencing process are considered on appeal.

69. This court has repeatedly confirmed that appellate intervention to vary a sentence is warranted only if the sentence is demonstrably unfit or the sentencing judge made an error in principle that had an impact on the sentence.[107] This deferential stance is justified because Parliament has vested broad discretion in the sentencing judge, who enjoys significant advantages over an appellate court in what is a "profoundly subjective process".[108] These advantages include "unique qualifications of experience and judgment" derived from front-line service, familiarity with the circumstances and needs of the local community which has suffered the consequences of the offender's crime, and the ability to directly assess the evidence and the sentencing submissions of the Crown and the offender.[109] Importantly, this standard of review also promotes the efficient use of judicial resources—"a consideration that must never be overlooked"—because in the absence of an impactful error it avoids "[a]ppellate repetition of the exercise of judicial discretion

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[103] BCCA Reasons para. 54; *R.R.B.* para. 24; *R. v. G.T.A.*, 2021 BCCA 425, paras. 40-49, 89; *Keough* para. 20; *Burback* paras. 12-15; *Parr* para. 54.
[104] *Scott* paras. 30-31; *Blake-Samuels* para. 36, *Burke* paras. 3-6; *Jacobson* paras. 30-31.
[105] *Keough* para. 21.
[106] *Lacasse* para. 44; *Friesen* at para. 26.
[107] *Friesen* para. 26.
[108] *R. v. Shropshire*, [1995] 4 S.C.R. 227, para. 46; *Lacasse* para. 40.
[109] *Lacasse* paras. 39-44; *M. (C.A.)* paras. 89-91.

by the trial judge, without any reason to think that the second effort will improve upon the results of the first".[110]

70. These principles should not be abandoned where the judge's error was failing to provide an opportunity for further submissions. The practical purpose served by requiring such an opportunity to be given is to ensure that the judge does not impose sentence without considering something relevant that the parties had not otherwise brought to the court's attention: facts, evidence, authority, argument, a negotiated element of the resolution, or other information. When the complaint on appeal is that the appellant did not have an opportunity to provide information that was material to the sentencing judge's exercise of discretion, the appeal court should intervene only if satisfied that (1) there was such information that could and would have been put before the judge and (2) that the information would have had an impact on the sentence imposed. If there was nothing else to be said, or nothing that would have made a difference, by intervening the appeal court would be substituting its own decision for that of the sentencing judge for no good reason.[111]

71. The appeal court may be able to see quite clearly that neither party had anything substantively new to add to the picture. For example, in *Scott*, the appellant did not establish that there was anything that should have been brought to the sentencing judge's attention but was not because the judge failed to advise counsel that he was considering imposing a sentence greater than that sought by the Crown. "Had there been other facts that might well have been brought to the judge's attention that could have had an impact on the sentence," the *Lacasse* requirement of an error that had an impact would have been met. But there was nothing to indicate that the failure of procedural fairness had an impact on the sentence imposed, so appellate intervention was not warranted.[112] In *R.R.B.*, nothing was advanced on appeal that showed that the result would have been affected.[113] In *G.T.A.*, the appellant did not apply to adduce fresh evidence, so there was "no

[110] *Lacasse* para. 48.
[111] *Friesen* para. 25.
[112] *Scott* paras. 30-32.
[113] *R.R.B.* para. 24.

evidentiary basis to meaningfully consider" his submission.[114] In *Jacobson*, the appellant put forward only "generic things that apply to any situation when an accused pleads guilty".[115]

72. Even where there was something else to say, the standard of review as articulated in *Lacasse* contemplates that an erroneous failure to consider something relevant may nevertheless have no impact on the sentence imposed, and appellate courts are often able to determine that this was the case. For example, in *R. v. Gracie*, a sentencing judge erred by failing to consider the offender's indigenous heritage before determining that only an indeterminate sentence would adequately protect the public, but the information that the judge failed to consider had no bearing on the key issue of whether the offender could be managed in the community.[116] In *E.S.* the sentencing judge failed to consider a psychiatric report; the court of appeal reviewed it and found that the error did not impact the sentence.[117] Failure to consider something relevant may also be an error without an impact where it has no bearing on the sentencing objectives the judge was statutorily required to emphasize or decided in her discretion to prioritize or where it is merely confirmatory of other information or expectations.

73. On the other hand, where there was something that would have been brought to the judge's attention and would have made a difference to the sentence, there will have been an impactful error, and appellate intervention will be warranted. For example, in *Keough*, the Crown recommended that certain sentences be imposed to run concurrently; without permitting the parties an opportunity to make further submissions, the sentencing judge imposed consecutive sentences because the Crown "did not develop a position" justifying concurrent sentences. On appeal, the court determined that, given an opportunity, the Crown would have been able to do so, and the appellant would also have been able to make submissions in support of the Crown's position.[118] In *Ehaloak*, a dearth of authority before the judge could have been remedied.[119] *Scott* gives as an

[114] *G.T.A.* para. 49.
[115] *Jacobson* para. 32.
[116] *R. v. Gracie*, 2019 ONCA 658, paras. 42-47.
[117] *R. v. E.S.*, 2017 BCCA 354, paras. 47, 55, 63
[118] *Keough* paras. 9-10, 21.
[119] *Ehaloak* paras. 37-38.

example a *quid pro quo* that the parties might keep to themselves unless warned by the judge that a higher sentence is under consideration.[120]

74. Looking to the consequences of the procedural failing to determine whether appellate intervention is justified is consistent with the way other procedural deficiencies at a sentencing hearing are addressed on appeal. For example, s. 726 of the *Criminal Code* provides that "[b]efore determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say". This requirement serves important purposes, but where it is not followed, appellate courts intervene only where prejudice is established, and not where the substance of what the offender would have said was already before the sentencing court.[121] Even in the case of a deficiency going directly to the validity of the guilty plea itself, prejudice must be shown.[122] It is also consistent with the general approach of appellate courts to receiving new evidence, which is always to ask whether it could reasonably be expected to have affected the result.[123]

C. Judges should not be required to give specific reasons for "departing" from the parties' recommendations

75. Section 726.2 of the *Criminal Code* requires the sentencing judge to state the reasons for the sentence imposed. Reasons allow the parties to understand why a decision was made, provide public accountability by allowing justice to be seen to be done, and facilitate appellate review of the sentence.[124]

76. Some courts require that a sentencing judge considering a more stringent sentence than the Crown recommends not only advise the parties and receive further submissions, but also give specific reasons for exceeding the Crown. The Court of Appeal for Ontario has said that while "there is no dispute that a sentencing judge retains discretion to exceed the Crown's position on sentencing", a judge who still believes it necessary to do so after hearing further submissions must

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[120] *Scott* paras.18-21.
[121] *R. v. Rigler*, 2013 BCCA 117, paras. 16-22; *R. v. B.S.*, 2019 ONCA 72, para. 15; *R. v. Korte*, 2008 ABCA 286, para. 4; *R. v. Murphy*, 2019 SKCA 8; *R. v. Linklater*, 2021 MBCA 65, paras. 101-104; *R. v. Ogden*, 2004 NSCA 86, paras. 8-11; *R. v. Travers*, 2019 NSCA 83, paras. 16-18; *Gavin c. R.*, 2009 QCCA 1, paras. 17-23.
[122] *R. v. C.K.*, 2021 ONCA 826, paras. 90-94.
[123] *R. v. Lévesque*, 2000 SCC 47.
[124] *R. v. Sheppard*, 2002 SCC 26, para. 20; *R. v. R.E.M.*, 2008 SCC 51, para. 11.

give clear and cogent reasons why.[125] The Court of Appeal for Manitoba recognizes that a judge, having given fair warning and a full opportunity for counsel to respond, is entitled to impose a proportionate sentence outside the range suggested by counsel—but requires reasons that "adequately explain a principled rationale for the departure".[126]

77. The respondent disagrees that reasons justifying the sentence imposed as a "departure" from one party's recommendation should be required. At a contested sentencing, the judge must undertake the conventional sentencing exercise of considering everything that is relevant in light of the objectives and principles of sentencing and then exercising her discretion. If the reasons, read in conjunction with the rest of the record, explain the reasoned basis of the result of that exercise to the parties, the public, and the court of appeal, they are adequate to their purposes. If they demonstrate that the judge failed to consider a relevant factor—including something brought to light by counsel upon being warned that the judge was considering exceeding the Crown's recommendation—and that error had an impact on the sentence imposed, appellate intervention will be warranted. While *Anthony-Cook* requires a judge to give specific reasons for departing from a joint submission, such reasons are necessary to address the different question facing the judge in that context—why the specific sentence jointly proposed would bring the administration of justice into disrepute—and permit appellate review of the judge's answer to that question.[127]

78. That is not to say that a judge might not choose to give such reasons or use their preparation as a means of focusing on the salient issues and ensuring nothing is overlooked.[128] Nor is to suggest that such reasons would never facilitate appellate review. Where a sentencing judge has failed to hear further submissions, *and* failed to give reasons specifically explaining why a higher sentence was imposed, *and* the appellant has demonstrated material information that would have been brought to judge's attention given an opportunity, evaluating the impact of the error may be considerably more difficult. Several decisions of the Court of Appeal for Ontario are to the effect that if the record is such that it does not permit the court of appeal to gauge what the impact of the

[125] *Blake-Samuels* paras. 19-21, 30-32.
[126] *R. v. Kravchenko,* 2020 MBCA 30, leave to appeal refused 2020 CanLII 74023, para. 32.
[127] *Anthony-Cook* para. 60.
[128] *Sheppard* para. 23; *R.E.M.* para. 12.

procedural error was, an appellate court can more readily intervene.[129] In *Blake-Samuels*, the judge exceeded the Crown's position without warning the parties and without giving reasons. In the circumstances of that case, it was impossible to say that the sentence was not impacted.[130] Similarly, in *Mohiadin*, where it was impossible to conclude that the procedural lapse had not impacted the sentence, the court had to perform its own sentencing analysis to impose a fit sentence.[131] *Lacasse* at least implicitly recognized that appellate intervention where the record does not permit the appeal court to assess the impact of an error can be appropriate.[132]

III. Application

A. The public interest test should not be applied here

79. If the public interest test applies in this case, it applies in the overwhelming majority of criminal cases that end in a guilty plea where, as here, the Crown makes a principled determination of its sentencing position on a guilty plea and tells the defence what it is.

80. The respondent says the public interest test should be reserved for joint submissions, but even if it applies where there is a meaningful *quid pro quo* distinguishing a given case from an ordinary contested sentencing, that is not the case here. The Crown's position on a guilty plea was more lenient than its position post-trial because a guilty plea by law is mitigating and the Crown must act accordingly.

81. *Anthony-Cook* contemplates a *quid pro quo* that results in the Crown recommending a sentence that is more lenient than it otherwise would at a contested sentencing.[133] There is nothing in the record here to suggest that the Crown had previously provided a higher sentencing position on a guilty plea and then decided to take a more lenient position based on something the defence agreed to do or give up.

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[129] *Blake-Samuels* paras. 18, 36; *R. v. Mohiadin*, 2021 ONCA 122, paras. 9-11; *R. v. R.B.*, 2017 ONCA 74, paras. 19-20.
[130] *Blake-Samuels* paras. 36, 39.
[131] *Mohiadin* para. 9-11.
[132] *Lacasse* paras. 47, 83.
[133] *Anthony-Cook* para. 36.

B. The judge's failure to invite further submissions had no impact on the sentence imposed

82. When the judge accepted the appellant's second guilty plea, she cautioned him that it was "the sentencing judge who has to make the ultimate decision and the judge isn't bound by what the lawyers say".[134] During colloquy with defence counsel, she pointed out that the Crown's recommendation of three to five years for each offence would mean a global sentence of six to 10 years if consecutive. She invited submissions from defence as to whether the sentences should be imposed consecutively or concurrently: "I can't see why they wouldn't be consecutive, or it would—you know, I would want to hear submissions on concurrent".[135] She did not advise the parties she was considering a sentence exceeding the top of the Crown's range of four to six years globally. Under the law as presently understood in British Columbia, she was not required to do so; the error was inadvertent.

83. The judge's failure to advise the parties and invite further submissions had no impact on the sentence imposed. As the Court of Appeal found, the appellant did not establish that he would have put any substantively new information before the sentencing judge. The fresh evidence the appellant sought to introduce to establish prejudice spoke only to the fact that "the second guilty plea was entered after the appellant was assured of the position that would be taken by the Crown on sentencing". But the sentencing judge was aware that the appellant entered his second guilty plea following "extensive resolution discussions" including "a thorough statement of facts and Crown's sentencing decision".[136] The appellant had nothing new to say.

84. The fresh evidence the appellant sought to introduce was the Crown's letter stating its sentencing position.[137] In *Anthony-Cook*, this court observed that even where it is necessary to inform the judge why a proposed sentence would not bring the administration of justice into disrepute, that is not meant to consist in counsel informing the court of the substance of their resolution discussions or negotiating positions. This court cited *Tkachuk*, which held that the substance of discussions leading to an agreement is private and should not normally be disclosed

[134] Appellant's Record, Volume II, p. 4.1-15.
[135] Appellant's Record, Volume II, p. 73.47 – 74.22.
[136] BCCA Reasons paras. 55-56; Appellant's Record, Volume II, p. 3.
[137] Appellant's Record, Volume I, Tab 8.

to the court and is usually unnecessary, as it was here.[138] The respondent wishes to reiterate the point that this should not generally be the practice.

C. This court should uphold the eight-year sentence

85. If this court disagrees that the failure to invite submissions was without impact, it should nevertheless affirm the eight-year sentence.

86. The sentencing judge relied on precedents that were appropriate guidance both factually and because, like the appellant's offence against E.N. (but not S.R.), they predated a 2015 increase to the maximum sentence for sexual assault of a person under the age of 16.[139] The judge's balancing of the relevant considerations in light of these precedents fully justifies the sentence imposed; this case is not an example of the upward departure from past precedents this court would call for less than two months after the appellant was sentenced.

87. The decision in *Friesen* was intended as a "strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities."[140] Those harms are pronounced here and the sentence imposed by the judge appropriately reflects that.

88. The appellant's nieces experienced the physical[141] and psychological[142] harms this court described in *Friesen*, such as the appellant's repeated violation of their physical and sexual integrity, the risk of pregnancy to which he exposed them, and the night terrors, anxiety, and day-to-day breakdowns experienced by S.R., who told the court, "I have thought about ending my life so many times".[143]

89. The appellant breached a position of trust by abusing his nieces. The harmfulness of a breach of trust was emphasized by this court in *Friesen* and when she addressed the court in

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[138] *Anthony-Cook* para. 55; *R. v. Tkachuk*, 2001 ABCA 243, para. 34.
[139] BCCA Reasons paras. 23, 62-64.
[140] *Friesen* para. 5.
[141] *Friesen* paras. 131-133, 139.
[142] *Friesen* paras. 56-57
[143] Appellant's Record, Volume II, pp. 19-20.

tears,[144] S.R. emphasized the same thing: what "my own uncle did to me, not just some random person that I've not ever going to remember, my own uncle, a person I grew up to say I love and to think that he wouldn't hurt me, and to be the person that hurt me the worst".

90. *Friesen* placed some emphasis on impacts going beyond the physical and psychological: there are "ripple effects" of the sexual exploitation of children that harm their relationships with their families and communities, some of which effects can flow from a familial breach of trust.[145] A trust relationship may inhibit children from reporting, particularly where the perpetrator resides with the victim,[146] and that is evident here: E.N., who lived in the same home as the appellant because her mother could not take care of her, did not disclose the years of repeated abuse because she correctly feared it would tear her family apart and because she had nowhere else to go.[147] S.R. did report prior assaults to her grandmother, who did not believe her.[148] When E.N. eventually came forward after learning that the appellant had also assaulted S.R., she, too, was disbelieved by her grandmother.[149] Both experienced what this court described as the "further trauma" caused by other family members "taking the side of the perpetrator and disbelieving the victim".[150]

91. Familial alienation and division were particularly evident consequences of the appellant's offences. After E.N. came forward, her grandmother demanded she leave. She left in panic and tears and was not allowed to see her cousins anymore.[151] S.R felt she could no longer return to her grandmother's home to see the rest of her family or to her community on the reservation to see her best friend, for fear of running into her family. She told the court: "To have my own family against me is probably the worst part": "they're just so against me and they don't love me anymore and they want nothing to do with me...all I want is to be able to hug my grandma, my grandpa, my

[144] RFS para. 15.
[145] Friesen paras. 60-64.
[146] *Friesen* para. 127.
[147] RFS para. 9.
[148] BCCA Reasons para. 10.
[149] RFS para. 12; Appellant's Record, Volume II, p. 24.43 – p. 25.16
[150] *Friesen* para. 60.
[151] Appellant's Record, Volume II, p. 25.1-16.

aunties—and say I love you, and for them to say it back but they can't 'cause they're so stuck in their own worlds and don't want to believe me."[152]

92. In *Friesen* this court declared itself "determined" to ensure that sentences imposed for sexual offences against children correspond to a "contemporary understanding of the profound harm that sexual violence against children causes", which will "frequently require substantial sentences". The court did not set out binding quantitative guidance because "judges must retain the flexibility needed to do justice in individual cases," but the "overall message" was still clear: "mid-single digit penitentiary terms for sexual offences against children are normal" and "upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances".[153] The five- and three-year sentences imposed are, it is submitted, proportionate to the gravity of the offence and the appellant's degree of responsibility and should be upheld.

PART IV – SUBMISSIONS ON COSTS

93. The respondent does not seek costs and asks that no costs be awarded against it.

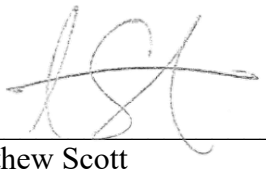
PART V – ORDER SOUGHT

94. The respondent seeks an order dismissing the appeal.

PART VI – PUBLICATION BAN

95. A publication ban under ss. 486.4(1) and (2) of the *Criminal Code* restricts the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness under the age of 18.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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December 17, 2021
Vancouver, B.C.

[152] Appellant's Record, Volume II, p. 19.2 – p. 20.32.
[153] *Friesen* paras. 107, 110, 114.

PART VII – TABLE OF AUTHORITIES