SCC File No. 39599

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

B E T W E E N :

KERRY ALEXANDER NAHANEE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. "Plead guilty today and the Crown will ask for time served." Such exploding plea offers are commonplace in Canada. The Crown offeror is limited in its bargaining position only by the resources of Her Majesty's coffers and the solemn yet amorphous duty to seek justice.[1] The offeree, usually low-income and marginalized in the Canadian society, has little power to negotiate. Most accused people feel pressure to take the deal.[2] When they do and live up to their end of the bargain, it is unfair to exceed the Crown's offered sentence recommendation without the safeguards this Court has required in *Anthony-Cook*.[3]

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

PART II – POSITION ON QUESTIONS IN ISSUE

3. In light of an accused person's disadvantaged position during plea negotiation, fairness requires that the same safeguards for joint sentence submissions contemplated in *Anthony-Cook* apply to plea agreements with open sentencing positions. The CLA agrees with both the Appellant and the Respondent that a sentencing judge should give notice of her intention to exceed the Crown's recommended sentence. The CLA submits that the Crown's position should only be exceeded when the public interest test is met. In those circumstances, accused persons should have a meaningful opportunity to withdraw the plea.

PART III – STATEMENT OF ARGUMENT

A. The Crown enjoys greater bargaining power in plea negotiations

4. This Court recognized in *Anthony-Cook* that a "power imbalance" may exist between the parties during plea negotiations, justifying an asymmetrical approach in considering whether to exceed or undercut a joint sentence submission.[4] The same imbalance affects the terms of a plea agreement when there is no joint submission on sentence. Indeed, "Crown prosecutors have

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[1] Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations During Plea Bargaining", 2018 63-1 McGill Law Journal 45, 2018 CanLIIDocs 324, at 56 ("Seeking Justice by Plea"

[2] *R. v. T.(R.)* (1992), 10 O.R. (3d) 514 (C.A.), at para. 18.

[3] *R. v. Anthony-Cook*, 2016 SCC 43.

[4] *R. v. Anthony-Cook*, 2016 SCC 43, at para. 52.

tremendous discretionary authority that they can mobilize in order to put extraordinary pressure on defendants to accept plea bargains."[5] When an accused person takes the Crown's offer to plead guilty, fairness therefore requires restraint in exceeding the Crown's sentence recommendation.

5. This section describes nine factors that guarantee an inequality of bargaining power in virtually every case. The first five factors relate to familiar aspects of the criminal procedure that place accused persons under pressure to take the Crown's offer, including the powerful impact of pre-trial detention, overcharging, and the prospect of further incarceration.[6] The final four factors relate to race, class, Indigeneity, and other areas of systemic marginalization in the Canadian society.

1) Pretrial detention

6. Pretrial detention presents a serious disadvantage in plea-bargaining. As this Court has recognized, "an accused placed on remand is often subjected to the worst aspects of our correctional system by being detained in dilapidated overcrowded cells without access to recreational or educational programs."[7] In addition to these harsh conditions and difficulties in contacting counsel, "Pre-trial detention can result in negative impacts on accused persons' employment and income, housing, health and access to medication, relationships, personal possessions, and ability to fulfill parental obligations."[8] Other circumstances, including difficult journeys from detention centres to courts, add to a sense of hopelessness.[9]

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[5] Seeking Justice by Plea, 2018 CanLIIDocs 324, at 50, 58.

[6] Joseph Di Luca, "Expedient McJustice or Principled Alternative Dispute Resolution – A Review of Plea Bargaining in Canada" (2005) 50:Issues 1 & 2 Crim LQ 14, at 38, ("Expedient McJustice or Principled Alternative Dispute Resolution"). [Book of Authorities "BOA", TAB 2]

[7] *R. v. Hall*, 2002 SCC 64, at para. 118.

[8] *R. v. Zora*, 2020 SCC 14, at para. 62.

[9] Abby Deshman and Nicole Myers, "Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention" (2014), Canadian Civil Liberties Association and Education Trust, at 12, 8, ("Set Up to Fail").

7. The link between pre-trial incarceration and guilty pleas has long been established.[10] A study of over 1,800 cases in Toronto published in 2002 found that odds of pleading guilty are 2.5 times greater for those who are detained:[11]

> While accused persons may resolve not to plead guilty to charges they feel are unfair, we found that, given enough time in custody, the likelihood is that most individuals who are remanded into custody will eventually plead guilty to something. [12]

The pressure to take the deal is especially high when the Crown's offer is one of time served, leading to a situation where "The road to freedom is a guilty plea, whereas insisting upon innocence means that incarceration continues"[13] Before ascending to the Ontario Superior Court bench, then-defence lawyer Andras Schreck estimated that guilty pleas are entered "hundreds of times a day" just to end pretrial detention.[14] Faced with such pressure, it is unrealistic to think accused persons have the power to effectively bargain over the Crown's sentencing position, or that the Crown's position will often require a judicial increase.

2) Punitive process

8. Pretrial detention is not the only difficult aspect of the criminal process for accused persons. "Prosaic procedural brutality is a universal feature of virtually every encounter with the system".[15] From the initial arrest and detention, the process punishes the innocent and guilty alike. While those detained are subject to strip searches, assaults, lockdowns, lack of programming, over-crowding, and unhygienic conditions, those who are out of custody face other sources of hardship and stress. They may need to take time off work and arrange for childcare and transportation to attend numerous set-date hearing before resolution.[16] Accused persons may also be subject to

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[10] *R. v. Hall*, 2002 SCC 64, at para. 58; Expedient McJustice or Principled Alternative Dispute Resolution, at 38 [BOA TAB 2]; Set Up to Fail, at 10.
[11] Gail Kellough & Scot Wortley, "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002) 42:1 Brit J Criminology 186, at 199, ("Remand for Plea") [BOA TAB 3].
[12] Remand for Plea, at 201 [BOA TAB 3].
[13] Expedient McJustice or Principled Alternative Dispute Resolution, at 39 [BOA TAB 2].
[14] Joan Brockman, An Offer You Can't Refuse: Pleading Guilty When Innocent" (2010) 56:Issues 1 and 2 Crim LQ 116, at 122 ("An Offer You Can't Refuse") [BOA TAB 1]; see also Set Up to Fail, at 3-4.
[15] An Offer You Can't Refuse, at 126 [BOA TAB 1].
[16] An Offer You Can't Refuse, at 127 [BOA TAB 1].

onerous bail conditions, or conditions that limit their contact with family members. All accused persons can expect to experience lengthy delays and frustrating adjournments, a process this Court has described as an "exquisite agony".[17] This process serves to convince accused persons to take the deal:

> The cost of retaining counsel, the frustration of multiple remands, and the educative effect of multiple appearances to allow the "consumer" to know exactly how the system works (by way of guilty plea of course) all contribute to fostering a guilty plea state of mind. [18]

Where the resolution process is itself punitive for one party to negotiations, any partial agreement on sentence will seldom be a "windfall" for that party.

3) Over-charging

9. Only one "side" in plea bargaining has the power to initiate proceedings – and the state can do so without risking a costs order, unlike in the civil context. This encourages the laying of dubious or unnecessarily serious charges, or at least a less rigorous charge screening practice, in order to extract more favourable plea deals.[19] A 2014 study of plea bargaining in the Provincial Court of Manitoba, for example, found that 61% of charges laid were later withdrawn or stayed by the Crown.[20] Police agencies continue to lay multiple charges for the same occurrence.[21] When over-charging artificially inflates accused persons' jeopardy, they are more likely to agree to a less favourable plea deal, including ones with unduly harsh Crown sentence positions.

4) Plea culture

10. A culture of guilty pleas has grown in the Canadian justice system out of a culture of expediency.[22] "In all the criminal courts the prosecutor's major administrative responsibility is to

[17] *R. v. Askov*, [1990] 2 S.C.R. 1199 at para 43
[18] David Ireland, Bargaining For Expedience? The Overuse of Joint Recommendations on Sentence, 2014 38-1 Manitoba Law Journal 273, 2014 CanLIIDocs 268, at 285-86 ("Bargaining For Expedience?").
[19] Bargaining For Expedience?, 2014 CanLIIDocs 268, at 290-91; Seeking Justice by Plea, 2018 CanLIIDocs 324, at 51-52; Milica Potrebic Piccinato, "Plea Bargaining", Department of Justice Canada (2004) at 4-5 ("Plea Bargaining ").
[20] Bargaining For Expedience?, 2014 CanLIIDocs 268, at 316.
[21]Remand for Plea, at 189 [BOA TAB 3].
[22] Bargaining For Expedience?, 2014 CanLIIDocs 268, at 278.

ensure that the cases before the court keep moving ... The prime administrative value is celerity, the need to dispose of a great deal of cases with the least delay."[23] Repeat players in the system, including Crown and defence counsel, all have a shared interest in disposing of cases quickly, getting along, and moving forward in a predictable fashion.[24] This culture pushes some defence lawyers towards "plea pushing".[25] Faced with low legal aid funding and heavy caseloads, these defence lawyers quickly process each client by pleading out a large volume of cases.[26]

11. Facing pressure from their own lawyers, accused persons have an even more diminished say in the terms of their plea agreements. This disempowering dynamic is facilitated by the prevalence of "going rate" plea bargains, which are reached quickly based on superficial reviews of the facts alleged in occurrence reports and what repeat players know to be the "standard price" of pleading guilty to a given offence, based on previous Crown offers.[27] The fact that little negotiation takes place in such cases highlights the Crown's superior negotiating position.

5) Prospect of incarceration

12. Although the Crown has an interest in any sentence imposed, only an accused persons has to contemplate enduring it. While the Crown considers the broader public interest and negotiates with some detachment, an accused person negotiates with years of her life. This difference in perspective creates a disadvantage in sentence bargaining – to such an extent that the Crown can induce guilty pleas by creating an effective penalty for those who choose to go to trial.[28] This penalty consists of a differential between the sentence sought after a guilty plea and that sought after a contested trial. "Crowns can use their discretion to control the magnitude of the sentencing differential, thereby calibrating the pressure to plead out."[29] For example, the Court of Appeal for

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[23] Expedient McJustice or Principled Alternative Dispute Resolution, at 17 [BOA TAB 2].
[24] Bargaining For Expedience?, 2014 CanLIIDocs 268, at 283-84, 286.
[25] Bargaining For Expedience?, 2014 CanLIIDocs 268, at 287.
[26] Angela Bressan and Kyle Coady, "Guilty pleas among Indigenous people in Canada", Department of Justice Canada (2018) at 11 ("Guilty pleas among Indigenous people in Canada"); Milica Potrebic Piccinato, "Plea Bargaining", Department of Justice Canada (2004) at 4; Chloé Leclerc, "Pleading Guilty: A Voluntary or Coerced Decision?", 34 No. 3 Can. J.L. & Soc'y 457, at 474 [BOA TAB 4].
[27] Seeking Justice by Plea, 2018 CanLIIDocs 324, at 51-52.
[28] Bargaining For Expedience?, 2014 CanLIIDocs 268, at 289.
[29] Seeking Justice by Plea, 2018 CanLIIDocs 324, at 52.

Ontario described in the following terms the "terrible dilemma" facing Anthony Hanemaayer, who falsely pleaded guilty to one of Paul Bernardo's crimes:

> He had spent eight months in jail awaiting trial and was facing the prospect of a further six years in the penitentiary if he was convicted. The estimate of six years was not unrealistic given the seriousness of the offence. The justice system held out to the appellant a powerful inducement that by pleading guilty he would not receive a penitentiary sentence.[30]

It is unfair to subsequently jump the Crown's sentencing position that induces a guilty plea without meeting a public interest test.

6) Classism

13. Poverty and low income contribute to both a disproportionate number of contacts with the criminal justice system and an unequal bargaining power at plea negotiations. Canada's legal aid programs are in a state of crisis due to underfunding.[31] As a result, many accused people who cannot afford lawyers represent themselves.[32] Because of stringent financial and other eligibility criteria, a significant number of those rejected by legal aid are below the poverty line.[33] While sometimes these individuals are assisted by duty counsel who are "often stretched to the limit", the scope of such assistance is narrow.[34] Unrepresented accused people tend to take the Crown's plea offers, in part because of an inability to understand the process or the merits of their cases.[35] Poverty and low income also increase the likelihood of pretrial detention and onerous bail conditions, which in turn increase the pressure to plead out.[36] Genuine sentence bargaining under these conditions is impossible.

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[30] *R. v. Hanemaayer*, 2008 ONCA 580, at para. 18.
[31] Jennifer Bond, "Failure to Fund: The Link between Canada's Legal Aid Crisis & Unconstitutional Delay in the Provision of State-Funded Legal Counsel" (2015), National Journal of Constitutional Law, Vol. 35, No. 1, 2015, Available at SSRN: https://ssrn.com/abstract=2821270, at 16 ("Failure to Fund").
[32] Failure to Fund: https://ssrn.com/abstract=2821270, at 16.
[33] Spyridoula Tsoukalas and Paul Roberts, "Legal Aid Eligibility and Coverage in Canada" (2002), Department of Justice Canada, at 1, 45 ("Legal Aid Eligibility and Coverage in Canada").
[34] Legal Aid Eligibility and Coverage in Canada, at 47, 79.
[35] Legal Aid Eligibility and Coverage in Canada, at 48.
[36] Remand for Plea, at 187 [BOA TAB 3]; *R. v. Zora*, 2020 SCC 14, at para. 79.

7) Racism

14. Canadian criminal justice institutions reflect the racism that exists in the Canadian society at large.[37] Black people, for example, are more likely to be over-policed, over-charged, and over-detained.[38] Controlling for legally relevant factors, Black individuals are about 1.5 times more likely to be detained before trial than others.[39] While detained, Black individuals are liable to worse treatment than those from other racial groups.[40] Moreover, the higher concentration of poverty and low income among racialized people create disproportionate challenges in retaining counsel and accessing legal aid. Racialized individuals are also more likely to experience discrimination in housing and employment, leading to greater pressure to resolve pending criminal charges that tend to exacerbate that discrimination.[41] All of these factors stemming from systemic discrimination serve to undermine the plea-bargaining position of racialized individuals.

8) Colonialism

15. Indigenous people face unique disadvantages in the plea-bargaining process because of the continuing reality of colonialism. The Court of Appeal for Ontario has taken judicial notice that Indigenous people plead guilty at higher rates than non-Indigenous people, in part because they believe they will not receive a fair trial in Canada's courts, where racist attitudes are prevalent.[42] A paper published by Canada's Department of Justice acknowledges that distrust in the justice system and language barriers lead Indigenous people to plead guilty and "to agree in court whether they agree or even understand."[43]

16. Moreover, factors that weaken all accused persons' negotiating positions, including pre-trial detention, delays, onerous bail conditions, and barriers in accessing legal aid, affect

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[37] *R. v. Le*, 2019 SCC 34, at para. 90; *R. v. Theriault*, 2021 ONCA 517, at para. 143; *R. v. Morris*, 2021 ONCA 680, at para. 1.
[38] *R. v. Morris*, 2018 ONSC 5186, rev'd on other grounds, *R. v. Morris*, 2021 ONCA 680.
[39] Remand for Plea, at 196 [BOA TAB 3].
[40] Remand for Plea, at 196 [BOA TAB 3].
[41] *R. v. Morris*, 2018 ONSC 5186, rev'd on other grounds, *R. v. Morris*, 2021 ONCA 680.
[42] *R. v. C.K.*, 2021 ONCA 826, at paras. 3, 55, 63-64; Hon. Just. Frank Iacobucci, First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci (Toronto: Ministry of the Attorney General Ontario, 2011), at para. 215.
[43] Guilty pleas among Indigenous people in Canada, at 5.

Indigenous people disproportionately.[44] For example, Indigenous people in remote and northern communities face added pressures due to delays caused by fewer court sittings and transportation issues.[45] As Justice Iacobucci has reported in an independent review, "the problem of inadequate legal representation of First Nations individuals, particularly in the north, [is] resulting in virtually automatic guilty pleas".[46] In these circumstances, accused persons experience plea offers essentially as contracts of adhesion, in the sense that they have no power to negotiate the terms.[47]

9) Other axes of marginalization

17. Many accused persons are affected by additional vulnerabilities, including mental health or addiction issues, physical or mental disabilities, homelessness, language barriers or illiteracy. These factors create additional pressures during plea negotiations.[48] On the one hand, this group of accused persons feel the punitive aspects of the criminal process most acutely. They are disproportionately affected by denial of bail or unreasonable bail conditions, leading to "records with breach convictions in the double digits."[49] On the other hand, any cognitive or communicative challenges would limit the ability of some accused individuals to understand their options or advocate for a better outcome. These factors further solidify the Crown's dominance in plea negotiations.

B. Fairness requires procedural protections before exceeding the Crown's position

18. It is usually unfair for a sentencing judge to exceed a bargained-for Crown position on sentence. Joint submissions are only one possible form of sentence bargains. In exchange for a guilty plea, the Crown may also offer to make a particular sentence submission without requiring the offeree to adopt the same submission.[50] These offers for an "open" sentence submission encompass quick going rate bargains and those where the accused person is too powerless to

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[44] Guilty pleas among Indigenous people in Canada at 5; Remand for Plea, at 187 [BOA TAB 3].
[45] Guilty pleas among Indigenous people in Canada, at 10-11.
[46] Hon. Just. Frank Iacobucci, First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci (Toronto: Ministry of the Attorney General Ontario, 2011), at para. 372.
[47] *Uber Technologies Inc. v. Heller*, 2020 SCC 16.
[48] Guilty pleas among Indigenous people in Canada, at 6.
[49] *R. v. Zora*, 2020 SCC 14, at paras. 57, 79.
[50] Bargaining For Expedience?, 2014 CanLIIDocs 268, at 277-78.

negotiate with the Crown for anything below its initial offer. Given the Crown's superior bargaining position, its offered sentence submission is unlikely to be too lenient or require upward judicial re-calibration. Practicing restraint in exceeding the Crown's sentence position following a plea would ensure that such re-calibration is rare and reserved for when it is truly needed. It would also enhance fairness of the process in three ways.

19. First, taking the Crown's offer as the upper limit on sentence helps accused persons enter pleas with a clearer understanding of the consequences. The main consequence of concern to an accused person is the sentence that follows the plea – and an answer to the question, "What am I looking at?"[51] The assurance that courts generally honour the deals reached by the Crown would furnish a relatively definite answer to this question. As the Manitoba Court of Appeal has held,

> For a guilty plea to be valid, an accused must understand the nature and consequences of the plea prior to entering it... This includes an understanding of the Crown's position on sentence. Typically, the Crown's position will represent the upper limit of any sentence an accused can expect to receive from the sentencing judge. While the Crown's position cannot bind the discretion of the sentencing judge, judges should be slow to go over the recommended upper limit of the sentence or "jump" the sentence without first giving counsel an opportunity to address any concerns.[52]

Adopting the public interest test would serve to inform accused persons that, unless the Crown position is so exceptionally lenient that it would signify a "breakdown in the proper functioning of the justice system," it reflects the upper limit of the sentence they can expect to receive on a plea. Adopting this test would render guilty pleas more informed and, as a result, fairer. On the other hand, when the public interest test is met, accused persons should be allowed to withdraw their plea (which has been rendered uninformed) before imposing a harsher sentence.

20. Second, exceeding the Crown's recommended sentence on a plea would risk giving the Crown a windfall. Because of its superior bargaining position, the Crown is unlikely to offer an inappropriately low sentencing submission. Rather, any superficially lenient Crown offer can be assumed to incorporate factors, such as weaknesses in the Crown's case, that may be difficult for an accused person to identify or effectively demonstrate before a sentencing judge. A relatively

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[51] Expedient McJustice or Principled Alternative Dispute Resolution, at 17 [BOA TAB 2].
[52] *R. v. Beardy*, 2014 MBCA 23, at para. 6 (emphasis added).

lenient Crown offer may also be designed to encourage a guilty plea. Increasing the anticipated sentence only after the plea has already been entered can therefore lead to an unfair bait-and-switch. Adopting the public interest test and providing a meaningful opportunity to withdraw the plea would prevent this unfairness.

21. Third, exempting open sentencing positions from the protections contemplated in *Anthony-Cook* would deepen a power imbalance between the parties. The only way for the defence to ensure the sentence would not exceed the Crown's submissions would be to turn it into a joint submission protected under *Anthony-Cook*. This would unfairly pressure accused persons, already disadvantaged in plea negotiations, to agree not only to plead guilty but also to adopt the Crown's position on sentence – a complete capitulation. Although this process may turn out to be "efficient" in reducing the number of contested hearings, it would be too tilted in the Crown's favour and effectively remove the judiciary from sentencing. Instead, the public interest test should be applied before exceeding the Crown's open sentencing position and accused persons should have an opportunity to withdraw any guilty plea when the test is met.

PART IV – SUBMISSIONS ON COSTS

22. The CLA does not seek costs and asks that none be awarded against it.

PART V – ORDER REQUESTED

23. The CLA takes no position on the disposition of this appeal as it pertains to the facts of the cases before the Court.

24. ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27 day of January 2022.

BOTTOMLEY BARRISTERS
R. Craig Bottomley

SAVARD FOY LLP
Arash Ghiassi

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Criminal Lawyers' Association (Ontario)

PART VI – TABLE OF AUTHORITIES

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