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

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA, CRIMINAL DEFENCE LAWYERS' ASSOCIATION OF MANITOBA, SASKATCHEWAN TRIAL LAWYERS ASSOCIATION INC. AND CANADIAN COUNCIL OF CRIMINAL DEFENCE LAWYERS/ CONSEIL CANADIEN DES AVOCATS DE LA DÉFENCE (JOINTLY), TRIAL LAWYERS' ASSOCIATION OF BRITISH COLUMBIA, DIRECTOR OF PUBLIC PROSECUTIONS, CRIMINAL LAWYERS' ASSOCIATION ONTARIO, INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

INTERVENERS

FACTUM OF THE JOINT INTERVENERS,
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PART I: Overview and Statement of the Facts

A. Overview

1. It is fundamental that an accused be entitled to a fair hearing before being sentenced for a crime. Public confidence in an open, reliable, and predictable sentencing process demands no less. The joint Interveners Saskatchewan Trial Lawyers Association Inc. and the Canadian Council of Criminal Defence Lawyers/ Conseil Canadien des Advocats de la Défence [collectively the "STLA/CCCDL"] intervene in the within appeal to make four submissions on the essential requirements of a fair sentencing hearing.

2. First, an accused must be entitled to reasonable notice of the jeopardy faced, and a fair opportunity to make submissions. The opportunity to be heard is a principle of fundamental justice under section 7 of the *Charter* and must include the full and fair opportunity to make submissions on any point of fact or law that might be of concern to the sentencing judge, particularly one that alters the anticipated jeopardy faced.

3. Second, a Crown position on sentence is an exercise of Crown discretion. As the Crown is also entitled to a reasonable opportunity to explain its position, it is fundamentally unfair to an accused person that a sentencing judge would exceed a Crown position on sentence without notice when an accused person reasonably expects Courts to not scrutinize exercises of Crown discretion without sufficient cause.

4. Third, section 606(1.1)(b)(iii) of the *Criminal Code* is not an adequate substitute for clear notice from a sentencing judge about an issue the judge has with sentencing submissions.

5. Fourth, a robust view of procedural fairness must provide an accused, in appropriate cases, with the opportunity to withdraw their guilty plea when the sentencing judge serves notice that the judge intends to exceed the Crown's position on sentence.

6. When an accused person does not receive notice from a sentencing judge that the judge intends to exceed the Crown's position on sentence, and subsequently receives a harsher sentence

than what the accused expected, both the Crown and the accused are caught by surprise. However, the accused, the person receiving the sentence outside the recommended range, is the only party who legally and practically bears the sting of that unfairness or injustice.

B. Statement of the Facts

7. The STLA/CCCDL rely on the facts as set out set out in the Factums of the Appellant and Respondent.

PART II: Intervener Position on the Question in Issue

8. With respect to the question in issue on this appeal as framed at para 38 of the Appellant's factum, the STLA/CCCDL agrees with the Appellant at paras 75-101 of the Appellant's factum that the failure of a trial judge to alert counsel that they intend on exceeding the sentencing ceiling proposed by Crown is an error in principle resulting in fundamental unfairness and warranting appellate intervention. The STLA/CCCDL provide the following four submissions on this issue.

9. First, the failure to provide notice should be recognized as an error in principle because notice is required as a constitutional principle guaranteed under section 7 of the *Charter*. Second, the failure to provide notice constitutes an impermissible review of Crown discretion. Third, section 606(1.1)(b)(iii) of the *Criminal Code* is not an adequate substitute for clear notice from a sentencing judge about an issue with sentencing submissions. Fourth, a robust view of procedural fairness must provide an accused with an opportunity to withdraw their guilty plea when the sentencing judge serves notice that the judge intends to exceed the Crown's position on sentence.

PART III: Argument

A. Procedural fairness is rooted in the *Charter*.

10. Sentencing has been described as "one of the most delicate stages of the criminal justice process in Canada": *R v Lacasse*, 2015 SCC 64 at para 1, [2015] 3 SCR 1089. Section 7 of the *Charter* plays a fundamental role in the sentencing stage. An accused person faces a potential deprivation of liberty through the imposition of sentence. The deprivation of liberty must therefore conform with the principles of fundamental justice in section 7 of the *Charter*.

11. The rules of natural justice comprise what is commonly known as procedural fairness. They include the *audi alteram partem* principle, which requires the Courts provide an opportunity to be heard: *A(L.L.) v B.(A.)*, [1995] 4 SCR 536 at para 27. It is well accepted that *audi alteram partem* principle is comprised of two essential elements: notice and a hearing.

12. The STLA/CCCDL submit that procedural fairness, as mandated by section 7 of the *Charter*, requires that the parties in a sentencing hearing be entitled to a full and fair opportunity to make submissions on any point of fact or law that might be of concern to the sentencing judge. This will include: (i) concessions on a factual issue at sentencing (*R v White*, 2019 BCCA 461 at paras 36-37; *R v Whincup*, 2011 BCCA 520 at para 11); (ii) the sentencing judge's view of an aggravating or mitigating factor (*R v Huon*, 2010 BCCA 143 at para 6); and (iii) in cases such as this, where the sentencing judge is troubled by counsel's proposed sentencing positions and proposes to exceed the Crown's agreed sentencing range.

13. The principle of notice feeds the *audi alteram partem* principle. There are many reasons why counsel have agreed on a joint submission, a joint submission on some matters but not others (such as an agreement on the length of a probation order but not the terms), a range of sentence to be proffered, or an upper limit to be advanced by the Crown. The reasons and rationale that propelled discussion, and such agreements, may not be readily apparent to a sentencing judge, and may not be offered at first instance to a sentencing judge as they may be sensitive in nature. Further, certain positions on sentencing issues, such as concessions on matters of fact or law, can lead the opposing party to limit their submissions on that issue, believing some matters to not be in issue. Without affording accused persons the opportunity to address specific concerns held by the sentencing judge, in the face of specific sentencing recommendations, squarely works to the disadvantage of only one party to those negotiations.

B. Reviews of exercises of Crown discretion are tightly limited.

14. Resolution agreements invariably involve concessions by both the Crown and the accused. The STLA/CCCDL submits that Crown concessions on facts, positions on aggravating or mitigating factors, or views of the appropriate sentencing ranges, all constitute exercises of Crown discretion. Such discretion is not to be scrutinized by the courts absent evidence of abuse of

process: *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167. As this Court said in *R v Power*, [1994] 1 SCR 601 at p 616, "courts should be careful before they attempt to 'second-guess' the prosecutor's motives when he or she makes a decision".

15. The Crown is no ordinary litigant, but a "Minister of Justice": *R v Regan*, 2002 SCC 12 at para 65, [2002] 1 SCR 297. An accused person should be entitled to rely on a Crown exercise of discretion, without expectation that a sentencing judge will review that exercise of discretion short of compelling reasons. To allow a sentencing judge to scrutinize a particular exercise of Crown discretion in a sentencing proceeding, in a manner detrimental to the accused who has relied on that exercise of Crown discretion and has given up their right to a trial as a result, without affording the accused the opportunity to address the court's concern, lacks procedural fairness and should be recognized as inconsistent with section 7 of the *Charter*.

16. To be clear, we do not suggest for a moment that a sentencing court should lose the ability to ensure that a sentence being imposed is not contrary to the ends of justice, as contemplated by the "public interest test". Such power must be maintained by the Court. However, before the only party negatively affected by a court exceeding the Crown's pre-negotiated and agreed upon position on sentence, is so affected, the accused should be afforded notice of the issue and an opportunity to be heard.

17. Without such a safeguard, there is little reason for an accused to continue to engage in resolution discussions with the one party empowered to negotiate at its discretion. When resolution discussions are "properly conducted [they] benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally": *R v Anthony-Cook*, 2016 SCC 43 at para 35, [2016] 2 SCR 204.

18. These issues are of concern across the country, including in the North. In *R v Ehaloak*, 2017 NUCA 4 at para 33, Grist J. on a summary conviction appeal in the Nunavut Court of Appeal stated:

> The danger associated with exceeding the ranges indicated by counsel is the impact this may have on counsel's efforts to resolve disposition of cases before the courts. Responsible counsel will, in the course of considering disposition by

> a guilty plea, consult on the range of sentence to be recommended and secure assurances in this regard. This is a useful exercise even if complete agreement cannot be finalized by way of a joint submission. The importance of supporting this process, targeted on disposition, has been the subject of numerous judicial comments and the process is one particularly valuable to the Northern Courts.

19. The practical reality is that the criminal justice system does not exist in a vacuum. Financial resources, human resources as well as other considerations of practical concern, require the justice system to operate efficiently. In areas where resources are scarce, such as the North or other remote communities, such efficiencies are of even greater import. The STLA/CCCDL contend that the justice system may collapse under its own weight if accused persons, through counsel, were dissuaded from negotiating with Ministers of Justice, those cloaked with the ability to negotiate such resolutions, with a good faith belief that their negotiated resolutions would be honoured by the sentencing judge – at least to the point where the parties would be put on notice of and offered the ability to address specific concerns the Court may hold.

20. The circumstances of *Nahanee* support this contention. The Crown had sent a letter to defence counsel setting out what the Crown's sentencing position would be in two different scenarios. In the first scenario, the Crown would seek 3-4 years in jail for the first offence in which a guilty plea had already been entered, and 4-5 years in jail on the second offence, to be served concurrently, if the second offence proceeded to trial. In the second scenario, if the appellant pleaded guilty to the second offence, the Crown would seek 4-6 years in jail in relation to each offence, to be served concurrently. 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 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: *Respondent's Factum* at paras 15 and 16.

21. In other words, the Crown gave a detailed explanation to the accused, in advance of trial, about how it would seek a 4–6 year jail sentence if the accused pleaded guilty, but a 7-9 year jail sentence if the accused ran a trial and was convicted. The STLA/CCCDL submits it lacks procedural fairness for an accused person, having accepted such a position and given up their right

to a trial, to not receive clear notice that the Crown's considered sentencing position is inadequate. How could responsible counsel, fulfilling their duty to a client, ever instruct an accused person to waive their right to a trial if a sentencing court were to have an unfettered ability to "second-guess" the Crown's exercise of discretion on an appropriate sentence, without the protection to be put on such notice and address such concerns?

C. Section 606(1.1)(b)(iii) is not a sufficient answer for notice.

22. Section 606(1.1)(b)(iii) of the *Criminal Code* provides that a Court may accept a plea of guilty only if it is satisfied that the accused understands that "the court is not bound by any agreement made between the accused and the prosecutor". The STLA/CCCDL submit that section 606(1.1)(b)(iii) of the *Criminal Code* is not an adequate substitute for clear notice that the sentencing judge is contemplating exceeding a Crown position on sentence.

23. It is reasonable for an accused person to anticipate that, in most cases, a sentence that is imposed will fall within the range of sentences recommended by counsel, particularly the upper limit submitted by the crown, as negotiated.

24. Section 606(1.1)(b)(iii) of the *Criminal Code* re-iterates to accused persons and counsel that the sentencing court does not act as a "rubber stamp" to merely accept counsel's recommendations without an underlying responsibility to impose an appropriate sentence in accordance with the law. Having recognized that section 606(1.1)(b)(iii) of the *Criminal Code* confirms a sentencing court's overriding responsibility for the imposition of sentence, this Court in *Anthony-Cook*, at paras 32-44, set forth all the reasons why a stringent test is required before a sentencing court imposes a sentence that departs from a joint submission.

25. The STLA/CCCDL submit there is no rationale offered that does not equally apply to a negotiated limit on sentence. If reference to "joint submissions" were removed from those paragraphs, and in its place "negotiated cap on sentence" inserted, nothing would be lost.

26. It is submitted that section 606(1.1)(b)(iii) of the *Criminal Code*, in the context of a negotiated upper limit on a sentencing position, performs the same function as it does in the context of a joint recommendation. That is, it grants the court jurisdiction to accept a guilty plea. It does

not, however, satisfy the notice requirement to an accused or proscribe the test to be used in rejection of the recommended range for sentence, any more than it did in the context of joint recommendations.

D. Procedural fairness should grant the accused an opportunity to withdraw their plea.

27. Finally, the STLA/CCCDL submit that procedural fairness should grant the accused an opportunity to withdraw their plea in appropriate circumstances where notice is provided by the sentencing judge that the judge intends to exceed the Crown's sentencing position.

28. A guilty plea must always meet the three requirements of being voluntary, unequivocal and informed. One of the components of an informed plea is that the accused is aware of both the criminal consequences and the legally relevant collateral consequences of the plea: *R v Wong*, 2018 SCC 25, [2018] 1 SCR 696.

29. *Anthony-Cook* makes the point that in some circumstances the sentencing hearing itself may reveal that a guilty plea was not properly informed. Having spoken to four steps of a procedure for a sentencing judge to address concerns about a joint recommendation, Moldaver J. stated, at paragraph 59:

> Fifth, if the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea. The circumstances in which a plea may be withdrawn need not be settled here. However, by way of example, withdrawal may be permitted where counsel have made a fundamental error about the legality of the proposed joint submission, for example, where a conditional sentence has been proposed but is unavailable.

30. While the example offered by the above passage is not exemplary of the special circumstances at play (as an accused, having received advice that amounted to ineffective assistance, would ordinarily be allowed to withdraw their guilty plea), the logic underlying that an individual not receiving that for which they have negotiated being entitled the return of that which they have negotiated away, is sound.

31. Accordingly, procedural fairness dictates that, in appropriate circumstances where notice has been provided by a sentencing judge that the judge intends to exceed the Crown's sentencing position, an accused should be afforded the opportunity to apply to withdraw their plea. By affording this opportunity, it would allow both parties to potentially be made whole in a circumstance where only one party would be disadvantaged by the court's disinclination to accept the negotiated resolution.

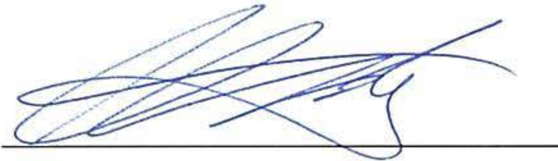
PART IV: Costs

32. The STLA/CCCDL do not seek costs and asks that none be awarded against them.

PART V: Orders Sought

33. The STLA/CCCDL make no further submissions on the ultimate order to be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of January, 2022.



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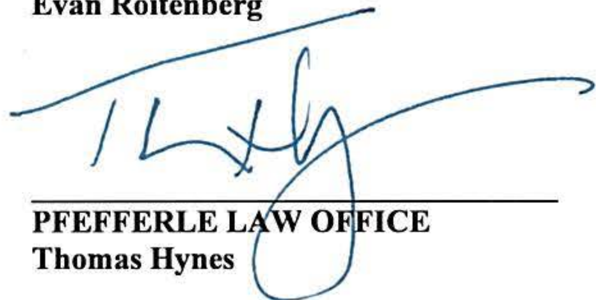

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PART VI: Table of Authorities

Case Law	**Paragraph Reference**
A(L.L.) v B.(A.), [1995] 4 SCR 536.	11
R v Anderson, 2014 SCC 41, [2014] 2 SCR 167.	14
R v Anthony-Cook, 2016 SCC 43, [2016] 2 SCR 204.	17, 24, 29
R v Ehaloak, 2017 NUCA 4.	18
R v Huon, 2010 BCCA 143.	12
R v Lacasse, 2015 SCC 64, [2015] 3 SCR 1089.	10
R v Power, [1994] 1 SCR 601.	14
R v Regan, 2002 SCC 12, [2002] 1 SCR 297.	15
R v Whincup, 2011 BCCA 520.	12
R v White, 2019 BCCA 461.	12
R v Wong, 2018 SCC 25, [2018] 1 SCR 696.	28

Legislation	**Section(s)**
Criminal Code, RSC 1985, c C-46 *Code criminel* (L.R.C. (1985), ch. C-46)	606(1.1)(b)(iii) 606(1.1)(b)(iii)
The Constitution Act, *1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 *Loi constitutionnelle de 1982*, Annexe B de la Loi de 1982 sur le Canada (R-U)	7 7