File No. 39599

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

BETWEEN:

KERRY ALEXANDER NAHANEE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and -

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Interveners

FACTUM OF THE INTERVENER TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA

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PART I – OVERVIEW

1. In the Canadian justice system, *how* a decision is made is just as important to fundamental fairness as *what* the decision ultimately is. Procedural fairness is critical to the legitimacy of both the outcome of a particular case and the justice system as a whole. Its characterization as a rule of natural justice and a principle of fundamental justice under the *Charter* reflects the importance of procedural fairness to Canadian society's views on what constitutes justice.

2. The Trial Lawyers Association of British Columbia ("TLABC") submits that it is fundamentally unfair for a sentencing judge to impose a sentence upon an accused that is harsher than the sentence sought by the prosecution without giving the accused notice and an opportunity to respond to the judge's concerns. This conclusion necessarily flows from the existing law on procedural fairness and the need for the appearance of fairness in judicial proceedings.

3. When a sentencing judge refuses to provide the accused with notice of their intent to exceed the Crown's sentencing position or an opportunity to make submissions to address the judge's concerns, they deny the accused notice of the changed case to meet and the opportunity to be heard. This breach of procedural fairness renders the sentencing proceeding fundamentally unfair. It also appears unfair to the accused and to reasonable members of the public. Where the accused is a racialized person, as in this case, the actual and apparent unfairness is even more severe given the justice system's systemic bias against racialized accused.

4. In these circumstances, the only remedy is a re-hearing. This Court has repeatedly held that breaches of natural justice always render a decision invalid. A procedure that denies an accused natural justice is not remedied by a subsequent finding that the decision was not otherwise unfair or would have been the same had the breach not occurred. In spite of this, appellate courts have declined to intervene on the basis that further submissions would not have changed the sentencing judge's mind or the sentence was not demonstrably unfit.

5. This Court should find that an error of this nature requires the appellate court to conduct a fresh sentencing analysis without deference to the existing sentence. A re-hearing is necessary to restore fundamental fairness to the proceeding.

PART II – POSITION ON QUESTION IN ISSUE

6. TLABC's submissions address the appellant's second question before this Court, namely: Is the failure of a sentencing judge to alert counsel that they intend to exceed the sentencing ceiling proposed by the Crown an error in principle resulting in fundamental unfairness and warranting appellate intervention? TLABC submits that the answer to this question is yes.

PART III – ARGUMENT

A. Procedural fairness requires sentencing judges to give notice and an opportunity to respond if the judge intends to exceed the Crown's sentencing position

7. Procedural fairness is a rule of natural justice[1] and a principle of fundamental justice.[2] It is closely tied to the legitimacy of the justice system as a whole. A proceeding without the requisite degree of procedural fairness will neither be fair, nor appear to be fair.[3]

8. The right to be heard – also referred to as the *audi alteram partem* principle – is an essential component of procedural fairness. This principle provides that individuals whose rights, privileges, or interests are affected by a decision must be given an opportunity to be heard before the decision is made.[4] The desire for actual and perceived fairness underlies these participatory rights. Allowing those affected to put forward their views and evidence fully and have them considered by the decision-maker contributes to a fair, open, and impartial process.[5]

9. The right to be heard is closely tied to the right to notice of the case to meet. The case to meet informs the parties of the issues they need to address and guide the parties' submissions and the evidence they will adduce at the hearing.[6]

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[1] *Cardinal v. Director of Kent Institution*, [1985] 2 SCR 643 at para. 14; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 SCR 219 at p. 233; *R. v. Dodson*, 2000 CanLII 5623 (ONCA) at para. 23; *R. v. Villota*, 2002 CanLII 49650 (ONSC) at paras. 93-95 (per Hill J.).
[2] *R. v. McDonald*, 2018 ONCA 369 at paras. 37-39; *Canada (Citizenship and Immigration v. Harkat*, 2014 SCC 37 at para. 41.
[3] *McDonald* at para. 37; *Supermarchés* at p. 236; *Villota* at paras. 95, 108.
[4] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at pp. 836-841; *Supermarchés* at p. 239; *Dodson* at para. 23; *Villota* at paras. 97-101.
[5] *Baker* at p. 837.
[6] *Harkat* at paras. 41-43, 54, 57.

10. Methods of achieving procedural fairness are context-specific. The nature of the decision being made and the importance of the rights and interests at stake are important contextual factors.[7] "The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*."[8] If a party legitimately expects that a certain procedure will be followed, that also supports a finding that the procedure must be followed to achieve procedural fairness.[9]

11. Sentencing proceedings require a high degree of procedural fairness given the nature of the decision, the rights at stake, and the legitimate expectations of the parties. A sentencing judge's decision affects the accused's liberty interests, even where incarceration is not on the table. When the judge is determining how long the accused will be imprisoned, as in this case, the decision has a significant and direct impact on the accused's s. 7 *Charter*-protected rights to life, liberty, and security of the person. In *Singh v. Canada (Minister of Employment and Immigration)*, Wilson J. found that where physical liberty is at stake, "it would seem on the surface at least that these matters are of such fundamental importance that procedural fairness would invariably require an oral hearing".[10] The accused can and should expect to receive strong procedural protections at sentencing.

12. In *McDonald*, LaForme J.A. applied the principles from *Singh*, *Baker*, *Suresh*, *Charkaoui*, and other leading cases on procedural fairness in the sentencing context.[11] The Court considered the degree of procedural fairness required at a dangerous offender hearing.[12] The Court held that, given the significant deprivation of liberty involved, "procedural fairness must be jealously guarded and strictly enforced in this context".[13] Fairburn J.A. came to the same conclusion in *Walker*, another

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[7] *Baker* at p. 837; *Cardinal* at para. 15.
[8] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 118; see also *Baker* at pp. 838-839; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 25.
[9] *Baker* at pp. 839-840.
[10] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at para. 58.
[11] *McDonald* at paras. 37-39.
[12] A dangerous offender proceeding is part of the sentencing process: *R. v. Walker*, 2019 ONCA 765 at para. 86.
[13] *McDonald* at para. 41.

dangerous offender case.[14] When it comes to incarceration, the individual and societal stakes are extremely high; a high degree of procedural protections is the necessary corollary.

13. Thus, for a sentencing hearing to be procedurally fair, the accused must know the case they need to meet, have an opportunity to present their case fully and fairly, and have the sentence imposed be the result of an open and impartial process.[15]

14. Procedural fairness is violated when a sentencing judge refuses to give the accused notice of their intent to exceed the Crown's position or an opportunity to respond to the judge's concerns. This flawed procedure denies the accused notice of the changed case to meet and an opportunity to respond to this changed case.

15. In a criminal prosecution, the Crown typically determines the case the accused needs to meet. The Crown is the accused's opponent in the adversarial criminal justice system; the judge is the neutral arbiter. The Crown decides what charges to bring (or to pursue, in the case of police-laid charges), how the charges will be particularized, and what evidence to present to prove the case against the accused. For this reason, when determining whether the accused has been given adequate notice of the case they need to meet at trial, "the proper question is not what *the accused* knew but what charges *the Crown* decided to prosecute, or not to prosecute, in the first instance".[16] The same set of facts may give rise to multiple different charges but unless the prosecution gives the accused notice that they intend to pursue a conviction on a certain charge, the accused will not have been given adequate notice of the case to meet.[17] The Crown's position on the charges is the position to which the accused must respond.

16. This reasoning applies to sentencing proceedings as well. While the *Criminal Code* delineates the maximum sentence for an offence, it would nonetheless be unfair for the Crown to refuse to provide the accused with its sentencing position in advance of the hearing. The jeopardy faced by the accused is strongly tied to the Crown's recommended sentence. That the judge is permitted to impose a sentence higher than the Crown's proposed sentence does not obviate this

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[14] *Walker* at para. 25.
[15] *McDonald* at para. 38, citing *Baker*.
[16] *R. v. G.R.*, 2005 SCC 45 at para. 6 (emphasis in original).
[17] *G.R.* at paras. 12-13.

truth. The practical reality is that a judge exceeding the Crown's sentencing position does not happen in the majority of sentencing proceedings. Moreover, as courts across the country have recognized, the adversarial justice system means that the positions of the parties will guide the evidence led and submissions made at a sentencing hearing:[18]

- "A judge always retains the right to impose a sentence he deems fit. But, just as procedural fairness requires that a judge provide parties the opportunity to address an intended departure from a true joint submission, fairness also demands that same opportunity to be heard where the judge intends to depart from a proposed range of sentencing. That is because, up to that point, the parties will be directing argument primarily to the positions taken by the opposing party. Generally the points of disagreement between the parties on sentence form the basis of their submissions." (*R. v. Burback*, 2012 ABCA 30 at para. 13)

- "Sentencing takes place in an adversarial context. It is anticipated that in most cases the sentence imposed will fall at the boundaries, or within the range of sentences recommended by counsel. While there is no legal requirement that the sentencing judge stay within that range, or adopt the recommended structure of the sentences, it is of concern when that is not done. … The accused is entitled to reasonable notice of the jeopardy he faces, and a fair opportunity to make submissions. The Crown is also entitled to a reasonable opportunity to explain its position. Where the Crown makes a recommendation that the accused finds to be acceptable or fair, both sides may believe the point is not in contention, and the accused may not make any submissions on the point; a subsequent sentence inconsistent with that recommendation can catch both parties by surprise. An accused who receives a sentence outside the recommended range may in such circumstances harbour a feeling of unfairness and injustice." (*R. v. Keough*, 2012 ABCA 14 at para. 19)

- "It is impossible to say that the sentence was not impacted by the unavailability of submissions – our adversarial system relies on counsel's presentation of submissions and framing of the issues." (*R. v. Blake-Samuels*, 2021 ONCA 77 at para. 36)

- "S'ajoute à cette première considération le fait que les représentations sur sentence sont souvent le reflet d'un équilibre soigneusement négocié entre les parties. L'accusé plaide coupable en ayant à l'esprit la peine maximale réclamée par la poursuite même s'il caresse toujours l'espoir de convaincre le juge d'imposer une peine moins sévère. Les observations des parties sont donc modulées en fonction de cette réalité." (*Gervais c. R.*, 2021 QCCA 652 at para. 8)

- "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." (*R. v. Ehaloak*, 2017 NUCA 4 at para. 33)

[18] All underlining added.

- "The rationale for requiring sentencing judges to put counsel on notice in these situations is based on the importance of preserving the fairness of the process to all parties. It recognizes that even in the absence of a joint submission, an accused's decision to plead guilty, or the Crown's decision to take a certain position on sentence, may well be the result of discussions between counsel, including discussions as to what their respective positions on sentencing will be." (*R. v. William*, 2012 NWTSC 53 at para. 32)

17. When the judge takes the position that the accused must be punished more severely than the Crown recommends, the sentencing judge changes the case the accused needs to meet at the sentencing hearing.

18. In these circumstances, procedural fairness demands that the accused be provided with notice of the changed case to meet and an opportunity to respond to it. These requirements are easily fulfilled: the judge must tell the parties of their intent to exceed the Crown's sentencing position and the concerns or reasons underlying this view. The accused and Crown must then be provided with a reasonable opportunity to make submissions or lead evidence to respond to the judge's concerns.

19. The accused's legitimate expectations also indicate that procedural fairness requires notice and an opportunity to respond in these circumstances. The overwhelming majority of provincial appellate courts have found that sentencing judges should provide counsel with notice and the opportunity to respond when they intend to exceed the Crown's sentencing position; where they divide is on the appropriate remedy if this does not occur.[19] Even the B.C. Court of Appeal, which stands alone in finding that it is not an error for a judge to exceed the Crown's position without notice and an opportunity to respond, has held that that procedure is "undoubtedly preferable".[20]

20. In these circumstances, it is entirely legitimate for an accused person to expect the judge in their case to advise them of their concerns and give them a chance to respond before "jumping" the Crown's position on sentence. Where a judge refuses to do so, the accused – and the public –

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[19] See, for e.g., case law from Alberta (*Keough*; *Burback*); Ontario (*Blake-Samuels*; *R. v. Mohiadin*, 2021 ONCA 122); Northwest Territories (*R. v. Abel*, 2011 NWTCA 4); Quebec (*Gervais*); Manitoba (*R. v. Beardy*, 2014 MBCA 23); Nunavut (*R. v. Parr*, 2020 NUCA 2; *R. v. Kritaqliluk,* 2021 NUCA 4); Newfoundland and Labrador (*R. v. Scott*, 2016 NLCA 16); and Saskatchewan (*R. v. Burke*, 2016 SKCA 100).

[20] *R. v. R.R.B.*, 2013 BCCA 224 at para. 22.

may legitimately perceive the sentencing proceeding as being unfair, even if the sentence the judge ultimately imposes is not.[21]

21. Protecting procedural fairness is particularly important where the accused is a racialized person. Racialized litigants, particularly Black and Indigenous accused, already experience unfairness from discrimination inherent to the justice system.[22] Almost thirty years ago, Doherty J.A. recognized the pervasiveness of anti-Black racism and that "our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes."[23] More recently, Bauman C.J. acknowledged that, for Indigenous people, "the court system has often been a barrier to justice, rather than a critical tool in pursuit of the truth."[24] The criminal justice system continues to operate at a disadvantage to racialized accused, even where judges follow all the rules. Denying racialized accused procedural fairness at sentencing only compounds this unfairness.

22. The existence of systemic bias against racialized accused also supports making notice and a further opportunity to be heard a requirement, not just a recommendation, when a judge seeks to punish the accused more harshly than the prosecutor says is necessary. Sentencing judges hold immense power over accused persons. The benefits of mandating notice and an opportunity to be heard vastly outweigh the minor additional obligations such a requirement puts on sentencing judges. Notice and an opportunity to be heard is the bare minimum required for procedural fairness; it should not be optional.

B. The need to preserve the appearance of fairness requires a sentencing judge to give notice and an opportunity to respond if the judge intends to exceed the Crown's position

23. A sentencing proceeding in which a judge exceeds the Crown's sentencing position without notice raises two distinct appearance of fairness concerns: apparent unfairness arising from the actual

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[21] *Keough* at para. 19; *McDonald* at para. 42; *R. v. Hertrich*, 1982 CanLII 3307 (ONCA) at para. 81.
[22] See, for e.g., *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 65; *R. v. Ipeelee*, 2012 SCC 13 at paras. 59-63; *Ewert v. Canada*, 2018 SCC 30 at para. 57; *R. v. Anderson*, 2021 NSCA 62 at paras. 3-15.
[23] *R. v. Parks*, [1993] O.J. No. 2157 (C.A.) at para. 54.
[24] Zena Olijnyk, "Recognition of Indigenous legal systems crucial to reconciliation, delegates to conference told," *Canadian Lawyer* (November 18, 2021).

procedural unfairness, and apparent unfairness due to doubts about the judge's neutrality and impartiality toward the accused.

24. Proceedings which appear unfair undermine public confidence in the justice system. This, in turn, undermines the rule of law and the legitimacy of the justice system as a whole:

> The public's confidence in the administration of justice is inextricably linked to the rule of law. The rule of law is threatened when the public loses confidence in the justice system. Both actual and perceived unfairness in the court system can shake that confidence. That is why "procedural fairness must be jealously guarded and strictly enforced", particularly in proceedings where the individual and societal stakes are high, like dangerous offender proceedings.[25]

25. Courts are the custodians of public confidence in the justice system. Courts must ensure that justice both be done and "manifestly and undoubtedly be seen to be done."[26] This duty means that judges must exercise their wide powers of discretion in a manner that both is and appears to be fair and impartial to a reasonable, objective observer.[27] Because of the power they hold, judges are held to the highest standards of impartiality.[28]

26. The need for proceedings to appear fair is particularly acute in cases involving racialized accused, where the accused's trust and belief in the justice system may already be fragile. Courts have recognized that "there is a fundamental disconnect between the Aboriginal view of Justice and the system" imposed upon them by colonial powers.[29] Similarly, Black offenders "keenly feel the discrimination they experience at the hands of the criminal justice system".[30] It is unsurprising that "[r]acialized people who view the system as unjust are less likely to believe they should abide by that system's rules".[31] Protecting the appearance of fairness in sentencing therefore benefits both the accused and the justice system's objective of fostering respect for the law.

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[25] *Walker* at para. 25, citations omitted. See also *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 91.
[26] *R. v. Moazami*, 2021 BCCA 328 at para. 38, citing *R. v. Sussex Justices, Ex. P. McCarthy* (1923), 93 L.J.K.B. 129.
[27] *S. (R.D.)* at para. 92.
[28] *S. (R.D.)* at paras. 93-94.
[29] *R. v. Holmes*, 2018 ABQB 916 at paras. 2-3; see also *Ewert* at para. 57.
[30] *R. v. Morris*, 2018 ONSC 5186 at para. 22.
[31] *Morris* at para. 22.

27. When a sentencing judge imposes a sentence exceeding that sought by the Crown without giving the accused notice or an opportunity to convince the judge to reconsider, the judge risks appearing biased against the accused. After all, the Crown is the party seeking to punish the accused, protect victims' interests, and advance the community's interest in seeing that justice is done.[32] When a judge decides that the punishment suggested by a person in this role is not severe enough, it may reasonably raise questions about the judge's neutrality towards the accused.

28. These questions can be resolved by holding a further hearing where the judge explains their reasoning and gives the accused an opportunity to respond with further evidence or submissions. When the judge refuses to give the accused this opportunity, they cause further damage by appearing close-minded.[33] In this scenario, a reasonable and objective observer could fairly infer that the judge simply did not care what the accused had to say – even if that is not really the case. That is why, as Hill J. noted in *Villota*, "a final decision made in circumstances of a denial of the right to be heard almost inevitably raises the spectre of prejudgment and a reasonable apprehension of bias."[34]

C. The only remedy for a breach of procedural fairness or the appearance of unfairness is a fresh sentencing analysis

29. A fresh sentencing hearing is the only meaningful remedy for the breach of natural justice that occurs when a sentencing hearing lacks procedural fairness. Whether or not the sentence is justifiable under the law is irrelevant. Breaches of natural justice *always* render a decision invalid, regardless of the impact of the breach on the decision.[35] Le Dain J., for a unanimous Court in *Cardinal*, explained why a results-based approach is unacceptable when considering remedies for breaches of procedural fairness:

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and

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[32] *R. v. Anthony-Cook*, 2016 SCC 43 at para. 44.
[33] *R. v. Rootenberg*, 2019 ONSC 6072 at para. 46.
[34] *Villota* at para. 108. See also *R. v. Sibbert*, 2018 ONSC 2731 at paras. 33-34; *Cardinal* at paras. 17, 21.
[35] *Cardinal* at para. 23; *Supermarchés* at pp. 237-239; *Sibbert* at para. 50.

> sense of justice on the basis of speculation as to what the result might have been had there been a hearing.[36]

30. The fitness of the sentence is similarly irrelevant when considering a remedy for the appearance of unfairness. Miscarriages of justice can result of the appearance of unfairness alone, regardless of the result.[37]

31. For these reasons, the Courts in *McDonald* and *Walker* rejected Crown submissions that the appeals should be dismissed because the outcome of another hearing would inevitably be the same. The accused's liberty was at stake. The sentencing process violated procedural fairness, causing the appearance of unfairness. In these circumstances, a new hearing was the only acceptable remedy.[38]

32. These analyses flow from the basic principle that fundamental fairness depends on the procedure being fundamentally fair, *regardless of the result*. A fundamentally unfair proceeding cannot be remedied by an appellate court's conclusion that the unfairness did not matter to the result. The unfairness still matters to the parties, the public, and the administration of justice. A re-hearing is necessary to restore fairness, and the appearance of fairness, to the sentencing proceeding.

PARTS IV & V – SUBMISSIONS ON COSTS AND ORDER SOUGHT

33. TLABC does not seek costs and asks that no costs be awarded against it. TLABC takes no position on the disposition of the appeal.

All of which is respectfully submitted this 31st day of January, 2022.

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Rebecca McConchie & Elsa Wyllie
Counsel for the Intervener TLABC

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[36] *Cardinal* at para. 23 (emphasis added).
[37] *McDonald* at paras. 51-54; *Hertrich* at para. 99; *Walker* at paras. 120-124.
[38] *McDonald* at paras. 54-55; *Walker* at paras. 120-124.

PART VI – TABLE OF AUTHORITIES

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