Court File No. 39599

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

B E T W E E N:

KERRY ALEXANDER NAHANEE

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

AND:

CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), ATTORNEY GENERAL OF ALBERTA, DIRECTOR OF PUBLIC PROSECUTIONS, TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA, SASKATCHEWAN TRIAL LAWYERS ASSOCIATION INC., CANADIAN COUNSEL OF CRIMINAL DEFENCE LAWYERS, THE CRIMINAL DEFENCE LAWYERS ASSOCIATION OF MANITOBA, ATTORNEY GENERAL OF ONTARIO, and INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY

Interveners

FACTUM OF THE INTERVENER
THE CRIMINAL DEFENCE LAWYERS ASSOCIATION OF MANITOBA

(PURSUANT TO RULE 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

OVERVIEW

1. The Criminal Defence Lawyers Association of Manitoba (hereinafter 'CDLAM') is a not-for-profit, member-based organization which currently includes over 150 criminal defence lawyers practising throughout the Province of Manitoba. The CDLAM's membership includes sole practitioners and those who practice at large law firms, ranging in year of call from 1963 to 2021. Members are based across the province including in Winnipeg, Brandon, Thompson, Dauphin, Portage La Prairie, and Swan River. Members practice in both urban centres and rural circuits and represent clients on both a private and legal aid basis.

2. CDLAM's members regularly represent Indigenous Accused Persons and provide legal services in First Nation communities throughout Manitoba. These include, but are not limited to, Bloodvein, Brokenhead, Cross Lake, Fisher River, God's Lake Narrows, Lake St. Martin, Norway House, Peguis, Pauingassi, Sandy Bay, St. Theresa Point and Waywayseecappo. A significant number of these First Nation communities are in northern, rural areas – most of which are accessible only by chartered flights and winter roads.

STATEMENT OF FACTS

3. CDLAM makes no submissions on the facts of this appeal and relies on the 'Statement of Facts' as set out by the Appellant and Respondent in their respective Factums.

PART II – POSITION ON THE QUESTIONS AT ISSUE

ISSUES

4. As they are understood the issues on this appeal, as framed by the Appellant in their Factum, are:[1]

   i. *Does the public interest test articulated in Anthony-Cook apply to plea resolutions that reflect partial agreement or an agreed upon sentencing range; and,*

   ii. *Does the failure of a sentencing judge to alert counsel that they intend to exceed the sentencing range proposed by the Crown amount to an error in principle resulting in procedural unfairness.*

POSITION ON ISSUES

5. The CDLAM's position on the first question posed on this appeal is that it should be answered in the affirmative: that partial agreements on sentencing or agreed sentencing ranges proposed by counsel should be subject to the "public interest test" as enunciated by this Honourable Court in *R. v. Anthony-Cook*.[2]

6. The CDLAM's position on the second question posed on this appeal is that it should be answered in the affirmative, more specifically: that it is a reversible error for a sentencing judge to (1) not alert counsel that they are considering pronouncing a sentence that falls outside the proposed range or includes aspects not initially proposed by counsel, and, (2) not to allow counsel the opportunity to provide further submissions

[1] Factum of the Appellant, page 1, paragraph 4
[2] [2016] 2 S.C.R 204, 2016 SCC 43

or foundation for the partial agreement or proposed range of sentence prior to rendering a decision.

PART III – STATEMENT OF ARGUMENT

INTRODUCTION

7. It has been accepted law in Manitoba for some time that sentencing judges should not deviate from a joint submission from counsel unless they have "clear and cogent" reasons for doing so.[3]

8. The principle of deference to a jointly recommended sentence by Crown and Defence has received further endorsement and clarification by the Manitoba Court of Appeal.[4]

9. In 2016 this Honourable Court enunciated the appropriate test for deviating from a joint recommendation in *R. v. Anthony-Cook*.

10. What was specifically *not* addressed in *Anthony-Cook* were sentencing issues where Crown and Defence were not in complete agreement on sentence.

11. This gap in jurisprudence has led to the main issue in this appeal - whether or not the public interest test applies when Crown and Defence are only in partial agreement on sentence or are proposing a sentencing range.

12. The CDLAM respectfully submits that when considering this appeal this Honourable Court recognize that this issue is not just limited to instances of custodial sentences, but has implications in all other forms of sentence for which counsel may be in partial agreement or for which they may be suggesting a range - such as the amount of a fine,

[3] *R. v. Sinclair*, 2004 MBCA 48, at para. 4
[4] *R. v. Beardy*, 2014 MBCA 23

whether probation should or should not be ordered and for what length of time, specific conditions of probation if it is ordered, whether such an order should be made for a

discharge, and other corollary orders such as DNA, weapons prohibitions, and orders under s. 161 or SOIRA orders.

13. Further, while CDLAM appreciates the arguments already set out on this issue by both the Appellant and Respondent as well as the other interveners in this matter, we submit that there are particular implications to Indigenous Accused Persons, especially those who reside in remote rural locations, which require this Honourable Court's attention and consideration.

SENTENCING OF INDIGENOUS OFFENDERS

14. This Honourable Court's acknowledgment that Indigenous peoples are overrepresented in almost all aspects of the criminal justice system[5] came as no surprise to the members of CDLAM, especially those who practice in the plethora of northern remote and rural communities in Manitoba.

15. As a result of their overrepresentation throughout the system as a whole, Indigenous Accused Persons make up a disproportionate amount of accused persons who ultimately plead guilty and are sentenced for offences. This has been the glaring and shameful

[5] *R. v. Gladue*, [1999] 1 SCR 688, para. 61

reality in Manitoba for some time, highlighted as early as the Aboriginal Justice Inquiry (AJI) in 1991.[6]

16. Since the Inquiry's Final Report further studies have confirmed the same findings – that due to a number of systemic factors, Indigenous peoples find themselves at a disadvantage when navigating the criminal justice system, especially when facing the unlimited resources of the Crown. This includes the decision on whether or not to plead guilty to an offence rather than take a matter to trial.[7]

17. Further, it is trite to acknowledge that the majority of criminal matters never make it to trial and are disposed of by way of a guilty plea, usually bred from some form of plea bargain or another.[8]

CIRCUIT COURTS IN MANITOBA

18. Circuit Courts are not new inventions or novel to the Canadian justice system. They were widely used throughout Medieval England, 18th century Canada, America, and throughout the British Colonies as a method of providing "justice to populations spread across large territories."[9]

[6] The Aboriginal Justice Inquiry Report, 1991; PART 1 - Chapter 4 – Aboriginal Over-Representation. http://www.ajic.mb.ca/volumel/chapter4.html
[7] Angela Bressan and Kyle Cody, "Guilty Pleas among Indigenous people in Canada", Department of Justice (2017)
[8] David Ireland, "Bargaining for Experience? The Overuse of Joint Recommendations on Sentence", 2014 Manitoba Law Journal, Vol 31, Issue 1, 273-330; 2014CanLIIDocs268
[9] David Matyas, "Short Circuit: A Failing Technology for Administering Justice in Nunavut", (2018) 35 Windsor Y B Access Justice 379; 2018CanLIIDocs11106, at 383

19. Though once a useful tool for dispensing justice in rural areas, the Aboriginal Justice Inquiry determined that there was "no clearer example of the unequal and uneven manner in which the current justice system deals with Aboriginal (sic) people than in the circuit courts of Northern Manitoba."[10]

20. The AJI highlighted numerous difficulties faced by northern Indigenous communities which are serviced by circuit courts: the frequency which the court sits, the travel requirements for court parties, and accessibility to the court by northern residents.

21. There has been little to no improvement in service to the North in the 30 years since the AJI. Most northern communities – especially First Nations, are serviced by a single Judicial Centre in Thompson, Manitoba. This Court Centre currently lists 15 different Provincial Circuit Court locations that it serves, including areas such as Cross Lake, Churchill, Lac Brochet, Norway House, Oxford House, among others.[11]

22. Other judicial centres such as Brandon in southwestern Manitoba service multiple circuit courts including those on First Nations, such Waywayseecappo, Sioux Valley Dakota Nation, or close to them.

23. In the North the majority of these circuit courts are reachable only by plane or winter roads. For those that are accessible by year-round roads, there is always the concern of inclement weather which might impede either the Court's ability to reach the circuit location or those residents traveling to Court for their matters.

[10] The Aboriginal Justice Inquiry Report, 1991; PART 1 - Chapter 6 – Circuit Courts. http://www.ajic.mb.ca/volumel/chapter6.html#13

[11] Manitoba Courts, Provincial Court Locations and Contact Information: https://www.manitobacourts.mb.ca/provincial-court/locations-and-contact-info/

24. Further, the majority of the circuit courts only sit sporadically – some at most once a month or less, which results in delays between sittings or availability to hear trials. Should a monthly sitting be cancelled due to inclement weather, the last minute unavailability of a party or judge, or for any other myriad of reasons, there would be added delay for resolution or disposition of a matter.

25. While counsel make their best efforts to use circuit court time effectively, the problems plaguing remote circuit courts and the little time that is available to counsel and parties was readily identified by the AJI – including the over-reliance on plea bargaining.[12]

26. Circuit Courts do not stand alone as problems facing Indigenous Accused in the North. Resource issues continue to plague the administration of justice in Northern Manitoba even at the bail hearing stage of proceedings. This issue was laid bare in Martin J.'s fulsome and detailed decision in *R. v. Balfour & Young* issued in 2019 focusing on the inadequacy of resources for bail hearings in Thompson.[13] What is truly concerning is the unavoidable reality of the meager resources available to those who rely on the Court in northern areas, especially those who utilize circuit courts.

[12] AJI, *supra* note 10 – "Circuit Courts – Plea Bargaining"
[13] *R. v. Balfour & Young*, 2019 MBQB 167

IMPLICATIONS OF APPEAL

27. Considering the above, the CDLAM submits that there are particular implications of this appeal for Indigenous Accused Persons in Northern Manitoba.

28. Given the limited frequency of circuit court sittings in the North, and the already thinly stretched judicial resources available to them, the CDLAM submits that certainty in outcome is paramount to those accused who face criminal charges in the North.

29. To set matters for trial might mean months of delay until a matter can be heard provided that there is time available on the court docket and the sitting is not cancelled due to one of the myriad of delays that are ever-present realities in the North.

30. As a result, it is not unexpected to see the majority of criminal charges resolve by way of plea and disposition for some form of sentence or another. Not only is this plain common sense but is reinforced by the empirical and anecdotal evidence available to the Court.

31. Given the unequal bargaining power between an Accused and the Crown there is an increased pressure on an Accused to accept whatever range or type of sentence the Crown may be seeking, lest any resolution be scuttled and the matter set for trial.

32. As such, Accused in Northern Manitoba face the unenviable but inescapable dilemma of either accepting the Crown's range or position on sentence by way of a joint recommendation or be faced with a non-joint sentencing thereby abandoning any type of certainty they might have had in the outcome.

33. The CDLAM respectfully submits that this result is not only unfair but that it strikes at the heart and purpose of resolution discussions and the aim of plea bargaining - namely the justice system's need to resolve matters without a trial. If it is said that the criminal justice system as a whole would grind to a halt without plea bargaining, it is no stretch of the imagination that the entire circuit court system in Northern Manitoba would implode should plea bargaining no longer be a useful tool for resolution of matters.

34. The CDLAM therefore submits that by making joint sentencing ranges, or partial resolution agreements, subject to the "public interest test" as suggested by the Appellant, accused individuals in the North can be offered a further level of certainty of outcome without the requirement of absolute agreement with the Crown. To remove this protection would create a further imbalance to Indigenous Accused Persons in the North and add more barriers to the efficient administration of justice.

35. In response to the second question on appeal, the CDLAM respectfully submits that if the "public interest test" is endorsed by this Honourable Court as the appropriate threshold for sentencing ranges and partial resolution agreements, then instances were sentencing judges do *not* endorse or fall within those ranges should be few and far between.

36. In those rare occasions the CDLAM submits that a sentencing judge who is not inclined to endorse or accept a sentencing range or partial agreement on sentence presented by counsel should be required to allow for further submissions on the issue.

37. That being said, we would be remiss to not take note that such a process in Northern Manitoba poses its own problems – that if a sentencing judge was disinclined to endorse

the range or partial sentencing recommendation, having the parties return at a later date for further submissions would cause in additional delays and scheduling issues given the infrequency of Court sittings. This, we submit, further stresses the need for this Honourable Court to strongly consider the impact of this appeal and to endorse the "public interest test" for these types of dispositions.

PART IV – SUBMISSIONS ON COSTS

38. The CDLAM does not seek costs and asks that none be awarded against it.

PART V – ORDER REQUESTED

39. The CDLAM takes no position on the disposition of this appeal as it pertains to the facts of the case before the Court, save and except for the endorsement of the answers to the questions at issue submitted herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of February, 2022

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PART VI – TABLE OF AUTHORITIES

Caselaw	**Paragraph(s)**
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Secondary Sources	**Paragraph(s)**
The Aboriginal Justice Inquiry Report, 1991 http://www.ajic.mb.ca/volume.html	15, 16, 19, 20, 21
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