SCC 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
COUNSEL OF CRIMINAL DEFENCE LAWYERS (JOINTLY),
TRIAL LAWYERS' ASSOCIATION OF BRITISH COLUMBIA,
DIRECTOR OF PUBLIC PROSECUTIONS,
CRIMINAL LAWYERS' ASSOCIATION ONTARIO,
INDEPENDENT CRIMINAL DEFENCE ADVOCACY SOCIETY**

Interveners

FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF ONTARIO
Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*

Ministry of the Attorney General of Ontario
Crown Law Office – Criminal
720 Bay Street, 10th Floor
Toronto, Ontario M7A 2S9

Jennifer Epstein
Katherine Beaudoin

Tel: (416) 326-4600
Fax: (416) 326-4656
E-mail: jennifer.epstein@ontario.ca
katherine.beaudoin@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

Jabour Sudeyko Lucky
200 - 92 Lonsdale Avenue
North Vancouver, BC V7M 2E6

Hollis Lucky
James Nadel

Tel: (604) 986-8600
Fax: (604) 986-4872
E-mail: hollis@luckylaw.ca

Counsel for the Appellant,
Kerry Alexander Nahanee

Michael J. Sobkin
331 Somerset Street West
Ottawa, ON
K2P 0J8

Michael J. Sobkin

Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Agent for the Appellant,
Kerry Alexander Nahanee

British Columbia Prosecution Service
Criminals Appeals and Special Prosecutions
600 - 865 Hornby Street
Vancouver, BC V6Z 2G3

Matthew G. Scott
Mila Shah

Tel: (604) 660-0738
Fax: (604) 660-1133
E-mail: matthew.scott@gov.bc.ca
mila.shah@gov.bc.ca

Counsel for the Respondent,
Her Majesty the Queen

Gowling WLG (Canada) LLP
160 Elgin Street,
Suite 2600
Ottawa, Ontario
K1P 1C3

Matthew Estabrooks

Tel: (613) 786-0211
Fax: (613) 788-3573
E-mail: matthew.estabrooks@gowlingwlg.com

Agent for the Respondent,
Her Majesty the Queen

Alberta Justice & Solicitor General
Alberta Crown Prosecution Service
300, 332-6 Avenue SW
Calgary, AB T2P 0B2

Rajbir Dhillon

Tel: (403) 297-6005
Fax: (403) 297-3453
E-mail: rajbir.dhillon@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

Gowling WLG (Canada) LLP
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Alberta

Robson Hall, Faculty of Law
University of Manitoba
224 Dysart Road
Winnipeg, MB R3T 2N2

David Ireland
Andrew Synyshyn

Tel: (204) 474-6147
Fax: (204) 474-7580
E-mail: david.ireland@umanitoba.ca
andrew@ajslaw.ca

Counsel for the Intervener,
Criminal Defence Lawyers' Association of Manitoba

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Thomas Slade

Tel: (613) 695-8855 ext. 103
Fax: (613) 695-8580
E-mail: tslade@supremeadvocacy.ca

Agent for the Intervener,
Criminal Defence Lawyers' Association of Manitoba

Wolson Roitenberg Robinson Wolson Minuk
1120-363 Broadway
Winnipeg, MB R3C 3N9

Evan Roitenberg
Thomas Hynes

Tel: (204) 985-8199
Fax: (204) 560-5226
E-mail: eroitenberg@wrrwmlaw.ca
thomas@pfefferlelaw.com

Counsel for the Intervener,
Saskatchewan Trial Lawyers Association Inc. and Canadian Council of Criminal Defence Lawyers

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major

Tel: (613) 695-8855 ext. 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Saskatchewan Trial Lawyers Association Inc. and Canadian Council of Criminal Defence Lawyers

Peck and Company Barristers
610-744 West Hastings Street
Vancouver, BC V6C 1A5

Rebecca McConchie

Tel: (604) 669-0208
Fax: (604) 669-0616
E-mail: rmcconchie@peckandcompany.ca

Counsel for the Intervener,
Trial Lawyers' Association of British Columbia

Norton Rose Fulbright Canada LLP 1500-
45 O'Connor Street
Ottawa, ON K1P 1A4

Marie-France Major

Tel: (613) 780-8654
Fax: (613) 230-5459
E-mail: matthew.halpin@nortonrosefulbright.com

Agent for the Intervener,
Trial Lawyers' Association of British Columbia

Public Prosecution Service of Canada
12th Floor, 800 Burrard Street
Vancouver, BC V6V 6Z2

John Walker

Tel: (604) 775-5692
Fax: (604) 666-1599
E-mail: john.walker@ppsc-sppc.gc.ca

Counsel for the Intervener,
Director of Public Prosecutions

Public Prosecution Service of Canada
160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

François Lacasse

Tel: (613) 957-4770
Fax: (613) 947-7865
E-mail: francois.lacasse@ppsc-sppc.gc.ca

Agent for the Intervener,
Director of Public Prosecutions

Bottomley Barristers
180 Bloor Street West, Suite 1201
Toronto, ON M5S 1T6

R. Craig Bottomley
Arash Ghiassi

Tel: (416) 922-6161
Fax: (416) 934-0006
E-mail: bottomley@crimdefence.ca
arash@savardfoy.ca

Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major

Tel: (613) 695-8855 ext. 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Criminal Lawyers' Association (Ontario)

Peck and Company Barristers
610-744 West Hastings Street
Vancouver, BC V6C 1A5

Tony Paisana
Kate Oja

Tel: (604) 669-0208
Fax: (604) 669-0616
E-mail: tpaisana@peckandcompany.ca
kate@kateoja.ca

Counsel for the Intervener,
Independent Criminal Defense Advocacy Society

Supreme Advocacy LLP
100 - 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major

Tel: (613) 695-8855 ext. 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for the Intervener,
Independent Criminal Defense Advocacy Society

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS **1**

PART II: POINTS IN ISSUE **2**

PART III: STATEMENT OF ARGUMENT **2**

A. This Court Should Take a Bright-Line Approach to the Application of the *Anthony-Cook* Public Interest Test and Notice Requirement to Avoid Litigating the Degree of Negotiation Involved in a Guilty Plea 2

i) Requiring sentencing judges to determine the extent of negotiation involved in a guilty plea would erode the efficiency of guilty plea proceedings 2

ii) Applying different rules to non-joint submissions and "negotiated" non-joint submissions would diminish certainty and finality 4

iii) Litigating the extent of negotiations would require routine disclosure of privileged resolution discussions in open court 4

B. Notice That a Judge May Exceed the Crown's Sentencing Position Should Not on Its Own Justify the Withdrawal of a Guilty Plea 5

i) Courts across the country have found that rejection of an agreed-upon sentencing recommendation is not justification for withdrawing a guilty plea 5

ii) Requiring more than an unexpected sentence before allowing withdrawal of a guilty plea best serves the principles of efficiency and finality, and protects the integrity of the justice system 8

PART IV: SUBMISSIONS CONCERNING COSTS **10**

PART VII: TABLE OF AUTHORITIES **11**

PART I: OVERVIEW AND STATEMENT OF FACTS

1. This appeal provides the opportunity to establish a consistent legal framework when a judge considers departing from non-joint sentencing submissions in a guilty plea proceeding.

2. The appellant asks this Court to create two classes of non-joint submissions: one class in which the plea was the result of "extensive resolution discussions between counsel", and one in which it was not.[1] The parties' sentencing positions would be treated differently depending on how the plea was classified.

3. The Attorney General of Ontario urges this Court to decide the issues in this appeal using a "bright-line" approach, rather than the appellant's "degree of negotiation" approach. Litigation of the extent and impact of plea negotiations is an inefficient use of already-stretched court resources and should be avoided. Ontario's position is that the public interest standard should apply to joint submissions *only*, regardless of the degree of negotiation involved in a plea. Ontario agrees with the respondent's submissions on the fundamental differences between joint and non-joint submissions, and the policy considerations as to why they should receive different treatment.

4. Ontario further agrees with the appellant and respondent that a judge should give notice before departing from either a joint position or the parties' proposed sentences in a guilty plea proceeding. The appellant argues that when the parties receive such notice, the judge should "possibly allow the accused to withdraw his or her guilty plea".[2] The Criminal Lawyers' Association argues that an opportunity to withdraw the plea should be required.[3] Ontario submits that a judge's intent to exceed either a joint submission or the Crown's position on sentence does not, on its own, warrant the withdrawal of a guilty plea. Courts across the country have found that an accused person cannot withdraw their plea simply because the sentence does not suit them. This is the prevailing law and it accords with the principles of fairness, efficiency, and finality, and protects the integrity of the justice system.

---

[1] Factum of the Appellant, at para. 12.
[2] Factum of the Appellant, at para. 75.
[3] Factum of the Criminal Lawyers' Association, at paras. 3, 19; see also the Factum of the Saskatchewan Trial Lawyers Association & Canadian Council of Criminal Defence Lawyers, at paras. 27-31.

5. Ontario takes no position on the facts of this case.

PART II: POINTS IN ISSUE

6. Ontario advances two points on this appeal:

A. This Court should take a bright-line approach to the application of the public interest test and notice requirement set out in *R. v. Anthony-Cook*[4] in order to avoid litigating the degree of negotiation involved in a guilty plea; and

B. Notice that a judge may exceed the Crown's sentencing position should not, on its own, justify the withdrawal of a guilty plea.

PART III: STATEMENT OF ARGUMENT

A. This Court Should Take a Bright-Line Approach to the Application of the *Anthony-Cook* Public Interest Test and Notice Requirement to Avoid Litigating the Degree of Negotiation Involved in a Guilty Plea

7. When an accused person pleads guilty and the parties proceed to a contested sentencing hearing, asking the sentencing judge to apply a different legal framework depending on the extent of plea negotiations begs for further litigation. Litigating the extent and impact of plea negotiations would be an onerous and inefficient pre-condition to sentencing. To avoid this, this Court should take a bright-line approach to the *Anthony-Cook* public interest test and notice requirement. The public interest test should apply *only* to joint submissions, and *not* to non-joint submissions, regardless of the degree of negotiation involved. The notice requirement should apply to both joint and non-joint submissions. The appellant's "degree of negotiation" approach is inefficient, impractical, and unworkable. It should be rejected.

i) Requiring sentencing judges to determine the extent of negotiation involved in a guilty plea would erode the efficiency of guilty plea proceedings

8. A rule that requires litigating the extent of plea negotiations is inefficient and dilutes the benefits of a guilty plea. A guilty plea is one of the most significant mitigating factors on sentence

---

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

because it saves the court system "precious time, resources, and expenses".[5] That positive economic impact on the justice system would be diminished, however, if sentencing judges were required to apply the *Anthony-Cook* public interest test to "negotiated" non-joint submissions.

9. In order for a sentencing judge to determine whether a non-joint submission was the result of a "negotiated plea" akin to a joint submission, she would have to hear argument on the nature and extent of the negotiations, and decide their impact on the accused's decision to plead guilty. The sentencing judge would have to decide whether the plea was sufficiently negotiated such that it attracted a level of certainty comparable to a joint submission, or whether the plea negotiations fell short of that standard. This is not an efficient use of court time or resources.

10. This type of analysis has the potential to overwhelm the plea proceedings and delay the imposition of sentence. Determining whether a particular plea is a "negotiated plea" akin to a joint submission is an unwieldly task. The appellant does not distinguish between the type of negotiations he suggests should attract the *Anthony-Cook* principles and those that should not. This is a practical difficulty with the appellant's proposal. Not all plea negotiations are created equal. As the Court of Appeal for Nova Scotia put it in *R. v. Knockwood,* "[s]ituations will vary ranging from virtually no communication at all, to a casual overture without any tangible result, to a representation from one side which turns out to be virtually the same as the other, to serious bargaining in which a negotiated plea is exchanged for leniency or some other concession".[6]

11. A court cannot assume that because the parties engaged in plea negotiations, the accused's plea must have been triggered by a *quid pro quo* comparable to a joint submission. Not every accused person's decision to plead guilty involves a clear *quid pro quo*.[7] Nor does every accused person plead guilty on the basis of the Crown's sentencing position.[8]

---

[5] *Anthony-Cook*, *ibid.*, at para. 40. See also: *R. v. Martineau*, 2021 ABCA 401, at para. 24; *R. v. S.L.W.*, 2018 ABCA 235, at paras. 32, 35; *R. v. R.M.*, 2019 BCCA 409, at para. 6; *R. v. Hoang*, 2003 ABCA 251, at para. 25; *R. v. Edgar*, 2010 ONCA 529, at para. 111; *R. v. Naslund*, 2022 ABCA 6, at para. 50.

[6] *R. v. Knockwood*, 2009 NSCA 98, at para. 17; *R. v. Sinclair*, 2004 MBCA 48, at para. 13.

[7] *R. v. Lidkea*, 2019 ABCA 511, at para 13; *R. v. McKay*, 2004 MBCA 78, at paras. 20-21.

[8] Some accused are motivated to plead guilty for other reasons, such as to minimize stress and legal costs (see *Naslund*, *supra* note 5, at para. 52); to spare themselves or their loved ones from

12. Applying a bright-line approach to the *Anthony-Cook* public interest test and notice requirement would promote certainty and efficiency, by rendering litigation about the degree of plea negotiation unnecessary, without sacrificing fairness in the process.

ii) Applying different rules to non-joint submissions and "negotiated" non-joint submissions would diminish certainty and finality

13. Separating non-joint submissions into "negotiated" and "non-negotiated" would result in a two-tier system: non-joint submissions assessed under the *Anthony-Cook* framework, and non-joint submissions assessed according to traditional sentencing principles. This is unworkable, as there is no clear line to draw between a plea that is "sufficiently negotiated" and one that is not. It would also decrease certainty and finality for the parties. Since it would be up to the judge to make the final determination on whether the negotiations were sufficient to trigger the *Anthony-Cook* framework, the parties would not know the standard under which their plea would be assessed until they walked into court. Furthermore, a two-tier system would increase the potential for appeals in cases where the sentencing judge and counsel disagreed on the degree or impact of the plea negotiations, and therefore the applicable framework.

iii) Litigating the extent of negotiations would require routine disclosure of privileged resolution discussions in open court

14. Litigating the extent of negotiations or *quid pro quo* involved in a guilty plea would require the parties to routinely disclose their resolution discussions during sentencing submissions. This Court in *Anthony-Cook* recommended against such a practice.

15. Resolution discussions are protected by settlement privilege, subject to exceptions "when the justice of the case requires it."[9] Settlement privilege protects the parties' communications as

---

the criminal trial process (see *R. v. Tryon*, 1994 CanLII 1365 (ON CA) and *R. v. Douglas,* 2010 BCPC 265, at paras. 49, 93-94); to secure the most lenient sentence possible (see *R. v. King*, 2004 CanLII 26619 (ON CA)); or to alleviate internal guilt and suffering and start making amends (see *Naslund*, *supra* note 5, at para. 50).

[9] *R. v. Delchev*, 2015 ONCA 381, at paras. 24, 27-28; *R. v. Dickson*, 2014 ABPC 233, at paras. 56-81; *R. v. Roberts*, 2001 ABQB 520, at paras. 59-62.

they attempt to settle a dispute. It "promotes honest and frank discussions between the parties" and allows them to negotiate without fear that the information they disclose will be used against them.[10]

16. Resolution discussions should not routinely form part of the parties' submissions on sentence. While the parties have an obligation to justify their sentencing positions, Moldaver J. in *Anthony-Cook* clarified that this does not mean "that counsel must inform the trial judge of 'their negotiating positions or the substance of their discussions leading to the agreement'".[11] In making this statement, Moldaver J. referred to *R. v. Tkachuk*, in which the Court of Appeal for Alberta held: "[t]hese are private negotiations which need not, and normally should not, be disclosed to the court.[12] Routinely disclosing plea negotiations during sentencing submissions would erode the privilege attached to those negotiations. It is a practice best avoided.

B. Notice That a Judge May Exceed the Crown's Sentencing Position Should Not on Its Own Justify the Withdrawal of a Guilty Plea

17. When a sentencing judge signals her intent to exceed the Crown's position on sentence, there should be no routine right for an accused person to withdraw their guilty plea. The plea inquiry required by s. 606(1.1) of the *Criminal Code* ensures that accused persons are informed that the court is not bound by any agreement the accused has made with the prosecutor. When an accused chooses to admit guilt knowing that the judge may impose a higher sentence than the Crown recommended, a sentence that does not suit the accused should not be the basis for allowing them to change their plea. This has been the law across Canada and, since it serves the principles of efficiency and finality and protects the integrity of the justice system, it should remain as such.

i) Courts across the country have found that rejection of an agreed-upon sentencing recommendation is not justification for withdrawing a guilty plea

18. A valid guilty plea must be voluntary, unequivocal, and informed. To be informed, the accused must be aware of the nature of the allegations, the effect of the plea, and the legally

[10] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, at para. 31; *Delchev, supra* note 9, at para. 31; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, at paras. 11-13, 17.
[11] *Anthony-Cook*, *supra* note 4, at para. 55.
[12] *R. v. Tkachuk*, 2001 ABCA 243, at para. 34.

relevant consequences of the plea.[13] The imposition of a harsher sentence than that recommended by the Crown does not render a guilty plea uninformed, as the Criminal Lawyers' Association has suggested.[14] The plea inquiry notifies the accused that the judge has the final say on sentence and that the court is not bound by any agreement with the Crown; whatever the parties' submissions on sentencing, the final disposition is up to the judge.[15] The accused pleads guilty informed that the judge may exceed the Crown's position. The plea does not become uninformed because the judge exercises this discretion.

19. Canadian courts have long established that an accused person is not permitted to withdraw their guilty plea solely because the judge did not agree with the proposed sentence. In *R. v. Lyons*, LaForest J. observed: "Subsequent dissatisfaction with the 'way things turned out' or with the sentence received is not, in my view, a sufficient reason to move this Court to inquire into the reasons behind the election or plea of an offender".[16]

20. The Court of Appeal for Ontario was asked in *R. v. Rubenstein* to consider whether, when a trial judge intends to reject a joint submission, she should give the accused an opportunity to withdraw their plea. The appellant in *Rubenstein* argued that to do otherwise would be fundamentally unfair, since an accused offers the plea with the expectation that the joint submission will be followed. Writing for the Court, Zuber J.A. held:

> I disagree with this proposition. The power of the trial judge to impose a sentence cannot be limited to a joint submission, and **the joint submission cannot be the basis upon which to seek to escape the sentencing judge when it appears that he chooses to reject the joint submission.** As Judge Draper observed, an accused who could thus withdraw his plea could simply keep doing so until he found a trial judge who would accept the joint submission. A plea of guilty in the same way as a finding of guilt after trial exposes an accused to a proper sentence to be determined by the trial judge. ... To permit an accused to withdraw his plea when the sentence does not suit him puts the Court in the unseemly position of bargaining with the accused.[17] [emphasis added]

---

[13] *R. v. Wong*, 2018 SCC 25, at paras. 3-4; *R. v. T.(R.)*,1992 CanLII 2834 (ON CA) at para. 13.
[14] Factum of the Criminal Lawyers' Association (Ontario), at para. 19.
[15] See *R. v. Hason*, 2011 ONCA 396, at para. 3; *R. v. Ali*, 2006 ONCJ 92, at paras. 6-7, 11-16.
[16] *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 372.
[17] *R. v. Rubenstein*, 1987 CanLII 2834 (ON CA), at paras. 11-12, leave to appeal to SCC refused [1988] S.C.C.A. No. 85.

21. The principles set out in *Rubenstein* have been adopted as authoritative across the country.[18] Recently, the Court of Appeal for Alberta plainly stated: "Defendants must be taken to know that joint submissions might not necessarily be accepted by the court, and the mere rejection of a joint submission would not routinely justify a withdrawal of the plea."[19] A judge's intent to impose an unexpectedly high sentence does not give an accused the right to withdraw their guilty plea, whether the sentence exceeded was a joint position or simply the Crown's recommendation.

22. One outlier is *R. v. Fuller*, in which the Ontario Court of Justice found that if the accused agreed to plead guilty in exchange for a joint submission on sentence, it may be appropriate to allow him to withdraw his plea as "fairness would dictate the accused be restored to his previous position and allow him to argue these issues."[20] However, as the court in *R. v. Belakziz* pointed out in declining to follow *Fuller*, the decision in *Fuller* does not refer to s. 606(1.1) of the *Criminal Code*, let alone engage in any form of real analysis of the provision, in considering what is "fair." *Fuller* envisions an almost automatic right to withdraw an otherwise valid guilty plea following rejection of a proposed sentence – a broad standard which was explicitly considered and rejected in *Rubenstein*, and by the Court of Appeal for Alberta in *R. v. Hoang*.[21]

23. It is still open to an accused to withdraw a guilty plea if there are valid reasons to do so, as long as the circumstances are exceptional and constitute more than the mere fact the judge intends to exceed the proposed sentence.[22] The following are examples of exceptional circumstances that have entitled an accused to strike their guilty plea:

---

[18] See e.g. *R. v. Samms*, 1993 CanLII 8180 (NL CA), at paras. 17-18; *R. v. Desmond*, 2002 NSCA 31, at paras. 24-25; *R. c. Bergeron*, 2000 CanLII 7459 (QB CA), at para. 30; *R. v. M.J.Z.W.*, 2009 BCSC 1126, at para. 12.
[19] *R. v. Belakziz*, 2018 ABCA 370, at para. 31
[20] *R. v. Fuller*, 2017 ONCJ 865, at para. 55.
[21] *R. v. Belakziz*, 2018 ABQB 375, at paras. 25-27, aff'd 2018 ABCA 370; *Hoang*, *supra* note 5, at para. 25
[22] *Adgey v. R.*, [1975] 2 S.C.R. 426, at p. 431; The example provided by Moldaver J. at para. 59 of *Anthony-Cook* would fit into this category: an accused may be permitted to withdraw their guilty plea in the exceptional circumstance that the joint submission could never have been acceded to because it was an illegal sentence.

- An accused was not fully informed about the consequences of his plea because he did not know that the Crown would withdraw its support of the joint submission after the plea was entered, and take the position that the agreed sentence was not in the public interest. He pleaded guilty on the understanding that the Crown would actively support the joint position and that it would be presented and supported by both sides.[23]

- An accused was erroneously told there would be no immigration consequences, the plea inquiry made no mention of collateral consequences, and the accused demonstrated subjective prejudice.[24]

- An accused entered his guilty plea with the honest belief that a non-custodial sentence was settled, based on a clear promise from his lawyer and the judge's statement in a judicial pre-trial that he could see fit to impose a non-custodial sentence if the accused pleaded guilty. In these particular circumstances, the plea inquiry – in which the judge informed the accused he could sentence as he saw fit – could be discounted as being, from the accused's point of view, merely part of the ritual.[25]

ii) Requiring more than an unexpected sentence before allowing withdrawal of a guilty plea best serves the principles of efficiency and finality, and protects the integrity of the justice system

24. As this Court said in *Adgey v. R.*, the significance of a guilty plea "must be acknowledged": in pleading guilty, an accused admits having done that with which he is charged.[26] This factual acknowledgement of guilt must be kept in mind when considering the repercussions of allowing an accused to change their plea to "not guilty" because the sentence does not suit them.

25. There are practical and valid policy considerations why a court should not allow a guilty plea to be withdrawn except in exceptional circumstances.[27] When an accused seeks to set aside a guilty plea for a reason that has no impact on the factual accuracy of the plea, the court is asked to overlook the solemnity of court proceedings and to disregard finality. Although dealing with a

---

[23] *R. v. Espinoza-Ortega*, 2019 ONCA 545.
[24] *R. v. Davis*, 2020 ONCA 326.
[25] *R. v. Al-Diasty*, 2003 CanLII 41570 (ON CA).
[26] *Adgey, supra* note 22, at p. 433.
[27] *Hoang*, *supra* note 5, at para. 25.

different issue, Smith J.A.'s comments in *R. v. Sanders*, quoted with approval by this Court in *R. v. Bamsey*,[28] speak to these concerns:

> On the face of it, there would seem something anomalous in the law if it allowed an accused person, with full understanding, to plead "guilty" before a Magistrate and then, because he found the sentence unexpectedly heavy, or had unexpected consequences, or for some other reason having nothing to do with the merits, allowed him to appeal to the County Court and, without explanation, blandly plead "not guilty", and thus obtain a full trial on the merits. That seems to be playing fast and loose with the administration of justice.[29]

Finality

26. The principle of finality is fundamental and essential to the integrity of the criminal process. In *R. v. Wong*, this Court noted: "The vast majority of criminal prosecutions are resolved through guilty pleas and society has a strong interest in their finality. Maintaining their finality is therefore important to ensuring the stability, integrity, and efficiency of the administration of justice."[30] When an accused has pleaded guilty voluntarily, unequivocally, and knowing that the judge may impose a higher sentence than the accused expects, finality should prevail.

Efficiency

27. It is inefficient to allow accused persons to withdraw their guilty pleas any time a judge intends to exercise her discretion to impose a higher sentence. The court "must be cognizant of the wastage of court resources that these applications cause".[31] A large part of a guilty plea's value is the time and resources it saves. But, as this Court pointed out in *Rubenstein*, an accused who could thus withdraw their plea could simply keep doing so until they found a trial judge who would accept the recommended sentence.[32] The need to avoid a multiplicity of unwarranted court proceedings is important, and courts must not facilitate "judge shopping".[33]

---

[28] *R. v. Bamsey*, [1960] S.C.R. 294, at p. 300.
[29] *R. v. Sanders*, 1953 CanLII 420 (BC CA), at p. 82.
[30] *Wong*, supra note 13, at para. 3.
[31] *R. v. MacDonald*, 2006 CanLII 13235 (NL PC), at para. 45.
[32] *Rubenstein*, *supra* note 17, at para. 12.
[33] *R. v. St-Cloud*, 2015 SCC 27, at para. 125.

Integrity of the justice system

28. The importance of a conviction on the basis of a guilty plea is more than an administrative convenience. It also promotes the values inherent in the criminal trial process.[34] Public confidence in the integrity of the justice system would be diminished if a person who admitted committing a crime and pleaded guilty to it was allowed to change their plea to "not guilty" for the sole reason that – knowing the judge was not bound by any sentencing recommendations – they did not receive the sentence they expected. Not only would it put the court in the "unseemly position of bargaining with the accused",[35] it also degrades the meaningfulness of the presumption of innocence. As the Court of Appeal for Alberta (quoting from the American Bar Association) stated in *Hoang*:

> [T]he limited use of the trial process for those cases in which the defence has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence. The frequency of conviction without trial, therefore, not only permits the achievement of legitimate objectives in cases where pleas of guilty are entered, but also enhances the quality of justice in other cases as well.[36]

PART IV: SUBMISSIONS CONCERNING COSTS

29. Ontario makes no submissions as to costs.

ALL OF WHICH is respectfully submitted by

Jennifer Epstein Counsel for the Intervener Attorney General of Ontario	Katherine Beaudoin Counsel for the Intervener Attorney General of Ontario

DATED at Toronto this 1st day of February, 2022

[34] *Hoang*, *supra* note 5, at para. 26.
[35] *Rubenstein*, *supra* note 17, at para. 12.
[36] *Hoang*, *supra* note 5, at para. 26.

PART VII: TABLE OF AUTHORITIES

Cases:	**Paragraph No.:**
Adgey v. R., [1975] 2 S.C.R. 426	23, 24
R. c. Bergeron, 2000 CanLII 7459 (QB CA)	21
R. v. Al-Diasty, 2003 CanLII 41570 (ON CA)	23
R. v. Ali, 2006 ONCJ 92	18
R. v. Anthony-Cook, 2016 SCC 43	6, 7, 8, 10, 12, 13, 14, 16, 23
R. v. Bamsey, [1960] S.C.R. 294	25
R. v. Belakziz, 2018 ABQB 375, aff'd 2018 ABCA 370	21, 22
R. v. Davis, 2020 ONCA 326	23
R. v. Delchev, 2015 ONCA 381	15
R. v. Desmond, 2002 NSCA 31	21
R. v. Dickson, 2014 ABPC 233	15
R. v. Douglas, 2010 BCPC 265	11
R. v. Edgar, 2010 ONCA 529	10
R. v. Espinoza-Ortega, 2019 ONCA 545	23
R. v. Fuller, 2017 ONCJ 865	22
R. v. Hason, 2011 ONCA 396	18
R. v. Hoang, 2003 ABCA 251	10, 22, 27, 28
R. v. King, 2004 CanLII 26619 (ON CA)	11
R. v. Knockwood, 2009 NSCA 98	10
R. v. Lidkea, 2019 ABCA 511	11
R. v. Lyons, [1987] 2 S.C.R. 309	19
R. v. M.J.Z.W., 2009 BCSC 1126	21
R. v. MacDonald, 2006 CanLII 13235 (NL PC)	27
R. v. Martineau, 2021 ABCA 401	10
R. v. McKay, 2004 MBCA 78	11
R. v. Naslund, 2022 ABCA 6	10, 11
R. v. R.M., 2019 BCCA 409	10
R. v. Roberts, 2001 ABQB 520	15

R. v. Rubenstein, 1987 CanLII 2834 (ON CA) leave to appeal to SCC refused [1988] S.C.C.A. No. 85	20, 27, 28
R. v. S.L.W., 2018 ABCA 235	10
R. v. Samms, 1993 CanLII 8180 (NL CA)	21
R. v. Sanders, 1953 CanLII 420 (BC CA)	25
R. v. Sinclair, 2004 MBCA 48	10
R. v. St-Cloud, 2015 SCC 27	27
R. v. T. (R.), 1992 CanLII 2834 (ON CA)	18
R. v. Tkachuk, 2001 ABCA 243	16
R. v. Tryon, 1994 CanLII 1365 (ON CA)	11
R. v. Wong, 2018 SCC 25	18, 26
Sable Offshore Energy Inc. v. Ameron International Corp, 2013 SCC 37	15
Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35	15

Statutory Provisions or Regulations:	**Paragraph No.:**
Criminal Code, R.S.C., 1985, c. C-46, s. 606(1.1) *Code criminel*, L.R.C. (1985), ch. C-46, art. 606(1.1)	17, 22