File Number: 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

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

Interveners

FACTUM OF THE INTERVENER
DIRECTOR OF PUBLIC PROSECUTIONS

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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

John Walker
Jessica Lawn
Tel: (604) 775-5692
Fax: (604) 666-1599
Email: john.walker@ppsc-sppc.gc.ca
jessica.lawn@ppsc-sppc.gc.ca

Counsel for the intervener,
Director of Public Prosecutions

Kathleen Roussel
Director of Public Prosecutions
160 Elgin Street, 12thFloor
Ottawa, Ontario K1A 0H8

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

Ottawa agent for the intervener,
Director of Public Prosecutions

Jabour Sudeyko Lucky
200 – 92 Lonsdale Avenue
North Vancouver, British Columbia V7M 2E6

Hollis Lucky
James Nadel
Tel: (604) 986-8600
Fax: (604) 986-4872
Email: hollis@luckylaw.ca

Counsel for the appellant

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

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

Ottawa agent for the appellant

Ministry of Attorney General
Criminal Appeals and Special Prosecutions
6th Floor, 865 Hornby Street
Vancouver, British Columbia V6Z 2G3

Matthew Scott
Mila Shah
Tel: (604) 660-1126
Fax : (604) 660-1133
Email : matthew.scott@gov.bc.ca
mila.shah@gov.bc.ca

Counsel for the respondent

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

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Ottawa agent for the respondent

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
Email: jennifer.epstein@ontario.ca
katherine.beaudoin@ontario.ca

Counsel for the intervener, Attorney General of Ontario

Alberta Justice & Solicitor General
Alberta Crown Prosecution Service
300, 332-6 Avenue S. W.
Calgary, Alberta T2P 0B2

Rajbir Dhillon
Tel: (403) 297-6005
Fax: (403) 297-3453
Email: rajbir.dhillon@gov.ab.ca

Counsel for the intervener, Attorney General of Alberta

Gowlings WLG (Canada) LLP
2600 - 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

Ottawa agent for the intervener, Attorney General of Alberta

University of Manitoba
224 Dysart Road
Winnipeg, Manitoba R3T 2N2

David Ireland
Andrew Synshyn
Tel: (204) 474-6147
Fax: (204) 474-7580
Email: David.ireland@umanitoba.ca
andrew@ajslaw.ca

Counsel for the intervener, Criminal Defence Lawyers Association of Manitoba

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

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

Ottawa agent for the intervener, Criminal Defence Lawyers Association of Manitoba

McConchie Criminal Law
1555-1500 West Georgia Street
Vancouver, British Columbia V6G 2Z6

Rebecca McConchie
Tel: (604) 813-7464
Email: rebecca@mcconchie.ca

Counsel for the intervener, Trial Lawyers Association of British Columbia

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

Matthew J. Halpin
Tel: (613) 780-8654
Fax: (613) 230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa agent for the intervener, Trial Lawyers Association of British Columbia

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

R. Craig Bottomley
Arash Ghiassi
Tel: (416) 922-6161
Fax: (416) 934-0006
Email: bottomley@crimdefence.ca
arash@savardfoy.ca

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

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

Marie-France Major
Tel: (613)695-8855 ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa agent for the intervener,
Criminal Lawyers' Association (Ontario)

Peck and Company
610-744 West Hastings Street
Vancouver, British Columbia V6C 1A5

Tony Paisana
Kate Oja
Tel: (604) 669-0208
Fax: (604) 669-0616
Email: tpaisana@peckandcompany.ca
kate@kateoja.ca

Counsel for the intervener, Independent Criminal Defence Advocacy Society

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

Marie-France Major
Tel: (613) 695-8855 ext. 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa agent for the intervener,
Independent Criminal Defence Advocacy Society

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

Evan Roitenberg
Tel: (204) 985-8199
Fax: (204) 560-5226
Email: eroitenberg@wrrwmlaw.ca

Gerrand Rath Johnson LLP
#700-1917 Hamilton Street
Regina, SK S4P 3N6

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

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

Ottawa agent for the intervener,
Saskatchewan Trial Lawyers Association Inc. and Canadian Council of Criminal Defence Lawyers

Thomas Hynes
Tel: (306) 522-3030
Fax: (306) 522-3555
Email: thynes@grj.ca

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

TABLE OF CONTENTS

PARTS I & II – OVERVIEW AND STATEMENT OF POSITION

1. The Director of Public Prosecutions (the DPP) intervenes in this case to submit that the public interest test, as explained in *R v Anthony-Cook*, should not be extended to apply to contested sentencing hearings. A contested sentencing hearing is fundamentally different than a joint submission sentencing hearing and applying the strict public interest test is neither necessary nor is it workable.

2. The DPP also submits that where a sentencing judge considers it necessary to impose a sentence outside of the range proposed by the parties, there is no need for the judge to give notice of that intention. By virtue of a plea comprehension inquiry conducted pursuant to section 606(1.1) of the *Criminal Code*, and defence counsel's professional responsibilities, the accused is already on notice that a sentencing judge might impose a sentence outside of the proposed range.

PART III – ARGUMENT

A. The Public Interest Test Should be Rejected

3. Applying the public interest test to contested sentencing cases would unduly constrain a sentencing judge's critical role in crafting and imposing a proportionate sentence. A judge's role in a contested sentencing hearing is different from a judge's role in a joint submission sentencing. Accordingly, the underlying rationale for the application of the public interest test to joint submissions does not apply to contested sentencings.

a. The role of a sentencing judge in a contested sentencing hearing is different

4. In a joint submission sentencing, the judge's role is to consider whether the jointly proposed sentence is in the public interest. The substantial benefits of a joint submission led this Court to conclude that sentencing judges should generally defer to counsel's position.[1]

5. However, if a sentencing hearing proceeds on a contested basis, the sentencing judge's duty is instead to craft a fit, individualized and proportionate sentence.[2] This duty, taking into account the purpose and principles of sentencing, the circumstances of the case, and the circumstances of the offender has been described by this Court as a "profoundly subjective

---

[1] *R v Anthony-Cook*, 2016 SCC 43 at paras 35-44.
[2] *Criminal Code*, s 718.1.

process"[3] and "a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community."[4] The balancing of all relevant factors is the role of the sentencing judge, who is best positioned to craft a fit sentence for the offenders before them.[5]

b. The public interest test rationale does not apply to contested sentencing hearings

6. In *Anthony-Cook*, this Court determined that a sentencing judge cannot depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.[6] This high threshold is required because maximizing certainty of outcome is crucial to an accused and important to the Crown.[7] Significantly, joint submissions play a vital role in contributing to the administration of justice at large, by saving the justice system time, resources and expenses, which can be channelled into other matters.[8]

7. The criminal justice system also benefits from guilty pleas that do not result in a joint submission, but the benefits are far less substantial since the way a contested sentencing hearing proceeds is unlike a joint submission case. Even where the parties may have negotiated a range of sentence, the scope of the disagreement between the parties can vary widely. Parties can agree on nearly everything or nearly nothing. This is in stark contrast to a joint submission where parties have negotiated all aspects of the guilty plea resolution.

8. As noted by the respondent, regardless of whether an accused has indicated that they might plead guilty, Crown counsel typically communicates their sentencing position to an accused.[9] The accused might then just plead guilty. Or, the accused may choose to engage in plea discussions with Crown counsel but have no interest in negotiating a joint submission. On the other hand, the Crown might not be able to accept a joint submission proposed by an accused, because the

---

[3] *R v Shropshire*, [1995] 4 SCR 227 at para 46; *R v Parranto*, 2021 SCC 46 at para 13.
[4] *R v M.(C.A.)*, [1996] 1 SCR 500 at para 91; *R v Lacasse*, 2015 SCC 64 at para 89; *R v Parranto*, 2021 SCC 46 at para 9; *R v Friesen*, 2020 SCC 9 at para 25.
[5] *R v Shropshire*, [1995] 4 SCR 227 at para 46; *R v Parranto*, 2021 SCC 46 at para 13.
[6] *R v Anthony-Cook*, 2016 SCC 43 at para 32.
[7] *R v Anthony-Cook*, 2016 SCC 43 at paras 36-39.
[8] *R v Anthony-Cook*, 2016 SCC 43 at para 40.
[9] Respondent's Factum, para 44.

proposed sentence would not adequately represent the community's interest in seeing that justice is done.[10]

9. Upon the entry of a guilty plea, at the request of either counsel, the presiding judge may order that a pre-sentence report be prepared.[11] In the case of an indigenous offender, a *Gladue* report may also be prepared. The accused may obtain other reports, letters of support and character references. Victim impact statements and community impact statements may be put before the court.[12] Significantly, an evidentiary hearing may be required to resolve factual disputes.[13] Counsel may then make extensive submissions relying on the materials filed, submit how the factual disputes should be resolved and refer to disparate case authority in support of their position. While a judge might be able to sentence the offender immediately, the judge may be required to reserve to consider the appropriate disposition.

10. The tendered evidence, materials, and the submissions made may lead a sentencing judge to rightly conclude that the sentencing positions proposed by the parties are no longer appropriate. In some cases, the offending may be proven to be much more serious than it appeared when Crown counsel agreed to propose a range of sentence. However, in most cases, Crown counsel will be bound to maintain the position it communicated to the accused. It is imperative that an accused be able to rely on Crown counsel's sentencing position and the Crown should only repudiate its position in exceptional and rare circumstances.[14]

11. The strict public interest test should not be applied to contested dispositions; because, as the foregoing illustrates, there are fundamental differences between a contested sentencing hearing and a joint submission sentencing. While there can be no dispute that any case resolved by way of a guilty plea is beneficial to the efficient functioning of the criminal justice system, the benefits realized from a joint submission far exceed those from cases resolved on a contested basis. Contested sentencing hearings take much more time and require the expenditure of significantly more judicial resources.

---

[10] *R v Power*, [1994] 1 SCR 601 at 616; *R v Anthony-Cook*, 2016 SCC 43 at para 44.
[11] *Criminal Code*, s 721(1).
[12] *Criminal Code*, s 722, s 722.2; *Canadian Victims Bill of Rights*, SC 2015, c 13, ss 14, 15.
[13] *Criminal Code*, s 723, s 724(3); *R v Gardiner*, [1982] 2 SCR 368; *R v Pahl*, 2016 BCCA 234 at paras 53-55.
[14] *R v Nixon*, 2011 SCC 34 at paras 46-49.

B. Sentencing Judges Do Not Need to Notify the Parties that a Sentence Outside of the Recommended Range is Being Considered

12. There is no need for a sentencing judge to advise the parties that she might impose a sentence outside of the range recommended by the parties. An accused who pleads guilty is already on notice that the judge may not accede to the submissions of counsel because this notice is an essential component of a validly entered guilty plea. Furthermore, defence counsel are obliged to provide this very same advice to an accused before their client enters a guilty plea.

13. The rationale for the requirement that a judge provide notice of her intention to reject a joint submission has no application to contested sentencing hearings. In a joint submission case, the hearing proceeds on the basis that a judge is highly likely to impose the sentence sought. Sentencing submissions are aimed at satisfying the judge that the proposed disposition is in the public interest. There is no such presumption in a contested sentencing hearing, where the parties are well-aware that it is the sentencing judge's responsibility to determine the fitness of sentence. The parties advance all of their submissions in support of their respective positions in an effort to persuade the sentencing judge that their proposed sentence is fit. As a result, imposing a notice requirement to contested sentencing hearings would not serve any purpose.

a. A plea comprehension inquiry conducted pursuant to section 606(1.1) provides notice

14. Prior to accepting a guilty plea, a judge must be satisfied that the requirements set out in section 606(1.1) of the *Criminal Code* have been fulfilled, including that the accused is aware that the sentencing judge is not bound by any agreement made between the accused and the prosecutor.

Conditions for accepting guilty plea	Acceptation du plaidoyer de culpabilité
606 (1.1) A court may accept a plea of guilty only if it is satisfied that the accused	**606 (1.1)** Le tribunal ne peut accepter un plaidoyer de culpabilité que s'il est convaincu que les conditions suivantes sont remplies :
(a) is making the plea voluntarily; and	a) le prévenu fait volontairement le plaidoyer;
(b) understands	b) le prévenu :
(i) that the plea is an admission of the essential elements of the offence,	(i) comprend que, en le faisant, il admet les éléments essentiels de l'infraction en cause,
(ii) the nature and consequences of the plea, and	(ii) comprend la nature et les conséquences de sa décision,
(iii) that the court is not bound by any agreement made between the accused and the prosecutor; and	(iii) sait que le tribunal n'est lié par aucun accord conclu entre lui et le poursuivant;

(c) the facts support the charge. (1.2) The failure of the court to fully inquire whether the conditions set out in subsection (1.1) are met does not affect the validity of the plea.	c) les faits justifient l'accusation. (1.2) L'omission du tribunal de procéder à un examen approfondi pour vérifier la réalisation des conditions visées au paragraphe (1.1) ne porte pas atteinte à la validité du plaidoyer.

15. In 1993, the *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* recommended an amendment to the *Criminal Code* to ensure that any guilty plea resolution be "fully understood and agreed to" by the accused, thereby guaranteeing the integrity of any plea resolution agreement reached by the Crown and the defence.[15] The report further recommended that a plea comprehension inquiry be conducted in all cases,[16] because:

> The expenditure of a few more minutes to ascertain whether the plea was an intelligent, voluntary and accurate waiver of trial rights and admission of guilt would reduce the vulnerability to appellate review of cases based on guilty pleas and would improve the quality of summary justice immeasurably.[17]

16. In 2002, the *Criminal Code* was amended to add section 606(1.1)(a) and (b).[18] This codified the case law which had established that a plea could only be accepted if it was voluntary, unequivocal and informed.[19] The amendment specifically required that the accused know and understand that the court was not bound by any plea agreement reached between counsel.

17. The onus of ensuring that the requirements of section 606(1.1) are met rests with the judge.[20] But, the judge is not required to conduct the plea comprehension inquiry and a failure to

---

[15] Ontario, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer, 1993) p 318 & 323.
[16] Ontario, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer, 1993) p 318.
[17] Ontario, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer, 1993) p 323 citing O.E. Fitzgerald in *The Guilty Plea and Summary Justice* (1990) at p 329.
[18] Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts*, 1st Sess, 37th Parl, 2001, cl 49(1) (assented to 4 June 2002); Section 606(1.1)(c) was added later, SC 2019, c 25, cl 268.
[19] *R v Taillefer*, 2003 SCC 70 at para 85, citing *R v T.(R.)*, 1992 CanLII 2834 (ON CA), 10 O.R. (3d) 514 (CA) at p 519; *R v Hodgson*, 2019 SKCA 79 at para 32.
[20] *R v Bryant*, 2008 ABCA 203.

do so does not invalidate a guilty plea.[21] Inconsistencies in practice have developed and some judges have deferred to defence counsel's assurance that they have reviewed the section 606(1.1) requirements with their client.[22] Some courts have concluded that the better practise is for judges to conduct the plea comprehension inquiry themselves to ensure that every guilty plea is fully informed.[23]

b. Defence counsel's professional responsibilities also provides notice

18. Defence counsel have an important role to play in ensuring that an accused's guilty plea is an informed one.[24] Counsel's professional responsibilities also ensure that an accused is fully aware of a sentencing judge's discretion to impose a sentence outside of the recommended range. Professional codes of conduct across the country have adopted rules that require defence counsel to ensure that guilty pleas entered by their clients are voluntary, unequivocal and informed.[25] These rules all include a specific requirement that counsel advise their client that the court is not bound by any agreement between counsel. An offender cannot be legitimately surprised if a judge imposes a sentence outside the range suggested by counsel.[26]

---

[21] *Criminal Code*, s 606(1.2).
[22] *R v Harvey*, 2019 ABCA 462 at para 13; *R v Hoang*, 2003 ABCA 251 at para 32; *R v Sirianni*, 2015 ABCA 241 at para 4; *R v Schaaf*, 2017 ABCA 414 at para 9; *R v Prinsen*, 2013 ABCA 30 at para 3.
[23] *R v Lam*, 2020 BCCA 276 at paras 98-102; *R v Anderson*, 2021 ONCA 333 at para 50; *R v C.K.*, 2021 ONCA 826 at paras 92-95; *R v Gates*, 2010 BCCA 378 at para 21; *R v D.M.G.*, 2011 ONCA 343 at para 42.
[24] *R v Lam*, 2020 BCCA 276 at para 103; *R v Riley*, 2011 NSCA 52 at para 32.
[25] All Law Societies except the Barreau du Quebec have adopted the provision recommended by the Federation of Law Society's model code relating to the Agreement on Guilty Pleas. See: Law Society of Alberta, *Professional Code of Conduct*, Rule 5.1-8 (b); Law Society of Ontario, *Rules of Professional Conduct*, Rule 5.1-8 (b); Law Society of British Columbia, *Code of Professional Conduct*, Rule 5.1-8 (b); Law Society of Manitoba, *Code of Professional Conduct*, Rule 5.1-8 (b); Law Society of New Brunswick, *Code of Professional Conduct*, Rule 5.18 (b); Law Society of Newfoundland and Labrador, *Code of Professional Conduct* Rule 5.18 (b); Law Society of the Northwest Territories, *Code of Professional Conduct*, Rule 5.18 (b); Law Society of the Nunavut, *Code of Professional Conduct*, Rule 5.18 (b); Law Society of Prince Edward Island, *Code of Professional Conduct*, Rule 5.18 (b); Law Society of Saskatchewan, *Code of Professional Conduct*, Rule 5.1-8 (b); Law Society of the Yukon, *Code of Professional Conduct*, Rule 5.18 (b); and Nova Scotia's Barrister's Society, *Code of Professional Conduct*, Rule 5.18 (b).
[26] *R v Keough*, 2012 ABCA 14, dissenting reasons at para 56.

c. Providing more notice is unnecessary and would create inefficiencies

19. An accused already knows that the judge may impose a sentence outside of the submitted range. Requiring a sentencing judge to again provide this advice is superfluous.[27] Proceeding without providing additional notice is not procedurally unfair nor is it an error in principle to fail to do so.

i) Elevating good practice to a mandatory step is unnecessary

20. Requiring sentencing judges to provide the parties with another warning is unwarranted. In a given case, a sentencing judge might want to provide the parties with an opportunity to make further submissions, but that should be left to the good sense and discretion of the sentencing judge. In reality, in any sentencing hearing, judges question counsel when there is a perceived gap in their submissions or when something about counsel's position is troubling them. This is a natural part of the advocacy process[28] and this informal dialogue between the bench and counsel need not be formalized into a mandated step.

21. Appellate courts have universally recognized that it is at least preferable that a sentencing judge advise the parties that she is dissatisfied with the range of sentence proposed and may sentence outside of that recommended range.[29] However, no court has considered whether this additional procedural step is required if an offender has already been notified of this possibility through a properly conducted plea comprehension inquiry. In *R v Kravchenko*, the sentencing judge erred in applying the public interest test when she exceeded the range of sentence proposed by the Crown in a contested sentencing. Nevertheless, her warning that she was considering "jumping" the Crown's submission in conjunction with compliance with the requirements of section 606(1.1) entitled her to impose a proportionate sentence outside of the proposed range.[30]

---

[27] *R v Scott*, 2016 NLCA 16, dissenting reasons at para 51.
[28] *R v Burback*, 2012 ABCA 30 at para 14.
[29] For example: *R v G.T.A.*, 2021 BCCA 425; *R v R.R.B.*, 2013 BCCA 224; *R v Burback*, 2012 ABCA 30; *R v Keough*, 2012 ABCA 14; *R v Beardy*, 2014 MBCA 23; *Gabriel c R*, 2015 QCCA 1391; *Gervais c R*, 2021 QCCA 652; *R v Parr*, 2020 NUCA 2; *R v Kritaqliluk*, 2021 NUCA 4; *R v Hagen*, 2011 ONCA 749; *R v Blake-Samuels*, 2021 ONCA 77; *R v Scott*, 2016 NLCA 16.
[30] *R v Kravchenko*, 2020 MBCA 30 at paras 28, 31-32, leave to appeal ref'd, October 8, 2020, SCC No. 39152.

The court did not consider whether compliance with section 606(1.1) would in and of itself have amounted to notice.[31]

ii) Additional notice is an inefficient use of judicial resources

22. Requiring a sentencing judge to advise counsel that she is considering a sentence outside the proposed range of sentence will unnecessarily prolong the sentencing hearing. This additional notice would likely lead to an adjournment and a bifurcated sentencing hearing.[32] If a judge reserves and then comes to the realization that a sentence outside the range proposed is proper, counsel would then have to be advised, and court time secured to hear further submissions.

23. In a contested sentencing hearing, it is difficult to see what more the parties could add if provided with another opportunity to make further submissions. In this adversarial context, the parties advance all of their submissions in support of their respective submissions at the outset.

24. An approach that holds that a failure to give notice leads automatically to an error in principle is artificial and should be rejected.[33] As several appellate cases have shown, the failure to provide notice did not directly impact the sentence ultimately imposed. No fresh evidence was sought to be tendered on appeal or the fresh evidence tendered demonstrated that all relevant submissions had been made.[34] Where the failure to give notice was found to have an impact on the sentence imposed, often it was found that the sentencing judge had made other errors.[35]

25. The case at bar illustrates this point. In the court of appeal, the appellant sought to tender fresh evidence to show that his second guilty plea was entered only after being assured of the position the Crown would take on sentence. This was not new information, the sentencing judge was well aware that the appellant had entered his guilty plea following extensive resolution discussions with the Crown. There was nothing more that could be said on the appellant's behalf. Counsel had thoroughly and properly advanced all of his submissions in support of the sentence

---

[31] See also: *R v Blake-Samuels*, 2021 ONCA 77 at para 23.
[32] *R v Scott*, 2016 NLCA 16, dissenting reasons at para 52; See also *R v Keough*, 2012 ABCA 14, dissenting reasons at para 55.
[33] *R v Blake-Samuels*, 2021 ONCA 77 at para 36; *R v Mohiadin*, 2021 ONCA 122 at paras 9-10.
[34] *R v Scott*, 2016 NLCA 16 at para 31; *R v Hagen*, 2011 ONCA 749; *R v Burback*, 2012 ABCA 30 at paras 18-20; *R v Burke*, 2016 SKCA 100; *R v RGB*, 2017 ABCA 359.
[35] *R v Hood*, 2011 ABCA 169; *R v Keough*, 2012 ABCA 14; *R v R.O.*, 2017 ONCA 987; *R v Grant*, 2016 ONCA 639; *R v Peters*, 2020 MBCA 17; *R v Ehaloak*, 2017 NUCA 4.

sought, undoubtedly because he was well aware that the judge could impose a sentence above the range of sentence suggested by Crown counsel.[36]

26. The appropriate use of judicial resources must never be overlooked[37] and formalizing an additional notice requirement that is of no overall benefit will add to the burden of an already over-burdened system already struggling to meet the section 11(*b*) requirements as recently articulated by this Court.[38]

iii) Additional notice is not practical

27. Mandating notice before a judge exercises her important role in imposing a fit and just sentence is impractical because it leads to a host of additional questions.[39] As many as are the possible permutations of the contested sentencing hearing so too are the possible questions that arise from requiring additional notice that a deviation from the range proposed may occur. Is notice to be given only when the sentencing judge is inclined to exceed the range of sentence proposed by the Crown? Or is notice also to be given if the sentencing judge is inclined to impose a lower sentence than the one sought by the accused? What deviations from a proposed range of sentence would require a judge to give notice? Does it have to be a significant deviation, or is it any variation from any of the proposed terms of sentence? What is a significant deviation? For example, would modification to a proposed term of a probation order require that notice be given?

28. Requiring notice for all manners of deviations from the sentencing submissions of counsel or for some manner of deviations would likely cause confusion and be fertile ground for appellate review.

---

[36] *R v Nahanee*, 2021 BCCA 13 at paras 55-56.
[37] *R v Lacasse*, 2015 SCC 64 at para 48; *R v Scott*, 2016 NLCA 16, dissenting reasons at para 52.
[38] *R v Jordan*, 2016 SCC 27; *R v Cody*, 2017 SCC 31.
[39] See: *R v Keough*, 2012 ABCA 14, dissenting reasons at para 55.

PART IV – SUBMISSIONS AS TO COSTS

29. The DPP does not seek any costs and makes no submissions as to costs.

PART V – ORDER SOUGHT

30. The DPP takes no position on the relief to be granted in these appeals.

All of which is respectfully submitted this 1st day of February 2022.

_____

John Walker and Jessica Lawn
Counsel for the intervener, Director of Public Prosecutions

PART VI – TABLE OF AUTHORITIES

Jurisprudence	**Paragraphs Cited**
Gabriel c R, 2015 QCCA 1391	21
Gervais c R, 2021 QCCA 652	21
R v Anderson, 2021 ONCA 333	17
R v Anthony-Cook, 2016 SCC 43	1, 4, 6, 8
R v Beardy, 2014 MBCA 23	21
R v Blake-Samuels, 2021 ONCA 77	21, 24
R v Bryant, 2008 ABCA 203	17
R v Burback, 2012 ABCA 30	20, 21, 24
R v Burke, 2016 SKCA 100	24
R v C.K., 2021 ONCA 826	17
R v Cody, 2017 SCC 31	26
R v D.M.G., 2011 ONCA 343	17
R v Ehaloak, 2017 NUCA 4	24
R v Friesen, 2020 SCC 9	5
R v G.T.A., 2021 BCCA 425	21
R v Gardiner, [1982] 2 SCR 368	9
R v Gates, 2010 BCCA 378	17
R v Grant, 2016 ONCA 639	24
R v Hagen, 2011 ONCA 749	21, 24
R v Harvey, 2019 ABCA 462	17
R v Hoang, 2003 ABCA 251	17

R v Shropshire, [1995] 4 SCR 227	5
R v Sirianni, 2015 ABCA 241	17
R v T.(R.), 1992 CanLII 2834 (ON CA), 10 O.R. (3d) 514 (CA)	16
R v Taillefer, 2003 SCC 70	16

Legislation	**Paragraphs Cited**
Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts*, 1st Sess, 37th Parl, 2001, cl 49(1) (assented to 4 June 2002); Section 606(1.1)(c) was added later, SC 2019, c 25, cl 268.	16
Canadian Victims Bill of Rights, SC 2015, c 13, ss 14, 15	9
Criminal Code, SCR 1985, c C-46, s 606(1.2), s 718.1, s 721(1), s 722, s 722.2, s 723, s 724(3)	2, 5, 9, 14, 16, 17, 21

Other Sources	**Paragraphs Cited**
Law Society of Alberta, *Professional Code of Conduct*, Rule 5.1-8 (b);	18
Law Society of British Columbia, *Code of Professional Conduct*, Rule 5.1-8 (b)	18
Law Society of Manitoba, *Code of Professional Conduct*, Rule 5.1-8 (b)	18
Law Society of New Brunswick, *Code of Professional Conduct*, Rule 5.18 (b)	18
Law Society of Newfoundland and Labrador, *Code of Professional Conduct* Rule 5.18 (b)	18
Law Society of Ontario, *Rules of Professional Conduct*, Rule 5.1-8 (b)	18
Law Society of Prince Edward Island, *Code of Professional Conduct*, Rule 5.18 (b)	18
Law Society of Saskatchewan, *Code of Professional Conduct*, Rule 5.1-8 (b)	18
Law Society of the Northwest Territories, *Code of Professional Conduct*, Rule 5.18 (b)	18
Law Society of the Nunavut, *Code of Professional Conduct*, Rule 5.18 (b)	18
Law Society of the Yukon, *Code of Professional Conduct*, Rule 5.18 (b)	18

Nova Scotia's Barrister's Society, *Code of Professional Conduct*, Rule 5.18 (b)	18
Ontario, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer, 1993)	15