



SUPREME COURT OF CANADA

CITATION: R. v. Nahanee, 2022
SCC 37

APPEAL HEARD: March 16, 2022
JUDGMENT RENDERED: October
27, 2022
DOCKET: 39599

BETWEEN:

Kerry Alexander Nahanee
Appellant

and

His Majesty The King
Respondent

- and -

**Director of Public Prosecutions, Attorney General of Ontario, Attorney
General of Alberta, Criminal Lawyers' Association (Ontario), Trial Lawyers
Association of British Columbia, Saskatchewan Trial Lawyers Association
Inc., Canadian Council of Criminal Defence Lawyers, Criminal Defence
Lawyers Association of Manitoba and Independent Criminal Defence
Advocacy Society**
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin,
Kasirer and Jamal JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 70)

Moldaver J. (Wagner C.J. and Brown, Rowe, Martin, Kasirer
and Jamal JJ. concurring)

**DISSENTING
REASONS:**
(paras. 71 to 110)

Karakatsanis J. (Côté J. concurring)

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Kerry Alexander Nahanee

Appellant

v.

His Majesty The King

Respondent

and

**Director of Public Prosecutions,
Attorney General of Ontario,
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Interveners

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2022 SCC 37

File No.: 39599.

2022: March 16; 2022: October 27.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer
and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Sentencing — Sentencing procedure — Guilty plea — Contested sentencing hearing — Judge imposing sentence that exceeded range proposed by Crown — Whether framework for departure from joint submissions following guilty plea applies to contested sentencing hearings following guilty plea — Whether sentencing judge required to give notice to parties and provide further opportunity for submissions if they intend to impose sentence in excess of range proposed by Crown.

At age 19, N began sexually assaulting his 13-year-old niece shortly after she moved in with him and his parents. The assaults continued on a frequent basis over a five-year timeframe. At age 27, N sexually assaulted another niece, who was 15 years old, when she stayed overnight at the home N shared with his parents. N pleaded guilty to two counts of sexual assault. At the sentencing hearing, the Crown sought a global sentence of four to six years, while N sought a global sentence of three to three and a half years. The sentencing judge imposed a global sentence of eight years. N appealed, submitting, among other grounds, that the sentencing judge erred by failing to alert counsel that she planned to impose a sentence in excess of that sought by Crown counsel. The Court of Appeal dismissed N's appeal.

Held (Karakatsanis and Côté JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Moldaver**, Brown, Rowe, Martin, Kasirer and Jamal JJ.: The public interest test adopted in *R. v. Anthony-Cook*, 2016 SCC 43, [2016]

2 S.C.R. 204, which instructs judges not to depart from a joint sentencing submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest, must remain confined to joint submissions. It does not, and should not, apply to contested sentencing hearings following a guilty plea. However, if the sentencing judge presiding over a contested sentencing hearing is of a mind to impose a harsher sentence than what the Crown has proposed, they should notify the parties and give them an opportunity to make further submissions, failing which they run the risk of having the harsher sentence overturned on appeal.

The public interest test set out in *Anthony-Cook* exists to protect a specific agreed-upon sentence proposed by the Crown and the defence to a judge in exchange for an accused's guilty plea. Its stringency is designed to protect the unique benefits that flow from joint submissions. Unlike joint submissions, contested sentencings following a guilty plea do not offer, to the same degree, the benefits that *Anthony-Cook* sought to protect: certainty and efficiency. Contested sentencing hearings are characterized by a lack of agreement on a specific sentence, and therefore cannot offer the same degree of certainty as joint submissions. In addition, contested sentencing hearings are significantly less efficient than joint submissions. Although both save the justice system and its participants the time, stress, and cost of a trial, a contested sentencing requires the parties to prepare for and provide comprehensive submissions at a sentencing hearing.

If the public interest test applied to both joint submissions and contested sentencing hearings following a guilty plea, joint submissions would lose much of their attraction. They would no longer offer an unparalleled certainty as to the length of the accused's sentence, since contested sentencing hearings would offer a similar certainty. In addition, contested sentencing hearings would offer an added benefit to the accused that joint submissions would not: the possibility of a lower sentence. If joint submissions were frequently replaced with contested sentencing hearings, this would result in more lengthy and time-consuming sentencing hearings, thereby placing an even greater strain on a justice system that is already overburdened. Furthermore, if the public interest test applied to contested sentencing hearings, the sentencing judge's role to craft fit sentences that are proportionate to the gravity of the offence and the offender's degree of responsibility would be partially usurped and offloaded onto the Crown. The sentencing judge's discretion would be limited, as the lengths of sentences would be effectively capped at the Crown's proposed upper range.

Sentencing judges presiding over contested sentencing hearings are required to notify parties and provide an opportunity for further submissions if they plan to impose a harsher sentence than what the Crown has proposed. A sentencing judge should let the parties know as soon as possible if they are concerned that the Crown's proposed sentence is, or may be, too lenient and they are contemplating exceeding it. Adequate notice does not require the judge to set out in detail what it is that they find troublesome with the Crown's proposed sentence; they should, however, do so whenever possible. It is enough for a judge to advise the parties that, in their

view, the sentence proposed by the Crown appears too lenient, having regard to the seriousness of the offence and/or the degree of responsibility of the accused. The opportunity for further submissions should not be relied on by the parties as a chance to pull a rabbit out of the hat; it is critical that both the Crown and the accused initially provide as much relevant information as possible in support of their respective positions. Additional submissions, they should respond to the concerns raised by the sentencing judge, including matters that the parties considered irrelevant or simply overlooked in their initial submissions.

The sentencing judge's failure to provide notice and the opportunity for further submissions is not a breach of procedural fairness but an error in principle that will only justify appellate intervention where it appears from the judge's decision that such an error had an impact on the sentence. In these circumstances, the appellant must demonstrate that there was information that they could have provided, if given the opportunity to do so, and it must appear to the appellate court that this information would have impacted the sentence. In assessing impact, the focus should be on whether the missing information is material to the sentence at issue. Appellate intervention is also warranted where the sentencing judge failed to provide reasons, or provided unclear or insufficient reasons, for imposing the harsher sentence. Lastly, an appellate court may intervene if the sentencing judge relied on flawed or unsupportable reasoning for imposing the harsher sentence, such as the erroneous consideration of an aggravating factor or misapprehension of relevant authorities.

In the instant case, although the sentencing judge failed to provide notice that she was planning to exceed the Crown range and to provide an opportunity for further submissions, there was no impact on the sentence. N has not demonstrated that he had information to provide to the sentencing judge that would have impacted his sentence. The sentencing judge provided adequate reasons for why she exceeded the Crown range and her reasons for exceeding the Crown range, when read as a whole, were not erroneous. Furthermore, the eight-year sentence was not demonstrably unfit.

Per Karakatsanis and Côté JJ. (dissenting): There is agreement with the majority that the public interest test from *Anthony-Cook* is reserved for joint submissions. There is further agreement that a sentencing judge considering a harsher sentence than that proposed by the Crown is required to advise the parties and invite further submissions. The disagreement with the majority lies with the question of remedy when a judge fails to follow this procedure.

At a contested sentencing hearing where a sentencing judge is planning to impose a harsher sentence than that proposed by the Crown, the failure to advise counsel or invite further submissions is a breach of procedural fairness because it denies the parties adequate notice of the case to meet and the right to be heard. The flawed procedure impacts the parties' ability to make meaningful submissions, which might have addressed the judge's concerns. This creates a heightened risk that the judge will impose a sentence without all of the relevant information that might have been provided. If the parties knew the judge was considering a harsher sentence than

proposed by the Crown, either party could seek to provide further information, evidence or argument to address the judge's concerns, or provide additional authorities not previously brought to the judge's attention. Given the adversarial nature of sentencing proceedings, it is unrealistic to expect that the parties will initially adduce all potentially relevant information. If counsel were expected to adduce all relevant information, in an effort to pre-empt every potential concern of the sentencing judge, this would result in more lengthy and time-consuming sentencing hearings, thereby placing an even greater strain on the justice system.

Procedural fairness is an independent right. It is neither appropriate nor helpful to try to fit the analysis of procedural unfairness into the framework for appellate intervention set out in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, and *R. v. Friesen*, 2020 SCC 9. The decisions in *Lacasse* and *Friesen* do not detract from the Court's longstanding recognition that procedural unfairness is an independent basis for reviewing decisions affecting an individual's rights and interests. The inquiry into procedural fairness is distinct from the inquiry into whether a sentence is unfit or whether there has been an error in principle that impacted the sentence. Procedural fairness asks whether the sentence arrived at was the product of a fair procedure. A breach of procedural fairness impacts the right to a fair hearing and confidence in the process, regardless of whether or not the result is consistent with the purposes, principles and objectives of sentencing.

Where a sentencing judge imposes a harsher sentence than the Crown proposes without providing notice or inviting further submissions, the breach of procedural fairness may impact the sentence precisely because it is not possible to say whether further submissions would have impacted the sentence. In these circumstances, it is necessary to set the decision aside and conduct the sentencing afresh in order to restore fairness and the appearance of fairness to the proceedings. Thus, it is not necessary for the accused to demonstrate that the breach of procedural fairness caused actual prejudice. Where a court of appeal determines that there has been a breach of procedural fairness requiring the sentencing decision to be set aside, it must perform its own sentencing analysis without deference to the decision of first instance. Irrespective of the outcome of sentencing afresh, it is essential that fairness and the appearance of fairness have been restored.

In the instant case, there was a breach of the duty of procedural fairness that requires the sentencing decision to be set aside. The sentencing judge imposed a harsher sentence than that proposed by the Crown without providing the requisite notice or opportunity for further submissions. Even accepting that N might not have put forward substantively new information in response to an invitation for further submissions, he would have nevertheless been able to make further submissions tailored to the sentencing judge's concerns. Additionally, it is not known how the Crown would have responded to support its recommendation or how this could have addressed the sentencing judge's concerns. The appeal should be allowed and the

matter referred back to the Court of Appeal to perform its own sentencing analysis to determine a fit sentence.

Cases Cited

By Moldaver J.

Distinguished: *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204;
referred to: *R. v. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C. 106; *R. v. Blake-Samuels*, 2021 ONCA 77, 69 C.R. (7th) 274; *R. v. Jacobson*, 2019 NWTSC 9, [2019] 5 W.W.R. 172; *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696; *R. v. Shyback*, 2018 ABCA 331, 366 C.C.C. (3d) 197; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, *R. v. Friesen*, 2020 SCC 9; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *R. v. McDonald*, 2018 ONCA 369, 360 C.C.C. (3d) 494; *R. v. Sidhu*, 2022 ABCA 66, 411 C.C.C. (3d) 329; *R. v. Mohiadin*, 2021 ONCA 122; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

By Karakatsanis J. (dissenting)

R. v. Anthony-Cook, 2016 SCC 43, [2016] 2 S.C.R. 204; *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, *R. v. Friesen*, 2020 SCC 9; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536; *Lowry and Lepper v. The Queen*, [1974] S.C.R. 195; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219; *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *R. v. Blake-Samuels*, 2021 ONCA 77, 69 C.R. (7th) 274; *R. v. Huon*, 2010 BCCA 143; *R. v. G.W.C.*, 2000 ABCA 333, 277 A.R. 20; *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737; *R. v. Delchev*, 2015 ONCA 381, 126 O.R. (3d) 267; *R. v. Burbuck*, 2012 ABCA 30, 522 A.R. 352; *R. v. Ehaloak*, 2017 NUCA 4; *R. v. Parranto*, 2021 SCC 46; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; *R. v. Walker*, 2019 ONCA 765, 381 C.C.C. (3d) 259; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *R. v. Tran*, [1994] 2 S.C.R. 951; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202; *R. v. Papadopoulos* (2005), 196 O.A.C. 335; *Drapeau v. R.*, 2020 QCCA 796; *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 718.1, 718.2(a)(ii), (a)(ii.1), (a)(iii), (a)(iii.1), 718.3(1).

Authors Cited

Ruby, Clayton C. *Sentencing*, 10th ed. Toronto: LexisNexis, 2020.

APPEAL from a judgment of the British Columbia Court of Appeal (Willcock, Fenlon and Griffin JJ.A.), **2021 BCCA 13**, 69 C.R. (7th) 246, [2021] B.C.J. No. 47 (QL), 2021 CarswellBC 72 (WL), affirming a decision of Smith Prov. Ct. J., 2020 BCPC 41, [2020] B.C.J. No. 403 (QL), 2020 CarswellBC 625 (WL). Appeal dismissed, Karakatsanis and Côté JJ. dissenting.

Hollis A. Lucky, Michael Sobkin and James A. Nadel, for the appellant.

Matthew G. Scott and Mila Shah, for the respondent.

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

Jennifer Epstein and Katherine Beaudoin, for the intervener the Attorney General of Ontario.

Rajbir Dhillon, for the intervener the Attorney General of Alberta.

R. Craig Bottomley and *Arash Ghiassi*, for the intervener the Criminal Lawyers' Association (Ontario).

Rebecca A. McConchie and *Elsa Wyllie*, for the intervener the Trial Lawyers Association of British Columbia.

Evan J. Roitenberg and *Thomas Hynes*, for the interveners the Saskatchewan Trial Lawyers Association Inc. and the Canadian Council of Criminal Defence Lawyers.

David Ireland and *Andrew Synyshyn*, for the intervener the Criminal Defence Lawyers Association of Manitoba.

Tony C. Paisana and *Kate Oja*, for the intervener the Independent Criminal Defence Advocacy Society.

The judgment of Wagner C.J. and Moldaver, Brown, Rowe, Martin, Kasirer and Jamal JJ. was delivered by

MOLDAVER J. —

I. Introduction

[1] Where the Crown and the defence propose a specific agreed-upon sentence to a judge in exchange for an accused's guilty plea, a stringent test, known as the "public interest" test, exists to protect that submission. The test, adopted by this Court in *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204, instructs judges not to 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. Sentencing judges must not reject a joint submission lightly. They should only do so where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system.

[2] The stringency of this test is designed to protect the unique benefits that flow from joint submissions. It provides the parties with a high degree of certainty that the sentence jointly proposed will be the sentence imposed, and it avoids the need for lengthy, costly, and contentious trials. As a rule, joint submission sentencing hearings are expeditious and straightforward. They save precious time, resources, and expenses which can be channeled into other court matters. In short, they enable the justice system to function efficiently and effectively.

[3] The appellant, Mr. Nahanee, asks the Court to extend the *Anthony-Cook* public interest test from joint submissions — where the Crown and the defence agree on every aspect of the sentence — to contested sentencing hearings, where they do not. In his particular case, he proposes that the public interest test apply where the Crown and the defence have put forward different sentencing ranges to the judge following a

guilty plea, on the understanding that the Crown would not ask for a sentence that exceeds the high end of its sentencing range and the defence would not ask for a sentence that falls below the low end of its sentencing range. He submits that this extension of *Anthony-Cook* is an incremental change in the law. With respect, I disagree.

[4] In my opinion, the public interest test adopted by this Court in *Anthony-Cook* does not, and should not, apply to contested sentencing hearings following a guilty plea, regardless of the amount of prior negotiation between the parties culminating in the plea. In such cases, however, if the sentencing judge is of a mind to impose a harsher sentence, in any respect, than what the Crown has proposed, they should notify the parties and give them an opportunity to make further submissions — failing which, they run the risk of having the harsher sentence overturned on appeal for any one of the following three errors in principle:

- (i) the appellant establishes that there was information they or the Crown could have provided to the sentencing judge that would have impacted the sentence;
- (ii) the sentencing judge failed to provide adequate reasons for imposing the harsher sentence, thereby foreclosing meaningful appellate review; or

(iii) the sentencing judge provided erroneous or flawed reasons for imposing the harsher sentence.

[5] In the instant case, the sentencing judge imposed a global sentence of eight years on Mr. Nahanee for repeated sexual assaults of his two teenage nieces. This sentence exceeded the upper end of the sentencing range proposed by the Crown by two years. The sentencing judge did not provide notice that she planned to exceed the upper end of the Crown range, nor did she provide an opportunity for further submissions. Nonetheless, in my view, Mr. Nahanee has not shown that there was information he could have provided that would have impacted on the sentence; nor do the reasons of the sentencing judge disclose error. I would accordingly dismiss the appeal.

II. Background

[6] Mr. Nahanee and the Crown agreed on the facts at the sentencing. The agreed statement of facts included information about the sexual assaults that formed the basis of Mr. Nahanee's guilty pleas, as well as admissions about other sexual assaults on the victims that did not form part of his guilty pleas.

A. *Offences Against E.N.*

[7] At age 19, Mr. Nahanee began sexually assaulting his 13-year-old niece, E.N., shortly after she moved in with him and his parents, at a time when her mother was struggling with addiction. In her first year at her grandparents', E.N. awoke repeatedly to Mr. Nahanee digitally penetrating her vagina. Later that year, Mr. Nahanee forced her to engage in unprotected sexual intercourse. As she got older, she was able to resist the assaults by kicking him away. Regardless, he continued returning to her bedroom night after night.

[8] E.N. lost track of the number of assaults because they happened so frequently. The final assault, to which Mr. Nahanee admitted, fell outside the five-year timeframe captured by his guilty plea. Now 21 years old, E.N. returned to visit her grandparents. While she was sleeping next to her boyfriend, Mr. Nahanee put his hands under her shorts and tried to remove her underwear. She kicked him away.

[9] Mr. Nahanee's actions took an immeasurable toll on E.N.'s life. E.N. struggled with self-esteem. Her schooling, friendships, and family relationships suffered. She felt unable to disclose the abuse to her family for fear that it would tear them apart. Moreover, she felt that she had nowhere else to go. In her later high school years, she found herself physically and emotionally exhausted from losing sleep every night while fending off Mr. Nahanee's attacks. Years of abuse left her feeling disgusted with herself and not worthy of healthy relationships.

[10] E.N. reported the assaults to the police after she learned that her younger cousin, S.R., reported to the police that Mr. Nahanee had sexually assaulted her. Shortly

thereafter, when E.N. disclosed to her grandmother how Mr. Nahanee had abused her for many years, she was met with disbelief.

B. *Offences Against S.R.*

[11] Five days after the final assault on 21-year-old E.N., Mr. Nahanee, now age 27, sexually assaulted S.R., his 15-year-old niece. S.R. was staying overnight with her grandparents because her mother thought it would be safer for her to sleep there, rather than returning home by bus late at night. While S.R. was asleep in the same room as three of her younger cousins, she awoke to find Mr. Nahanee pushing his fingers inside her vagina. He then proceeded to have unprotected sexual intercourse with her.

[12] S.R. reported the sexual assault to the police about an hour later. The DNA sample obtained during S.R.'s examination at the hospital revealed that the semen found in her vagina came from Mr. Nahanee. The chances that the DNA was not his were found to be 1 in 81 quintillion.

[13] The assault had immediate and long-term physical and emotional effects on S.R. She suffered from anxiety, night terrors, and flashbacks. Shortly after the assault, she had suicidal thoughts. She was also fearful for the safety of other children in her grandmother's home.

[14] In addition to the one incident described by S.R., which formed the basis of his guilty plea, Mr. Nahanee acknowledged that S.R. told her grandmother that there

had been prior uncharged sexual assaults against S.R. As with E.N., her grandmother had disbelieved S.R. She accused S.R. of being vindictive and having mental health problems. S.R. was ostracized from much of the family for reporting to the police the assault that formed the basis of Mr. Nahanee's plea.

III. Procedural History

A. *Reasons for Sentence, British Columbia Provincial Court, 2020 BCPC 41 (Smith Prov. Ct. J.)*

[15] At the sentencing hearing, the Crown sought a global sentence of four to six years, while Mr. Nahanee sought a global sentence of three to three and a half years.

[16] Smith Prov. Ct. J. sentenced Mr. Nahanee to six years' imprisonment for the assaults on E.N., to be served consecutively to four years' imprisonment for the assault on S.R. Taking into account the principle of totality, she reduced the sentences to five and three years respectively, to be served consecutively, for a global sentence of eight years.

[17] In arriving at this sentence, Smith Prov. Ct. J. gave primary consideration to the objectives of denunciation and deterrence, given that Mr. Nahanee's offences involved the abuse of victims under the age of 18. In her view, four aggravating factors codified in the *Criminal Code*, R.S.C. 1985, c. C-46, applied to all of the offences: abuse of a family member (s. 718.2(a)(ii)); abuse of a person under the age of 18

(s. 718.2(a)(ii.1)); abuse of a position of trust (s. 718.2(a)(iii)); and the offences had a significant impact on the victims (s. 718.2(a)(iii.1)).

[18] Other aggravating factors common to both cases included that: the assaults involved unprotected intercourse, exposing the victims to a risk of pregnancy and sexually transmitted infections; both complainants were highly vulnerable while asleep; and the assaults occurred in a place where the victims had sought safety — their grandmother’s house. In E.N.’s case, there were eight instances of sexual intercourse. In S.R.’s case, other aggravating features included that: there was a 12-year age difference between S.R. and Mr. Nahanee; the assault was “not an isolated incident” (sentencing reasons, at para. 91); it was brazenly committed while other children slept nearby; and Mr. Nahanee had initially attempted to shift blame onto S.R.

[19] Mitigating factors in both cases included that: Mr. Nahanee entered a guilty plea; he was relatively young; and he had no criminal record. He also had a good work history, a supportive family in the community, and abided by his bail conditions. Although Mr. Nahanee demonstrated limited insight into the gravity of his crimes, Smith Prov. Ct. J. found that his expression of remorse was genuine and that he voiced a need and willingness to undergo treatment in the future.

[20] Smith Prov. Ct. J. considered Mr. Nahanee’s Indigenous background at length. She reviewed the *Gladue* report, the evidence of Mr. Nahanee’s mother, and Mr. Nahanee’s background, and found that none of the personal mitigating factors often present in cases of Indigenous offenders existed here. Hence, there was no basis

to reduce his blameworthiness on account of his Indigeneity. Although Smith Prov. Ct. J. took into account his family's historic experiences, including his grandparents' and father's attendance at residential schools, this was partly offset by the fact that both victims were Indigenous females who were more vulnerable to sexual assault than non-Indigenous women.

B. *British Columbia Court of Appeal, 2021 BCCA 13, 69 C.R. (7th) 246 (Willcock, Fenlon and Griffin J.J.A.)*

[21] The Court of Appeal unanimously dismissed Mr. Nahanee's sentence appeal. The court did not accept Mr. Nahanee's submissions that the sentencing judge erred by: (1) failing to alert counsel that she planned to impose a sentence in excess of that sought by Crown counsel; (2) imposing a demonstrably unfit sentence; (3) incorrectly applying statutory and common law aggravating factors; and (4) failing to properly consider his Indigenous heritage. Only the first ground of appeal is at issue in this Court.

[22] With respect to this ground, the Court of Appeal found that it was bound by its own precedent in *R. v. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C. 106, which held that, while it is preferable for a judge to notify parties that they plan to impose a sentence greater than that sought by the Crown and invite further submissions, failure to do so does not amount to reversible error. Nor did the court agree with Mr. Nahanee that *R.R.B.* had been overtaken by *Anthony-Cook*, such that the public interest test should apply to the negotiated sentencing ranges in his case. In the court's view, *R.R.B.*

was distinguishable because, like Mr. Nahanee’s case, it dealt with a contested sentencing rather than a joint submission, which was the sole focus of *Anthony-Cook*.

[23] In the court’s view, had the trial judge been obliged to notify counsel and invite further submissions, the failure to do so would only amount to a reversible error if Mr. Nahanee could show he was prejudiced. In this regard, the evidence Mr. Nahanee said he would have introduced at trial — that his second guilty plea, to the offence against E.N., was only entered after he was assured of the Crown’s sentencing position — was before the judge. The judge was told by defence counsel that Mr. Nahanee entered his second guilty plea following “extensive resolution discussions” that included “a thorough statement of facts and [the] Crown’s sentencing [position]” (C.A. reasons, at para. 56). There was no prejudice to Mr. Nahanee warranting interference with his sentence.

IV. Issues

[24] This appeal raises three issues:

- A. Does the *Anthony-Cook* framework for departure from joint submissions following a guilty plea apply to contested sentencing hearings following a guilty plea?

- B. Are sentencing judges required to give notice to the parties and provide an opportunity for further submissions if they plan to impose a harsher sentence than the Crown proposes?
- C. Does Mr. Nahanee's sentence warrant intervention?

V. Analysis

A. *Anthony-Cook Does Not Apply to Contested Sentencing Hearings Following a Guilty Plea*

[25] *Anthony-Cook* set out a stringent public interest test which must be met before sentencing judges can reject a joint submission following a guilty plea. At para. 34, the Court stated that:

Rejection [of a joint submission] denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

[26] This test sets a very high bar by design. It is meant to encourage agreement between the parties, which saves court time at sentencing. The test also incentivizes guilty pleas, sparing victims and the justice system the need for costly, time-consuming trials (*Anthony-Cook*, at paras. 35 and 40). Accused persons benefit because they have a very high degree of certainty that the sentence jointly proposed will be the sentence

they receive; and the Crown benefits because it is assured of a guilty plea on terms it is prepared to accept (paras. 36-39). Both parties also benefit by not having to prepare for a trial or a contested sentencing hearing.

[27] To be clear, a joint submission covers off every aspect of the sentence proposed. To the extent that the parties may agree to most, but not all, aspects of the sentence — be it the length or type of the sentence, or conditions, terms, or ancillary orders attached to it — the submission will not constitute a joint submission. The public interest test does not apply to bits and pieces of a sentence upon which the parties are in agreement; it applies across the board, or not at all. Apart from the logistical problems of applying two different tests to parts of the same proposed sentence, at the end of the day, there is only one composite sentence. Arriving at a sentence involves an assessment of all of its component parts. Isolating one or two parts of the sentence and subjecting them to a different test is antithetical to this determination, and may well undermine it.

[28] Mr. Nahanee asks this Court to extend the public interest test to contested sentencing hearings following a guilty plea, which generally will have come about after some negotiation between the Crown and the accused. He submits that the benefits of resolution discussions identified in *Anthony-Cook* apply equally to joint and contested submissions on sentence.

[29] With respect, I do not accept Mr. Nahanee's position. While recognizing that a contested sentence hearing following a guilty plea spares victims and the justice

system the need for costly trials, the *Anthony-Cook* public interest test must remain confined to joint submissions for three reasons.

(1) The Benefits of Joint Submissions Are Significantly Lessened With Contested Sentencings

[30] Contested sentencings following a guilty plea must be treated differently than joint submissions following a guilty plea because they do not offer, to the same degree, the benefits that *Anthony-Cook* sought to protect: certainty and efficiency. The public interest test encourages agreement on a specific agreed-upon sentence and offers certainty for the parties by protecting this agreement in order to promote efficient outcomes for the justice system and all participants. There is no such certainty or agreement where the Crown and the defence propose different sentencing ranges.

[31] Contested sentencings are characterized by a lack of agreement on a specific sentence, and therefore cannot offer the same degree of certainty as joint submissions. Joint submissions, which cover off every aspect of the sentence proposed to the court, offer certainty because of agreement in the form of a *quid pro quo*: the accused agrees to plead guilty in exchange for the Crown agreeing to recommend a specific sentence to the court that both the Crown and the accused find acceptable (*Anthony-Cook*, at para. 36). Nothing remains to be litigated. By its very nature, the *quid pro quo* of which I speak does not exist with contested sentencings, regardless of the amount of prior negotiation between the parties culminating in the guilty plea (I.F., Attorney General of Ontario, at para. 7). The proposed sentence is neither fixed nor

final. Loose ends remain to be litigated. Even in situations where the Crown and the accused may have resolution discussions prior to a contested sentencing hearing, the fact remains that the Crown is not agreeing to recommend a specific sentence to the court upon which the parties agree.

[32] Unlike a joint submission where both parties can be reasonably certain that their agreed upon position will be the outcome, the most an accused can reasonably expect at a contested sentencing is that the sentence is *likely* to fall within the disparate ranges proposed by counsel, and that it will not likely exceed the Crown's upper range. Contested sentencings lack the agreement of a *quid pro quo* — and resulting certainty — that this Court sought to protect in *Anthony-Cook*.

[33] In addition to providing a heightened degree of certainty for the parties, joint submissions are also significantly more efficient for the justice system than contested sentencing hearings. Although both save the justice system and its participants the time, stress, and cost of a trial, a contested sentencing requires the parties to prepare for and provide comprehensive submissions at a sentencing hearing. A joint submission hearing, on the other hand, can be counted on to take a fraction of the time and resources.

[34] This case provides an excellent example of the time and resources a contested sentencing hearing can eat up. Mr. Nahanee's sentencing hearing took an entire day. The Crown and the defence properly put their best foot forward, providing lengthy submissions in support of the reasonableness of their positions. Following the

hearing, the judge needed two weeks to deliberate and render a written decision. In contrast, joint submission hearings generally consist of the Crown reading in an agreed statement of facts and setting out the joint position. This will usually be completed in short order, with the sentence being imposed on the spot. Rarely is the judge required to render a lengthy decision.

[35] To be clear, these reasons should not be taken as placing pressure on accused persons to agree to a joint submission which they feel is not in their best interests. Proceeding to a contested sentencing may be the advisable choice for any number of reasons. Regardless, by virtue of their nature, joint submissions and contested sentencing hearings are not alike and should not be treated as though they are.

[36] *Anthony-Cook* protected joint submissions following a guilty plea because of their unique benefits to the justice system and all of its participants. These benefits — namely certainty and efficiency — are significantly attenuated in contested sentencing hearings. As a result, contested sentencings do not demand the stringent protection that the public interest test provides for joint submissions.

(2) Joint Submissions Would Be Discouraged

[37] If the *Anthony-Cook* public interest test applied to both joint submissions and contested sentencing hearings following a guilty plea, joint submissions would lose much of their attraction. They would no longer offer an unparalleled certainty as to the

length of the accused's sentence, since contested sentencings would offer a similar certainty. Where a joint submission is put forward, it will be the rarest of cases that a judge applying the public interest test deviates from the specific sentence proposed. In a contested sentencing, a judge applying the public interest test would be equally constrained from imposing a sentence that exceeded the upper end of the sentencing range proposed by the Crown.

[38] In addition to offering a high degree of certainty like joint submissions, a contested sentencing hearing would offer an added benefit to the accused that a joint submission would not: the possibility of a lower sentence. Accused persons might well choose to gamble by proceeding to a contested sentencing, leaving open the possibility of obtaining a lower sentence than the one that would have formed the basis of a joint submission. If joint submissions were frequently replaced with contested sentencing hearings, this would result in more lengthy and time-consuming sentencing hearings, thereby placing an even greater strain on a justice system that is already overburdened.

[39] Discouraging joint submissions by making contested sentencings a more attractive option undermines the overriding purpose of *Anthony-Cook*: to encourage joint submissions. As this Court stressed in *Anthony-Cook*, joint submissions not only “permit our justice system to function more efficiently . . . they permit it to function” (para. 40). Without them, “our justice system would be brought to its knees, and eventually collapse under its own weight” (para. 40).

(3) The Sentencing Judge's Role Would Be Partially Usurped and Offloaded Onto the Crown

[40] Sentencing judges are entrusted with crafting fit sentences that are proportionate to the gravity of the offence and the offender's degree of responsibility (*Criminal Code*, s. 718.1). Applying the public interest test to contested sentencings would limit judges' discretion by effectively capping the lengths of sentences at the Crown's proposed upper range. A judge wishing to exceed the Crown's upper range would have to consider whether the upper range was so low that reasonable persons would view it as a breakdown in the functioning of the justice system. This stringent test would rarely be met.

[41] As a result, one aspect of the responsibility to craft a fit sentence would gradually shift from sentencing judges to the Crown. The upper ranges for guilty pleas would effectively become a Crown prerogative. Although judicial discretion is limited by the public interest test in the context of a joint submission, this limitation is justified in order to protect the parties' agreement on a specific sentence — the length of which is not unilaterally decided by the Crown. In contrast, if the public interest test applied to contested sentencings, the upper range would often be unilaterally decided by the Crown. This, in turn, would also have consequences for parties considering case law ranges when agreeing on a joint submission. Joint submissions are rarely published. Parties deciding on a joint submission will generally look to case law ranges established in contested sentencing hearings following a guilty plea. Allowing the Crown to be the arbiter of the upper range of sentences following a guilty plea is surely not a role that

Parliament intended to confer upon the Crown (*R. v. Blake-Samuels*, 2021 ONCA 77, 69 C.R. (7th) 274, at para. 29; *R. v. Jacobson*, 2019 NWTSC 9, [2019] 5 W.W.R. 172, at para. 35).

[42] To summarize, the stringent public interest test in *Anthony-Cook* applies only to joint submissions following guilty pleas, and not to contested sentencings following guilty pleas, for three main reasons: (1) the benefits of a joint submission — certainty and efficiency — which justify the stringent public interest test are significantly attenuated on a contested sentencing hearing; (2) joint submissions would be discouraged because accused persons would have less incentive to compromise and more incentive to seek a lower sentence at a contested sentencing; and (3) applying the public interest test to contested sentencings undercuts the sentencing judge’s responsibility to determine the upper range of fit sentences, leading over time to the impermissible offloading of this responsibility onto the Crown.

B. *Sentencing Judges Are Required to Notify Parties and Provide an Opportunity for Further Submissions if They Plan to Impose a Harsher Sentence Than What the Crown Has Proposed*

[43] Mr. Nahanee and the Crown agree, as do I, that sentencing judges should notify the parties and provide an opportunity for further submissions if they plan to impose a harsher sentence than what the Crown has proposed. The parties diverge on when a failure to provide notice and/or the opportunity for further submissions is an error justifying appellate intervention. Before moving to a discussion of when an error

justifies appellate intervention, it might be helpful to provide some guidance on the requirements for notice and the opportunity for further submissions.

(1) Notice Requirement

[44] Sentencing judges should let the parties know as soon as possible if they are concerned that the Crown's proposed sentence is, or may be, too lenient and they are contemplating exceeding it.

[45] Adequate notice does not require the judge to set out in detail, or with exactitude, what it is that they find troublesome with the Crown's proposed sentence; they should, however, do so whenever possible. It is enough for a judge to advise the parties that, in their view, the sentence proposed by the Crown appears too lenient, having regard to the seriousness of the offence and/or the degree of responsibility of the accused. Providing comprehensive reasons for this concern may, and often will, prove impossible since the judge's position at this point is unlikely to be fixed. As indicated, the purpose is simply to put the parties on notice that the judge is considering exceeding the Crown's proposed sentence. Notifying the parties can be as simple as saying: I am considering imposing a higher sentence than the Crown is seeking due to the seriousness of this offence (see, e.g., *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167, at para. 37). While notice need not take a particular form, it must be more than simply asking questions or expressing vague concerns about the parties' sentencing proposals.

[46] There may be cases where the judge has no thought of imposing a harsher sentence than the Crown has proposed until the sentencing hearing is over and the judge has reserved their decision. When that occurs, the judge should notify the parties as soon as possible and invite further submissions, either orally or in writing. At this juncture, the judge may be able to provide greater detail as to the reasons for their concern.

[47] According to Mr. Nahanee, an accused should be allowed to withdraw their guilty plea when the judge provides notice that they are considering exceeding the Crown range. I would not give effect to this submission. Sentencing judges should only allow for the withdrawal of guilty pleas in exceptional circumstances, such as where counsel have made a fundamental error about the availability of the proposed sentence (*Anthony-Cook*, at para. 59). For example, this would occur where a period of incarceration is mandated by the *Criminal Code*, but the parties have erroneously proposed non-custodial sentences with differing terms and conditions. As the Attorney General of Ontario noted, it is settled law that an accused cannot withdraw their guilty plea solely because the judge does not agree with the proposed sentence (I.F., at para. 19; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 372). Allowing a plea to be struck simply because the judge decides to impose a harsher sentence than expected would undermine the finality of guilty pleas and encourage judge shopping (*R. v. Wong*, 2018 SCC 25, [2018] 1 S.C.R. 696, at para. 29).

(2) Opportunity for Further Submissions

[48] It is critical that both the Crown and the accused initially provide as much relevant information as possible at the contested sentencing hearing in support of their respective positions. The opportunity for further submissions should not be relied on as a chance to pull a rabbit out of the hat. Additional submissions should respond to the concerns raised, including matters that the parties considered irrelevant or simply overlooked in their initial submissions. For example, this will be the case where the parties propose differing non-custodial options and the judge signals that they are considering a period of incarceration. Further argument and pertinent authorities will likely be necessary.

[49] In appropriate cases, where facets of the plea negotiation are highly relevant to support the reasonableness of the Crown's proposed sentence — which may at first blush seem very low — the parties are well-advised to reveal the pertinent information in their initial submissions. Although documents and discussions arising out of plea negotiations are subject to settlement privilege (*R. v. Shyback*, 2018 ABCA 331, 366 C.C.C. (3d) 197, at para. 28), the parties can agree to waive this privilege where it would assist the judge in determining a fit sentence. The sentence proposed by the Crown will justifiably be more lenient than expected if, for example, the accused provided vital information for another prosecution or was a confidential informant. If there is a concern about revealing confidential information, the parties should discuss an appropriate way to let the judge know, such as a sealed affidavit. Another way may be for the parties to alert the judge as to the negotiation considerations without getting into details. For example, the Crown can be expected to alert the judge in its

submissions that it has considered the strength of its case in proposing its sentencing range, particularly where the range would appear to be too lenient. This is commonly done without the Crown going into detail about the deficiencies of its case. In sum, revealing facets of the plea negotiation will sometimes play an important role in enabling the judge to properly assess the fitness of the competing proposed sentences.

[50] Where the parties are put on notice and given an opportunity to make further submissions, the format for doing so rests with the judge in consultation with the parties. The judge may seek oral or written submissions, or both. The parties must be allowed a reasonable time to prepare additional submissions, if needed.

(3) Errors Justifying Appellate Intervention

[51] Mr. Nahanee submits that, in cases like his, a judge's failure to provide notice and/or the opportunity for further submissions is a breach of procedural fairness that will always justify a hearing where the sentence is considered afresh, even if there is no additional information — much less pertinent information — that the accused could have presented to the judge.

[52] With respect, I disagree. Procedural fairness is not the applicable route of appeal. Rather, the applicable route of appeal is the error in principle model, as outlined in *R. v. Lacasse*, 2015 SCC 64 [2015] 3 S.C.R. 1089. The judge's failure to provide notice and the opportunity for further submissions is an error in principle that will only justify appellate intervention "where it appears from the trial judge's decision that such

an error had an impact on the sentence” (*Lacasse*, at para. 44; see also *R. v. Friesen*, 2020 SCC 9, at para. 26). In short, this failure is always an error, though not necessarily one warranting appellate intervention. Where the appellant can establish impact, the judge will have been deprived of an important piece of information relevant to determining a fit sentence. I see no reason to diverge from this established approach to sentence appeals.

[53] The doctrine of common law procedural fairness was largely developed in administrative law cases, but the principles are also applicable to criminal cases (see, e.g., *Lyons*, at p. 361). It is well established that the requirements for procedural fairness are context-specific (*Lyons*, at p. 361; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-22; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 57; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 47-48). Certain protections required in one context to ensure procedural fairness may not be required in another (*Lyons*, at p. 361). In other words, “[w]hat is fair in a particular case will depend on the context of the case” (*Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 39).

[54] Mr. Nahanee alleges that the procedural unfairness in his case is a breach of the rule of *audi alteram partem*: a person must be given an opportunity to be heard where the outcome will affect them (*A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, at para. 27). In my view, his submission must fail. There is no breach of common law

procedural fairness in the context of a sentencing hearing where the accused has been made aware of the Crown's case and been given a full opportunity to respond to it. That is a very different situation from one where the accused has been denied *any* meaningful right to be heard at first instance (see, e.g., *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker*; *R. v. McDonald*, 2018 ONCA 369, 360 C.C.C. (3d) 494). Such cases involve both actual and perceived unfairness to the appellant.

[55] A fair hearing must generally allow the parties to know the opposing party's case so that they can respond to it and bring evidence in support of their position (*Rodgers*, at para. 48; see also *Ruby*, at para. 40). According to this general rule, accused persons like Mr. Nahanee are not denied a fair hearing because they have been made aware of the Crown's case and have provided detailed submissions at the initial sentencing hearing in support of their position. While the accused will not have been informed about the sentencing judge's concerns, they will have put their best foot forward as to why the sentence they have proposed is fit and why the Crown's sentence is excessive. This will often include, where necessary, cross-examining Crown witnesses, calling defence witnesses, filing reports, and/or providing an extensive review of relevant case law. That is a far cry from joint submissions, where the parties are unlikely to have presented their case in such a detailed and comprehensive manner. It follows that, in the context of a joint submission, fairness requires that the parties receive notice and information about the judge's concerns in order to know how to respond in a more detailed manner (*Anthony-Cook*, at para. 58). The same concerns are

significantly attenuated in the context of a contested sentencing hearing, where it is expected that the parties will have provided detailed and comprehensive submissions.

[56] Here, Mr. Nahanee claims that he is entitled to be sentenced afresh because he was deprived of the opportunity to provide information at his sentencing hearing, assuming such information exists, regardless of whether it would have had an impact on his sentence. Respectfully, I disagree. As indicated, I am satisfied that in this context, the applicable route of appeal is the error in principle model, which requires impact.

[57] I say that because, in this context, there is no meaningful loss of procedural fairness since, by its nature, the informational deficiency, if it exists, is one that can be readily remedied on appeal (*Baker*, at para. 24). The basis of the appeal would be an alleged error in principle. The appellant need only inform the court of the information they were unable to bring to the attention of the sentencing judge. If this information is material, such that it appears to the appellate court that it would have impacted the sentence, the court can sentence afresh (*Friesen*, at para. 27; *Lacasse*, at paras. 43-44).

[58] Mr. Nahanee suggests that the error in principle model is inappropriate because appellate judges will be unable to assess impact, since they can never know what the parties may have put before the judge, had the parties been offered a further opportunity to do so. As a result, it is impossible for appellate judges to say that the sentence would not have been different (A.F., at para. 99; see also *R. v. Sidhu*, 2022 ABCA 66, 411 C.C.C. (3d) 329, at para. 73; *R. v. Mohiadin*, 2021 ONCA 122, at para. 9

(CanLII); *Blake-Samuels*, at paras. 36 and 38). I would not give effect to this submission. The parties are best placed to inform the appellate court of the information they would have provided, had they been given the opportunity to do so. It is not unduly burdensome to require the appellant — with the aid of the Crown where it has relevant information to share as to why its proposed sentence was appropriate — to provide the appellate court with the information the sentencing judge did not have due to their failure to provide notice. If there is no additional information that the accused would have provided, then the lack of opportunity to provide this information will have had no impact on the sentence. This is simply not a situation where the error’s impact on sentence is unknowable, such that impact must be assumed in all cases.

[59] In my view, where the sentencing judge fails to provide notice and/or an opportunity for further submissions, there are three types of errors in principle that would warrant intervention by the appellate court:

- i. *If the failure to provide notice and/or further submissions impacts the sentence.* The appellant must demonstrate that there was information that they could have provided, if given the opportunity to do so, and it appears to the appellate court that this information would have impacted the sentence. If the appellate court is of the view that there is missing information that would realistically have impacted the sentence, the court can consider the sentence afresh. In assessing impact, the focus should be on whether the missing information is

material to the sentence at issue. For example, where both parties propose non-custodial sentences and the judge imposes a period of incarceration without notice, the appellant can establish impact by pointing to something material that they would have presented had they been given notice and the opportunity for further submissions, such as a pertinent authority or important mitigating fact. The Crown should assist the appellate court wherever possible by providing or confirming the information that the sentencing judge did not have.

- ii. *If the sentencing judge failed to provide reasons, or provided unclear or insufficient reasons, for imposing the harsher sentence.* Failure to provide sufficient reasons is an error of law, which is a type of error in principle (*Friesen*, at para. 26; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 28). The appellate court may only intervene if the insufficiency of reasons foreclosed meaningful appellate review. While it is preferable for sentencing judges to explicitly say why they exceeded the Crown range, it will not necessarily foreclose meaningful appellate review if this is not done. The court may look to the record, as a whole, to determine whether sufficient reasons have been given for exceeding the Crown range. Courts are to take a functional approach to sufficiency of reasons (*Sheppard*, at para. 50).

iii. *If the sentencing judge provided erroneous reasons for imposing the harsher sentence.* The appellate court may intervene if the sentencing judge relied on flawed or unsupportable reasoning for imposing the harsher sentence, such as the erroneous consideration of an aggravating factor or misapprehension of relevant authorities. Standing alone, however, flawed reasoning will not be enough; the appellant must also satisfy the court that this reasoning impacted the sentence (*Lacasse*, at paras. 43-44).

[60] An appellant may argue one or more of these three grounds of appeal. In cases where it may be difficult for the appellant to demonstrate impact based on the content of the sentencing judge's reasons, the latter two grounds of appeal — in addition to the Crown's obligation to assist the appellate court with respect to information not in front of the sentencing judge — act as safeguards to ensure that the appellant can obtain a remedy where appropriate.

[61] If there is an error in principle that impacts the sentence, the appellate court may sentence the appellant afresh without deference, save for the findings made by the sentencing judge (*Friesen*, at para. 28). Although I need not decide whether appellate courts can remit a case back to the trial court for a fresh sentencing hearing, I would not foreclose the possibility that they could, in rare cases, order a fresh sentencing hearing where the record is so incomplete as to foreclose a fresh assessment at the appellate court. If no error in principle is established, or the error in principle does not

have an impact on the sentence, then the only potential remaining ground of appeal will be whether the sentence is demonstrably unfit (*Friesen*, at para. 26).

C. *Mr. Nahanee's Sentence Does Not Warrant Intervention*

[62] Mr. Nahanee asks this Court for a fresh sentencing hearing on the basis that he was denied procedural fairness at the sentencing hearing. I decline to do so, for reasons I have already explained. Rather, I consider the three possible errors, namely: (1) failure to provide notice and an opportunity for further submissions; (2) failure to provide sufficient reasons for imposing the harsher sentence; and (3) erroneous reasons were provided for imposing the harsher sentence. In addition, while not formally advanced as a ground of appeal before this Court, for the sake of completeness I consider whether Mr. Nahanee's sentence was demonstrably unfit. I find that none of these alleged errors warrant intervention in this case.

(1) Notice and Opportunity for Further Submissions

[63] Although the sentencing judge failed to provide notice that she was planning to exceed the Crown range and to provide an opportunity for further submissions, there was no impact on the sentence. Mr. Nahanee has not demonstrated that he had information to provide to the sentencing judge that would have impacted his sentence. He submits that, given the opportunity, he would have told the judge that he only entered his second guilty plea, regarding the offence against E.N., after being assured of the Crown's sentencing position.

[64] This information was already before the sentencing judge. At the plea proceeding prior to sentencing, Mr. Nahanee's trial counsel indicated to the judge that the matter regarding E.N. had been set down for trial but that, "[t]hrough extensive resolution discussions with my friend, including quite a thorough statement of facts and Crown's sentencing decision which was provided by my friend's office . . . I do have instructions to resolve [the matter] and enter a plea of guilty" (A.R., vol. II, at p. 3).

[65] The sentencing judge was well aware of the information Mr. Nahanee now says he would have provided had the judge given him notice. Hence, he has not demonstrated any impact on his sentence warranting intervention.

(2) Sufficient Reasons for Exceeding the Crown Range

[66] The sentencing judge provided adequate reasons for why she exceeded the Crown range. Although it would have been preferable had she explicitly addressed this issue, the judge's detailed reasons leave no question as to why the Crown's range of four to six years was too low. In particular, the judge cited the seriousness and repeated nature of Mr. Nahanee's crimes, the young age and Indigenous background of the victims, and the lack of factors in Mr. Nahanee's *Gladue* report that would have reduced his blameworthiness. I am satisfied that, looking at the judge's reasons functionally and as a whole, they do not foreclose meaningful appellate review (*Sheppard*, at para. 50).

(3) Erroneous Reasons for Exceeding the Crown Range

[67] The sentencing judge's reasons for exceeding the Crown range, when read as a whole, were not erroneous. As noted above, the factors she considered were relevant and supported her conclusion that the upper end of the Crown's range was too low.

(4) Whether the Sentence Was Demonstrably Unfit

[68] The eight-year sentence was not demonstrably unfit. The sentencing judge pre-empted this Court's decision in *Friesen* — released only two months later — that upper-single and double-digit penitentiary terms for sexual offences against children should not be unusual, nor reserved for rare circumstances (para. 114).

[69] Mr. Nahanee's prolonged and profoundly harmful actions irreparably impacted the lives of two young Indigenous women. His actions highlight the heightened risk of sexual assault faced by marginalized young women. Mr. Nahanee was in a position of trust as the victims' uncle and violated them while they were in a vulnerable position, asleep at their grandmother's house. Eight years cannot be said to be a demonstrably unfit sentence for his crimes.

VI. Disposition

[70] I would dismiss Mr. Nahanee's appeal.

The reasons of Karakatsanis and Côté JJ. were delivered by

KARAKATSANIS J. —

I. Introduction

[71] I would allow this appeal and remit the matter to the Court of Appeal for British Columbia for sentencing afresh. I agree with my colleague that the sentencing judge was not required to apply the public interest test from *R. v. Anthony-Cook*, 2016 SCC 43, [2016] 2 S.C.R. 204, which is reserved for joint submissions. I further agree that a judge considering a harsher sentence than that proposed by the Crown is required to advise the parties and invite further submissions. What divides us is the question of remedy when a judge fails to follow this procedure.

[72] In *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, and *R. v. Friesen*, 2020 SCC 9, this Court set out the principles concerning appellate intervention in appeals from the sentence imposed. For good reason, these decisions narrowly defined the role of appellate courts in varying sentencing decisions. However, they were not concerned with procedural fairness, nor did they address the longstanding principle that procedural fairness is an independent basis for reviewing decisions affecting an individual's rights and interests, and providing a remedy if appropriate. This case requires the Court to address the additional issue of procedural fairness and the related principle that justice must not only be done, it must be seen to be done.

[73] In my view, it is fundamentally unfair for a sentencing judge to impose a sentence upon an accused that is harsher than the one proposed by the Crown without giving the parties notice and an opportunity to respond to the judge's concerns. An accused is not required to demonstrate that this flawed procedure resulted in a sentence that is demonstrably unfit or that it amounted to an error in principle that had an impact on sentence. Nor is it necessary to demonstrate that there was specific information that would have been provided to the sentencing judge and that it would have impacted the sentence.

[74] Sentencing is a dynamic process in which the art of advocacy, the adversarial context, and the parties' legitimate expectations play an important role; the parties are entitled to put their best foot forward to respond to the case they must meet. They must be able to address a point of fact or law that is of concern to the sentencing judge, and which could result in a more severe deprivation of liberty. Where this is not done, there is a breach of the duty of procedural fairness which, in itself, will generally warrant appellate intervention. In such a case, the appellate court should conduct a fresh assessment to determine a fit sentence.

II. Analysis

[75] I proceed as follows. First, I consider the duty of procedural fairness and the high degree of procedural fairness that is required in sentencing proceedings. Second, I conclude that the duty of procedural fairness is breached where a sentencing judge fails to provide the parties with notice of their intent to impose a harsher sentence

than the Crown proposes or an opportunity to make submissions to address the judge's concerns. Third, I consider the appropriate remedy to restore fairness and the appearance of fairness to the proceedings.

A. *Procedural Fairness in Sentencing*

[76] I begin with first principles. Procedural fairness is a rule of fundamental justice (*Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, at para. 41; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 77, per Cory J.). The common law doctrine of procedural fairness has been developed in both administrative law cases and criminal cases. In criminal proceedings, the obligation to hold a fair hearing is due to both the accused and the Crown (*S. (R.D.)*, at para. 96, per Cory J.).

[77] An essential component of procedural fairness is that parties have the right to be heard. Individuals whose rights, privileges or interests are affected by a decision must be given an opportunity to be heard before the decision is made (*A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, at para. 27; *Lowry and Lepper v. The Queen*, [1974] S.C.R. 195). 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.

[78] 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 guides their submissions and the evidence they will adduce at the hearing (*Harkat*, at para. 41).

[79] In sentencing proceedings, a high degree of procedural fairness is required. It is well established that the requirements of procedural fairness are context-specific (*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at para. 47; *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41, at para. 36). Depending on the nature of the decision being made and the importance of the rights and interests at stake, procedural fairness may need to be more jealously guarded and strictly enforced. Accordingly, especially in proceedings of a penal nature, it is essential that parties be afforded the right to be heard (*Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at para. 60).

[80] Procedural fairness is also particularly important in sentencing proceedings due to their adversarial nature. In the adversarial justice system, the positions of the parties and their framing of the issues will guide the evidence led and submissions at a sentencing hearing (*R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 38). While a judge is permitted to impose a harsher sentence than the Crown proposes, the jeopardy faced by the accused is typically tied to the Crown's recommendation. Accordingly, at a contested sentencing hearing, the accused will be directing argument primarily to the positions taken by the Crown; the points of disagreement between the parties on sentence generally form the basis of their submissions (see, e.g., *R. v. Blake-Samuels*, 2021 ONCA 77, 69 C.R. (7th) 274, at para. 36). The accused may believe a point not

disputed by the Crown is not in contention and not make any submissions on that point; a subsequent sentence inconsistent with the point can then take both parties by surprise (see, e.g., *R. v. Huon*, 2010 BCCA 143, at paras. 5-6 (CanLII)).

[81] As a result, it is critical that the parties have notice of the case to meet and an opportunity to be heard where a judge intends to depart from their submissions on sentencing.

B. *Failing to Give Notice or to Invite Submissions Is a Breach of Procedural Fairness*

[82] In *Anthony-Cook*, at para. 58, the Court stated that where a trial judge is troubled by a joint submission on sentence, “fundamental fairness dictates that an opportunity be afforded to counsel to make further submissions in an attempt to address the . . . judge’s concerns before the sentence is imposed” (quoting *R. v. G.W.C.*, 2000 ABCA 333, 277 A.R. 20, at para. 26). Although this statement was made in the context of joint submissions, in my view, the underlying principle extends to contested sentencing hearings where a judge is planning to depart from the parties’ submissions and impose a harsher sentence than what the Crown has proposed (see also *Blake-Samuels*, at para. 32).

[83] The failure to advise counsel or invite further submissions regarding the judge’s intention to impose a harsher sentence than the Crown’s recommendation is a breach of procedural fairness because it denies the parties adequate notice of the case

to meet and the right to be heard. The flawed procedure impacts the parties' ability to make meaningful submissions, which might have addressed the judge's concerns. There is a heightened risk that the judge will impose a sentence without all of the relevant information that might have been provided. Furthermore, the appearance of fairness in the proceedings is undermined.

[84] Respectfully, I do not agree with the assumption that where a judge fails to provide notice or an opportunity for further submissions in the context of a contested sentencing hearing, the parties will have already provided comprehensive submissions and thus fairness concerns are significantly attenuated (Moldaver J.'s reasons, at paras. 55 and 64).

[85] First, given the adversarial nature of sentencing proceedings, it is unrealistic to expect that the parties will initially adduce all potentially relevant information. The submissions of the Crown and the accused will be tailored to each other's positions, and may not be responsive to the unexpressed concerns of the sentencing judge (see, e.g., *Huon*, at paras. 5-6). In *R. v. Scott*, 2016 NLCA 16, 376 Nfld. & P.E.I.R. 167, at para. 37, Rowe J.A. (as he then was) recognized this point, stating:

. . . certain facts or cases may become relevant if the sentencing judge is considering "jumping" the Crown's submission on sentence, whereas they would not be relevant if the judge were to impose a sentence no greater than that sought by the Crown. Unless Defence counsel is aware that the judge is considering "jumping" the Crown's submission on sentence, matters relevant to sentence may not be placed before the judge.

If counsel were expected to adduce *all* relevant information, in an effort to pre-empt every potential concern of the sentencing judge, this would result in more lengthy and time-consuming sentencing hearings, thereby placing an even greater strain on the justice system.

[86] Counsel may also choose not to reveal certain information during the sentencing hearing, even though it may be relevant, absent some indication that it bears on an issue of concern to the sentencing judge. For example, there may be a negotiated element to the parties' positions on sentencing. The reasons and rationale for the negotiations and resulting agreements may not be readily apparent to a sentencing judge, and may not be offered at first instance as they may be sensitive in nature (see, e.g., *Scott*, at paras. 19-22). Resolution discussions are also protected by settlement privilege, subject to exceptions "when the justice of the case requires it" (*Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623, at para. 12, citing *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740; *R. v. Delchev*, 2015 ONCA 381, 126 O.R. (3d) 267, at para. 28). Accordingly, as the intervener Attorney General of Ontario put it, "Routinely disclosing plea negotiations during sentencing submissions would erode the privilege attached to those negotiations. It is a practice best avoided" (I.F., at para. 16).

[87] If the parties knew the judge was considering a sentence harsher than the Crown proposes, the Crown could provide useful information to justify the reasons for its position (see, e.g., *R. v. Burbuck*, 2012 ABCA 30, 522 A.R. 352, at para. 14). Either

party may seek to provide further information, evidence or argument to address the judge's concerns, or provide additional authorities not previously brought to the judge's attention (see, e.g., *R. v. Ehaloak*, 2017 NUCA 4, at para. 37 (CanLII)). For example, a harsher sentence could trigger a collateral consequence. If there is a negotiated element to the parties' positions involving a *quid pro quo* that the parties have, for whatever reason, chosen not to explain, being advised that the judge is considering a harsher sentence provides them the opportunity to put all their cards on the table (R.F., at para. 62). For example, the Crown may take the opportunity to explain that the apparent leniency of its recommendation is warranted, based on deficiencies in its case that would have made it difficult to secure a conviction at trial.

[88] These considerations highlight the importance of ensuring that the parties have notice and an opportunity to respond to the sentencing judge's concerns; the failure to adhere to this procedure is a breach of the duty of procedural fairness. I next turn to discuss the issue of remedy.

C. *Remedy for Breach of the Duty of Procedural Fairness in Sentencing*

[89] In *Lacasse* and *Friesen*, this Court stated that an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit; or (2) the sentencing judge made an error in principle that had an impact on the sentence (*Lacasse*, at paras. 41 and 44; *Friesen*, at para. 26; *R. v. Parranto*, 2021 SCC 46, at para. 30).

[90] This deferential approach to appellate review of sentencing decisions is critical. Parliament chose to grant discretion to sentencing judges to determine the appropriate degree and kind of punishment under the *Criminal Code*, R.S.C. 1985, c. C-46 (*Lacasse*, at para. 41; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90; s. 718.3(1) of the *Criminal Code*). Sentencing judges are in a privileged position and bring “unique qualifications of experience and judgment” to their task (*M. (C.A.)*, at para. 91). And, concerns regarding delay and misuse of judicial resources would arise if appellate courts were to take a more interventionist approach to sentencing appeals (*Lacasse*, at para. 48).

[91] The respondent Crown relies on *Lacasse* and *Friesen* to argue that a procedural deficiency in sentencing may justify appellate intervention only if it had an impact on the sentence: “In the absence of an impact on the sentence that was imposed, fairness does not require the appeal court to redo the entire exercise from scratch” (R.F., at para. 67).

[92] In my view, it is neither appropriate nor helpful to try to fit the analysis of procedural unfairness into the framework for appellate intervention set out in *Lacasse* and *Friesen*. First, these decisions were not concerned with issues of procedural fairness. The sentencing decisions at issue in each case did not involve any breach of procedural fairness. Further, the discussion of the role of appellate courts in these cases focused on their “dual role” of safeguarding against errors and developing the law and providing guidance (*Friesen*, at para. 34; *Lacasse*, at paras. 36-37). Because procedural

fairness was not at issue, this Court did not comment upon the important role that appellate courts also play in maintaining public respect for the administration of justice by ensuring fairness and the perception of fairness within the criminal justice system (see, e.g., *S. (R.D.)*, at para. 91, per Cory J.; *R. v. Walker*, 2019 ONCA 765, 381 C.C.C. (3d) 259, at para. 25).

[93] Second, issues of procedural fairness are not captured by the *Lacasse* and *Friesen* framework because procedural fairness is an independent right. The decisions in *Lacasse* and *Friesen* do not detract from this Court’s longstanding recognition that procedural unfairness is an independent basis for reviewing decisions affecting an individual’s rights and interests. In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 661, this Court stated that “[t]he right to a fair hearing must be regarded as an independent, unqualified right”. Similarly, outside of the administrative law context, this Court in *R. v. Tran*, [1994] 2 S.C.R. 951, at p. 981, referred to the “independent responsibility” that courts have “to ensure that their proceedings are fair and in accordance with the principles of natural justice”.

[94] Thirdly, given that it is an independent right, the inquiry into procedural fairness is distinct from the inquiry into whether a sentence is unfit or whether there has been an error in principle that impacted the sentence. If the process was unfair, by definition, the basis upon which the sentence was determined is undermined.

[95] Procedural fairness asks whether the sentence arrived at was the product of a fair procedure. By contrast, the inquiry into the fitness of a sentence focuses on

whether it constitutes an “unreasonable departure” from the fundamental principle of proportionality (*Lacasse*, at paras. 52-53).

[96] Similarly, an assessment of whether there was an error in principle that impacted sentence is separate from an assessment of procedural fairness. Errors in principle include “an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor” (*Friesen*, at para. 26). The weighing of factors can constitute an error in principle only if the sentencing judge exercised their discretion unreasonably. Whether or not the parties could exercise their right to be heard — a central concern of procedural fairness — is not addressed by the focus on the sentencing judge’s discretion or their application of the principles of sentencing. A breach of procedural fairness impacts the right to a fair hearing and confidence in the exercise of the court’s jurisdiction in reaching the result, regardless of whether or not the result is consistent with the purposes, principles and objectives of sentencing.

[97] Additionally, in many cases, it will be impossible for an accused to demonstrate that a breach of procedural fairness had an actual impact on sentence. I agree with the observation from C. C. Ruby, *Sentencing* (10th ed. 2020), at §3.93, that, “we do not know where on the proper range the sentence would have been fixed if the judge had heard effective submissions”. To give an obvious example, a sentencing judge may reject the Crown’s recommendation as too lenient, without appreciating that the recommendation was justified by deficiencies in the Crown’s case that would have

made it difficult to secure a conviction at trial. This information is not something the accused can credibly speak to, to demonstrate how further submissions could have impacted the sentence.

[98] In my view, a breach of the duty of procedural fairness in sentencing, in itself, will generally require that the decision of the sentencing judge be set aside. Procedural fairness is an essential aspect of a sentencing hearing.

[99] The Crown argues that, where a sentencing judge imposes a more stringent sentence without providing notice or an opportunity for further submissions, there is no meaningful loss of procedural fairness, since a sentence appeal is “the forum which gives the parties the opportunity to make the full argument they were denied in the court below” (R.F., at para. 66). I would not give effect to this submission.

[100] The task of an appellate court is fundamentally different when it acts in its appellate function and when it acts as a court of first instance. In the former role, the court begins its examination of the sentence from a position of deference. By contrast, when it concludes that the sentence was the product of an unfair procedure, the sentencing decision must be set aside, and the appellate court “will apply the principles of sentencing afresh to the facts, without deference to the existing sentence” (*Friesen*, at para. 27).

[101] Where a sentencing judge imposes a harsher sentence than the Crown proposes without providing notice or inviting further submissions, the breach of

procedural fairness may have had an impact on the sentence precisely because it is not possible to say whether further submissions would have impacted the sentence. In these circumstances, it is necessary to set the decision aside and conduct the sentencing afresh in order to restore fairness and the appearance of fairness to the proceedings. I agree with the Court of Appeal for Ontario that “[i]t is not appropriate to deny procedural fairness during the sentencing process with the expectation that any error can be cured on appeal” (*Blake-Samuels*, at para. 33). An accused should not have to rely on the appeal process to ensure fairness; rather, “[f]airness should be afforded at all steps” (para. 33).

[102] Thus, it is not necessary for the accused to demonstrate that the breach of procedural fairness caused actual prejudice. As the Court stated in *Cardinal*, “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” (p. 661). Similarly, the Court has also recognized that the judgment of a partial adjudicator must be set aside, regardless of the merits of their decision: “The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, is void” (*R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, at para. 6 (emphasis deleted), citing *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 645).

[103] A new determination of a fit sentence will be required, because the procedural deficiency *may* have worked to the prejudice of one of the parties (*Kane v. Board of Governors (University of British Columbia)*, [1980] 1 S.C.R. 1105, at p. 1116). Nonetheless, there are rare circumstances in which a court may exercise its discretion to not grant a remedy for a procedural deficiency where the result is otherwise inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at p. 228; *R. v. Papadopoulos* (2005), 196 O.A.C. 335, at para. 24; *Drapeau v. R.*, 2020 QCCA 796).

[104] In sum, where a sentencing judge fails to advise the parties and invite submissions concerning his or her intention to impose a harsher sentence than the Crown proposes, it is not possible to say whether further submissions would have impacted the sentence. The accused must show that there was a breach of the duty of procedural fairness but need not show actual prejudice. However, in rare cases, the court may choose not to grant a remedy where it is clear that the breach was such that the result was inevitable and public confidence would not be affected.

[105] Where a court of appeal determines that there has been a breach of procedural fairness requiring the sentencing decision to be set aside, it must perform its own sentencing analysis without deference to the decision of first instance. In *R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 27, this Court recognized that “the predominant view is that there is no authority in the court of appeal to remit the matter to the trial judge for a new sentencing hearing. . . . If the court of appeal finds that there

are grounds requiring its intervention, it imposes a fit sentence in what amounts to a new sentencing hearing” (see also *Lowry and Lepper*). There is no specific provision in the *Criminal Code* empowering the court of appeal to remit the case back to the sentencing judge (Ruby, at §4.52).

[106] In sentencing afresh, the appellate court may reach a decision that coincides with the penalty imposed at first instance, despite the additional submissions and analysis. However, irrespective of the outcome of sentencing afresh, it is essential that fairness and the appearance of fairness have been restored.

III. Application

[107] The appellant, Mr. Nahanee, seeks an order allowing the appeal, and asks this Court to impose a sentence consistent with the Crown and the defence counsel’s sentencing recommendation, or, in the alternative, to refer the matter back to the Court of Appeal for a full and fresh sentencing hearing.

[108] I have come to the conclusion that there was a breach of the duty of procedural fairness that requires the sentencing decision to be set aside. The sentencing judge imposed a harsher sentence than what the Crown proposed without providing the requisite notice or opportunity for further submissions.

[109] Even accepting that Mr. Nahanee might not have put forward substantively new information in response to an invitation for further submissions, he would have

nevertheless been able to make further submissions tailored to the sentencing judge's concerns. Additionally, it is not known how the Crown would have responded to support its recommendation or how this could have addressed the sentencing judge's concerns. In these circumstances, we must make sure that justice appears to be done.

IV. Disposition

[110] For the foregoing reasons, I would allow the appeal and would refer the matter back to the Court of Appeal for British Columbia to perform its own sentencing analysis to determine a fit sentence.

Appeal dismissed, KARAKATSANIS and CÔTÉ JJ. dissenting.

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