



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

Citation: *R. v. Scott*, 2016 NLCA 16

Date: April 26, 2016

Docket: 201501H0001

BETWEEN:

JOHN SCOTT

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Rowe, White and Hoegg JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Corner Brook

Appeal Heard: February 16, 2016

Judgment Rendered: April 26, 2016

Reasons for Judgment by Rowe J.A.

Concurred in by White J.A.

Dissenting In Part; Concurring in the Result by Hoegg J.A.

Counsel for the Appellant: Randolph J. Piercey Q.C.

Counsel for the Respondent: Lloyd M. Strickland

Rowe J.A.:

[1] The appellant, John Scott, seeks to appeal his sentence of four years for sexual interference (s. 157 of the *Criminal Code*) and four months consecutive for breach of probation (s. 733.1 of the *Criminal Code*).

[2] In April 2014, Mr. Scott was arrested and charged with seven counts of sexual interference (s. 157), seven counts of internet luring (s. 172.1(1)(b)), seven counts of sexual assault (s. 271), one count of accessing child pornography (s. 163.1(4.1)) and two counts of breach of probation (s. 733.1). In May 2014, Mr. Scott pleaded guilty to one count of sexual interference (s. 151) and one count of breach of probation (s. 733.1). All other charges were withdrawn.

[3] At the sentencing hearing in December 2014, the Crown outlined an agreed statement of facts, as follows:

On February the 2nd, 2014, the Royal Canadian Mounted Police of Rocky Harbour in Newfoundland received a complaint that pertained to a sexual assault which occurred in the Town of Rocky Harbour in Newfoundland. A member of the RCMP of Deer Lake, Constable Greg Marche, was obtaining a statement from a 14 year old victim in regard to an unrelated matter when she stated that she had sexual intercourse a number of times in a wooded area nearby the school in the Town of Rocky Harbour, Newfoundland with John Scott who was 43 years old.

The police reviewed the statement taken by Constable Marche from the victim and the officer learned the following: she had met with Mr. Scott in the Town of Rocky Harbour because she was friends with Mr. Scott's step-daughter who is also her same age. She and Mr. Scott started communication via Facebook. She stated that Mr. Scott had contacted her numerous times so they could meet and have sexual intercourse. She stated that Mr. Scott and she had sexual intercourse at least five times in the Town of Rocky Harbour and they used protection. She describes, physically, John Scott and the vehicle he was driving and also provided his address in Rocky Harbour, Newfoundland. She stated that the communication – she stopped communication with Mr. Scott in September of 2013 because he was annoying and he kept contacting her on Facebook so they could meet again.

On February 5th, 2014, the police met with the victim and her mother at the RCMP Deer Lake detachment. They learned the following: that she had just turned 13 years old in the summer of 2012. The last of June or around this date was when she had first had sexual intercourse with Mr. Scott. The sexual intercourse occurred outdoors in a wooded area on a trail near by the school in the Town of Rocky Harbour. They had sexual intercourse at least five times in Rocky Harbour and two times in Cormack. The sexual intercourse in Rocky Harbour always occurred at the same location and the sexual intercourse

occurring in Cormack occurred by the church in Mr. Scott's blue motor vehicle and on a rock at the end of the road.

She stated that Mr. Scott initiated the contact on Facebook. He was inviting her to meet him via Facebook. They arranged a time to meet and a location via Facebook. She could not recall when the other sexual intercourse occurred but they occurred between the first time and the end – at the end of June in 2012 and throughout the end of September 2013.

The victim indicated that Mr. Scott asked the victim to take pictures of her privates, upper and bottom parts and to send the same to him which she did. She did not recall if it was posted on Facebook or was sure that she sent the photos to Mr. Scott's cellular phone that he, apparently, does not currently have. At the end of September 2013, Ms. – the victim got annoyed by Mr. Scott who kept asking her to meet. She blocked him from Facebook and did not communicate with him since then. She stated that she had deleted the messages from Mr. Scott since.

Officers obtained consent to search her Facebook account. They logged into her account on March 29, 2014 and officers observed John Scott's Facebook account. Mr. Scott was using the user name: Wyle Coyote Scott. Officers recognized Mr. Scott on the photos. The officers observed that Mr. Scott had sent a message to the victim on June 24, 2013 stating: Can you talk to me or no?

On the 3rd day of April, 2014 at 10:31 a.m., the police arrested John Scott for sexual assault at the Royal Canadian Mounted Police Rocky Harbour detachment. Mr. Scott was given, verbatim, the rights to counsel on which he replied that he wanted to speak with Legal Aid. He was given, verbatim, the police caution which he understood. At 10:37, Mr. Scott was put in contact with a Legal Aid lawyer. At approximately, 10:50 a.m. the same day, police obtained a cautioned statement from Mr. Scott and learned the following: Mr. Scott stated that he met the victim when she was 14 years old. She was making sexual comments and that she wanted sex with Mr. Scott. They were using Facebook to communicate. John Scott was using his cellphone. Mr. Scott stated that he had complete sexual intercourse with the victim a number of times in Rocky Harbour and Cormack but, could not tell how many times. He stated that it was always normal sex, no violence. He stated that the victim was 150% - or the victim's consent was 150% consensual and that the sexual intercourse occurred outdoors sometimes in a wooded area nearby the school in Rocky Harbour and by a church in his motor vehicle in Cormack. Mr. Scott stated he knew it was wrong and told the victim that she should not be doing that.

He stated that the victim gave blow jobs to Mr. Scott and they had full penetration. Mr. Scott qualified the victim as being "loose as a goose" and she was so loose that could not keep it in. Mr. Scott stated that he was not the only one and there were other males between 20 and 50 years of age who had sexual intercourse with the victim. He indicated the victim was always initiating contact.

The victim picked the time and the location and the victim sent naked pictures of her exposing her breasts and vagina on his cellphone. He stated the victim was demanding Mr. Scott to take a picture of his penis and he forward the same to the victim. He thought that the age of consent was 14 years old.

The accused stated that the victim was getting revenge because he had stopped communicating with her and stated that he had stopped communicating with her as he could not afford to drive down to Cormack where she wanted to have sex. The police ended the interview with Mr. Scott at 11:48 a.m. Police checks showed that Mr. Scott was on a Probation Order dated May 21st, 2013 and the Crown has a copy of this order, Your Honour.

[4] At the sentencing hearing, the Crown submitted Mr. Scott's criminal record; this included two convictions for sexual assault in 1998.

[5] The Crown sought imprisonment of 32-36 months for sexual interference and four months consecutive for breach of probation [check].

[6] The Defence sought two years for the sexual interference and agreed with four months consecutive for breach of probation. [check]

[7] In December 2014, the Provincial Court judge imposed a sentence of four years for sexual interference and four months consecutive for breach of probation.

[8] In January 2015, Mr. Scott filed a notice of application for leave to appeal his sentence.

[9] In October 2015, pursuant to s. 684(1) of the *Criminal Code*, this Court appointed Randolph Piercey Q.C. to represent Mr. Scott.

[10] The Crown conceded that leave to appeal should be granted.

ISSUES

(1) Did the sentencing judge err by failing to advise counsel after a guilty plea that he was considering imposing a sentence higher than that sought by the Crown?

(2) Whatever the answer with respect to issue (1), should the sentence for sexual interference be varied and, if so, what sentence should be imposed?

(1) Judge Considering a Higher Sentence

[11] The sentencing judge wrote at paragraph 113 of his decision:

I realize that this is a sentence higher than that requested by the Crown (in *R. v. R.R.B.*, [2013] B.C.J. No. 949 (C.A.), it was held, at paragraph 22, that “there is no requirement that, if a judge disagrees with the range of sentence proposed by one or more counsel, he/she is obliged to advise counsel that he/she is considering imposing a sentence outside that range”)

However, opposing views have been expressed by other Canadian jurists.

[12] The Alberta Court of Appeal dealt with the matter as one of procedural fairness in *R. v. Burback*, 2012 ABCA 30:

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

14 As a matter of practice, most judges naturally enter into an exchange with counsel, as the judge did in *Abel*, where he or she intends to depart from the range, or the common sentence in a joint submission. In such cases, the parties should have an opportunity to argue against a higher sentence. Providing such an opportunity is not an onerous obligation, and would naturally occur in the vast majority of cases. Not only does notice provide an offender the opportunity to address why a higher sentence is not fit, but the Crown may provide useful information as to the reasons for its submission. Similarly, in the case where a judge intends to impose a sentence less than that requested by an offender, an offender may wish to indicate why he has agreed to the sentence suggested. Indeed, a suggested range by the parties may indicate an agreement between counsel akin to a joint submission and the judge should consider the representations from that point of view. Argument may impact the judge’s final decision of a fit sentence.

[13] The North West Territories Court of Appeal took a similar view in *R. v. Abel*, 2011 NWTCA 4, at paragraph 23:

We agree with the appellant that when a sentencing judge proposes to give a sentence outside the ranges submitted by counsel she must inform the parties of her intention and give them an opportunity to respond. This is the obligation when

there is a joint submission on sentence, and a similar obligation arises when the judge is considering a sentence outside the range proposed by counsel for each of the parties. In *R. v. Hood*, 2011 ABCA 169 (Alta. C.A.), the court stated, at para 15:

We have mandated that approach in situations where the sentencing judge is disinclined to follow a joint submission: see *R. v. GWC*, 2000 ABCA 333, 277 AR 20; and *R. v. Tkachuk*, 2001 ABCA 243, 293 AR 171. We fully agree that counsel should be given the same opportunity in situations like this, where there is no joint submission but the sentencing judge is inclined to sentence outside the range proposed by counsel.

[14] The Ontario Court of Appeal wrote at paragraph 5 of *R. v. Hagen*, 2011 ONCA 749:

In our view, where the trial judge intends to jump the Crown on sentence, particularly by a significant amount, as here, the judge should advise counsel to give them the opportunity to make submissions and provide further authorities, if so advised.

[15] In *R. v. Williah*, 2012 NWTAC 53, Charbonneau J. of the Supreme Court of the North West Territories wrote, at paragraph 32:

The rationale for requiring sentencing judges to put counsel on notice in these situations is based on the importance of preserving the fairness of the process to all parties. It recognizes that even in the absence of a joint submission, an accused's decision to plead guilty, or the Crown's decision to take a certain position on sentence, may well be the result of discussions between counsel, including discussions as to what their respective positions on sentencing will be. And even when a joint submission is not put forward, the positions taken by the parties may be based on factors that are not readily apparent from the record. So where a judge is inclined to depart significantly from the ranges being proposed, counsel should be given an opportunity to make additional submissions to support the position that they are advancing. *R. v. Burbach*, 2012 ABCA 30 (Alta. C.A.), at para. 12.

[16] See also: *R. v. G.W.R.* 2011 MBCA 62, para. 8; *R. v. Keough* 2012 ABCA 14, para. 19-21.

[17] Counsel for the Crown, in reply, submitted that it is important not to conflate the role of counsel with that of the sentencing judge. While it is incumbent on the judge to give careful consideration to submissions by counsel, those submissions do not constrain the judge's discretion to impose a fit sentence.

[18] One cannot argue with this. But, that is not what is in issue. Rather, it is whether a simple procedural step should be taken to ensure that all relevant facts are before the judge before he or she imposes sentence after a guilty plea.

[19] Counsel for Mr. Scott gave a useful example. A person charged with a drug offence agrees to tell police where drugs are hidden, plus plead guilty, the *quid pro quo* being that the Crown will seek a sentence of no greater than X years. (There is no joint submission, as Defence counsel argues for a sentence less than X years.)

[20] If Crown and Defence counsel tell the sentencing judge about the foregoing “deal”, then the offender might well be in danger because he would be seen as a “rat” by others in the drug trade. Thus, at the sentencing hearing, no reference is made to the “deal”.

[21] If the judge is of the view that the sentence sought by the Crown is too low and advises counsel that he is considering imposing a higher sentence, then the offender (with the advice of his counsel) has a choice to make. The offender could instruct his counsel to say nothing about the “deal” and take his chances the judge will impose a sentence higher than that sought by the Crown (as part of the “deal”). Or, the offender could accept the risks of being seen as a “rat” and instruct his counsel to place (at least some facts of) the “deal” before the judge, in which case the judge would be more likely to impose a sentence no greater than that sought by the Crown.

[22] One can imagine a variety of other scenarios in which, for practical reasons, there would be a reluctance to lay all the cards on the table in open court after a guilty plea, but there might well be a willingness to do so if the sentencing judge advises counsel that he or she is considering a sentence higher than that sought by the Crown.

[23] The ability of Crown and Defence counsel to pursue such arrangements is critical to maintaining a flow of cases through the courts. What we are dealing with are the means to facilitate and not undermine such practical arrangements between Crown and Defence counsel. That said, the Crown can never offer an assurance as to the sentence that will be imposed. That always remains within the discretion of the judge.

[24] From another perspective, we are seeking to ensure the sentencing judge has before him or her all relevant considerations before he or she

exercises his or her discretion in imposing sentence. As illustrated above, unless the judge advises counsel that he or she is considering imposing a sentence higher than that sought by the Crown, there may well be instances where facts warranting consideration by the judge are not placed before the court.

[25] In the end, the arguments of fairness and practicality merge. At the same time, requiring a judge to advise counsel if he or she is considering imposing a sentence higher than that sought by the Crown offends no principle and adds no significant burden to the task of the sentencing judge.

[26] Accordingly, I would adopt the approach set out by the Alberta Court of Appeal in *R. v. Burbach*, quoted above.

(2) Fitness of the Sentence for Sexual Interference

[27] Counsel for Mr. Scott argued that the sentencing judge erred in principle by virtue of his failure to advise counsel that he was considering imposing a sentence higher than that sought by the Crown. As indicated above, I agree.

[28] The Crown urged upon this Court that even if such an error was made by the sentencing judge, that would not be sufficient for this Court to set aside the sentence that that Court sees as fit unless it is shown that the error “had an impact on the sentence”.

[29] The Crown referred to paragraphs 43 and 44 of *R. v. Lacasse*, 2015 SCC 64, where Wagner J. (for the majority) wrote:

[A]n error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge’s reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges. It is therefore necessary to avoid a situation in which [TRANSLATION] “the term ‘error in principle’ is trivialized”: *R. v. Lévesque-Chaput*, 2010 QCCA 640, at para. 31

In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge’s decision that such an error had an impact on the sentence.

[30] On my reading of the foregoing passage (and the overall reasons for decision in *Lacasse*), the Supreme Court of Canada has affirmed the type of errors that may warrant appellate intervention as set out in such cases as *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 and *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, but has underlined that intervention is warranted only where “such an error had an impact on sentence”.

[31] In the context of the case, was there anything to indicate that the failure of procedural fairness identified above “had an impact on sentence”? There was not. Counsel for Mr. Scott brought nothing to our attention that should have been brought to the sentencing judge’s attention but was not because he failed to advise counsel that he was considering imposing a sentence greater than that sought by the Crown. Had there been other facts that might well have been brought to the judge’s attention that could have had an impact on the sentence, then the requirement set out in paragraph 44 of *Lacasse* would have been met.

[32] Thus, on the facts of this case the failure of procedural fairness does not warrant appellant intervention to vary the sentence imposed.

[33] There remains, of course, the question whether the sentence of four years for sexual interference in the circumstances of this case is a sentence that is “demonstrably unfit”.

[34] While the sentencing judge had regard to sources that I would not view as relevant, e.g. a decision of the Northern Ireland Court of Appeal (paragraph 69 of his reasons for decision) and the Sentencing Council for England and Wales’ report “Sexual Offences: Guideline Consultation” (paragraph 106 of his reasons), he did conduct an extensive review of sentencing decisions bearing on the facts of this case.

[35] While counsel for Mr. Scott submitted to this Court cases (including *R. v. Kendell* 2012 NLTD(G) 52, *R. v. Hammond* 2011 NLTD(G) 8, *R. v. Nightingale* (2013) 332 Nfld. & P.E.I.R. 60 and *R. v. Cooper* 2011 NLTD(G) 121) wherein a sentence of less than four years was imposed for sexual interference (s. 157 of the *Criminal Code*), nonetheless there is ample precedent for a sentence in the order of four years for sexual intercourse with a minor. See in particular *R. v. Vokey* 2000 NFCA 14 at para. 19. Accordingly, it has not been shown that the sentence of four years was demonstrably unfit.

[36] I would note that before Piercey Q.C. was appointed to represent Mr. Scott, the latter had provided written materials to the Court. I have had regard to these. Nothing in them constitutes a basis in law for showing that the sentence imposed was demonstrably unfit.

[37] Finally, concerning the reasons for decision of Justice Hoegg, she states that it is not for the sentencing judge to inquire of Crown and Defence counsel as to the discussions they had regarding sentence; I agree. That is not my point. Rather, it is that 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. This would result in an unfairness to the accused, one that could easily be avoided by the sentencing judge saying simply “I am considering imposing a sentence higher than that sought by the Crown. In light of that are there any further submissions that you wish to make?”

[38] My colleague favours expediency. She denies there is any unfairness. I disagree. The expediency she favours is illusory. The unfairness she denies is real.

CONCLUSION

[39] I would dismiss the appeal.

M. H. Rowe J.A.

I Concur: _____

C. W. White J.A.

Hoegg J.A. Dissenting in Part, Concurring in the Result.

Hoegg J.A.:

[40] I have had the benefit of reading the decision of my colleague Rowe J.A. in this matter. I agree with him that the four-year sentence for Mr. Scott's crime of sexual interference has not been shown to be unfit and that the appeal must therefore be dismissed. I do not agree, however, with his conclusion at paragraph 27 that the sentencing judge erred in principle by failing to advise counsel, after they had made their sentencing submissions and before he imposed sentence, that he was considering imposing a sentence higher than that sought by the Crown.

[41] In *R. v. Anderson*, 2014 SCC 41 the Supreme Court made abundantly clear that it is judges, not counsel, who are responsible for imposing fit sentences on offenders (paragraph 25).

[42] A sentencing judge is in a unique position to craft a fit sentence for an offender, and he or she enjoys "a broad discretion", constrained by the sentencing provisions of the *Criminal Code* and relevant jurisprudence in doing so (*R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206 at paras. 43-46 and *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at paras. 90-94 and *R. v. Lacasse*, 2015 SCC 64).

[43] In sentencing, as with all criminal and civil proceedings, the role of counsel is to advocate on behalf of their respective clients. The role of Crown Counsel in criminal proceedings is somewhat different than the role of defence counsel, in that it is the duty of the Crown, and Crown counsel on behalf of the Crown, to firmly but fairly present "all available legal proof of the facts" to the court, in order that the court may reach a just decision respecting the charge (*Boucher v. The Queen*, [1955] S.C.R. 16 at 23-24). This statement of principle also applies to sentencing proceedings, in that the objective of the Crown is to "firmly but fairly" put relevant information, including relevant case law, before the court. By contrast, the role of defence counsel is to obtain the best achievable result for their clients within the limits of the law.

[44] The somewhat different obligation on Crown counsel does not mean that the Crown is to be treated differently by a judge or that the sentencing submissions of Crown counsel have any special status. Crown counsel remains an advocate for the Crown's position, just as defence counsel is an advocate for the defendant's position, and the judge makes the rulings and decisions. The role of counsel, including Crown counsel, is distinctly different from that of the judge, and a judge can accept or reject positions submitted by either, as judges routinely do. There is no magic in the

Crown's position to the effect that it represents the outer limits of what sentence can be imposed on a defendant.

[45] Sentencing submissions jointly made by the Crown and the defence involve an added consideration for a sentencing judge, as was explained by this Court in *R. v. Druken*, 2006 NLCA 67. A joint sentencing submission involves a defendant entering a guilty plea in exchange for a joint recommendation to the judge for a sentence that is lower than what would otherwise have been sought by the Crown. Such a submission relieves the Crown from the burden of proving the defendant's guilt beyond a reasonable doubt, thereby alleviating the stress and strain on witnesses and judicial and court resources while giving the defendant a good chance at receiving the recommended sentence. These mutual benefits are commonly referred to as *quid pro quo*.

[46] The defendant has this good chance because a sentencing judge must only reject a joint submission if the jointly recommended sentence "would bring the administration of justice into disrepute or would otherwise be contrary to the public interest". In that regard, a judge who receives a joint submission is required to advise counsel, after hearing the joint sentencing submission, if he or she is considering not accepting it, so that counsel will have a further opportunity to convince the judge that the jointly recommended sentence is fit and appropriate (*Druken* paragraph 28).

[47] In *Druken*, Justice Rowe described the duties on Crown and defence counsel making a joint submission as "assessing the case to determine if a guilty plea is warranted and whether they can agree on a joint sentencing submission", and added that counsels' respective positions must be supportable on the facts of the case (paragraph 12).

[48] Counsel for Mr. Scott suggests that in cases falling short of a joint submission there might be understandings between counsel such that defence counsel would have relied on what the Crown had advised it would seek on sentence before making decisions on plea and what his or her own sentencing submission would be. Defence Counsel further submits that just in case this is so in any given case, it is incumbent on a sentencing judge to advise counsel if he or she is considering imposing a sentence in excess of that requested by the Crown so as to give counsel a further opportunity to make submissions justifying or explaining their positions. Defence Counsel submits that it is "procedurally unfair" for a sentencing judge not to do so. This view is shared by my colleague who states that there may be reasons

why the defence is reluctant to lay all the cards on the table initially, but might well do so if advised by the sentencing judge that he or she is considering a sentence higher than that sought by the Crown, thereby giving counsel a second opportunity to place additional information before the sentencing judge. Defence Counsel readily concedes that the sentencing judge is not bound by counsels' sentencing submissions and that good defence counsel always advise their clients that it is the sentencing judge who decides what sentence to impose regardless of the submissions.

[49] My colleague relies on *Burback* to support his position. In *Burback*, the court acknowledged that there may be cases where there has been an understanding or agreement between counsel as to submissions on sentence, and that while such cases fall short of a joint submission, they are nevertheless based on an understanding, which could be express or implied, which is relied upon by the defence. *Burback* says that a sentencing judge should not presume that such an agreement exists, but that he or she has an obligation to inquire so as to bring the matter to light.

[50] I agree with the reasoning in *Burback* and with my colleague that an agreement between Crown and defence counsel respecting their sentencing submissions could be a relevant factor to a sentencing judge's determination. However, I do not agree that a sentencing judge has any duty to inquire into whether counsel have had such an agreement. In my view it is the responsibility of counsel to advise the judge of any such agreement, if there is one, at the time when counsel are making their sentencing submissions, so that the judge can consider that circumstance along with all other relevant factors when deciding on a fit sentence. In cases involving joint submissions, it is the duty of counsel to advise the sentencing judge that they are making a joint submission, and to the extent they choose, of the *quid pro quo* involved. There is a fundamental difference between a joint sentencing submission and individual sentencing submissions put forward by Crown and defence counsel which are distinctly different. In short, there is no *quid pro quo* in different sentencing submissions. My colleague recognized this difference in *R. v. Fizzard*, 2012 NLCA 80 at paras 6-7.

[51] My colleague accepts that it is procedurally unfair for a sentencing judge not to advise counsel if he or she is considering imposing a sentence outside of the range proposed by Crown counsel, and that it is an error in principle if he or she does not do so. Again he relies on *Burback*, and also on the North West Territories Provincial Court in *Williah*, its Court of Appeal in *Abel*, and the Ontario Court of Appeal in *Hagen* to support his

view. *Burback* stops short of saying that a judge commits an error in principle if he or she fails to make such inquiries or to advise counsel of an intention to impose a higher sentence than what has been sought by the Crown, but it does say that, in that case “the judge should have” advised counsel of his leaning toward a higher sentence because not to do so could result in prejudice to an accused (paragraph 20). I do not agree that a judge’s failure to give counsel notice that he or she is considering a sentence outside the range submitted is or could be procedurally unfair or that the judge errs in principle if he or she does not do so. This is not to say, however, that it would be inappropriate or unwise for a sentencing judge to make inquiries or to give such notice in appropriate circumstances. It is only to say that a sentencing judge does not err in principle if he or she does not do so. I fail to see any unfairness to an offender who has had a full opportunity to put all relevant information before the sentencing judge, well aware that the sentencing judge may impose a sentence outside of the range submitted by counsel. An offender and his counsel know that the imposition of sentence is the duty of the sentencing judge, and that there is always a risk that the sentencing judge may impose a sentence outside the submitted range. That risk ought to inform their sentencing submission from the start (see section 606(1.1)(iii) of the *Criminal Code*). To my mind, putting a positive duty on a sentencing judge to check with counsel as to whether there was any agreement between them, or to advise counsel that he or she is considering a sentence outside of the range submitted after counsel has had full opportunity to make submissions and before imposing what the judge considers to be a fit sentence, conflates the role of counsel with that of the judge, and undermines the judicial role.

[52] On a practical note, I cannot agree with my colleague that seeking additional submissions on sentence “adds no significant burden to the sentencing judge” (paragraph 27). At a minimum, it adds additional time to a scheduled sentencing hearing if in fact the judge involved is even aware of his or her inclination to impose a higher sentence than that sought by the Crown at that time. More concerning is that the imposition of such a duty on a sentencing judge would likely result in an increase in bifurcated sentencing hearings. If a sentencing decision is reserved (as often happens in serious or unusual cases) and the judge comes to a realization that a sentence outside of the ranges proposed by counsel could be indicated, a second hearing would be required to bring counsel back so that the judge can advise of his or her inclination, and perhaps even a third hearing would be necessary if counsel are unprepared to make additional submissions when

called back. In this regard, I refer to paragraph 48 of *Lacasse* wherein the Court states that the appropriate use of judicial resources is a consideration that must never be overlooked, and quoted with approval the words of Doherty J.A. in *R. v. Ramage* (2010), 257 C.C.C. (3d) 261 (Ont. C.A.):

[70] ... Appellate repetition of the exercise of judicial discretion by the trial judge, without any reason to think that the second effort will improve upon the results of the first, is a misuse of judicial resources. The exercise also delays the final resolution of the criminal process, without any countervailing benefit to the process.

[53] I agree with my colleague that Canadian appellate courts have expressed different views on the presenting issue. I prefer the reasoning of the British Columbia Court of Appeal in *R.R.B.*, the Quebec Court of Appeal in *Gabriel v. R.* [2015] O.J. No. 8142, 2015 QCCA 1391, and the Alberta Court of Appeal in *R. v. Keough*, 2012 ABCA 14, a decision made a few months prior to *Burback* by a different panel.

[54] In *R.R.B.*, a case involving the sexual assault of a child, the British Columbia Court of Appeal stated at paragraph 22:

... there is no requirement that, if a judge disagrees with the range of sentence proposed by one or more counsel, he/she is obliged to advise counsel that he/she is considering imposing a sentence outside that range. While it is undoubtedly preferable for the sentencing judge to afford that opportunity to counsel in appropriate circumstances, failure to do so does not amount to an error of law or principle.

[55] *Gabriel* involved the sentencing of offenders convicted (after trial) of taking part in a riot and forcible confinement. The Quebec Court of Appeal stated that Crown and defence counsel's competing general perspectives on what a fit sentence should be were "far from a joint submission", and ruled that the sentencing judge did not err by failing to alert counsel that she was going to sentence offenders to a higher sentence than that suggested by the Crown.

[56] In *Keough*, Slatter J.A. wrote that while Alberta caselaw recognized the importance of a trial judge giving fair warning to counsel when he or she proposed to sentence outside the recommended range, "[n]evertheless, the sentencing judge has an obligation to impose a fit sentence, and neither exceeding the recommended range, nor failing to give counsel notice of intention to exceed the range is, without more, reviewable error" (paragraph

20). Paperny J.A., in dissent on other issues, expressed her concurrence with the majority at paragraphs 55-57 of *Keough*:

In my view, the potential negative effects of requiring a sentencing judge to invite further submissions every time he or she is considering sentencing outside the range proposed by counsel significantly undermine the argument that natural justice demands this course of action. After receiving submissions, a sentencing judge will often adjourn to reflect on the authorities provided and the evidence led. He or she may well conclude that the range or terms proposed by counsel are inappropriate in the circumstances. The possibility of unfairness is seriously diminished if counsels' own submissions or authorities support the sentence ultimately imposed. How far can the appellant's proposition realistically be extended? Is a sentencing judge required to seek additional submissions to change the length or terms of probation and other conditions of sentence? If the sentence is lower than the proposed range, is that an error? If so, does that give the Crown a right of appeal as an issue of law?

Any concern that an accused may be taken by surprise suggests that defence counsel incorrectly advise their clients that the jeopardy they are in lies within the range of sentence provided by counsel. That is not so. It cannot seriously be argued that the range of sentences proposed reflects the outer limits of potential sentences. The discretion always remains with the sentencing judge. Elevating a good practice to a mandated requirement would have the unintended effects of undermining judicial discretion, prolonging sentencing hearings and minimizing the vital role of defence counsel. If a sentence is unfit or if there has been an error in principle, a court of appeal can intervene.

While discussion between the court and counsel is to be encouraged, a sentencing is not a three way dialogue, a negotiated settlement or a JDR. The *Criminal Code* rests the authority to impose a fit sentence on the sentencing judge.

I agree with Justice Paperny's remarks.

[57] I also rely on *Lacasse*, where the Supreme Court held that a deviation from a sentencing range is not synonymous with an error of law or an error of principle (paragraphs 56-72). I acknowledge that *LaCasse* presumes that the accepted range of sentence has been put before the court, and also that there is a distinction between what a sentencing range is and what counsel in their submissions suggest may be an appropriate sentencing range. However, if it is not an error in principle to depart from the sentencing range, it surely cannot be an error in principle to depart from the sentencing range submitted by counsel.

[58] In this case there is no suggestion of any arrangement between counsel respecting their sentencing submissions. Neither is there any suggestion that the Judge based his sentence on a factor which counsel had not had the opportunity to address. Each counsel made her own submission and they were quite different from each other. Crown Counsel submitted that a sentence “starting at 32 to 36 months” (page 12 of the transcript of the December 2, 2015 proceedings) would be appropriate and Defence Counsel asked for a sentence of two years.

[59] The transcript reveals, like in *Gabriel*, that the sentencing submission of the Crown was markedly different from the submission of Defence Counsel, and not at all akin to a joint submission. Crown counsel stressed the seriousness of the facts in Mr. Scott’s case, his lack of remorse, his being on probation when he committed the offence, and his two previous (although dated) convictions for sexual assault, and appropriately acknowledged his guilty plea as a mitigating factor. She also submitted, no less than four times during her final submission, that a “significant” or “lengthy” period of incarceration was warranted. Moreover, Crown Counsel’s reference to “32 to 36 months” was prefaced by the words “starting at”. These words seem to have been forgotten – even by the sentencing judge, for he acknowledged in his decision that he was imposing a sentence on Mr. Scott that was outside the range proposed by counsel. Defence counsel acknowledged the seriousness of the offence and appropriately emphasized Mr. Scott’s personal history and present circumstances, and sought a two-year sentence.

[60] In conclusion, while I have no wish to malign Crown and defence counsel who routinely manage heavy caseloads at an often frantic pace, it does not escape me that neither counsel’s sentencing submission respecting this matter referenced relevant authorities from this Court. In that regard, see this Court’s decisions in *Vokey, R. v. Barrett*, 2012 NLCA 46, 324 Nfld. & P.E.I.R. 246, *R. v. Payne*, 2012 NLCA 72, 330 Nfld. & P.E.I.R. 181 and *R. v. A.B.*, 2015 NLCA 19. Any sentencing submission respecting a conviction involving repeated sexual intercourse between a 43-year-old man and a 13-year-old girl, who is unable to legally consent to the activity, ought to reference these cases. If either counsel was of the view that these precedents ought not to be followed, then I would have expected counsel to distinguish Mr. Scott’s case from them.

[61] In summary, while I cannot agree that the sentencing judge committed an error in principle by failing to advise counsel that he was considering imposing a sentence above what he understood to be that proposed by

Crown Counsel, I agree with my colleague that the four-year sentence imposed on Mr. Scott is not unfit.

L. R. Hoegg J.A.