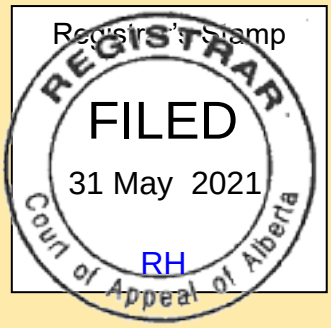
COURT OF APPEAL OF ALBERTA

Form CRA-K
[Rule 16.37(2)]

COURT OF APPEAL FILE NUMBER:	2103-0047A
TRIAL COURT FILE NUMBER:	171350168Q1
REGISTRY OFFICE:	EDMONTON
RESPONDENT:	HER MAJESTY THE QUEEN
APPELLANT:	HELEN DORIS NASLUND
DOCUMENT:	**FACTUM AND AUTHORITIES**



Appeal from the Sentence of
The Honourable Mr. Justice S.M. Sanderman
Sentenced on the 30th Day of October, 2020
The Accused Having Plead Guilty

FACTUM and AUTHORITIES OF THE APPELLANT

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Form CRA-E
[Rule 16.17(2)]

Sentence Appeal Questionnaire

This questionnaire should be placed as the first page of the sentence appeal factum, immediately after the table of contents. (R. 16.17(2))

1. Offences of which convicted and sentenced.

Offence Name	Section	Offence Date	Sentence
Manslaughter	236 C.C.	September 5, 2011	18 years imprisonment
Total Sentence			**18 years imprisonment less four months credit for time in custody**

2. Amount of time in custody before sentence: an unspecified short time; credit given: 4 months.

3. Total sentence then imposed: 18 years less four months imprisonment.

4. Any probation conditions? No.

5. ☒Guilty plea or ☐ trial?

6. Date released on bail pending appeal: N/A.

7. Serving time for other offences also? ☒ No ☐ Yes

8. Does appellant have previous criminal record? ☒ No ☐ Yes

9. Was the appellant on any form of release or supervision at the time of the offences? ☒ No ☐ Yes

10. Age at time of offence: 46 years of age. Age now: 56.

11. Employment history, including last job: Manager with A-1 Rentals, Wetaskiwin (Transcript October 30, 2020, p.6, line 7, Agreed Facts as read in)

12. Any pre-sentence, psychological or other report? No.

13. Any evidence of, or statement of, effects of the offence on the victim? No.

PART 1 – STATEMENT OF FACTS

Overview

[1] This case is about the appropriate sentence for a battered woman who killed her sleeping husband then destroyed evidence and concealed the crime with the help of her son. It is about the Prosecutor's consent to her guilty plea to manslaughter, which came at the cost of her agreement to an unduly harsh sentence: 18 years imprisonment. It is about the gendered lens through which the justice system continues to evaluate the conduct of battered women who kill to survive.

[2] Helen Naslund was indicted with one of her three sons, Neil, for first degree murder and committing an indignity to the dead body of her abusive husband of 27 years. She shot him in the back of the head while he slept. After bargaining, Ms. Naslund was allowed to plead guilty to manslaughter while her son Neil pled guilty to committing an indignity to the body. Both sentencing hearings proceeded with joint submissions. On October 30, 2020, Helen Naslund was sentenced to 18 years imprisonment, her son Neil to 3 years imprisonment.

[3] Adverse public reaction to her sentence quickly followed. In February 2021, this Court extended the time for her to appeal from her sentence. She now seeks to adduce evidence of that significant public reaction to her sentence. She seeks a reduction in the 18-year sentence. Her marital life under constant threat as a woman battered by the deceased was not properly considered by the justice system. It was not adequately considered by the Prosecutor requiring a joint submission to 18 years imprisonment as the price for his consent to the manslaughter plea. It was not considered by the Learned Sentencing Judge who failed to properly scrutinize the joint submission. The administration of justice has been brought into disrepute by the sentence.

[4] Women's violence toward their abusers continues to be examined through a male focused framework that does not accurately reflect the dynamics of these relationships where women continually live at significant risk of femicide. Courts are beginning to take

notice of the staggering numbers of women killed by male intimate partners; of the dangerous environments in which those women live.[1] Those factors properly inform women's moral culpability when they act to survive.

Circumstances of the Offence[2]

[5] In 2011, the Naslund family lived on a farm near Holden, Alberta. Helen (46 years old) lived with her husband of 27 years, Miles (49 years old) and two of their sons, 23-year old Darrel and 19-year old Neil. The oldest son Wesley, 27, had moved out of the family's long-time home. Miles was self-employed and Helen was a manager with a local equipment rental company in Wetaskiwin. The family experienced numerous financial issues over the years and the farm was often at risk. That was the case in the fall of 2011.

[6] Over the 27-year marriage, Miles physically and emotionally abused Helen and engaged in controlling behaviour over her. Family members saw Miles handling guns in and around home while he was heavily intoxicated. Although he intimated suicide when in that state, Helen genuinely feared for her safety because of the comments Miles made at such times. She felt she could not leave Miles due to the abuse, concern for her sons, depression, and learned helplessness.

[7] Helen's use of alcohol over the years increased and her depression struggles led to suicide attempts, one nearly succeeding in the spring of 2003.

[8] The September long weekend was the farm's yearly financial measuring stick, the year's financial health dependent on the work done on the farm in the surrounding two months. On that weekend in 2011, Miles became highly intoxicated. While handling his

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[1] *R. v. Charles Maltais*, 2021 NBQB 90 at paras. 29 - 42. At para.39, Justice Ferguson recounted statistics from the *Canadian Femicide Observatory for Justice and Accountability*: "The Observatory noted that between 2016 and 2020 it documented 761 deaths of women and girls in Canada killed mostly by men who were close to them. That means that on average, each year, 152 women and girls are killed; one woman or girl every 2.5 days. It is a sobering statistic."

[2] The Agreed Facts document, marked as Exhibit S-1 on the sentencing date of October 30, 2020 was read into the record on March 19, 2020 when the guilty plea was entered. It is found in full at Transcript, March 19, 2020, p.5, line 38 – p. 9, line 13. It is summarized in the factum.

gun, he ordered Helen and Neil to complete farming tasks. Helen worked on the Saturday, September 3rd, at the rental company. On returning to the farm, she ran the haybine that evening and throughout the day Sunday, the 4th. The tractor broke down, requiring Miles to leave the residence to assist in repairing it. Miles became so angry that he threw wrenches at Helen during an angry tirade.

[9] Helen prepared Sunday dinner for the family on a brief break while the tractor was repaired. When Miles returned from the field, he said that Helen would pay dearly for damaging the equipment and he violently cleared the fully set dinner table onto the floor. He said the meal was not fit for a dog. His threatening behaviour increased in severity throughout the day, only temporarily calming when he passed out late that evening.

[10] While he slept in the early morning hours of September 5, 2011, Helen retrieved a .22 caliber revolver pistol stored in a cabinet in the home and shot him in the back of the head, killing him instantly.

[11] That morning, Helen and Neil dragged his body outside and placed it in a large toolbox designed to fit in the bed of a pick-up truck. They placed a grocery bag over his head, drilled holes in the side of the box, placed tractor weights inside it, and welded the lid shut. The box was then put in the bed of a pick-up truck.

[12] Helen retrieved a small excavating machine from the rental company, and that afternoon a large hole was dug behind a shop on the farm. Miles' car was placed in the hole, crushed by the bucket of the excavator and covered with dirt. That evening Helen and Neil took the toolbox containing Miles' body and a fishing boat to a nearby dugout. The boat was paddled out and the toolbox containing the body dumped in the water.

[13] The pistol used to kill Miles and his .357 Magnum handgun were thrown into a dugout near the house as part of the plan to conceal the death. Helen emptied the bedroom of its contents, removing an area rug, the mattress and bedding and burned the evidence on the farm. She cleaned the bedroom area to eliminate any sign of the killing.

[14] On September 6, 2011, Helen phoned the local police and reported Miles missing. She fabricated a story to explain his sudden disappearance and suggested that her sons also adopt it. The story was that Miles had left the house in a vehicle to go farming and did not return. He took his .357 Magnum revolver with him but not his phone or wallet. The story implied that he had driven off somewhere and committed suicide.

[15] The RCMP took formal statements into Miles' disappearance in November 2012 and March 2013. In the statements, Helen, Darrel and Neil were consistent about Miles having left in a vehicle with his Magnum to go cut hay. They said that the family rented a backhoe that day to fix a hydrant on the farm. They all referenced the names of people who assaulted Miles a few years before, citing that altercation as one possible catalyst for Miles' disappearance. The RCMP spent considerable time and resources investigating the fabricated information.

[16] During the years following Miles' death, Helen feigned concern from time to time with the lack of progress in the RCMP investigation and criticized them. This led to further investigation, including interviews with Miles' extended family, friends and co-workers. There were additional searches for his body and his car.

[17] On August 28, 2017, RCMP received reports that Darrel had recently told people about the killing and disposal of Miles' body. On August 31, 2017, Darrel provided police a statement detailing the events surrounding the death and body disposal in September 2011. Between September 1 and 13, 2017, the residence, farm and two dugouts were searched. Police recovered the large metal toolbox almost completely buried in silt at the bottom of a dugout a few miles from the house. Miles' partially decomposed body was inside. At the second dugout near the house, police found the .22 caliber pistol and the .357 Magnum. After excavation behind the shop, the car was recovered.

[18] At autopsy September 5, 2017 two gunshot wounds to the back of the head were observed with soot deposition on the skull, indicative of contact gunshot wounds. Two .22 caliber bullets were recovered from brain tissue. The cause of death was gunshot

wounds to the head. Helen and Neil surrendered at the request of police on September 7, 2017. Helen admitted to them that she shot Miles in the back of the head and killed him.

[19] In the Agreed Facts document tendered at sentencing Helen admitted that shooting Miles in the head at close range was an unlawful act where serious bodily harm was objectively foreseeable but that she lacked the intent to murder him.

[20] No victim impact statement was tendered.

Submissions of Counsel

[21] Defence counsel amplified the history of the deceased's coercive control over Ms. Naslund. He said: "She describes her relationship with Miles, indicating that, when I was in public, he was always right there. If I talked to a friend, he had to be there to include his input. I couldn't go anywhere without him. I had to get rid of the horses. I couldn't go to events. It was do as I say or else, that's the way it's going to be. It was always the third degree in terms of questioning, and if I went to town, he would ask where exactly did you go, who exactly did you speak with." [3]

[22] She and family members recounted to him "numerous experiences of difficulties within the home. Alcohol was a significant issue, as was violence, as well as gun play."[4] Counsel conveyed that friends and family who reached out in support of Ms. Naslund "could barely understand the justification and fairness of what was to happen today."[5]

[23] Defence counsel called Ms. Naslund's act "out of character" and a "decision of last resort."[6] He told the Court that the central issue for the defence was "whether or not the application of the concept of battered woman syndrome would apply."[7] He confirmed Ms.

[3] Transcript, October 30, 2020, p. 23, lines 7 – 12.
[4] Transcript, October 30, 2020, p. 23, line 14.
[5] Transcript, October 30, 2020, p. 22, lines 21-23.
[6] Transcript, October 30, 2020, p. 22, lines 28-29.
[7] Transcript, October 30, 2020, p. 23, line 18.

Naslund's diagnosis of "severe depression. Her depression was an ongoing circumstance. It was certainly a consideration at the time of the offence, but prior to the offence, that depression led to suicide attempts."[8]

[24] Defence called the Crown's recitation of mitigating and aggravating factors "correct." [9] The Prosecutor referred to the statutory aggravating factor of "intimate partner and position of trust."[10] However, that factor cannot be cited without recognition of the deceased's gross and continuous abuse of Helen Naslund's trust over the course of the 27-year marriage. Ms. Naslund married at 19 years of age and the children were born soon after. Oldest son Wesley "described the house as one of constant struggle as he was growing up, and yet he describes and wished to express his gratitude to his mother for all she had done to protect he and his brothers."[11]

[25] Crown Counsel observed that the crime occurred in the "victim's own home, a place where he's entitled to feel safe."[12] Again, the import of that "aggravating factor" pales when compared to the 27 years during which Ms. Naslund was unsafe in her own home, subjected to the deceased's violence.

The Sentencing Judge's Decision

[26] The Sentencing Judge accepted the joint submission presented by counsel. He too assessed the circumstances through a lens, now challenged, which fails to recognize the lived reality of women at risk of femicide. His Lordship observed: [13]

> " …most people who are charged with criminal offences in this building aren't evil people. They are not bad people. They are people who make mistakes because they are generally overwhelmed by their personal difficulties. They react poorly when other options are open to them, but they then have to pay for the manner in which they have overreacted because it offends our sense of morality and our sense of the law.

[8] Transcript, October 30, 2020, p. 23, lines 23-25.
[9] Transcript, October 30, 2020, p. 21, line 20.
[10] Transcript, October 30, 2020, p. 19 line 36.
[11] Transcript, October 30, 202, p. 23, lines 33-35.
[12] Transcript, October 30, 2020, p. 19, line 41.
[13] Sentence Appeal Record, p. 18, lines 5-10.

> … They are two people who haven't been able to deal with the problems in their lives, and they have committed serious crimes."

[27] The Sentencing Judge made no reference to the agreed fact that "[t]he accused was unhappy in her marriage, but due to [the] history of abuse, concern for her children, depression, and learned helplessness, she felt she could not leave."[14]

[28] His Lordship stated: "This was a callous, cowardly act on a vulnerable victim in his own home, so his domicile, by a partner."[15] Again, that observation overlooks the decades during which Ms. Naslund was vulnerable and at risk in her own home.

[29] As noted by Watt, J. in *R. v. Foy*: [16]

> "The killing partner here held no economic or emotional advantage over the other. The recorded instances of abuse were more directed towards the accused than initiated by her. It seems somewhat incongruous to consider conduct that often results from years of abuse to be aggravated by the simple fact that the deceased-abuser and accused-killer stood in a defined relationship to each other. It is akin to telling the abused that we recognize the syndrome, but if you kill, we will consider your offence aggravated because you killed your battering partner."

[14] Transcript, March 19, 2020, p. 6, lines 21-23 (Agreed Facts).
[15] Sentence Appeal Record, p. 19, lines 32-33.
[16] *R. v. Foy*, [2002] OJ No. 4004 at para.77. A sentence functionally equivalent to 8 years was imposed for manslaughter for stabbing her abuser in the heart: See Appendix A.

PART 2 – GROUNDS OF APPEAL

Ground 1: The sentence brings the administration of justice into disrepute.

Ground 2: The sentence is contrary to the public interest: it offends proportionality and parity and can be seen as a product of coercive plea-bargaining.

PART 3 – STANDARD OF REVIEW

[30] The 18-year sentence imposed on Ms. Naslund accorded with the joint submission of the lawyers. Being the product of a joint submission, the standard of review is whether the sentence brings the administration of justice into disrepute or is otherwise contrary to the public interest.[17] There are compelling public policy reasons for such a high standard.

[31] The "public interest" test is also the standard by which the Sentencing Judge was required to gauge the propriety of the joint submission. It is not the test he applied. This portion of the factum addresses the Supreme Court's high standard set in *Anthony-Cook* for rejection of a joint submission, the stated basis for the Sentencing Judge's scrutiny of this proposed sentence and the meaning of the proper test.

Why there is a high threshold for rejection of a Joint Submission

[32] Joint submissions on sentence are common and are vital to the efficient operation of the criminal justice system.[18] One of the obvious benefits to an accused person is that the Crown agrees to recommend a sentence that the accused is prepared to accept.[19] Therefore, for joint submissions to be effective, the parties must have a high degree of confidence that they will be accepted. Otherwise, a party may instead choose to accept the risks of a trial or a contested sentencing hearing.[20]

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[17] *R. v. Anthony-Cook*, 2016 SCC 43 at para. 5.
[18] *Anthony-Cook* at para. 2.
[19] *Anthony-Cook* at para. 36.
[20] *Anthony-Cook* at para. 41.

[33] But the public interest test recognizes that certainty of outcome is not the ultimate goal of the sentencing process. “Certainty must yield where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty of result.”[21]

[34] Joint submissions on sentence can follow plea negotiations between adversaries of unequal bargaining power. Not all *quid pro quos* are equal or equitable. For example, Mr. Anthony-Cook changed his plea to guilty in the middle of his manslaughter trial in exchange for the Crown’s joint submission on sentence for a further 18-months incarceration. The Trial Judge erred in “jumping” the joint submission which he found unfit. The nature of the bargain struck in this case is very different.

[35] Ms. Naslund risked a mandatory minimum sentence of life imprisonment for murder if the Crown did not consent to her guilty plea to the lesser crime of manslaughter. Accepting a plea to the lesser offence is solely within the Prosecutor’s discretion. Avoiding the risk of a mandatory life sentence was an obvious and significant benefit of the guilty plea to Ms. Naslund. It was not the Crown’s joinder in 18-year penitentiary sentence. Ms. Naslund could not easily “accept the risk of a trial”. Nor did she have the option of a contested sentencing hearing for manslaughter.

[36] Ms. Naslund now resiles from the position taken by her counsel in the court below. As noted by the Ontario Court of Appeal in *R. v. Wood*,[22]

> “Certainly, the accused is given greater latitude than the Crown on an appeal of this kind in that he is generally not bound to the same extent by the submission of his counsel as to sentence.”

In *Wood*, a joint submission of 14-years imprisonment on a guilty plea to manslaughter, in the face of an indictment for first degree murder, was varied on appeal to 8-years imprisonment, the Court observing:

> “But, in our view, the Crown overreached in attaching a condition of a joint submission to a sentence which was far in excess of the usual range of sentences for manslaughter in the circumstances of the present case. The condition placed the accused, as well as

[21] *Anthony-Cook* at para. 43, quoting Doherty JA in *R. v. DeSousa*, 2012 ONCA 254 at para. 22.
[22] *R. v. Wood*, (1988) 43 C.C.C. (3d) 570, at p.574.

> experienced defence counsel, in a difficult position and to some extent may have hampered the trial judge. It would have been preferable to submit an appropriate range of sentence and to let the trial judge determine the sentence."[23]

The test applied by the Sentencing Judge

[37] Describing his duty in the face of a joint submission, the Sentencing Judge said:

> "And so what a judge's function is when there's a joint submission before the Court is to make sure that justice is still done. That is the goal that we try to reach, that somebody isn't being taken advantage of. Now, my knowledge of this case is much, much less than that of [counsel]…So they know more about it than I do, and they are experienced lawyers. They are lawyers who have handled cases like this in the past. No one is being taken advantage of here. Sometimes you see that when you have a senior defence counsel and a junior Crown. That is not happening here."[24]

[38] It is respectfully submitted that His Lordship applied the wrong test in assessing the propriety of the joint submission. The issue was not whether a lawyer was being taking advantage of. The issue was whether the sentence imposed on this battered woman who killed her abuser brings the administration of justice into disrepute or is otherwise contrary to the public interest. Certainty for the sake of efficiency cannot override a miscarriage of justice.

[39] The Court in *Anthony-Cook* directed that trial judges should apply the public interest test when they are considering imposing a sentence below the joint submission. From the accused person's perspective, undercutting a joint submission does not engage fairness concerns or undermine confidence in the certainty of plea negotiations. Justice Moldaver further observed:

> "…in assessing whether the severity of a joint submission would offend the public interest, trial judges should be mindful of the power imbalance that may exist between the Crown and defence, particularly where the accused is self-represented or in custody at the time of sentencing."[25]

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[23] *Wood*, at p.575-576.
[24] Sentence Appeal Record, p. 19, lines 16-20 and 23-27.
[25] *Anthony-Cook* at para. 52.

[40] Ms. Naslund was represented by experienced counsel. But so was Mr. Wood in the case cited above. The inequality of bargaining positions here is patent. More importantly, women charged with homicide for killing their abusers face "irresistible forces to plead guilty" to a reduced charge. [26] Turning down the "bargain" risks a life in prison.

[41] Judge Ratushny's 1997 *Self Defence Review* recommended sentencing reform to allow a jury to recommend, in exceptional circumstances, that a person convicted of second-degree murder be considered for leniency.[27] She recognized that the problem flowed from the mandatory minimum sentence for murder, resulting in extreme pressure on women who have killed their abusers to plead guilty to manslaughter. Judge Ratushny also recommended that Prosecutors who are prepared to accept a guilty plea to manslaughter consider indicting only on manslaughter to avoid an equivocal plea where there is some evidence supporting a defence such as self-defence.[28] To be clear, Ms. Naslund does not resile from her acknowledgement of legal responsibility for this crime. However, the Crown's required "joint submission sentence" was unjust.

The Public Interest test

[42] Referencing two Newfoundland Court of Appeal decisions, the Supreme Court in *Anthony-Cook* framed the public interest test with these questions: "would an informed and reasonable public lose confidence in the institution of the courts" or "is the sentence so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system."[29] Justice Moldaver continued:

> "Rejection 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

[26] L. Ratushny, *Self-Defence Review Final Report* (1997) at p. 159 – 163, reciting the factors which uniquely exist in case cases of battered women who kill their abusers including family considerations, the embarrassment of publicly testifying about the abuse she endured and remorse. [Appendix B]
[27] *Self-Defence Review Final Report* (1997) at p. 195. [Appendix C]
[28] *Self-Defence Review Final Report* (1997) at p. 179 – 180.
[29] *Anthony-Cook* at para. 33.

> resolution discussions, to believe that the proper functioning of the justice system had broken down."[30]

[43] This Court has observed that the "repute of the administration of justice" and "public interest" are generic terms, taking their meaning from context.[31] The validity of a joint submission cannot be decided merely by comparison to other sentencing decisions for the same offence which may not account for factors considered by the parties in plea negotiations. The issue is whether the joint submission, considered overall and in that context, was so unfit as to bring the administration of justice into disrepute.[32]

[44] In determining whether a joint submission "produces a breakdown in the proper functioning of the justice system," a court must consider the benefits and the advantages of this resolution process. Fitness, considering parity and proportionality, must also be informed by the dynamics of the joint submission process.[33]

PART 4 – ARGUMENT

Ground 1: The sentence brings the administration of justice into disrepute.

[45] Ms. Naslund seeks to introduce fresh evidence by way of an Affidavit from Prof. Elizabeth Sheehy, a criminal law scholar knowledgeable about legal responses to male violence against women. Professor Sheehy's reaction of shock to Ms. Naslund's 18-year sentence was quick and decisive. She spoke out. She was not alone in her concern. She is a reasonable and informed member of the public.

[46] A second Affidavit is proffered from Matthew Behrens, a community advocate and writer. Mr. Behrens began a public petition to address what he perceived to be an unjust outcome. His affidavit produces the petition, including Prof. Sheehy's op-ed, captures

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[30] *Anthony-Cook* at para. 34.
[31] *R. v. Belakziz*, 2018 ABCA 370 at para. 15.
[32] *Belakziz* at paras. 21 and 29.
[33] *R. v. C.R.H.*, 2021 BCCA 183 at para. 54 and 84.

comments posted by signers, and appends a dozen letters of support from Women's Shelters and other organizations.

[47] A separate Memorandum seeking the introduction of this fresh evidence addresses the law. From this evidence, it may be concluded that many members of the public have lost confidence in the courts because they perceive this sentence as excessive. Such evidence should be accepted for a limited purpose and weighed accordingly. Some of the evidence is from the informed public and is reliable. Some of the evidence, on its face, is less reliable. This evidence cannot alone demonstrate the error of accepting the joint submission. But it may inform this Court's assessment of the public interest test following a more traditional fitness assessment.

[48] Fear of opening the floodgates is not live due to the highly unusual circumstances of this case. The entirety of what the public can know about the case to justify the sentence is contained in the sentencing transcript, available to Prof. Sheehy and others. It was a harsh joint submission sentence drawing swift and strong public reaction. The new evidence does not stand alone in supporting the appeal argument, but can contribute to this Court's assessment of ground 2.

Ground 2: The sentence is contrary to the public interest: it offends proportionality and parity and can be seen as a product of coercive plea-bargaining.

The dynamics of the joint submission process

[49] Post *Anthony-Cook* jurisprudence examining rejection of joint submissions urges consideration of plea-bargaining dynamics and interests when assessing "fitness" within the meaning of the public interest test. Before turning to a more traditional assessment of the fitness of this sentence, the plea negotiation dynamics are addressed.

[50] It is within the sole discretion of the Prosecutor whether he will accept a guilty plea to a reduced charge of manslaughter on an indictment for murder. When the accused person's agreement to a harsh sentence is the cost for his exercise of that discretion, the

bargain risks being seen as coercive. The accused person faces the trial risk of a mandatory life sentence if the bargain is rejected and a conviction for murder results. A trial is a gamble. For battered women, there are additional factors at play including family interests, the ordeal of having to publicly describe her treatment at the hands of her abuser, and the risk that a jury would not understand or accept her actions as defensive.[34] A contested manslaughter sentencing hearing should be an option. But, this option is eliminated when consent to the reduced plea is contingent on agreement with the Prosecutor's penalty.

[51] Prosecutors exercising this power become the adjudicators. The Prosecutor chooses the charge, and the sentence. Transparency is lacking when neither the Court nor the public can understand how the bargained sentence was determined.[35] If Crown Counsel is prepared to accept a guilty plea to a charge of manslaughter, why must a joint submission on sentence be required? What is the public interest in requiring agreement to an unduly harsh sentence? What is the public interest in a case where the battered woman killed her abuser and there is no evidence of risk?

Fitness of sentence having regard to proportionality and parity

[52] Counsel cited one case to the Sentencing Judge: *R. v. Laberge*.[36] No other cases, nor even the fact of a jurisprudential review, were cited to justify an 18-year sentence. In the agreed facts, Ms. Naslund expressly admitted the *mens rea* of the "second level" of unlawful act reflecting moral blameworthiness as described in *Laberge*: serious bodily harm was objectively foreseeable. But, as noted in *Laberge*, "to complete the moral blameworthiness picture and to ensure that an offender is properly situated in terms of sentencing *vis-a-vis* others convicted of the same offence, the court must also have

[34] L. Ratushny, *Self-Defence Review Final Report* (1997) at p. 159 – 163; E. Sheehy, "*Battered Women and Mandatory Minimum Sentencing*" (2001) 39 Osgoode Hall Law Journal 529; M. Shaffer, "*The Battered Woman Syndrome Revisited: Some Complicating thoughts Five Years after R. v. Lavallee*", 47 U Toronto LJ 1 (1997) at 25. [Appendix D]
[35] A. Flynn and K. Fitzgibbon, *Bargaining with Defensive Homicide: Examining Victoria's Secretive Plea Bargaining System Post-law Reform*, (2011) 35 Melbourne University Law Review 905 at 906-907, 918, 924, 928. [Appendix E]
[36] *R. v. Laberge*, 1995 ABCA 196.

regard to those personal characteristics of the offender which would mitigate or aggravate culpability." [37] Moral culpability must be assessed by balancing all relevant factors.

[53] Crown counsel cited *Laberge* in the context of his characterization of this manslaughter as "near murder". This Court has recently noted in *R. v. Anderson*[38] that the words "near murder" merely express why a sentence near life imprisonment would be just having regard to both aspects of s.718.1 *C.C.*'s proportionality, which includes the specific offender's degree of responsibility. Proportionality is the *sine qua non* of a just sanction.[39]

[54] In *Anderson*, the Court upheld a 16-year sentence for a guilty to manslaughter on a second-degree murder indictment, for the shooting death of a 24-year-old immigrant who was simply in the "wrong place at the wrong time" and whose family was shattered by his senseless death. Mr. Anderson had a significant, serious criminal record including violence and was intoxicated, driving while prohibited, holstering a loaded handgun while prohibited, and drove into the victim's parked vehicle at a high speed. In the ensuing confrontation, when the victim expressed a desire to contact police, Mr. Anderson pointed his loaded gun, which discharged into the victim's head after a momentary scuffle.

[55] This Court has recognized that "something of a range" of 8 – 12 years imprisonment has evolved for cases that fit the most serious category within the *Laberge* analysis, many of those being cases of "group involvement, protracted brutality, use of weapons, vulnerable victims and so on."[40]

[56] Neither *Anderson* nor many of the cases cited below of battered women killing their abusers and surviving, involved post offence actions as occurred here, which aggravate this crime. However, even giving those aggravating acts due weight, the sentence of 18-

[37] *Laberge*, at para. 10.
[38] *R. v. Anderson*, 2021 ABCA 135 at para. 32.
[39] *R. v. Ipeelee*, 2012 SCC 13 at para. 37 [not reproduced].
[40] *R. v. Holloway*, 2014 ABCA 87 and paras. 47-51.

years imprisonment far exceeds other, factually similar manslaughter sentences by women who acted and survived. It also exceeds many sentences for femicide.[41]

[57] Appendix A is a chart of manslaughter sentencing cases of battered women who killed their abusers, citing cases from 1984 to 2020. The chart cites only cases which occurred in Alberta, or involve use of a firearm, or the stabbing of a sleeping person, or aggravating post-offence conduct, or are rulings of an appellate court, or where the sentence functionally exceeds 10 years. Not one approaches the 18-year sentence required here.

That a Battered Woman killed her abuser informs moral culpability

[58] Evidence of the battered woman's experience informs her moral culpability when she kills her abuser. In 1990, Justice Bertha Wilson observed that:

> "Fortunately, there has been a growing awareness in recent years that no man has a right to abuse any woman under any circumstances. Legislative initiatives designed to educate police, judicial officers and the public, as well as more aggressive investigation and charging policies all signal a concerted effort by the criminal justice system to take spousal abuse seriously. However, a woman who comes before a judge or jury with the claim that she has been battered and suggests that this may be a relevant factor in evaluating her subsequent actions still faces the prospect of being condemned by popular mythology about domestic violence. Either she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it."[42]

[59] Myths still pervade the justice system. Ms. Naslund was told by the Sentencing Judge that "other options [were] open" and that she "[hadn't] been able to deal with the problems in [her] life". The agreed facts explained her inability to leave.[43]

[41] For example, *R. v. Mullen*, 2017 SKQB 237 and the cases cited therein at paras. 32 and 37.
[42] *R. v. Lavallee,* (1990) 55 CCC (3d) 97 (SCC) at 112.
[43] Factum at paras. 5 and 24-25, above.

[60] When sentencing Jocelyn Bennett in 1983 to a suspended sentence for the stabbing death of her sleeping husband, Judge Ratushny noted cases cited to her where battered women who killed their abusers were not sent to jail: [44]

> "In each of these cases, the courts examined sentencing principles in light of the abuse to consider whether or not the abuse justified something less than incarceration for the taking of a human life, in other words, whether or not the abuse should serve to mitigate sentence. In each case, the courts were sympathetic to the accused because of the abuse they had suffered, the provocation they had endured and their victimization. But what is the relevance of this sympathy and what is the underlying reason for the abuse-serving to mitigate sentence?
>
> In any sentencing, traditional sentencing principles have to be considered and applied and for Ms. Bennett they are no different: is there a need to protect the public from her; is there a need of general deterrence to make an example of her to others to deter them from committing similar crimes; is there a need to punish her and to deter her from similar crimes in the future?"

[61] The Ontario Court of Appeal cited Judge Ratushny reasons in 2011 when reducing Teresa Craig's sentence from 8 years imprisonment to time served (3 years) for repeatedly stabbing her sleeping husband. They added:[45]

> "As explained by Ratushny J. in *Bennett*, at para. 20, a passage quoted by the trial judge, abuse, whatever its form, can have different effects on the subject of the abuse. Where that abuse leaves the abused individual feeling utterly trapped in the relationship and emotionally and mentally unable to cope with or escape from the relationship, the moral culpability of the individual who reacts by killing the abuser is substantially reduced. That reduced culpability must be reflected in the sentence imposed. It may be easier to reach the conclusion that the abuse has had a serious impact on the person abused where it includes a significant physical component. However, as the evidence in this case makes clear, psychological, verbal and emotional abuse combined with intimidation and the realistic fear of physical violence can have an overwhelming impact on the abused individual."

[44] *R. v. Bennett*, [1993] O.J. No. 1011 at paras. 16 and 17.
[45] *R. v. Craig*, 2011 ONCA 142 at para. 59.

[62] Ms. Naslund shot her sleeping husband. So did Jane Stafford,[46] Judith Chivers,[47] Lisa Ferguson[48] and Lilian Getkate.[49] They received suspended sentences, conditional sentences or 6 months imprisonment. In January 1996, the *Criminal Code* was amended to require a mandatory minimum sentence of 4 years imprisonment for manslaughter with a firearm.[50]

The aggravating factor of post offence conduct

[63] Ms. Naslund's conduct after the killing aggravates her sentence. On his mother's acceptance of responsibility for the killing, the Crown Prosecutor withdrew the murder charge against Neil Naslund and he pled guilty to offering an indignity to human remains contrary to s.182 *C.C.* He was sentenced to 3 years imprisonment on a joint submission.[51] His admitted conduct included assisting his mother in disposing of his father's body, hiding his car and dumping the guns and toolbox containing the body into the dugout. He too fabricated a story to the police and maintained the lie until his arrest 6 years later.

[64] Counsel justified their sentencing position in his case by reference to a case review supporting sentences of 2-4 years imprisonment. That range is supported by the authorities.[52]

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[46] *R. v. Whynot (Stafford),* Appendix A, facts at (1983) 9 CCC (3d) 449 at 452; 1993 CanLII 3495 – 6 months imprisonment but undetermined if credited time in custody. Sentence reported in E. Sheehy, *Defending Battered Women on Trial* (2014) UBC Press, p. 6. [Appendix F]

[47] *R. v. Chivers*, Appendix A, [1987] NWTJ No. 118 – suspended sentence.

[48] *R. v. Ferguson*, Appendix A, [1997] OJ No. 2488 – conditional sentence. The deceased was "lying on the couch" at the time he was shot (para. 33) and it is unclear if he was sleeping.

[49] *R. v. Getkate*, Appendix A, [1998] OJ No. 6329 – conditional sentence.

[50] Firearms Act, S.C. 1995, c. 39, s. 142.

[51] Transcript, March 19, 2020, p. 9 -12 Agreed Facts read; Sentenced October 30, 2020, p. 26 -35.

[52] In *R. v. McLeod*, 2016 MBCA 7 at para. 24, the trial judge's range of 2 – 4 years was endorsed. A 15-year sentence was upheld for a manslaughter conviction after a murder trial. The accused choked his male friend during consensual wrestling, left the body for 3 hours, then dismembered it and hid body parts throughout Winnipeg. The head was never found. The accused continued to deny involvement until the trial. See also *R. v. Parkin*, 2017 ABQB 336 where a range of 2 – 3.5 years was identified at para. 20. The accused was sentenced to 13 years on his guilty plea to manslaughter and 3 years consecutive for s. 182 *CC*. He lured the victim to a rural location and shot him 3 times at close range. He boasted about the killing, burned the body, destroyed other evidence and used the deceased's bank card. See also *R. v. Armstrong*, 2018 BCSC 2260 where a range of 18 months to 5 years was identified at para. 59. Sentences of 6 years and 4 years were imposed for guilty pleas to manslaughter and s. 182 *C.C*. The accused struck his intimate roommate 3 times in the head with a hammer and left her where she died. He sent text messages and photos pretending to be her until he quit his job, lied about where he was going and took the body to a

[65] Some of the Appendix A cases of battered women sentenced for manslaughter also involved serious post offence conduct. Deborah Doonanco[53] set fire to the room where she shot her ex-partner twice in the chest. His body was burned beyond recognition. She was sentenced to 8 years imprisonment on a joint submission, pleading guilty to manslaughter after a murder conviction and successful appeal.

[66] Donaline Caplette[54] stripped and cleaned her dead husband's body, placed it in a trunk and threw it off a cliff. It was discovered two weeks later, but only identified 7 years later. She was charged with second degree murder 16 years after the killing. In sentencing her to a suspended sentence, Mr. Justice Oppal said:

> "In examining this case the most aggravating aspect of the incident relates to the subsequent cover-up, if you will. Mr. Butcher, in a thorough submission, has offered two explanations. He said first that she feared retribution from Mr. V.'s associates in the drug trade. I accept that explanation as being reasonable. But perhaps the most significant explanation for the cover-up, so-called, and non-disclosure by Mr. Butcher relates to the societal attitudes towards violence, violence towards women.
>
> It is said in 1977 the public attitude towards violence against women was not as enlightened as it is today. I have to agree with that assessment."

Conclusion

[67] Neil Naslund's sentence was acceptable to the parties and the Judge who imposed the recommended 3 years. Even accepting that Helen Naslund's sentence for manslaughter could have been increased by 3 years to reflect the impact of her post

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remote location where he burned it. Other cases in which serious post offence conduct was not separately charged but considered aggravating include *R. v. McGenn*, 2018 BCSC 1942 where a 10 year sentence was imposed after trial for strangling the victim, leaving the body for 3 weeks before it was found and using the deceased's phone and credit cards to impersonate him to the deceased's family and friends and conceal the death; *R. v. Ellsworth*, 2003 BCSC 1315 where the accused was sentenced to 10 years after pleading guilty to manslaughter on a murder indictment. He struck his common law spouse one to three times in the head with an axe from behind. He then staged a robbery, called the house and left loving voice messages, fabricated an alibi and gave police an exculpatory statement which he maintained for 10 days.

[53] *R. v. Doonanco*, Appendix A, unreported Aug 31, 2020, ABQB per Michalyshyn J. ASF and transcript in authorities.

[54] *R. v. D.E.C.*, Appendix A, [1995] BCJ No. 1074 at paras. 35-36.

offence conduct, a 15-year sentence would still far exceed any similar previous sentence which can be found reflecting somewhat similar circumstances. The highest sentences recorded within Appendix A are the 8 years imposed on Ms. Doonanco, above, who shot her partner twice in the chest before setting fire to the room, and *R. v. Fisher*.[55] Rachel Fisher received a sentence functionally equivalent to 11 years for stabbing her partner in the heart during a drunken argument. She was an Indigenous woman with substance addictions and a lengthy criminal record for violence. Post offence, she made efforts to conceal the crime and also lied about it.

[68] A sentence for Helen Naslund which reflects her moral culpability and respects parity cannot reasonably approach 18 years in the penitentiary, even giving significant weight to her post offence conduct. No public policy argument informing the necessity of joint submissions can support this unduly harsh penalty. This Court should condemn this "bargain" and substitute a just sentence.

PART 5 – RELIEF SOUGHT

[69] Helen Naslund seeks a reduction in the 18-year sentence of imprisonment she is serving for having killed her abusive husband.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of May 2021.

Estimated time for Oral Argument: 45 minutes

[55] *R. v. Fisher*, 2004 CanLII 10497, Appendix A.

NO	CASE LAW
1	***R. v. Charles Maltais***, 2021 NBQB 90
2	***R. v. Anthony-Cook***, 2016 SCC 43
3	***R. v. Wood***, (1988) 43 C.C.C. (3d) 570
4	**R. v. Belakziz**, 2018 ABCA 370
5	***R. v. C.R.H.***, 2021 BCCA 183
6	***R. v. Laberge***, 1995 ABCA 196
7	***R. v. Anderson***, 2021 ABCA 135
8	***R. v. Holloway***, 2014 ABCA 87
9	***R. v. Mullen***, 2017 SKQB 237
10	***R. v. Lavallee***, (1990) 55 CCC (3d) 97
11	***R. v. Bennett***, [1993] O.J. No. 1011
12	***R. v. Craig***, 2011 ONCA 142
13	Firearms Act, S.C. 1995, c. 39, s. 142
14	**R. v. McLeod,** 2016 MBCA 7
15	***R. v. Parkin***, 2017 ABQB 336
16	***R. v. Armstrong***, 2018 BCSC 2260
17	***R. v. McGenn***, 2018 BCSC 1942
18	***R. v. Ellsworth***, 2003 BCSC 1315
19	***R. v. Doonanco,*** unreported, Aug 31, 2020, ABQB Michalyshyn, J
20	***R. v. Poucette,*** 2019 ABQB 725
21	***R. v. Craig***, 2011 ONCA 142
22	***R. v. Crowchief,*** 2005 ABCA 92
23	***R. v. Fisher***, 2004 CanLII 10497 (ONSC)

24	***R. v. Foy*****,** [2002] OJ No. 4004
25	***R. v Getkate*****,** [1998] OJ No. 4199
26	***R. v Getkate***, [1998] OJ No. 6329
27	***R. v. Ferguson,*** [1997] OJ No. 2488
28	***R v D.E.C.,*** [1995] BCJ No. 1074
29	***R. v. Howard,*** [1991] BCJ No. 3780 (BCCA)
30	***R. v. Chivers***, [1987] NWTJ No. 118
31	**R. v. Whynot (Stafford),** Facts: (1983) 9 CCC (3d) 449 at 452(NSCA); 1993 CanLII 3495

NO	APPENDICIES
A	Sentencing Chart
B	L. Ratushny, Self-Defence Review Final Report (1997)
C	E. Sheehy, “Battered Women and Mandatory Minimum Sentencing” (2001) 39 Osgoode Hall Law Journal 529
D	M. Shaffer, “The Battered Woman Syndrome Revisited: Some Complicating thoughts Five Years after R. v. Lavallee”, 47 U Toronto LJ 1 (1997)
E	A. Flynn and K. Fitzgibbon, Bargaining with Defensive Homicide: Examining Victoria’s Secretive Plea Bargaining System Post-law Reform, (2011) 35 Melbourne University Law Review 905
F	E. Sheehy, Defending Battered Women on Trial (2014) UBC Press

Appendix A

Sentencing of Battered Women who killed their abuser
Filtered to include only: Alberta cases; Shooting; Stabbing of sleeping person; Appellate level; aggravating post offence conduct; sentences exceeding 10 years
(Accused Women had no criminal record unless otherwise indicated)

R. v. Doonanco*,* unreported, Aug 31, 2020, ABQB Michalyshyn, J	**8 years imprisonment** on a joint submission	Guilty Plea to manslaughter on a 2nd degree murder indictment; Deceased shot twice in the chest; he had earlier discharged that rifle into the floor near her while cocaine intoxicated; divorced but he resided with her; Accused set fire to the room after and body burnt beyond recognition
R. v. Poucette, 2019 ABQB 725	**2 years imprisonment** and 3 years probation	Tried and convicted of manslaughter; Deceased stabbed once in the chest while a friend tried to block his advance to the accused who he had earlier assaulted; both intoxicated; she called 911; Indigenous woman with addictions and mental health issues and a minor criminal record; on strict house arrest for 2 years after 3.5 months in pretrial custody
R. v. Craig**,** 2011 ONCA 142	**3 years imprisonment** (time served) Reduced on appeal from 8 years imprisonment	Convicted of manslaughter by a jury on a trial for first degree murder; Placed a pillow over the face of her sleeping drunk husband then stabbed him 4 times in the chest; Immediately ran to the neighbors, admitted killing him and asked them to call 911; Sentencing errors included “near murder” characterization given the medical testimony about her mental state and emphasizing the form not the effect of the abuse she suffered
R. v. Crowchief, 2005 ABCA 92	**3 years imprisonment**	Guilty plea to manslaughter on a 2nd degree murder indictment; Single stab during an argument while both were drinking; immediately called 911; Indigenous woman with minor criminal record
R. v. Fisher**,** 2004 CanLII 10497 (ONSC)	**8 years imprisonment** After consideration of **pretrial credit equaling 3 years imprisonment**	Guilty Plea to manslaughter on a murder indictment; Single stab to the heart during an argument; both intoxicated; post offence attempts to conceal the crime including false statements; Indigenous

Sentencing of Battered Women who killed their abuser
Filtered to include only: Alberta cases; Shooting; Stabbing of sleeping person; Appellate level; aggravating post offence conduct; sentences exceeding 10 years
(Accused Women had no criminal record unless otherwise indicated)

		woman with a lengthy criminal record for violence and substance addictions
***R. v. Foy*,** [2002] OJ No. 4004	**6 years imprisonment** After **26 months credit** for 13 months pretrial custody	Guilty Plea to manslaughter Single stab to the heart; She obtained, washed and hid a knife after an earlier altercation and returned to the room where he lay in bed; after the stabbing she hid the knife, changed clothes and attempted to hide but was quickly found and disclosed the knife; Indigenous mother of 3 young children with a minor record and substance addictions
***R. v Getkate*,** [1998] OJ No. 6329 Nonsuit on 1st degree murder: [1998] OJ No. 4199	**Conditional sentence**	Convicted of manslaughter after jury trial for 2nd degree murder; Deceased shot twice while sleeping; psychiatric evidence at trial of depression and PTSD; remorseful mother of 2 young children
R. v. Ferguson, [1997] OJ No. 2488	**Conditional sentence**	Convicted of manslaughter after trial for murder; Deceased shot while lying on the couch; immediately called 911 and remorseful; minor criminal record and alcohol addiction;
R. v. D.E.C., [1995] BCJ No. 1074	**Suspended sentence** and 1 year probation	Guilty Plea to manslaughter on a 2nd degree murder indictment; Deceased shot twice in the chest; Accused confronted him with the gun after learning he sexually assaulted her daughter; Accused stripped and cleaned the body, placed it in a trunk and threw it off a cliff; body discovered after 2 weeks but identified after 7 years; Accused charged 16 years later; Accused feared retribution from deceased drug dealer's associates
***R. v. Bennett*,** [1993] O.J. No. 1011	**Suspended sentence** and 3 years probation	Guilty Plea to manslaughter on an indictment for 2nd degree murder; Deceased stabbed, likely while sleeping; Pre-offence statement "I'm gonna kill him… I can't take it anymore"; Accused called 911 after;

Sentencing of Battered Women who killed their abuser
Filtered to include only: Alberta cases; Shooting; Stabbing of sleeping person; Appellate level; aggravating post offence conduct; sentences exceeding 10 years
(Accused Women had no criminal record unless otherwise indicated)

		Both intoxicated; Expert medical evidence tendered
R. v. Howard, [1991] BCJ No. 3780 (BCCA)	**2 years imprisonment** Reduced on appeal from 5.5 years	Guilty plea to manslaughter on a 2nd degree murder indictment; After an assault, Accused obtained a knife from the kitchen, returned to the bedroom and stabbed deceased once; both intoxicated; Indigenous mother of 4 young children and pregnant at the time;
R. v. Chivers, [1987] NWTJ No. 118	**Suspended sentence** and 2 years probation After 6 months in pretrial custody for breach of abstention condition	Convicted of manslaughter after jury trial for 2nd degree murder; Shot her sleeping husband once in the back of the head in the dark; earlier he had attempted forced oral sex then fired a shot at her after she refused; both intoxicated; Indigenous mother of young children living in a rural area
R. v. Whynot (Stafford) Facts: (1983) 9 CCC (3d) 449 at 452(NSCA); 1993 CanLII 3495 Sentence: Sheehy E., *Defending Battered Women on Trial* (2014) p. 6	**6 months imprisonment** Undetermined if time in custody considered between killing on March 11, 1982 and sentencing in 1984	Guilty Plea to manslaughter in 1984 after new trial ordered by NSCA on Crown appeal of acquittal by jury of first degree murder; Shot deceased while he slept in his truck