IMPACTS OF THE SUPREME COURT'S DECISION IN *R V ANTHONY-COOK* ON THE CERTAINTY OF PLEA AGREEMENTS AND JOINTLY PROPOSED SENTENCING

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In the recently issued decision in *R. v. Anthony-Cook*,[1] the Supreme Court of Canada (the "Court") clarified that there is only one test that a court must apply when assessing whether a joint submission on sentence should be rejected, namely the "public interest test".

The Court also determined that trial judges should indicate the possibility of giving accused persons the opportunity of withdrawing their guilty plea where trial judges express concerns regarding a joint submission and might reject the sentence proposed by Crown and defence counsel pursuant to a plea agreement.

Facts

As observed by the Court, the facts of the case "are as simple as they are tragic."[2] The appellant, Mr. Anthony-Cook, had a history of mental health and drug use issues and occasionally visited a drop-in centre for mental health and addiction issues located in Vancouver, British Columbia. The appellant threw punches at a volunteer of the drop-in centre, who fell down and died after fracturing his skull on the pavement.

The appellant was accused of manslaughter. After the trial began, he eventually elected to plead guilty, agreeing with Crown counsel on a joint submission on sentence. The jointly proposed sentence consisted of a custodial sentence of 18 months (with 11 months already spent by the accused in pre-trial custody) with no period of probation thereafter.

The Supreme Court of British Columbia rejected the joint submission on the basis that the proposed sentence gave inadequate "weight to the principles of denunciation, deterrence, and protection of the public."[3] In lieu of the proposed sentence, the trial judge increased the custodial sentence to 24 months and issued a 3-year probation order. The Court of Appeal for British Columbia determined that the sentence imposed by the trial judge was fit in the circumstances and unanimously rejected the sentence appeal of the accused.

Principles Adopted by the Court

Public Interest Test

The Court (speaking through Moldaver J.) unanimously held that the sole test that courts must employ to decide if a joint submission is acceptable is the stringent "public interest test." Pursuant to this test, trial judges must "not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest."[4] In other words, a trial judge may only reject a jointly proposed sentence where it "would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system."[5]

By adopting this unique test, the Court rejected the less demanding "fitness of sentence" and "demonstrably unfit" tests that some courts had inconsistently applied in the past and commented that "a joint submission should not be rejected lightly."[6]

In justifying the need for a test that encompasses a high threshold, the Court mentioned that joint submissions on sentence increase the certainty of the outcome of criminal proceedings, a feature which is relied on by both the accused and the Crown and which presents several benefits for participants in the criminal justice system. Imposing restraint on trial judges with respect to the rejection of joint submissions allows this high degree of certainty. Joint submissions also greatly benefit the administration of justice in terms of efficiency as they, in the words of the Court, "save the justice system precious time, resources, and expenses, which can be channeled into other matters."[7] The Court further observed that it is appropriate to let Crown and defence counsel enter into plea agreements and expressed its confidence in the fact that they are able to reach just resolutions that are in line with the public interest.

It remains, however, that "[c]ertainty must yield where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty of result."[8] The Court indicated that this principle is acknowledged by the public interest test.

Guidance for Trial Judges

In addition to imposing a single, stringent test for rejecting joint submissions on sentence, the Court provided guidelines for trial judges to determine where it is appropriate to depart from a sentence proposed by Crown and defence counsel.

In a nutshell:

1. Judges must consider joint submissions "as is", *i.e.* they must make the assumption that if a particular order was not included in the joint sentence, the parties considered it and elected not to include it. However, if the judge determines that a mandatory order was omitted from the joint submission, he or she must inform counsel.

2. Judges must apply the public interest test when deciding whether to increase or reduce a proposed sentence. However, the analysis is different in each case. From the perspective of the accused, benefitting from a more lenient sentence does not engage concerns about fair trial rights or undermine the confidence in the certainty of plea negotiations. In particular, in assessing whether a sentence is too severe, judges have to 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"[9] and "should bear in mind that the community's confidence in the administration of justice may suffer if an accused enjoys the benefits of a joint submission without having to serve the agreed-upon sentence." [10]
3. Judges need to know the circumstances underlying the joint submission. Particularly, the judge should consider the benefits procured to the Crown: "the more concessions made by the accused, the more likely it is that the trial judge should accept the joint submission, even though it may appear to be unduly lenient."[11] This implies a corollary obligation of counsel to provide full details regarding such circumstances to the judge without request. This does not mean, however, that counsel must reveal their "negotiating positions or the substance of their discussions leading to the agreement [...]."[12] Also, in cases where confidentiality is a concern, for instance to avoid risks of negatively impacting active criminal investigations, counsel nonetheless has to communicate such circumstances using alternative means.
4. In the event that the judge finds the joint submission unacceptable, he or she must notify counsel and give them the opportunity to make further representations in an attempt to address the judge's concerns before the sentence is imposed. When notifying counsel of his or her concerns, the judge should concurrently indicate the possibility of permitting the accused of withdrawing his or her guilty plea.
5. If the judge is of the view that his or her concerns have not been alleviated by the submissions of counsel, he or she may give the accused the opportunity to withdraw his or her guilty plea. The Court chose to remain silent on the circumstances where such a possibility should be offered to the accused, but gave as an example the situation "where counsel have made a fundamental error about the legality of the proposed joint submission [...]."[13]
6. Trial judges must provide "clear and cogent" grounds justifying the departure from the joint submission.

Holding

The Court allowed the appeal and varied the appellant's sentence to bring it in line with the joint submission, on the grounds that (i) the trial judge applied the incorrect test and, (ii) in accordance with the public interest test, (a) the proposed custodial sentence was not low to the point that it could be said to bring the administration of justice into disrepute or otherwise be contrary to the public interest and (b) "[c]ounsel's view

that the probation order was duplicative and therefore unnecessary to protect the public was reasonable in the circumstances."[14]

Impacts and Comments

This decision of the Court is significant in that it confirms that a stringent test is applicable to the acceptability of joint submissions on sentence and provides guidance to trial judges in circumstances where it might be appropriate to depart from a sentence.

The Court's comments support the view that sentences jointly submitted by Crown and defence counsel should not be rejected readily given that maintaining certainty, while not consisting in "the ultimate goal of the sentencing process",[15] is capital to ensure the efficacy of plea agreements.

That said, the Court's instructions with regard to the possibility for the accused of withdrawing his or her guilty plea where the trial judge expresses concerns with respect to the joint submission or rejects it and varies or adds to the sentence, do not appear entirely clear to us.

As stated previously, in its fourth instruction, the Court mentions that "[t]he judge should notify counsel that he or she has concerns, and invite further submissions on those concerns, including the possibility of allowing the accused to withdraw his or her guilty plea, as the trial judge did in this case." [emphasis added][16] The trial judge in Anthony-Cook stated that he "put both Crown and defence counsel on notice that although [he] would give serious consideration to their joint submission on sentence, [he] would not necessarily be bound by it, and if, in light of that fact, Mr. Anthony-Cook wished to reconsider his plea, [he] would entertain that submission."[17]

While the trial judge stated that he would "entertain" a submission of the accused to reconsider his plea, we are under the impression that the trial judge implied that he would unconditionally allow the accused to withdraw his plea. At that stage, the only reason that the accused would want to withdraw his plea, and the only reason why the judge would offer such a possibility, is because the trial judge indicated that he "would not necessarily be bound by it" (*i.e.* that there was a risk that the judge could reject it).

Taking this line of thought further, perhaps it is possible that the Court, by referring to "what the trial judge did in this case", meant that at the stage of the fourth instruction (*i.e.* where the judge first expresses concerns regarding the joint submission, before the parties have provided additional submissions to justify the proposed sentence), the accused can apply to withdraw his guilty plea without having to advance any grounds for doing so.

The Court then states, in its fifth instruction, that if the trial judge's apprehensiveness of the joint submission has not been alleviated by the submissions of counsel, he or she "may allow the accused to apply to withdraw

his or her guilty plea." [emphasis added][18] The Court, however, declined to settle on the "circumstances in which a plea may be withdrawn."[19]

In our view, the words of the Court cannot be construed as meaning that withdrawing a guilty plea made pursuant to a plea agreement can now be made automatically and without restriction at the stage described in the fifth instruction. Could this mean that a different and more stringent test applies to an accused at that stage? Trial judges may allow the accused to apply to withdraw his or her guilty plea after having received additional submissions from counsel, but they are not bound to systematically grant the guilty plea withdrawal when they still have concerns regarding the proposed sentence.

It is also worth noting that the example situation given by the Court where an accused may be permitted to withdraw his or her sentence is quite exacting (i.e. in the event of a "fundamental error about the legality of the proposed joint submission"[20]). One may wonder whether this means that a withdrawal will only be permitted in exceptional circumstances and that the court must remain vigilant to ensure that the accused cannot be allowed to abandon a guilty plea when things do not play out as he or she had expected. In Canada, circumstances that courts have considered to justify the decision to permit the withdrawal of a guilty plea before sentencing have included the following:

- Where the accused was wrongly advised by his or her counsel;
- Where the accused did not properly understand the nature and consequences of his or her plea;
- Where the accused did not intend to admit being guilty of the offence charged;
- Where the accused pleaded guilty under improper inducement or threats;
- Where the accused had a valid defence; and
- Where accepting the plea of guilty would result in a miscarriage of justice.[21]

The Court[22] and provincial appeal courts[23] have held that the onus of demonstrating that the guilty plea is not valid is borne by the accused. The Court did not alter its previous position in *Thibodeau v. R.*[24] (1955) that the decision of whether to allow a plea of guilty to be withdrawn "rests in the discretion of the judge and will not be lightly interfered with if exercised judicially."[25] Courts have found that a change of plea should not to be granted if the accused was aware of the consequences of pleading guilty. [26] It has also been held that dissatisfaction with the sentence imposed by the judge is not a proper ground on which to permit the withdrawal of a plea of guilty. [27]

In our view, allowing the accused to cancel his or her guilty plea without restriction in the event that the trial judge rejects the proposed sentence and indicates that he or she might impose one that is more severe would further reduce uncertainty surrounding joint submissions on sentence and therefore increase the efficacy and appeal of plea agreements, which would in turn permit our criminal justice system to be more efficient.

However, it is not clear whether the Court in *Anthony-Cook* meant to indicate that withdrawing guilty pleas should be less challenging or automatic at the stage contemplated in its fourth instruction, or if the fourth instruction merely contemplates the "possibility" making the application described in the fifth instruction for which the outcome is dependent on certain circumstances being present and the trial judge's discretion.

In our opinion, the unsettled uncertainty stemming from the need to provide reasons to withdraw a guilty plea can weaken the efficacy of programs such as the Competition Bureau's Leniency Program, which are designed to incite offenders to report offences, cooperate with authorities and agree to plead guilty.

A contrast can be made with U.S. federal law. Pursuant to Rule 11(c)(5)(B) of the *Federal Rules of Criminal Procedure*, if a court rejects a plea agreement that contains either a provision that the government will "not bring, or will move to dismiss, other charges" or "agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply", it must "advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea." In such cases, the accused may withdraw his or her plea without having to provide reasons for doing so, as long as the court has not yet imposed sentence (Rule 11(d)(2)(A)).

Therefore, U.S. trial judges arguably are under more pressure than their Canadian counterparts to accept plea agreements, given that the accused may, unilaterally and without reason, withdraw his or her guilty plea and seek a trial, thus negatively impacting the efficient administration of criminal cases. This may drive U.S. judges to reject guilty pleas made pursuant to plea agreements and contemplated under Rule 11(c)(5)(B) only where the proposed sentencing range is clearly unreasonable.

While the stringent test applied by the Court does afford some additional certainty with respect to jointly proposed sentences by limiting the circumstances in which they may be rejected, it remains that any restrictions imposed on the withdrawal of guilty pleas still generate a significant degree of uncertainty, and an accused may therefore hesitate to enter into a plea agreement if it can ultimately lead to the imposition of harsher fine, custodial sentence and/or additional conditions.

In our view, if there is a distinction between the Court's fourth instruction and fifth instruction with respect to the burden imposed on the accused to obtain the trial judge's authorization to withdraw his or her plea, such a distinction does not make sense. In fact, we would argue, to preserve a high degree of certainty with regard to plea agreements and the efficiency of our criminal justice system, that the possibility of withdrawing a plea unconditionally should arise at the stage of the fifth instruction, after the parties have had the chance to try to convince the trial judge that the sentence contemplated in the joint submission complies with the public interest test.

Affording the possibility to the accused of easily withdrawing his or her plea at the step described in the fourth instruction, but then rendering his or her withdrawal subject to proving limited or stringent circumstances in the next step after the judge has received additional submissions from counsel could encourage accused persons to avoid taking chances and withdraw their plea as soon as the trial judge has expressed concerns. This could reduce the efficiency of our criminal justice system by inciting the accused not to present additional submissions to the trial judge (which could potentially have changed the judge's views) and instead go directly to trial, thereby wasting time and resources and incurring additional expenses.

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[1] 2016 CSC 43 [*Anthony-Cook*].
[2] *Ibid*, at para 7.
[3] *Ibid*, at para 20.
[4] *Ibid*, at para 32.
[5] *Ibid*, at para 34.
[6] *Ibid*.
[7] *Ibid*, at para 40.
[8] *Ibid*, at para 43.
[9] *Ibid*, at para 52.
[10] *Ibid*.
[11] *Ibid*, at para 53.
[12] *Ibid*, at para 55.
[13] *Ibid*, at para 59.
[14] *Ibid*, at para 66.
[15] *Ibid*, at para 43.
[16] *Ibid*, at para 58.
[17] *R. v Anthony-Cook*, 2014 BCSC 1503, at para 3.
[18] *Anthony-Cook supra* note 1, at para 59.
[19] *Ibid*.
[20] *Ibid*.
[21] See *R. v Wilson*, 2014 NSSC 24 for a summary of the law in that respect.
[22] *Adgey v The Queen*, [1975] 2 SCR 426.
[23] *R. v Eastmond* [2001] Carswell Ont 3911 (O.C.A.); *R. v Clermont* (1996), 150 NSR (2d) 264 (NSCA).
[24] [1955] SCR 646.
[25] *Ibid*.

[26] *R v Atlay* [1992] 70 CCC (3d) 553 (BCCA).
[27] *R v Antoine* [1988] 1 SCR 212.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.