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R v Anthony-Cook and the Community's Sense of Justice

By: Lisa Silver

Case Commented On: *R v Anthony-Cook*, 2016 SCC 43 (CanLII)

In *R v Anthony-Cook*, 2016 SCC 43 (CanLII), Justice Moldaver, on behalf of the full court, clarifies the test to be applied by a sentencing judge when departing from a joint submission on sentence and then gives clear step-by-step instructions to judges on how to properly apply the appropriate test. The joint sentence recommendation in this case arose out of a tragic set of circumstances in which the 28-year-old offender, who suffered from addiction and mental health issues, assaulted a fellow attendee at a local addiction and counselling organization. The assault resulted in death, and Mr. Anthony-Cook, after his lawyer negotiated a plea resolution with the Crown prosecutor (including an agreement on sentence), entered a plea of guilty to the charge of manslaughter. At the sentencing hearing, the defence and Crown prosecutor offered a joint submission on sentence, recommending the offender receive a further 18-months incarceration (he had already been in custody for a total of 11 months) without any period of probation.

The sentencing judge declined to accede to the joint recommendation as the proposed sentence did "not give adequate weight to the principles of denunciation, deterrence, and protection of the public" (*R v Anthony-Cook*, 2014 BCSC 1503 (CanLII), Ehrcke J at para 68) and instead imposed a sentence of two years less a day to be followed by 3 years of probation. (at paras 54 to 63) In the sentencing judge's view, the sentence proposed was unfit and therefore he was not bound by the joint submission. As a result, he departed "to some extent" from the negotiated sentence recommendation. (at para 67) The British Columbia Court of Appeal agreed with the sentencing judge's assessment that the proposed sentence was unfit and not in the public interest and found no error in his sentencing decision. The matter was further appealed to the Supreme Court of Canada (SCC) to clarify the test to be used by a sentencing judge in departing from a joint submission on sentence. Appellate courts across Canada were not *ad idem* on the issue, using four different tests for departure: the fitness test, the demonstrably unfit test, the public interest test, and a test which viewed the issues of fitness and public interest as the same. The SCC was asked to clarify which test was the controlling one, with the Court unanimously approving the public interest test. As the sentencing judge erred by applying the incorrect test, Anthony-Cook's negotiated sentence was imposed by the Court.

As we have come to expect from Justice Moldaver, he writes a plain language decision giving practical guidance to the sentencing judge in the context of the realities of our criminal justice system. This system is realistically depicted in other recent SCC decisions, most notably in *R v Jordan*, 2016 SCC 27 (CanLII), where we are told that trial fairness, a most cherished aspect of our principles of fundamental justice, is not in fact in "mutual tension" with trial efficiency; rather they are, "in practice," in a symbiotic or interdependent relationship. (at para 27) According to *Jordan* (at para 28), "timely trials further the interests of justice." These "interests of justice" involve our "public confidence in the administration of justice" and most notably our "community's sense of justice." (at para 25) It is therefore within the public interest to create clear and articulable bright-lines in our justice system to promote these community values. In the

Anthony-Cook decision, the SCC continue their search for clarity by delineating the line at which a sentencing judge can depart from a joint recommendation agreed to by the defence and the prosecution as determined by the "public interest test." Yet, as illuminating as this public interest test may be and as clear as the guidance is, just what the Court means by "public interest" must be unpacked by reference to other SCC decisions and by the Court's concept of the "community's sense of justice."

I purposely use the metaphor of "unpacking" for a reason. For to fully understand the public interest test in *Anthony-Cook* we must not only travel to those obvious decisions cited in *Anthony-Cook*, such as *R v Lacasse*, [2015] 3 SCR 1089, 2015 SCC 64 (CanLII) and *R v Power*, [1994] 1 SCR 601, 1994 CanLII 126 (SCC), but also to those decisions not mentioned by Justice Moldaver, such as *Jordan*, that have a clear and convincing connection. For the sake of "timeliness," I will travel to one such notable case, *R v St-Cloud*, [2015] 2 SCR 328, 2015 SCC 27 (CanLII), a unanimous decision rendered by Justice Wagner, on the test to be applied to the oft troublesome yet revamped tertiary ground for bail release under s. 515(10)(c) of the *Criminal Code*. (For a further discussion of the *St-Cloud* decision, read my post on ideablawg.)

We find in *St-Cloud* a fulsome discussion, a "deep dive" so to speak, into the meaning of the term "public." This case sheds the brightest light on the SCC's emphasis on the public as the litmus test for concerns relating to the administration of justice generally and advances future SCC decisions on the trial judge's specific role as the guardian or "gatekeeper" of a properly functioning justice system. I would argue, but leave to a future time, that the gatekeeping function of a trial judge is expanding under recent pronouncements from the SCC. This feature, in my view, is no longer confined to the traditional evidentiary gatekeeping duties but is reflected in the Court's vision of the trial judge, in the broadest sense, as the protector and keeper of the administration of justice as informed by the public's confidence in that system.

How much does this concept of the public impact the *Anthony-Cook* decision? I would argue, quite a lot. In *Anthony-Cook*, Justice Moldaver refers to both the phrase "public interest" and the term "confidence." In Moldaver J's view, "confidence" is a key indicator of the public interest. Therefore, the public interest test not only directly relates to the *public's confidence* in the administration of justice but also to the *offender's confidence* in that same system. This twinning of the public and the accused harkens back to *Jordan's* twinning of trial fairness and court efficiency. We, in criminal law, do not traditionally align the community's sense of justice with the offender's need for justice. We tend to compartmentalize the two as the antithesis of one another except when directed to do so by law, such as in considering the imposition of a discharge under s. 730 of the *Code*, where such a sanction depends on the best interests of the accused and is not contrary to the public interest. In *Anthony-Cook*, we have come full circle as the sentencing judge must take into account all aspects of the term "public".

Indeed, as recognized by the Court in *Jordan* and the many recent SCC decisions on sentencing, this silo approach is no longer useful or valid. Now, the "community's sense of justice" is approached holistically in the grandest sense yet tempered by the balance and reasonableness our Canadian notion of justice is founded upon. Indeed, as discussed earlier, the key descriptor of the community in *Anthony-Cook* and, quite frankly in most community-oriented legal tests, is "reasonableness." A "reasonably informed" and "reasonable" community participant is the embodiment of the "public interest." Although this limiting notion is expected in order to provide the bright-line needed in criminal law, to ensure citizens fair notice of the law and to

give those enforcing the law clear boundaries (see *R v Levkovic*, [2013] 2 SCR 204, 2013 SCC 25 (CanLII), Fish J at para 10), in a society where we value multiculturalism and diversity, this concept of "reasonableness" might not resonate and might not "in practice" fulfill the promise of the "community's sense of justice." No doubt, this is a matter that needs to be further "unpacked" as we continue our legal journey through the vagaries of the rule of law.

In any event, whatever inferences are needed in order to apply the public interest test, according to the SCC, it is the responsibility of our judiciary to be mindful of us, the public, and to apply our common sense, our "community's sense of justice" in the "delicate" task of sentencing. (see *Lacasse*, Wagner J at paras 1 & 12; see also *R v CAM*, [1996] 1 SCR 500, 1996 CanLII 230 (SCC), Lamer CJ at para 91) This sense of community justice, as articulated in *Anthony-Cook*, will provide the guidance the sentencing judge needs in assessing whether or not a departure from a joint recommendation as to sentence, which is an acceptable and desirable practice promoting the twin desires of fairness and timeliness, is just and appropriate.

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