# Overcoming the High Threshold for the Rejection of a Joint Submission on Sentence from *R v Anthony-Cook* to Protect Indigenous Women from Crimes of Intimate Partner Violence

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**ABSTRACT**

The social problem of intimate partner violence against women, and, in particular, Indigenous women, is hard to overstate. Indeed, it has reached epidemic proportions. Section 718.04 of the *Criminal Code of Canada* requires a sentence involving an act of intimate partner violence against a female, and in particular an Indigenous female, to give primary consideration to the objectives of denunciation and deterrence. The implications of the Supreme Court of Canada's decision in *R v Anthony-Cook* to set a high threshold for the rejection of a joint submission on sentence on the ability of a trial judge to give effect to these objectives has received scant attention. Based on a review of the relevant sentencing decisions, it will be observed that some trial judges are accepting joint submissions that depart fundamentally from the sentencing objectives in

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section 718.04, purportedly based on their interpretation that the high threshold cannot be met. It will be argued that the high threshold was not meant to override, prospectively, the legislative requirements of section 718.04, and was not meant to be treated as impossible to meet. Where a joint submission is decidedly too low to give effect to the sentencing objectives in section 718.04, the trial judge will retain the discretion to reject it in the absence of an underlying *quid pro quo* required to ensure the certainty of the Crown's prosecution.

***KEY WORDS:*** *Joint Submission; Quid Pro Quo; R v Anthony-Cook; Intimate Partner Violence; Denunciation and Deterrence; Plea Bargaining; Public Interest Test; Indigenous Female; Indigenous Offender*

## I. INTRODUCTION

The scale, extent, and disproportionate nature of intimate partner violence against Indigenous women in Canada is undeniable, well-documented, and has reached epidemic proportions. Based on self-report survey data from the Government of Canada, 61 percent of Indigenous women reported intimate partner violence since age 15, compared with 44 percent for non-Indigenous women. For the 12-month period preceding the survey, 17 percent of Indigenous women reported experiencing at least one type of intimate partner violence—psychological, physical, or sexual— compared with 12 percent of non-Indigenous women.[1] Accordingly, while women in general are overrepresented as victims of intimate partner violence, Indigenous women are at even higher risk. Indeed, they experience one of the highest rates of intimate partner violence in Canada and more frequently experience violence by a spouse, including serious forms of violence such as homicide and being sexually assaulted, choked, or beaten.[2]

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1 Government of Canada, *Fact sheet: Intimate partner violence* (Ottawa: WAGE, 2025), online: <canada.ca/en/women-gender-equality/gender-based-violence/intimate-partner-violence.html> [perma.cc/5ZYU-KUSY].

2 Statistics Canada, Canadian Centre for Justice and Community Safety Statistics, *Intimate partner violence: Experiences of First Nations, Métis and Inuit women in Canada, 2018,* by Loanna Heidinger, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00007-eng.htm> [perma.cc/3Q5M-3J2X].

These various types of intimate partner violence cause both short- and long-term consequences and affect the victim as well as their family and community. Intergenerational trauma and the continuation of violence and victimization across generations play a significant role in the extent of intimate partner violence among women and their families. Canadian research has demonstrated that many women who suffer abuse in childhood go on to experience intimate partner violence as adults. Sexual and physical child abuse and a child's experience with violence can adversely impact psychological and social development in regard to relationships and may raise the risk of intimate partner violence by engendering an environment where violence is viewed as a legitimate means of resolving conflict.[3]

Intergenerational trauma is particularly relevant to Indigenous women's experiences of intimate partner violence. Intergenerational trauma arising from colonization and the forceful eradication of culture and tradition exists in the lives of many Indigenous people. Indeed, three factors may leave Indigenous women at disproportionate risk of intimate partner violence later in life. First, the ongoing adverse consequences of historical trauma, discrimination, and violence arising from colonialism in Canada. This can be exemplified through the *Indian Act*. Second, the large-scale removal of Indigenous children from their homes, communities, and families of birth through the 1960s. Third, residential schools. Indigenous women continue to experience structural and systemic barriers that raise their risk of suffering various types of violence, including intimate partner violence. Systemic racism contributes to maintaining barriers that may further constrain many Indigenous women from seeking assistance following violent or traumatic incidents. This can be exemplified by cultural barriers to obtaining resources, the unavailability of supports and services, and a lack of trust in the police, the criminal justice system, and institutions designed to protect.[4]

In criminal proceedings, including in proceedings involving intimate partner violence against Indigenous women, it is not uncommon for sentencing courts to receive joint submissions on sentence where Crown and defence counsel agree to recommend a particular sentence to the judge

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3 *Ibid.*

4 *Ibid.*

in exchange for the accused entering a plea of guilty.[5] "They are both an accepted and acceptable means of plea resolution."[6] The *quid pro quo* of the joint submission is this: an accused forfeits his right to a trial in exchange for certainty and leniency of penalty.[7] The stronger the *quid pro quo*, the greater the weight that should be accorded to the joint submission.[8] Under a joint submission, because the parties are in full agreement as to the appropriate sentence, a contested sentencing hearing is avoided.

Joint submissions have become a routine part of administering criminal charges. Joint submissions assist in resolving the overwhelming majority of criminal charges and are integral to the efficient, fair, and smooth operation of the Canadian criminal justice system.[9] Most joint submissions are unremarkable and are readily accepted by trial judges.[10] Thus, resolution of criminal charges by joint submission should not be viewed in a "pejorative" sense.[11] In the *Martin Report*, it was stated that resolving charges by plea bargain "would benefit the efficient and accurate administration of

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5 *R v Aklok*, 2020 NUCJ 37, n 4 [*Aklok*].

6 *R v Anthony-Cook*, 2016 SCC 43 at para 2 [*Anthony-Cook*].

7 Lisa Kerr, "Judging a Joint Submission: Comparing the US and Canada on the Judicial Role in Plea Bargaining" (2017) 32:7 Crim Reports 22 at 30. See also *R v Sinclair*, 2004 MBCA 48 at para 13 [*Sinclair*], as cited in David Ireland, "Bargaining for Expedience? The Overuse of Joint Recommendations on Sentence" (2015) 38:1 Man LJ 273 at 276-77.

8 *Sinclair*, *ibid* at para 13.

9 *Anthony-Cook*, *supra* note 6 at para 2; *R v Nixon*, 2011 SCC 34 at para 47; *R v Sinclair*, *supra* note 7 at para 8.

10 *Anthony-Cook*, *supra* note 6 at para 1. Ken Chasse has suggested that any requirement of sentencing that restricts the trial judge's scope of decision-making over sentencing—for example, the requirement that a joint submission must be accepted in the absence of exceptional circumstances—necessarily widens the Crown's plea bargaining power. See Ken Chasse, "Plea Bargaining is Sentencing" (2010) Can Crim L Rev 55 at 58, as cited in Ireland, *supra* note 7 at 290.

11 For an instructive discussion on the evolution of the language pertaining to the subject—*i.e.*, from "plea bargaining," which carried potential for negative connotations—to "resolution discussions," a term legitimized by G Arthur Martin in Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolutions Discussions* (Toronto: Queen's Printer, 1993) [*Martin Report*], see Ireland, *supra* note 7 at 276.

justice."[12] This can be particularly helpful where the Crown's case is flawed, such as where there is an uncooperative witness, an unsavoury witness, or evidence that is potentially inadmissible. In such cases, a conviction of the accused might otherwise not be possible, potentially leading to an unjust acquittal.[13] Hence, the certainty of joint submissions increases the probability that the Crown can arrive at a resolution that protects the public interest.[14]

Based on the following passage from the Supreme Court of Canada's judgment in *Anthony-Cook*, the standard that needs to be met by a trial judge under section 606(1.1)(b)(iii) of the *Criminal Code of Canada*[15] to exercise discretion in rejecting a joint submission has been interpreted by some trial judges as impossibly difficult to meet:[16]

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

The stark language used in this passage—specifically the "so unhinged" test—to express the threshold for the rejection of a joint submission under the public interest test did not exist previously. For example, for a joint submission to be rejected in Ontario, the joint submission had to be shown to be contrary to the public interest and to bring the administration of

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12 Zina Lu Burke Scott, "An Inconvenient Bargain: The Ethical Implications of Plea Bargaining in Canada" (2018) 81:1 Sask L Rev 53 at 61.

13 *Anthony-Cook*, *supra* note 6 at para 39. See also Ireland, *supra* note 7 at 301.

14 *Anthony-Cook, ibid* at paras 38-39. Contested sentencing hearings are different than joint submissions. Contested sentencing hearings are characterized by a lack of agreement on a particular sentence because Crown and defence counsel are proposing different sentences or different sentencing ranges. Accordingly, contested sentencing hearings do not offer the same degree of certainty as do joint submissions: see *R v Nahanee*, 2022 SCC 37 at paras 30-32 [*Nahanee*].

15 RSC 1985 c C-46 [*Criminal Code*]. Section 606(1.1)(b)(iii) states that in accepting an accused's guilty plea, the court must ensure that the accused understands "that the court is not bound by any agreement made between the accused and the prosecutor." While this provision gives the trial judge discretion to reject a joint submission, the common law outlines the circumstances in which the discretion to reject a joint submission can be exercised: *Anthony-Cook*, *supra* note 6 at para 32.

16 *Anthony-Cook*, *supra* note 6 at para 34.

justice into disrepute.[17] No other standards like the "so unhinged" test had to be met.[18] Based on the Supreme Court of Canada's judgments in *Anthony-Cook* and *Nahanee* (arising in the context of a case considering whether to extend the *Anthony-Cook* public interest test for the rejection of a joint submission to contested sentencing hearings following a guilty plea),[19] the public interest test for the rejection of a joint submission is now more accurately depicted in the disjunctive rather than the conjunctive. The trial judge must not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.[20]

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17 *R v Cerasuolo*, 140 OAC 114 at para 8 [*Cerasuolo*]; *R v Downey*, 2006 CanLII 10206 (ONCA) at para 3.

18 Robert H Tanha, "In the Aftermath of *R. v. Anthony-Cook*: A Study of the Effects of the Supreme Court's Decision on Ontario's Public Interest Test for the Rejection of a Joint Submission on Sentence (2012-2021)" (2022) 70 Crim LQ 552 at 565-66.

19 *Anthony-Cook*, *supra* note 6 at para 32; *Nahanee*, *supra* note 14 at para 1. In *Nahanee*, the Supreme Court of Canada refused to extend the public interest test from *Anthony-Cook* to contested sentencing hearings following a guilty plea, irrespective of the amount of prior negotiation that occurs between the parties leading to the plea: paras 3, 4. There must be full agreement on every element of the sentence proposed to the court in order for the *Anthony-Cook* framework to apply to the joint submission: para 31. In *R v Wesley*, 2025 ONCA 51 at paras 69-89, the Court of Appeal for Ontario confirmed that the *Anthony-Cook* framework also does not apply to joint submissions following a trial where the accused did not plead guilty but was found guilty.

20 In the *Martin Report*, *supra* note 11, the Attorney General's advisory committee used the disjunctive formulation to explain the applicable standard under the public interest test for the rejection of a joint submission on sentence rather than the conjunctive formulation that was often used by Ontario courts prior to *Anthony-Cook*. See Recommendation 58 at 327: "The Committee is of the opinion that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest." In *Sinclair*, *supra* note 7 at paras 8-11, the Manitoba Court of Appeal observed that while courts in different provinces of Canada have used different language to describe the correct standard for deviating from a joint submission (*e.g.*, "good reason," "unreasonable," "contrary to the public interest," "unfit," "clear and cogent reasons," "would bring the administration of justice into disrepute"), that this was probably more a question of form as opposed to substance. According to Justice Fish in *R v Douglas* 2002 CanLII 32492 (QCCA), at paras 42, 43, 51 (as cited in *Sinclair*, *supra* note 7 at para 11), the common denominator to all the standards was whether the interests of justice were safeguarded by the acceptance of the joint submission on sentence,

While the Supreme Court of Canada in *Anthony-Cook* endorsed the public interest test for the rejection of a joint submission on sentence, it added a new dimension to the assessment of a joint submission. For a joint submission to be rejected, it had to be shown to be "so unhinged" from the circumstances of the offence and the offender, that its acceptance would cause a reasonable person, apprised of the relevant circumstances, to believe that the proper functioning of the justice system had broken down. In *Nahanee*, the rationale for the stringent standard was explained by the Supreme Court as follows:[21]

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

Despite the Supreme Court's emphasis on the numerous benefits of joint submissions,[22] the Supreme Court in *Anthony-Cook* cautioned that joint submissions were not to be treated as "sacrosanct" and that they could be rejected in appropriate circumstances.[23] Based on a review of the relevant decisions, it will be observed that the high threshold established by the Supreme Court in *Anthony-Cook* for the rejection of a joint submission on sentence, as interpreted and applied by some trial judges, may be preventing some sentencing courts from giving effect to s. 718.04 of the *Criminal Code*. When a trial judge is imposing a sentence for an offence that involves the

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meaning that the sentence jointly recommended fell within the acceptable range and that the plea was justified by the facts admitted. However, the application of the "so unhinged" test by some trial judges in Canada, as a justification to accept joint submissions that do not meet the sentencing requirements of section 718.04, demonstrates that the strength of the language used to express the standard for the rejection of a joint submission may not be a matter of mere semantics. Instead, it may be frustrating the ability of trial judges to comply with s. 718.04 of the *Criminal Code*.

21 *Nahanee*, *supra* note 14 at para 2. See also *Anthony-Cook*, *supra* note 6 at paras 35-45.

22 *Nahanee*, *ibid* at para 2. See also *Anthony-Cook*, *ibid* at paras. 36-45. For a lower court's acknowledgment of the benefits of joint submissions to the effective functioning of the criminal justice system, see *R v Mattess* 2021 BCPC 164 at para 137 [*Mattess*].

23 *Anthony-Cook*, *supra* note 6 at para 3. This means that "a judge can impose a sentence that departs from the joint submission (even where the defence and prosecution are entirely *ad idem* as to facts and sentence)": Kerr, *supra* note 7 at 23.

abuse of a person who is vulnerable because of personal circumstances, including because the person is Indigenous and female, s. 718.04 requires primary consideration to be given to the objectives of denunciation and deterrence of the conduct that forms the basis of the charge.

However, it will be suggested that this trend is not an ineluctable consequence of the Supreme Court of Canada's decision in *Anthony-Cook*. Indeed, it may be reversed because it represents a misinterpretation of the scope of the application of the high standard for the rejection of a joint submission that was established. The new common law standard was not meant to override, prospectively, the legislative requirements of s. 718.04. It will be argued that where a joint submission departs fundamentally from the sentencing objectives in s. 718.04, the "so unhinged" test will be met, and the joint submission will have to be rejected. This is because a trial judge's failure to impose a "just and principled sentence constitutes a breakdown in the justice system"[24] unless there is a *quid pro quo*, which is required to ensure the certainty of the Crown's prosecution.[25]

This article proceeds as follows. Part II considers the Supreme Court of Canada's decision in *Anthony-Cook*. Specifically, we will review the procedures that trial judges must follow when they have serious concerns about a joint submission. This review will support the argument that a joint submission can be rejected where it departs fundamentally from the requirement to give primary consideration to the sentencing objectives in s. 718.04. Part III considers the relevant academic commentary on joint submissions. This section demonstrates the limited academic discussion on the implications of the Supreme Court's decision in *Anthony-Cook*, which set a high threshold for rejecting a joint submission on sentence and constrained a trial judge's discretion to reject such a submission for contravening s. 718.04.

Part IV overviews the relevant legislative framework, including the mandatory nature of s. 718.04 (and its companion provision, s. 718.201). Part V considers four joint submission sentencing decisions that apply s. 718.04 since 2019, the year that the provision was passed. In each case, the trial judge found that their discretion to reject the joint submission was precluded by the high threshold from *Anthony-Cook*. However, it will be

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24 *Aklok*, *supra* note 5 at para 88.

25 *Anthony Cook*, *supra* note 2 at para 53.

argued that because in each case the proposed sentence departed fundamentally from the requirement to give primary consideration to the objectives of denunciation and deterrence, the trial judge's finding that the "so unhinged" test was not met was erroneous. Indeed, the trial judge should have exercised their discretion to reject the joint submission of counsel given the absence of a *quid pro quo* required to ensure the certainty of the Crown's prosecution.

In Part VI, *Mattess*,[26] a case involving the application of s. 718.04 to an offence of sexual violence against an Indigenous female, will be used to illustrate how to correctly apply the *Anthony-Cook* framework to the assessment of a joint submission. Where, if a joint submission is found to depart fundamentally from the requirement to give primary consideration to the sentencing objectives of denunciation and deterrence, it must be rejected in the absence of an underlying *quid pro quo*. Part VII provides a conclusion, in which it will be reiterated that despite some trial judges' stated inability to give effect to section 718.04—purportedly based on the high threshold for rejection of a joint submission from *Anthony-Cook*—that rationale does not hold up to close scrutiny.

## II. Specific Procedures to be Followed by Trial Judges When Assessing Contentious Joint Submissions

### A. Background Facts of *Anthony-Cook*

Before outlining the specific procedures that trial judges need to follow when they find a joint submission to be "contentious," as articulated by the Supreme Court of Canada in *Anthony-Cook*, it is helpful to consider the background facts of the case. On June 16, 2014, the appellant, Anthony-Cook, entered a guilty plea to manslaughter for his participation in the death of Michael Gregory. The plea of guilty stemmed from an incident occurring on February 9, 2013. The appellant dropped into a charitable centre that supports people with mental illness and addiction issues. The appellant had a long-standing mental health disorder and substance abuse issues. He punched a regular volunteer, Michael Gregory, who fell, hit his head on the concrete, and died. After Mr. Gregory fell, the appellant fled

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[26] *Supra* note 22.

and was later located and arrested by police.[27] He was released without charge the next day but was detained at a mental health facility in accordance with a Director's warrant issued under the *Mental Health Act*.[28] He stayed in detention at the mental health facility for approximately two months until April 4, 2013, when he was brought into police custody and charged with manslaughter.[29]

After four days in police custody, the appellant was released on bail with conditions. In July 2013, he violated his bail conditions, his bail was revoked, and he was arrested. He was held in custody thereafter until his sentencing hearing in June 2014, a period of about 11 months.[30] Originally, the appellant entered a plea of not guilty to the charge of manslaughter. After numerous days of trial, the appellant changed his plea to guilty. The appellant was 28 years old at the time of his plea and had a prior criminal record. The Crown and the defence made a joint submission on sentence, proposing a further 18 months in custody with no period of probation to follow. In exchange, the appellant would plead guilty to manslaughter and forfeit his right to a trial, including the possibility of raising the defence of self-defence.[31]

At the sentencing hearing, the trial judge advised the Crown and the defence that he had serious concerns about the joint submission and invited further submissions. He told the appellant that he could apply to withdraw his guilty plea if he desired to do so, but the appellant declined to do so. The trial judge expressed two reservations with the joint submission. First, he observed that counsel had overestimated (by approximately six months) the amount of credit to which the appellant was entitled for time spent in pre-sentence custody. While the Crown admitted the error, he stated that he did not change his position on the joint submission, and he maintained his position to seek a further custodial sentence of 18 months. Second, the trial judge was worried that without a probation order, the sentence would not sufficiently protect the public.

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27 *Anthony-Cook*, *supra* note 6 at paras 7-13

28 RSBC 1996, c 288, as cited in *ibid* at para 13.

29 *Anthony-Cook*, *supra* note 6 at para 13.

30 *Ibid* at para 14.

31 *Ibid* at paras 14-15.

Specifically, he considered it essential that the appellant abstain from using non-medically prescribed drugs. Counsel advised the trial judge that a probation order was not necessary for two reasons. First, it would be redundant because the appellant remained certified under the *Mental Health Act* and would be monitored by his treatment team while residing in the community. If his psychosis worsened, or he did not take his medications, a Director warrant could be issued requiring the appellant to be returned to hospital, where he would stay until his team felt he was appropriate for release. Second, counsel argued that a probation order would be unhelpful because the appellant had previously experienced challenges following multiple reporting obligations due to his mental illness.[32] In reaching his decision to reject the joint submission and to sentence the appellant to two years less a day (accounting for deductions for pre-sentence custody) and to three years of probation, the trial judge applied a "fitness of sentence test."[33]

## B. Applicable Procedure

In *Anthony-Cook*, the Supreme Court of Canada gives direction on the specific procedures that trial judges need to follow when they find that a joint submission is "contentious" and "raises concerns."[34] The procedures ensure that joint submissions are given adequate consideration and that accused persons who have already given a guilty plea are treated fairly. At the same time, the procedures recognize that most joint submissions are unremarkable and can be accepted as a matter of course.[35] Joint submissions that depart fundamentally from the requirement to give primary consideration to the sentencing objectives of denunciation and deterrence, contrary to s. 718.04, fall into the narrow category of joint submissions that are contentious and require special scrutiny before being accepted. When faced with a contentious joint submission, the specific procedures to be followed are as follows.

First, the trial judge should evaluate a joint submission on an "as-is" basis and apply the public interest test regardless of whether the judge is

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32 *Ibid* at paras 17-19.

33 *Ibid* at para 5.

34 *Ibid* at para 50.

35 *Ibid.*

considering varying the proposed sentence or adding something to it that the parties have not identified—for example, a probation order. If the parties have not requested a specific order, the trial judge should assume that the parties turned their mind to the order and decided not to include it. However, if counsel has failed to include a mandatory order, the trial judge must advise counsel. The requirement for certainty in joint submissions must give way when counsel has failed to impose a mandatory order.[36]

Second, the trial judge should apply the public interest test when contemplating "jumping" or "undercutting" a joint submission. If considering "jumping" a joint submission, the trial judge must be mindful of whether the severity of a joint submission might offend the public interest by undermining the accused's fair trial rights or by lowering confidence in the certainty of plea negotiations. Additionally, in evaluating whether the severity of a joint submission would offend the public interest, trial judges should be cognizant of the power imbalance that may be present between the Crown and defence, especially where the accused is self-represented or in custody at the time of sentencing. These factors may reduce the public interest in certainty and justify "undercutting" in limited circumstances. If considering "undercutting" a joint submission, the trial judge must be mindful of whether the leniency of a joint submission might offend the public interest by lowering the community's confidence in the administration of justice, particularly if an accused receives the benefits of a joint submission without having to serve the agreed-upon sentence.[37]

Third, when confronted with a contentious joint submission, the trial judge should inquire into the circumstances leading to the joint submission, specifically any benefits acquired by the Crown or concessions made by the accused. The greater the *quid pro quo*, and the greater the concessions made by the accused, the more probable it is that the trial judge should accept the joint submission, even if it may appear to be unduly lenient. For example, if the joint submission arises from an agreement by the accused to help the Crown or police, or from an evidentiary weakness in the Crown's case, an extremely lenient sentence might not go against the public interest. Contrariwise, if the joint submission resulted only in an accused's realization that conviction was unavoidable, the same sentence might result

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36 *Ibid* at para 51.

37 *Ibid* at para 52.

in the public losing confidence in the criminal justice system. That said, counsel should give the court a summary of the circumstances of the offender, the offence, and the joint submission without waiting for a particular request from the trial judge. This is because the trial judge needs a proper foundation to decide whether the joint submission should be accepted or rejected. More specifically, counsel should inform the trial judge as to why the proposed sentence would not bring the administration of justice into disrepute or otherwise be contrary to the public interest. If counsel fails to do this, they run the risk that the trial judge will reject the joint submission.[38]

Fourth, if the trial judge is not satisfied with the joint submission, basic fairness requires that counsel be given an opportunity to make further submissions in an effort to address the trial judge's concerns before the sentence is imposed.[39] The trial judge should advise counsel that he or she has concerns and ask for further submissions on those concerns, including the possibility of permitting the accused to withdraw his or her guilty plea.[40]

Fifth, if the trial judge's concerns are not ameliorated, the trial judge may permit the accused to apply to withdraw his or her guilty plea. Without providing an exhaustive list as to when such an allowance may be permitted, it is noted that withdrawal may be justified where counsel has made a "fundamental error about the legality of the proposed joint submission."[41]

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38 *Ibid* at paras 53-55. This does not mean that counsel must advise the trial judge of their settlement positions or the tenor of their discussions leading to the agreement: *ibid* at para 55. Nor does it mean that the primary considerations underpinning a joint submission must always be put on the public record. There may be safety or privacy issues or the risk of endangering ongoing criminal investigations. In these circumstances, counsel must devise alternative means of conveying these considerations to the trial judge in order to ensure that the judge is apprised of the relevant considerations and that a proper record is produced for appeal purposes: *ibid* at para 56. Requiring counsel to thoroughly justify their position with reference to the facts of the case as presented in open court also has an important public perception aspect. Unless counsel puts the considerations underpinning the joint submission on the record, even if justice is done, it may not appear to be done, and the public may believe, rightly or wrongly, that an unfairness has occurred. See Clayton C Ruby, Gerald J Chan & Nader R Hasan, *Sentencing*, 8th ed (Markham, Ont: LexisNexis, 2012) at 73, as cited in *ibid* at para 57.

39 *R v GWC*, 2000 ABCA 333 at para 26, as cited in *Anthony-Cook*, *supra* note 6 at para 58.

40 *Anthony-Cook, ibid* at para 58.

41 *Ibid* at para 59.

An example would be if a conditional sentence has been proposed but is not available for the offence in question.[42]

Sixth, if the trial judge remains unsatisfied by counsel's submissions, they should provide clear and cogent reasons for deviating from the joint submission. These reasons will help explain to the parties why the proposed sentence was unjustified, may assist accused persons and Crowns in resolving future cases, and will also facilitate appellate review.[43]

In applying the above procedures, the Supreme Court of Canada found that the trial judge should have accepted the joint submission. First, in deciding to reject the joint submission, the trial judge had applied the wrong test, a "fitness of sentence" test, rather than the more rigorous public interest test. The trial judge asked whether the joint submission was "fit" rather than whether the proposed sentence "would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest." He failed to consider the important systemic benefits of joint submissions and the corresponding requirement for them to be reasonably certain.[44] Second, with respect to the custodial sentence, the trial judge assessed the joint submission as though it were a conventional sentencing hearing and erred in doing so. The parties had made an unequivocal joint recommendation on the appropriate sentence: a further 18 months of jail with no period of probation, and it should have been respected. The Crown did not withdraw from the joint submission and maintained its position on sentence even when it discovered the calculation error with respect to the credit that the appellant was entitled to receive for his pre-trial custody.[45]

There was no justification for the trial judge to substitute their opinion for the considered agreement of counsel. The jail term proposed, while low, was not so lenient as to bring the administration of justice into disrepute or be contrary to the public interest. It was near the range of sentence identified by the trial judge. Indeed, the trial judge's proposed sentence was only six months higher than the proposed sentence that had been recommended by counsel. Therefore, the trial judge's interference amounted "to little more than tinkering" with the sentence and was

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42 *Ibid.*

43 *Ibid* at para 60.

44 *Ibid* at para 61.

45 *Ibid* at para 62.

improper. First, acceptance would promote the expedient operation of the criminal justice system. Second, the appellant had given up his right to a trial and the right to present a defence of self-defence, which could have been successful at trial.[46] With respect to the lack of a probation order, while the trial judge had reason to be concerned about how the appellant would be managed in the community and whether he would engage in substance abuse, those public interest concerns had been addressed by counsel. First, there was a Director warrant. Second, there was a probability that the probation order would be self-defeating because in the past, the appellant had experienced difficulties with following multiple reporting obligations due to his mental illness.[47]

While the Supreme Court of Canada's decision in *Anthony-Cook* was justified, the Supreme Court did not remove a trial judge's discretion to reject a joint submission in appropriate circumstances. Indeed, the Supreme Court recognized that a contentious joint submission must be reviewed thoroughly before it is accepted. Further, the Court recognized that a trial judge's concerns must be addressed before acceptance can occur. The circumstances leading to the joint submission, including the presence of any *quid pro quos*, must be considered. There was an important *quid pro quo* underlying the joint submission in *Anthony-Cook* because the accused had a viable defence to the charge of manslaughter. As well, the change in the quantum of the sentence being proposed by the trial judge (an increase of six months) indicated that the joint submission did not depart fundamentally from the range of sentence for the offence, such that important sentencing objectives were being compromised.

## III. Literature Review

To date, most of the academic commentary on the law of joint submissions has not addressed the implications of the Supreme Court of Canada's decision in *Anthony-Cook* to set a high threshold for the rejection of a joint submission, thereby impacting the ability of a trial judge to ensure that the sentencing objectives in section 718.04 are met. Instead, the

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46 *Ibid* at para 64.

47 *Ibid*. The Supreme Court of Canada also observed that there was no evidence that drug use contributed to the appellant's commission of the offence of manslaughter (even though it had been a factor in some of his previous offences): para 16.

literature has focused on the topic of plea bargaining more broadly (with joint submissions being a sub-topic in these larger discussions): (1) consideration of the public attitudes toward plea bargaining; (2) consideration of the interests of victims in plea bargaining; (3) consideration of the historical development of plea bargaining; and (4) consideration of the ethical implications of plea bargaining. To the extent that joint submissions have been addressed specifically, commentary has involved (1) comparative analysis of joint submissions and stipulated sentences between the Canadian and the American justice systems; (2) discussion of the over-use of joint submissions in the Canadian criminal justice system; and (3) the effects of *Anthony-Cook* on Ontario's public interest test for the rejection of a joint submission on sentence. One short online commentary was found that was on point. Together with the other relevant literature, it is discussed below.

David Ireland studied the use of joint submissions in the Provincial Court of Manitoba based on his own courtroom observations recorded over a non-consecutive two-week period in January 2014. Based on this limited data set, and acknowledging that his research conclusions were provisional and not definitive,[48] Ireland made four important findings. First, he found that the vast majority of criminal charges are resolved by way of guilty plea and plea bargaining. Second, he found that most joint submissions are accepted by trial judges without issue, regardless of the nature of the charges or the other circumstances of the case. Third, he found that most (80 percent) of these accepted joint submissions represent "cultural joint recommendations," meaning there is a lack of *quid pro quo*. That is to say, criminal charges were resolved based on "a culture of expedience" as opposed to the Crown and defence counsel entering into a "true plea bargain." Ireland argues that cultural joint recommendations should be given comparatively little weight, if not outright rejected by trial judges, given that the lenient sentence is not necessary to ensure the certainty of the Crown's prosecution. Fourth, he found that trial judges' acceptance of

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48 Ireland acknowledged that there were several factors that might inform plea bargaining between the Crown and the accused depending on the factual circumstances of the case, and that many of these factors were not easily gauged by court observation. For example, it was difficult to recognize if the Crown had agreed that it would not charge another person or would not appeal a given sentence since this information was usually not put on the record or shared with the presiding trial judge: Ireland, *supra* note 7 at 277-78.

cultural joint recommendations may increase the severity of sentences over time.[49]

Unlike in a criminal trial, Ireland found that the emphasis is not on ensuring procedural safeguards or on achieving desirable sentencing outcomes that avoid public disapprobation, but rather on the benefit of efficiency afforded by a joint submission. The norm of "cultural expedience" prevailed over arriving at a genuine plea bargain. That is to say, the swiftness with which an accused could be expedited through the criminal justice system took priority over the propriety of the sentencing outcome.[50] Ireland argues that the use (or over-use) of cultural joint recommendations may limit the judicial function in sentencing and may undermine public confidence in the administration of justice. Ireland concluded that the explosion in the use of cultural joint recommendations could solidify a culture of expedience in sentencing that might lead to higher sentences.[51] Ireland questioned the received wisdom from the *Martin Report* that plea bargains are a "necessary and desirable" part of the criminal justice system and attempts to re-open the debate about the utility and acceptability of plea bargaining, a debate that was viewed as being settled after the *Martin Report's* recommendations were published.[52]

Ireland found that a "true plea bargain" occurred when the Crown and defence counsel agreed that the accused would enter a guilty plea because of flaws in the Crown's case or because of the uncertainty of prosecution. In these circumstances, the Crown had an incentive to bargain with the accused to obtain a guilty plea because the accused had a reasonable chance of being acquitted at trial. For example, the Crown had a weak case it did not wish to take to trial, or the Crown had a vulnerable witness whom it

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49 *Ibid* at 274-79, 316-20.

50 *Ibid* at 273-74.

51 *Ibid* at 273. This culture of expedience may have become more solidified since the Supreme Court of Canada's judgment in *Anthony-Cook*, given that the judicial scope for the rejection of a joint submission has been narrowed further by the requirement that a joint submission meet the "so unhinged" test to merit rejection: *Anthony-Cook*, *supra* note 6 at para 34.

52 Ireland, *supra* note 7 at 273-75, 329. With reference to Debra Parks, Ireland (at 274-75) found that "unregulated plea bargaining" that happens "in secret" might lead to wrongful conviction and could lower public confidence in the administration of justice. These dangers could be avoided or minimized through the use of enhanced charge screening and the better use of resources.

wanted to protect from having to give evidence at trial, or the accused was giving up a viable defence that could lead to his or her acquittal. In these circumstances, it would make sense for the parties to agree to a joint submission and for the accused to receive a more lenient penalty than he could following a contested sentencing hearing because the accused was forfeiting a reasonable prospect of being acquitted at trial.[53]

Ireland found that the use of a joint submission is acceptable only where there is an underlying *quid pro quo*. If an accused pled guilty because of the certainty of conviction and the availability of a more lenient penalty, and the Crown accepted the bargain for reasons of expedience alone, a joint submission could not be allowed. Thus, Ireland concluded that sentence discounts, arising from a joint submission, were to be reserved to situations where the Crown required the accused's guilty plea to make out its prosecution, and were not to be given for reasons of expedience alone.[54]

Ireland took issue with the commercialization of guilty pleas, where guilty pleas are sold to accused persons as a way to avoid onerous "process costs."[55] These process costs included the significant expense of retaining counsel for multiple court appearances, the challenge of multiple remands, the requirement for the accused to miss work to make multiple court appearances (to gain a basic understanding on how the system operates, normally for the purposes of making a guilty plea), and having to endure adjournments and delays.[56] Ireland expressed concern about the "systemic pressures" within the criminal justice system that led to a culture of expedience and resulted in the resolution of many criminal charges by joint submission without a trial and without the procedural safeguards of a trial.[57]

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53 *Ibid* at 278. Based on his definition of a "true plea bargain," Ireland (at 279) raised the broader ethical question of why the Crown, given the danger of wrongful conviction, is proceeding with the prosecution at all if they did not have a reasonable prospect of conviction and were relying on plea bargaining with the accused to achieve a conviction. This question, while important, is outside the scope of this article to consider.

54 *Ibid* at 278-79.

55 *Ibid* at 286.

56 *Ibid* at 293. Ireland found that these process costs were more acute in the context of minor offences because the process costs might outweigh the benefits of going to trial: at 293.

57 *Ibid* at 274.

This seriously impairs the public interest by making it difficult to determine who was guilty and who was innocent.[58]

Ireland found systemic pressures that led to a culture of expedience within the criminal justice system to be antithetical to the public interest. The public interest was better served by the holding of a trial than by the use of a joint submission. A trial would ensure the upholding of the substantive criminal law and promote proper police investigations and Crown prosecutions. Ireland found that defence lawyers, Crown attorneys, and judges are all influenced by systemic pressures.[59] For example, "There are numerous day-to-day pressures prosecutors must respond to other than the public's desire for justice."[60] Ireland argues that advocacy on joint submissions should occur fully in the courtroom, as opposed to in the corridors of the courtroom. Otherwise, joint submissions should not be entitled to significant deference from the trial judge. Ireland cited two reasons in support of his position. First, prosecutorial discretion was reviewable only in cases of abuse of process. Second, Crowns incentivized guilty pleas by setting a trial penalty that was more severe than the penalty offered by joint submission.[61]

While Ireland found that plea bargaining might benefit lawyers in allowing them to handle heavy caseloads more effectively, the procedure was still undesirable for two reasons. First, it was not in the public interest. Second, its efficiency rationale was questionable. Ireland underlined the lack of consideration of alternatives to plea bargaining by joint submission, such as a simplified trial process that permits "adjudicative rather than submissive dispositions."[62] While Ireland states that a joint submission is

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58 *Ibid* at 287.

59 *Ibid* at 287.

60 *Ibid* at 293.

61 *Ibid* at 289-90. Based on a survey of judges' opinions conducted in the 1980s by the Canadian Sentencing Commission, Ireland underlined that many judges expressed satisfaction with the state of plea bargaining and sentence recommendations in Canada. The majority of judges (63 percent) opposed a legislative prohibition on the practice of plea bargaining. However, more recent judicial opinion and commentary has been more critical toward the practice, including toward the proliferation of joint submissions, and has called for greater judicial oversight and participation in sentencing. See Judge KD Skilnick, "Joint Submissions: Laudable Initiatives or the Death of Advocacy?" (2004) 62:3 The Advocate at 413, as cited in Ireland, *supra* note 7 at 288.

62 Ireland, *supra* note 7 at 296.

different from other forms of plea bargaining because a joint submission can take effect only on the approval of the trial judge, the trial judge's approval could be conditioned on consideration of the existence of a *quid pro quo*. He refers to a statement from the Manitoba Court of Appeal in *Sinclair* to illustrate the sentiment: "The clearer the *quid pro quo*, the more weight should be given an appropriate joint submission by the sentencing judge."[63]

Thus, where the joint submission represented a "true plea bargain" that compensated for a flaw in the Crown's case, the joint submission was entitled to more weight and deference and was more likely to be accepted. In sum, Ireland expresses reservations about joint submissions that are accepted based solely on an "efficiency rationale"—for example, to reduce a backlog in trial dates. Ireland focused on the important dichotomy between "cultural joint recommendations" and "true plea bargains" that he argued should be used as the controlling test to evaluate the acceptability of a joint submission.[64] In *R v J.W.I.B.*,[65] because the accused, in pleading guilty, was forfeiting an arguably successful defence, Ireland observed that there was a "true plea bargain." This is because there was a *quid pro quo* that involved more than expediting the administration of justice. Indeed, if the matter were to have proceeded to trial, the accused would likely have been acquitted. The Court took the view that joint submissions had a larger role to play when the Crown's case was weak and a *quid pro quo* was required to secure the certainty of the prosecution.

Ireland opposed the "pro counsel" trend that he found in Manitoba sentencing decisions, post-*Sinclair*, that lessened judicial discretion in sentencing and sought to protect all joint submissions "... based on assumptions about the value of plea bargaining that are not grounded in evidence."[66] In Ireland's view, cultural joint recommendations, such as the joint submission that arose in *R v McKay*,[67] where the Crown would likely have had no issue proving each of the charges against the accused beyond a reasonable doubt, should be rejected by trial judges. Contrariwise, where

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63 *Sinclair*, *supra* note 7 at para 13, as cited in Ireland, *supra* note 7 at 301.

64 Ireland, *supra* note 7 at 297-301.

65 2003 MBCA 92, as cited and discussed in *ibid* at 300.

66 Ireland, *supra* note 7 at 302.

67 2004 MBCA 78, as cited and discussed in *ibid* at 303.

the Crown's ability to make out a conviction is seriously in doubt, such as in *R v Lamirande*,[68] an HIV assault case where the Crown had to contend with a credible defence of intoxication and with witness frailty, the Court of Appeal for Manitoba properly ruled that counsel's joint submission should have been accepted by the trial judge and restored it accordingly. In the absence of a *quid pro quo*, joint submissions that provided for lenient sentences outside the low end of the sentencing range were not defensible and were to be rejected. Thus, in *R v Sharpe*,[69] the joint submission was properly rejected since it provided for less than 50 percent of the low end of the sentencing range where there was a lack of *quid pro quo*. Thus, the joint submission had to give way to the trial judge's "ultimate responsibility" to ensure that the accused received a fit and proper sentence. Ireland endorsed the view of the Court that the existence of an underlying *quid pro quo* should be the determinative factor as to the degree of deference to be afforded a joint submission.

Ireland found that the high use of joint submissions or otherwise resolving charges by plea bargain meant that the Manitoba criminal justice system was a "guilty plea system" where cultural joint recommendations had become "entrenched." In this system, he emphasized the importance of protecting the accused from higher sentences and from wrongful conviction that might be generated by joint submissions, given the lack of procedural safeguards and the "Crown's position of dominance." He challenged the conventional wisdom about the benefits that accrue to an accused from a joint submission and concluded that the "certainty" of the penalty for an accused (*i.e.*, a fixed sentence) might come at the expense of an accused receiving a more severe penalty than he might following a trial. In addition, "efficiency" might come at the expense of "effectiveness" and other more important values.[70] Ireland concluded that if cultural joint recommendations were precluded, judicial authority over sentencing might be restored in a manner that would promote the public's confidence in the administration of justice.[71]

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68 2006 MBCA 71, as cited and discussed in Ireland, *supra* note 7 at 304.

69 2009 MBCA 50, as cited and discussed in Ireland, *supra* note 7 at 305-06.

70 Ireland, *supra* note 7 at 321-22, 329.

71 *Ibid* at 325.

However, Ireland does not consider how "the culture of expedience" that has entrenched the use (and acceptability) of cultural joint recommendations can work against the realization of important sentencing objectives and the protection of victims. Because cultural joint recommendations are routinely accepted by trial judges, accused who are guilty of serious crimes, including crimes of intimate partner violence against Indigenous females, may, in breach of important sentencing objectives, receive lower penalties than they should. This is certainly true with respect to the application of s. 718.04, where trial judges have expressed reservations about having to accept a joint submission even though it departs fundamentally from the requirement to give primary consideration to the sentencing objectives of denunciation and deterrence.

Zina Lu Burke Scott studied the historical development of plea bargaining in Canada by considering the evolving views of various legislative, law reform, professional, regulatory, and judicial bodies on the ethical implications of plea bargaining in Canada.[72] According to Scott, the practice of plea bargaining evolved in three phases:[73]

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| Phase One (1973-1987) | Initial Discouragement of Plea Bargaining |
| Phase Two (1987-1993) | Cautious Acceptance of Plea Bargaining |
| Phase Three (1993) | The Martin Report's Endorsement of Plea Bargaining |

At phase one (1973-1987), there was an initial strong discouragement of the use of plea bargains by law reform bodies. This was exemplified by the Law Reform Commission of Canada in its 1975 working paper on criminal procedure that decried plea bargaining as a "practice which

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72 Scott (*supra* note 12 at 53-54) identified three concerns with the practice of plea bargaining. First, resolution agreements were not to "turn justice into a commodity" and usurp the role of the judge as a finder of truth. Second, by obtaining guilty pleas through offers of reduced charges, the presumption of innocence might be undermined. Third, the private and informal nature of plea negotiations threatened the proper judicial function and endangered public confidence in the administration of justice. Despite these concerns, Scott noted that plea bargaining was a well-established part of Canada's criminal justice system.

73 *Ibid* at 57-62.

degrades the administration of justice."[74] The Commission also commented: "[j]ustice should not be, and should not be seen to be, something that can be purchased at the bargaining table."[75] Similarly, in 1973, the Ontario Law Reform Commission, in its report on the administration of Ontario courts, stated that the practice of plea bargaining, while not new, had taken on an increased prominence based on an "unhealthy philosophy" imported into Canada from the United States that was antithetical to "an open, fair and public administration of justice."[76]

In 1976, the use of plea bargains was discouraged by the Attorney General of Canada's task force on the administration of justice. Indeed, one member of the task force, the Canadian Criminology and Corrections Association (CCCA), expressed strong disapproval for the practice of plea bargaining and suggested that the practice be abolished. Following the CCCA's report, the Ministry of the Attorney General delivered a memorandum to all Crown prosecutors reiterating that expediency was not a proper reason for accepting guilty pleas for lesser offences. The Ministry also cautioned that any pleas resulting from agreements to charge lesser offences should be disclosed in open court, together with the prosecutor's justification for doing so. The memorandum specified that the prosecutor's reasons should be adequate to satisfy the public in each case that there is nothing untoward or secretive in the process of the plea negotiation.[77]

At phase one, the judiciary was also opposed to the use of plea bargains. For example, in *R v Lyons*,[78] Justice La Forest endorsed the Law Reform Commission of Canada's statement from its 1975 working paper,[79] that justice should not be something that can be negotiated.[80] Similarly, in

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74 As cited in Scott, *supra* note 12 at 58-59.

75 As cited in *ibid* at 59.

76 Ontario Law Report Commission, *Report on Administration of Ontario Courts Part II* (Toronto: Ministry of the Attorney General, 1973) at 119, as cited in Scott, *supra* note 12 at 57.

77 Hedieh Nasheri, *Betrayal of Due Process: A Comparative Assessment of Plea Bargaining in the United States and Canada* (Lanham, MD: University Press of America, 1998) at 53, 165, 167-68, as cited in Scott, *supra* note 12 at 59.

78 1987 CanLII 25 (SCC) [*Lyons*], as cited in Scott, *supra* note 12 at 64.

79 As cited in Scott, *supra* note 12 at 64.

80 *Lyons*, *supra* note 78 at para 103, as cited in Scott, *supra* note 12 at 64.

*Perkins and Pigeau v The Queen*,[81] the Quebec Court of Appeal stated that guilty pleas to lesser offences may be accepted if the Crown's case is flawed, meaning that the Crown questions its ability to prove the charge. But, as a rule, plea bargains were to be eschewed for two reasons. First, because the accused is guilty, he or she must face the mandatory punishment imposed by law. Or, second, because the accused is not guilty, he or she must be acquitted.

At phase two (1987-1993), there was a significant shift in general attitudes toward the use of plea bargains to resolve criminal charges occurring at both the national and provincial levels. A cautious acceptance of plea bargains arose within law reform and legislative bodies. In 1987, the Canadian Sentencing Commission released a report recommending that plea bargaining be recognized as a valid practice in Canadian criminal law, so long as the practice was restrained, did not include input from the trial judge, and was subject to legislative controls.[82] In 1989, the Law Reform Commission of Canada recognized the value in using plea bargains to resolve criminal charges and retreated from its earlier position that was against the practice. An accused, or a lawyer acting for an accused, should be allowed to participate in plea discussions, so long as those discussions do not entice the accused to plead guilty. The introduction of the *Canadian Charter of Rights and Freedoms*,[83] the formalization of pre-trial conferences, the expansion of provincial legal aid programs, and the increased availability of legal aid counsel ameliorated the dangers posed by plea bargaining in the past and have now made it a valid practice.[84]

At phase three (1993), the Ontario Ministry of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions published an influential report making eighty recommendations for the betterment of the Ontario criminal justice system. The recommendations were based on input received from police, Crown prosecutors, defence counsel, witness groups, and victim groups. This

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81 (1976), 35 CR (NS) 222 (Que CA), as cited in Scott, *supra* note 12 at 20.

82 *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, 1986) at 427-29, as cited in Scott, *supra* note 12 at 59-60.

83 Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

84 Law Reform Commission of Canada, *Plea Discussions and Agreements*, Working Paper 60 (1989) at 4, as cited in Scott, *supra* note 12 at 60.

report, commonly referred to as the *Martin Report*, which reflects the fact that the Committee was chaired by the Hon. G. Arthur Martin (a leading criminal law jurist in Canadian history), led to a cementing of the practice of plea bargaining in the Canadian criminal justice system. Many of the *Martin Report* recommendations, including with respect to plea bargaining, were adopted by the Attorney General of Ontario and have been accepted and implemented by appellate-level courts across Canada. While the *Martin Report* was commissioned to review the pressing issue of court delay in Ontario, it was one of the first government reports to explicitly encourage and support the practice of plea bargaining.[85]

Indeed, the *Martin Report* contained comprehensive and influential recommendations with respect to the practice of plea bargaining in Canada. For example, in an attempt to normalize the practice, the term "plea bargaining" was recast as "resolution discussions." This reframing of language avoided the negative connotations of "bargaining for justice." Plea bargaining could be open, fair, and essential to the effective operation of the justice system. Instead of viewing plea bargaining as a threat to the administration of justice, it could benefit and help justice system participants, including the accused, victims, witnesses, and counsel, and also contribute to the administration of justice.[86] As a result of this shift in thinking, plea bargaining was brought out of the shadows and made a transparent component of the justice system: "By making resolution discussions a formalized and sanctioned step in the criminal process, the secretive backroom talks had been reborn as a mandatory and desirable component of our modern justice system."[87]

According to the *Martin Report*, unless a joint submission would bring the administration of justice into disrepute or was otherwise not in the public interest, it was to be accepted.[88] Indeed, in *Anthony-Cook*, the Supreme Court of Canada adopted the *Martin Report* formulation of the two-step public interest test that should be applied to the question of

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85 Scott, *supra* note 12 at 61-62.

86 *Ibid* at 61. In *Anthony-Cook*, *supra* note 6 at para 35, the Supreme Court recognized that joint submissions could be to the benefit of the same parties and interests.

87 Ireland, *supra* note 7 at 276, as cited in Scott, *supra* note 12 at 61-62.

88 *Martin Report*, *supra* note 11 at 327, as cited in Scott, *supra* note 12. See also *Anthony-Cook*, *supra* note 6 at para 29.

whether a joint submission should be rejected.[89] Thus, despite the earlier ethical concerns expressed about plea bargaining and an almost "across the board" rejection of the practice, the publication of the *Martin Report* and an almost universal acceptance of its recommendations had led to the practice of plea bargaining becoming cemented into Canadian law.[90]

According to Kent Roach, two other forces contributed to Canadian courts' acceptance of the practice of plea bargaining in the 1990s. First, in *R v Stinchcombe*,[91] the Crown's burden to disclose information to the defence before trial was increased. Second, in *R v Askov*,[92] the principle that the accused's *Charter* right to a trial within a reasonable time be respected was affirmed. Roach found that these two Supreme Court of Canada judgments allowed Crown and defence counsel to reach resolution agreements more easily before trial. Early disclosure by the Crown, as mandated by *Stinchcombe*, supported quick resolution of criminal charges without trial through a higher number of withdrawn charges and guilty pleas. Similarly, the Supreme Court's judgment in *Askov* pressured Crowns to plea bargain or to pursue plea bargaining arrangements to resolve criminal charges in order to avoid the statutory limitation on criminal trials.[93]

Scott referenced the changes in judicial attitudes in the 1990s toward acceptance of plea bargaining, with specific consideration of Canadian case law. For example, in *R v Power*,[94] the majority of the Supreme Court of Canada recognized that plea bargaining was a legitimate technique to resolve criminal charges. However, the decision to use the procedure was within Crown prosecutorial discretion and involved consideration of several factors. Appellate courts were ill-suited to assess these decisions. In

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89 *Anthony-Cook*, *supra* note 6 at para 32. See also *Nahanee*, *supra* note 14 at paras 1, 2.

90 *Scott*, *supra* note 12 at 62.

91 [1991] 3 SCR 326, 1991 CanLII 45.

92 [1990] 2 SCR 1199, 1990 CanLII 45.

93 *Due Process and Victim's Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 99, as cited in Scott, *supra* note 12 at 64-65. While Ireland agreed with Roach's conclusion that these two Supreme Court judgments made obtaining a pre-trial resolution easier, he added that in the wake of these two judgments, the *Charter* resulted in the improved quality of police investigations with most accused being anticipated to plead guilty: Ireland, *supra* note 7 at 285.

94 [1994] 1 SCR 601 at para 42-43, 1994 CanLII 126 as cited in *Scott*, *supra* note 12 at 65.

*R v Burlingham*,[95] the Supreme Court recognized that plea bargaining was an integral and necessary part of a properly functioning criminal justice system.[96]

As a result of this trend toward endorsement of plea bargaining by Canadian courts in the 1990s, and the realization that the criminal justice system was overburdened with criminal charges, there was an explosion in the use of joint submissions to resolve criminal charges. At the same time, Canadian courts became reluctant to overturn joint submissions that were strongly endorsed by counsel, especially if the joint submission had been prepared by experienced counsel. Because joint submissions were a product of plea bargaining between Crown and defence counsel (where the Crown was responsible for ensuring that the public interest was protected, and where defence counsel was responsible for ensuring that the accused's interests were protected), they were to be accepted unless there were clear and cogent reasons for rejecting them. For example, it was not proper for a trial judge to reject a joint submission because the crime committed could reasonably attract a higher sentence. At the same time, when evaluating whether there were cogent reasons to reject the joint submission, the trial judge had to consider all the circumstances surrounding the making of the joint submission and all of the principles of sentencing, such as deterrence, denunciation, mitigating factors, and aggravating factors. While joint submissions were not to be too readily rejected, the judicial discretion to reject a joint submission was recognized as part of the court's role in ensuring the proper administration of justice and was not to be relinquished.[97]

Scott makes valuable contributions to the discussion of plea bargaining and joint submissions in Canada. First, she effectively traces the evolution and acceptance of plea bargaining in the Canadian criminal justice system and within law reform and legislative bodies, culminating in the explosion in the use of joint submissions. Second, she discusses the ethical implications of plea bargaining in Canada, including the ethical concerns surrounding joint submissions. Further, she discusses how the current rules make a concerted effort to ensure that "bargained joint submissions" do not

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95 [1995] 2 SCR 206 at para 23, 1995 CanLII 88 as cited in *ibid* at 65.

96 *Scott*, *supra* note 12 at 64-65.

97 *Ibid* at 65-69.

harm the public interest. Still, she does not recognize the possible negative implications of the Supreme Court of Canada's judgment in *Anthony-Cook*. Namely, that some trial judges may believe that it is virtually impossible to reject joint submissions, even if a joint submission departs fundamentally from the requirement to give primary consideration to the sentencing objectives of denunciation and deterrence in s. 718.04, given the high standard for rejection set by the Supreme Court in that judgment.

Lisa Kerr studied and compared the judicial role in plea bargaining in Canada and the United States. She observed that in both Canada and the United States, the criminal justice system is heavily reliant on plea bargaining as an "efficiency enhancing practice."[98] Indeed, the criminal justice system in both countries used plea bargains to resolve the overwhelming majority of criminal charges. Kerr found that the use of joint submissions presented a risk because it lessened the degree to which the administration of criminal justice is regulated by legal rule.[99] This is because when a conviction was entered following a guilty plea, there was no adversarial trial process, meaning there was an absence of safeguards and fact-finding that the trial process would assure.[100] As a result, "the power dynamics of plea negotiations"[101] raised the possibility for excessive sentences or for the incarceration of accused who may have been able to raise a reasonable doubt as to their guilt at trial.

Kerr observed that the American reality was worse than the Canadian reality since in the United States, all plea bargaining happened in private with no judicial supervision. Thus, the sentencing outcome was determined mostly by prosecutorial discretion as opposed to by judicial discretion. Accordingly, she found that the factors that inform a guilty plea often have more to do with an imbalance of power between the accused and the prosecutor than with substantive legal principle. For example, to secure a

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98 Kerr, *supra* note 7 at 23.

99 Indeed, Marie Manikis underscored that joint submissions are accorded substantial deference by sentencing courts, meaning that they are very infrequently reviewed and normally accepted. This type of case resolution transferred significant sentencing powers from judges to prosecutors. See Marie Manikis, "Imagining the Future of Victims' Rights in Canada: A Comparative Perspective" (2015) 13:1 Ohio St J Crim L 163 at 178.

100 Kerr, *supra* note 7 at 22. See also Ireland, *supra* note 7 at 274.

101 Kerr, *supra* note 7 at 22.

fast conviction, prosecutors threatened accused persons with severe sentence increases if they did not accept the prosecutor's proposed plea agreement. Such tactics by Crown prosecutors in Canada could constitute an abuse of process and could justify a judicial reprimand (either a stay of proceedings or the imposition of a sentence below the statutory minimum).[102]

Unlike in Canada, in the American federal system, sentencing was subject to extensive guidelines and to mandatory sentencing (there were no proportionality limits on sentencing in felony or misdemeanour cases not punishable by death), which meant that charging decisions almost wholly determined sentence. For decades, American federal law was focused almost exclusively on the particulars of an offence and prior criminal conduct, as opposed to mitigating factors. In Canada, the sentencing regime was not narrowly focused in this manner. This led to comparative moderation in the severity of sentences imposed generally—sentences that could arise from a plea bargain. That said, Kerr noted that Canada's federal system differed from the American federal system in one important respect that had the possibility of producing more unanticipated severity in sentencing in some cases. Specifically, trial judges were not bound by the terms of a joint submission and could impose a sentence that departed from the terms of a joint submission, even when counsel was entirely in agreement as to the facts and sentence. In contrast, most American judges had no ability to interfere with a "stipulated sentence" (the equivalent of a joint submission in Canada).[103]

In the United States, "jumping" (increasing the severity of a sentence) or "undercutting" (decreasing the severity of a sentence) an agreed-upon sentence was strictly prohibited. The judge could accept or reject a stipulated sentence, but could not order a different sentence.[104] This did

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102 *Ibid* at 22, 23, 26.

103 *Ibid* at 23, 24, 29.

104 As Kerr (*ibid* at 25) observed, however, in the American system there was more judicial scope to allow the parties to return to the *status quo ante* under a "back to square one" provision, where a court decided to reject a stipulated sentence. That is, the accused had the unqualified right to withdraw his guilty plea and to proceed to trial, whereas in Canada, this outcome was not assured. As per *Anthony-Cook*, *supra* note 6 at para 58, the trial judge had to determine whether an accused, who did not get the sentence he bargained for on a joint submission, should be permitted to withdraw his guilty plea and to proceed to trial.

have the advantage of certainty: having pled guilty, the accused would know the sentence they would receive unless the judge rejected the stipulated sentence. Accordingly, the accused's incentive to reject a stipulated sentence was lower in the American system than in the Canadian system because the accused was assured of a more definite outcome. Kerr cited the Supreme Court of Canada judgment in *Anthony-Cook* for the proposition that Canadian judges were ultimately responsible for determining sentence even in the presence of a joint submission of counsel. This made the Canadian system different than the American system.[105]

Even though this raised the theoretical possibility of a Canadian trial judge imposing a more severe sentence than a joint submission, Kerr found that this danger had not materialized for two reasons. First, the trend had been for trial judges to interfere in joint submissions to undercut the penalty rather than impose a heavier penalty. Second, the Supreme Court of Canada in *Anthony-Cook* had imposed a high standard on trial judges who wished to depart from a joint submission, meaning that most joint submissions were accepted and there was no opportunity for a more severe penalty to be imposed.[106]

Kerr concluded that the serious inequities in plea bargaining in the United States were only in small part due to an absence of judicial oversight. The more important reasons were the absence of proportionality limits on sentencing in noncapital cases and prosecutorial overreach.[107] These flaws could only be ameliorated by "doctrinal change."[108] In sum, Kerr offers four insights into the law on joint submissions. First, she confirms that the threshold for the rejection of a joint submission, established by the Supreme Court of Canada in *Anthony-Cook*, is high and not easy to meet. Second, she observes that the high threshold can serve as protection against judges who may wish to reject a joint submission to impose a more severe penalty against an accused. Third, she underlines that the high threshold for the rejection of a joint submission incentivizes guilty pleas from accused individuals and promotes certainty in sentencing because most joint submissions have to be accepted by trial judges. Fourth, she suggests that

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105 Kerr, *supra* note 7 at 24.

106 *Ibid* at 25.

107 *Ibid* at 23-29.

108 *Ibid* at 29.

the law on joint submissions be modified to create a higher standard for "jumping" joint submissions and a lower standard for "undercutting" joint submissions. This is because the criminal justice system was calibrated to protect against punitive overreach as opposed to excessive leniency toward an accused.[109]

Despite these insights, Kerr does not isolate the crux of the problem identified in this article. That is, that joint submissions are being accepted by trial judges purportedly on the basis that the high standard for rejection from *Anthony-Cook* cannot be reached. This is the case despite departing fundamentally from the requirement to give primary consideration to the sentencing objectives of denunciation and deterrence contained in s. 718.04. The acceptance of joint submissions in these circumstances threatens the fair and accurate administration of justice. Accordingly, judicial interference in the direction of rejecting a joint submission to increase the severity of the criminal penalty is sometimes required to uphold important sentencing principles, even if the justice system is geared to protect against punitive overreach rather than excessive leniency toward an accused.

Robert Tanha found that the public interest test for the rejection of a joint submission, as articulated by the Supreme Court of Canada in its judgment in *Anthony-Cook,* differed in two respects from the Ontario public interest test. First, the test was now expressed in the "disjunctive" rather than in the "conjunctive." To be rejected, the joint submission must be contrary to the public interest or bring the administration of justice into disrepute.[110] Second, for rejection to occur, the joint submission must be shown to be "[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 promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down."[111]

Tanha concluded that the addition of the "so unhinged" requirement counteracted any reduction to the strictness of the public interest test that

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109 *Ibid* at 22-30.

110 Robert H Tanha, "In the Aftermath of *R. v. Anthony-Cook*: A Study of the Effects of the Supreme Court's Decision on Ontario's Public Interest Test for the Rejection of a Joint Submission on Sentence" (2022) 70 Crim LQ 4 at 556.

111 *Ibid* [emphasis in original].

might have been occasioned by the Supreme Court's expression of the test in the disjunctive rather than the conjunctive.[112] Indeed, based on the addition of the "so unhinged" requirement, which he identified as the "controlling test,"[113] he stated that if anything, the standard for rejection of a joint submission was higher now than it was before *Anthony-Cook*. After reviewing the relevant sentencing decisions and tabulating the results, he concluded that the rate of acceptance of joint submissions by trial judges (not considering reversals on appeal) was significantly higher under the *Anthony-Cook* formulation than under the Ontario Court of Appeal's previous formulation described in *Cerasuolo*. He reasoned that the "so unhinged" test was causing some trial judges to apply stricter standards for the rejection of joint submissions than were applied in the past.[114]

While Tanha describes the changes to the Ontario public interest test for the rejection of a joint submission arising from the Supreme Court of Canada's judgment in *Anthony-Cook*, he does not address how the high standard may be causing trial judges to accept joint submissions that depart fundamentally from the requirement to give primary consideration to the sentencing objectives stipulated in section 718.04.

Ashley Fulton identified the main dilemma raised in this article.[115] She found that the impossibly high threshold for the rejection of a joint submission represented by the "so unhinged" test resulted in the "prioritization of the certainty of joint submissions over judicial discretion." These restrictions on judicial discretion were preventing the "meaningful realization" of the sentencing objectives contained in s. 718.04.[116] To resolve

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112 *Ibid* at 556-57

113 *Ibid* at 557. See also Ashley Fulton, "Mixed Messaging? Intimate Partner Violence Sentencing Amendments to the *Criminal Code*" (7 September 2021), online: <sasklawreview.ca/comment/mixed-messaging-intimate-partner-violence-sentencing-amendments-to-the-criminal-code.php> [perma.cc/7EK5-9K2U].

114 Tanha, *supra* note 110 at 576-77.

115 Fulton, *supra* note 113.

116 Fulton, *ibid*, identified another possible impediment to the realization of the sentencing objectives of denunciation and deterrence in s. 718.04. Specifically, she noted the discordance between ss. 718.04 and 718.2(e) that arose when a sentencing court was imposing a sentence for intimate partner violence involving both an Indigenous offender and Indigenous female victim. Under s. 718.04, Parliament had asked trial judges to be stricter in sentencing when intimate partner violence is committed against

this discordance and to allow the sentencing objectives of s. 718.04 to be realized, Fulton recommended giving trial judges a "fuller judicial sentencing discretion" to reject a joint submission in the case of intimate partner offences committed against Indigenous females.[117] However, it will be suggested that recognition of a fuller judicial sentencing discretion is not necessary because the scope of the judicial sentencing discretion, recognized by the Supreme Court in *Anthony-Cook*, permits the rejection of a joint submission that departs fundamentally from the requirement to give primary consideration to the sentencing objectives in s. 718.04.

## IV. Legislative Framework

### A. Sections 718.04 and 718.201 of the *Criminal Code*

#### i. Plain Meaning and Shortcomings of Provisions

On September 19, 2019, s. 718.04 of the *Criminal Code* took effect. Section 718.04 reads:

> **Objectives – offences against vulnerable person**
> When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances – including because the person is Aboriginal and female – the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.[118]

While the first clause of the provision sets out the general requirements to trigger application of the provision, namely that the offence being sentenced

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Indigenous women by emphasizing denunciation and deterrence. However, under s. 718.2(e), Parliament had asked trial judges to conduct an analysis in accordance with *R v Gladue*, 1999 CanLII 679 (SCC), and *R v Ipeelee*, 2012 SCC 13, which accounted for the systemic factors leading to the overrepresentation of Indigenous offenders in Canada's jails. Fulton concluded that if Parliament did not resolve the tension between these two provisions that this could cause a further loss of trust in the criminal justice system among Indigenous Peoples.

117 Fulton, *supra* note 113.

118 *Criminal Code*, *supra* note 15. Note that ss. 718.01 (offences against children), 718.02 (offence against peace officer or other justice system participant), and 718.03 (offences against certain animals), all of which preceded the passage of s. 718.04, also require the sentencing objectives of deterrence and denunciation to be emphasized by the trial judge.

involve the abuse of a person who is vulnerable because of personal circumstances, which means that other categories of person, besides female Aboriginals, could theoretically trigger the application of the provision, only one category of person is expressly referenced in the provision. That is, victims who are "Aboriginal and female," which indicates that the provision is most strongly aimed at alleviating the vulnerability of this group. Given the use of the word "shall" in the second clause of the provision, s. 718.04 makes it mandatory (not discretionary) for a trial judge, when imposing sentence, to give primary consideration to the objectives of denunciation and deterrence.[119] In accordance with legislative drafting conventions, the word "shall" should be interpreted as establishing a statutory requirement. A large and liberal interpretation of s. 718.04 that best supports the attainment of the objective of the provision is supported by s. 12 of the *Interpretation Act*. Section 12 reads:[120]

> **Enactments deemed remedial**
> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

On September 19, 2019, Parliament also added s. 718.201 to the *Criminal Code*. Section 718.201 is a companion provision to s. 718.04. Section 718.201 intends to complement the purpose and objectives of s. 718.04. Section 718.201 reads: [121]

> **Additional consideration – increased vulnerability**
> A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.

While the first clause of s. 718.201 sets out the general requirements to trigger application of the provision, namely that the offence being sentenced involve the abuse of an intimate partner, the second clause makes it clear that the provision is aimed at the increased vulnerability of female persons, with specific attention to be paid to the circumstances of Aboriginal female victims. This means that females, not males—and especially Aboriginal females—are to be the focus of the provision. Parliament's use of the word

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119 *R v Lucas*, 2020 NWTTC 08 at para 24 [*Lucas*].

120 *Interpretation Act*, RSC 1985, c I-21.

121 *Criminal Code*, *supra* note 15.

"shall" in s. 718.201 indicates that the provision is mandatory (not discretionary). Like s. 718.04, s. 12 of the *Interpretation Act* deems s. 718.201 to be remedial, entitling it to a large and liberal interpretation.

When imposing a sentence, a trial judge must take ss. 718.04 and 718.201 into account any time an offender is convicted of committing an act of intimate partner violence against an Indigenous female victim. These provisions require trial judges to consider the increased vulnerability of Indigenous female victims and to give primary consideration to the objectives of denunciation and deterrence.[122] Parliament has not excluded

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[122] Two other *Criminal Code* provisions that are relevant to crimes of intimate partner violence against vulnerable Indigenous females are ss. 722(1) and 718.2(a)(ii), though unlike ss. 718.04 and 718.201, neither section references Indigenous female victims specifically. Indeed, s. 722(1) gives all victims of crime the right to participate in the sentencing process by filing, or reading aloud in court, a victim impact statement, which must be considered by the trial judge before sentence is imposed. Section 722(1) reads:

> When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.

Section 722(1) ensures that victims' voices are heard: Scott, *supra* note 12 at 78. Joint submissions are not exempt from the victim impact statement requirement: *Aklok*, *supra* note 5 at para 55. The right of a victim to make a victim impact statement, and for a victim to have their views considered with respect to decisions to be made by appropriate authorities in the criminal justice system that impact the victim's rights, are codified in the *Canadian Victim Bill of Rights*, SC 2015, c 13, s 14. Section 722(2) gives sentencing courts an ongoing supervisory function to ensure the Crown's compliance with s. 722(1). Specifically, as soon as practicable after a finding of guilt and in any case before imposing sentence, the trial judge must inquire with the Crown if reasonable steps have been taken to provide the victim with an opportunity to prepare a victim impact statement. This supervisory function is important for trial judges to discharge since some Crowns continue regularly to ask trial judges to sentence offenders without victims having been advised of their right to be heard, including in cases where sentencing involves a joint submission—see, for example, *Aklok*, *supra* note 5 at paras 56-58. On a joint submission, information in a victim impact statement may reveal whether the victim of the crime is an Indigenous female, which is specifically relevant to ensuring that the sentencing objectives contained in ss. 718.04 and 718.201 are met: *Lucas*, *supra* note 119 at paras 23-24, *R v LR*, 2020 BCCP 80 at para 44 [*LR #1*]. Information in victim impact statements can also ensure that joint submissions reflect the degree of

joint submissions from the requirement to adhere to the purpose, objectives, and principles of sentencing.[123] This means that even when a sentence is imposed by joint submission, as opposed to following a contested sentencing hearing, the sentence must comply with the requirements of ss. 718.04 and 718.201. Joint submissions are not given an exemption from the requirements of these provisions. However, neither s. 718.04 nor s. 718.201 expressly requires the Crown (or defence counsel) to present evidence as to whether the victim of an offence is an Indigenous female.[124] Nor do the provisions expressly authorize a trial judge to reject a joint submission where the joint submission does not give primary consideration to the sentencing objectives of denunciation and deterrence. These shortcomings may reduce a trial judge's ability to give effect to the sentencing objectives contained in ss. 718.04 and 718.201.

**ii. Legislative Intent and History of Provisions**

The enactment of ss. 718.04 and 718.201 were part of the legislative response[125] to *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.[126] The Report outlines four societal phenomena that have contributed to disproportionately high numbers of Indigenous women, girls, and

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psychological, emotional, or physical harm suffered by the victim: *LR #1* at para 44. Having said that, the weight of a victim impact statement may be reduced by the deference that a trial judge must show to a joint submission arising from a plea bargain: Scott, *supra* note 12 at 79. Section 718.2(a)(ii) makes abuse of an intimate partner an aggravating factor in sentencing regardless of the gender or ethnic background of the victim, making no specific mention to Indigenous females.

123 *Aklok*, *supra* note 5 at para 43.

124 In *Lucas*, *supra* note 119 at paras 5, 23, the Crown did not address whether either victim of the intimate partner violence was an Indigenous female, though this was likely based on the circumstances of the case. Justice Donovan Molloy noted that this conduct by Crowns, in omitting information on whether a victim of a crime of intimate partner violence is an Indigenous female (or whether any of the offender's previous convictions for violence involved intimate partner violence), was not uncommon and frustrated the Court's ability to impose sentences that give effect to sentencing objectives contained in ss. 718.04 and 718.201.

125 *R v Doucette and Gunanoot*, 2020 BCSC 907 at para 61 [*Doucette*].

126 National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place* (Ottawa: Queen's Printer 2019).

2SLGBTQQIA people being the victims of violence and oppression in their communities. They are:

(a) Historical multigenerational and intergenerational trauma;
(b) Social and economic disenfranchisement;
(c) Resistance to changing the status quo and an institutional lack of will;
(d) Excluding the agency and expertise of Indigenous women, girls, and 2SLGBTQQIA people.[127]

The basic rationale for the new legislative measures was explained by Justice Paul Bychok of the Nunavut Court of Justice in *R v Iqalukjuaq*:[128]

> The inter-generational effects of colonialism have not only contributed to the staggeringly high rates of Indigenous offending. This was the problem sought to be addressed by *Criminal Code* section 718.2(e) and *Gladue*. The impact of colonialism also gave rise to the very same inter-generational effects which have left all Inuit women – and not just intimate partners - in a particularly vulnerable position in society. In my view, this reality ought to inform the deliberations of a Nunavut sentencing judge when sentencing an offender who has victimized an Inuk woman.

In *Aklok*, Justice Bychok addressed the legislative intent of s. 718.04, which is to put justice system participants on notice as to the growing understanding of the severe effects violent crime has on Indigenous victims. This understanding requires counsel to make higher sentence recommendations and trial judges to impose higher sentences than were recommended or imposed in the past when sentencing offenders for crimes of intimate partner violence against Indigenous females.[129]

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127 *Ibid*, as cited in *Doucette*, *supra* note 125 at para 62.

128 2020 NUCJ 15 at para 35. In *Doucette*, *ibid*, at paras 55, 77, the Supreme Court of British Columbia observed that Canada's legacy of colonization against Indigenous peoples, including the inter-generational trauma experienced by Indigenous people because of residential schools, is correlated not only with Indigenous peoples' disproportionate involvement with the justice system but also with their poverty, lack of education, alienation, instability, sexual and physical abuse, and the severing of family ties.

129 *Aklok*, *supra* note 5 at paras 73-75.

## V. JOINT SUBMISSION SENTENCING DECISIONS: THE MIS-APPLICATION OF THE HIGH STANDARD FOR REJECTION OF A JOINT SUBMISSION FROM *ANTHONY-COOK*

Immediately below is a table depicting the joint submission sentencing decisions applying s. 718.04 since September 19, 2019 (the date the provision was passed). The decisions are compiled chronologically using a CanLII document text search. The decisions are limited to joint submissions involving (or likely involving) an act of intimate partner violence against an Indigenous female.

Accepting and applying Ireland's dichotomy and presuppositions about the circumstances in which joint submissions should be accepted or rejected, the joint submission decisions are broken down as "cultural joint recommendations," which should have been rejected, or "true plea bargains," which should have been accepted. In each of the four sentencing decisions reviewed in this section, the trial judge stated that they were precluded from exercising their discretion to reject the joint submission based on the high threshold from *Anthony-Cook*. However, given that the joint submission in each case was found by the trial judge to be unduly lenient, resulting in a fundamental departure from the requirement to give primary consideration to the sentencing objectives of s. 718.04, the trial judge's finding that the "so unhinged" test was not met is difficult to accept and must be seen as an error in principle. This is because a reasonable observer of the justice system would find that the proper functioning of the criminal justice system had broken down if judges were allowed to accept joint submissions that contravene s. 718.04. Given the absence of an underlying *quid pro quo*, the trial judge in each case should have exercised their discretion to reject the joint submission of counsel.

**Table 1: Joint Submission Decisions**

| Style of Cause | High Threshold From *Anthony-Cook* Stated as Reason for Acceptance of Joint Submission | Cultural Joint Recommendation | True Plea Bargain | Reservations Expressed as to Compliance with Sentencing Objectives of Denunciation and Deterrence in Section 718.04 |
|---|---|---|---|---|
| *R v Lucas* NWTTC 2020 8 | YES | YES | NO | YES |
| *R v Taylor* NWTTC 2020 10 | YES | YES | NO | YES |
| *R v Aklok* NUCJ 2020 37 | YES | YES | NO | YES |
| *R v L.R.* BCPC 2021 7 | YES | YES | NO | YES |

## A. Sentencing Decision #1: *R v Lucas*

### 1. Decision on Joint Submission and Anthony-Cook Threshold

In *Lucas*,[130] the offender, an Indigenous male, was convicted (after pleading guilty) of committing three heinous assaults against two of his intimate partners, who were (likely, based on victim self-identification) Indigenous females. The joint submission of counsel recommended a total period of 181 days' imprisonment, less a remand credit of 100 days, together

[130] *Supra* note 119.

with a period of probation of eighteen months and a DNA order that was a mandatory term of sentence.[131] Despite Honourable Justice Donovan Molloy's finding that the proposed sentence was "demonstrably unfit" because it was decidedly too low to ensure that primary consideration was given to the sentencing objectives in s. 718.04, the honourable justice found that the high threshold for rejection of a joint submission from *Anthony-Cook* precluded the use of his discretion to reject it:

> While judges, exercising their own unfettered discretion, may not impose sentences that are unfit or demonstrably unfit, such sentences must be acceded to where they result from joint submissions by legal counsel. This stems from the fact that *Anthony-Cook* mandates that judges not interfere with a joint submission unless it is *so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system has broken down.*[132] [Emphasis in original]
>
> This legal threshold to depart from a joint submission is sufficiently high that I conclude that I must accept the joint submission made here by Crown and Defence. I therefore must impose a sentence upon Mr. Lucas (an offender with at least seven prior convictions for assaulting intimate partners-one of whom is a victim of the current offences before me) that is demonstrably unfit and fails to recognize the danger that Mr. Lucas poses to his current or prospective intimate partners. The sentence is also inadequate in effecting general deterrence.
>
> This is not an isolated occurrence. Where it occurs, some might question whether the actual functioning of our criminal justice system is unhinged. Part of the role of a judge is to decide, on an independent and impartial basis, what represents a fit sentence. In the case of joint submissions, as a matter of practical reality, this is often no longer possible.[133]

However, it is submitted that Justice Molloy's conclusion that the high threshold from *Anthony-Cook* precluded his discretion to reject the joint submission is misplaced. If the joint submission departed fundamentally from the sentencing objectives in s. 718.04, the "so unhinged" test was met, and the joint submission should have been rejected. The honourable justice seems to acknowledge this at paragraph 9 when he states that in imposing the sentence, "some might question whether the actual functioning of our criminal justice system is unhinged." Effectively, Justice Molloy, in accepting

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131 *Ibid* at para 21. But for the fact that the accused had a current firearms prohibition, a firearm prohibition would have been included as a term of the joint submission: *ibid*.

132 *Ibid* at para 7.

133 *Ibid* at paras 8, 9.

the joint submission, was doing what the Supreme Court of Canada has cautioned against – treating the joint submission as sacrosanct and incapable of rejection based on the high threshold set for rejection in *Anthony-Cook*.[134]

**2. Cultural Joint Recommendation or True Plea Bargain**

With respect to the joint submission, there was a lack of a *quid pro quo* that might make it acceptable in the sense of being a true plea bargain. The Crown's case against the offender was relatively strong, and the Crown did not require the offender's guilty plea to ensure the certainty of the prosecution. First, the complainants were cooperative in the criminal investigation process. Second, the complainants had provided witness statements. Third, the complainants' injuries had been photographed. Fourth, one of the complainants had provided a victim impact statement. While the Crown did state that there were challenges regarding the quality of the police investigation with respect to the common assault charge, resolution of the charges by joint submission was not required to ensure certainty of the prosecution.[135] While the joint submission was culturally expedient to accept in the sense of keeping cases flowing through the criminal justice system,[136] it was not a true plea bargain because the Crown did not need the offender's guilty plea to ensure the certainty of the prosecution.

**3. Reservations Expressed as to Compliance with s.718.04**

Notwithstanding the presence of *Gladue* factors[137] and mitigating factors[138] lessening the Indigenous offender's moral blameworthiness,

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134 *Anthony-Cook*, *supra* note 6 at para 3.

135 *Lucas*, *supra* note 119 at paras 41, 42.

136 *Ibid* at para 10.

137 The *Gladue* factors cited were: (a) both the offender's parents were abused by Canada's residential school system; (b) there was significant exposure to alcohol abuse within the home during the accused's childhood; (c) in the family home, the offender frequently observed his father abuse his mother; and (d) the offender's development of a substance abuse problem as a young adult stemming from his upbringing: *ibid* at paras 14-16.

138 The mitigating factors cited were: (a) the offender entered an early guilty plea; (b) the complainants did not have to undergo cross-examination; (c) despite having no recollection of the events due to his degree of impairment, the offender voluntarily

Justice Molloy found that the joint submission fundamentally departed from the requirement to give primary consideration to the sentencing objectives of s. 718.04:

(1) **Victim impact**: The proposed sentence was not proportional to the physical and psychological injuries sustained by the Indigenous female victims. For example, one of the victims testified that due to the vicious assaults committed against her by the offender, she was suffering from night terrors and other irrational fears. She also sustained a permanent bald spot on her scalp, and her educational pursuits were derailed.[139]

(2) **Lack of parity**: The quantum of the proposed sentence was not consistent with sentences imposed for similar crimes in three other cases in the same court jurisdiction. These cases indicated a range of sentences between twelve and fourteen months, where the offender's circumstances were less aggravating than in the present case.[140]

(3) **Significant aggravating factors:** The proposed sentence was not consistent with the significant aggravating factors, increasing the offender's moral blameworthiness:

- The offender's history of violence against one of the female victims: this was the offender's eighth and ninth assaults against this victim;
- The offender's assault on the other female victim represented his tenth conviction for violence against an intimate partner;
- The offender's victims were both intimate partners;
- The offender's long criminal record;
- The offender's general propensity for violence: the offender had seventeen prior convictions for offences of violence;

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waived the requirement that his guilt be established by the Crown beyond a reasonable doubt; (d) the offender agreed to participate in a treatment program, which was an expression of the offender's desire to conduct himself better in the future: *ibid* at paras 29, 30.

139 *Ibid* at para 33.

140 *Ibid* at paras 34-39. As the honourable justice underlined (at para 34), the submission was not grounded in any relevant sentencing authority.

- The offender's history of disobeying conditions of probation and release orders.[141]

(4) **Maximum penalty:** The proposed sentence was a far cry from the maximum penalty available on summary conviction for the three assaults, being six years' imprisonment.[142]

In light of the above, and accounting for the totality principle, Justice Molloy found a fit sentence to be 14 months' imprisonment, as opposed to 181 days.[143] Justice Molloy's endorsement of the points from *R v Blanchard*[144] and *R v Kippomee*,[145] that no one joint submission could cause a reasonable person to believe that the proper functioning of the criminal justice system had broken down, and that *Anthony-Cook* not only requires deference to joint submissions but also dissuades judges from looking behind them,[146] is misplaced. First, Justice Molloy fails to consider the effect of parity in sentencing. Second, he treats the joint submission of counsel as sacrosanct and incapable of rejection.[147]

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141 *Ibid* at paras 13, 20, 31, 40.

142 *Ibid* at para 43. By indictment, the maximum sentence available for the three assaults would have been 25 years' imprisonment. This represents an even more stark difference from the proposed sentence of counsel, being a mere 181 days. This illustrates that for hybrid offences such as assault, the Crown's choice as to whether to proceed summarily or by indictment can heavily affect the trial judge's ability to give effect to the sentencing objectives in s 718.04. Because lengthier sentences will be available when the Crown proceeds by indictment rather than summarily, it will be easier for the trial judge to ensure that the sentence has sufficient denunciatory and deterrent effect.

143 *Ibid* at para 45. Justice Molloy's conclusion that a fit sentence would be 14 months as opposed to 181 days increased the proposed sentence by approximately 2.5 times, which means that significantly more than "tinkering" with the joint submission was required to bring the joint submission into conformity with the range of sentence required. This supports the argument that there was a legal basis for Justice Molloy to substitute his opinion for the considered agreement of counsel: *Anthony-Cook*, *supra* note 6 at para 63.

144 2017 NLPC 1317.

145 2019 NUCA 03.

146 *Anthony-Cook*, *supra* note 6 at paras 34-35.

147 *Ibid* at para 3.

## B. Sentencing Decision #2: *R v Taylor*

### 1. Decision on Joint Submission and Anthony-Cook Threshold

In *R v Taylor*,[148] the offender, an Indigenous male, was convicted (after pleading guilty) of three offences: common assault on an intimate partner (who was likely an Indigenous female), assault on a peace officer, and breach of a release order. The joint submission of counsel recommended ninety days' imprisonment (30 days consecutive per offence), a three-year firearms prohibition, and a period of probation of 12 months.[149] Decided by the same trial judge as in *Lucas*, Justice Donovan Molloy found that the joint submission represented an unfit sentence, because it fundamentally departed from the requirement to give primary consideration to the sentencing objectives in s. 718.04. However, the honourable justice concluded that the high threshold from *Anthony-Cook* precluded the use of his judicial discretion to reject it:

> A paltry 30 days imprisonment for Mr. Taylor for his serious assault upon Ms. Firth, with his antecedents, is significantly short in terms of denouncing his conduct and it lacks any real impact as a deterrent, either specific or general. Even still, I must endorse it as the *Anthony-Cook* decision precludes my ability to use sentencing policy to denounce intimate partner violence in clear terms in the face of joint submissions of this nature.[150]

Justice Molloy's conclusion that the high threshold from *Anthony-Cook* eliminated his judicial discretion to reject the joint submission was ill-founded. If the joint submission contravened s. 718.04, the "so unhinged" test was met, and he retained his discretion to reject the joint submission and he should have done so.

### 2. Cultural Joint Recommendation or True Plea Bargain

With respect to the joint submission, there was a lack of *quid pro quo* that might make it acceptable in the sense of it being a true plea bargain between the parties. The offender had pled guilty to a common assault charge, where the Crown's case had a weakness (there was no issue with respect to the prosecution of the two other charges against the offender). Specifically, the Crown had informed the trial judge of its inability to reach

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148 2020 NWTTC 108 [*Taylor*].

149 *Ibid* at paras 1-2.

150 *Ibid* at para 39.

the victim of the assault to secure her cooperation. However, the Crown had informed the court that a third party had witnessed the assault of the victim and that the prosecution's case did not rest on the evidence of the victim alone. Justice Molloy found that such evidence would normally receive substantial probative value at trial since the offence involved an act of violence against an intimate partner.[151] Thus, the strength of the *quid pro quo* was low since the Crown did not necessarily need the offender's guilty plea to ensure the certainty of the prosecution. While the joint submission could not be classified as being made for reasons of cultural expediency alone, it was not a true plea bargain because the weakness in the Crown's case was not insurmountable. For this reason, the joint submission should have been rejected, given its non-compliance with the sentencing objectives contained in ss. 718.04 and 718.204.

**3. Reservations Expressed as to Compliance with s.718.04**

Notwithstanding the presence of *Gladue* factors[152] and mitigating factors[153] lessening the Indigenous offender's moral blameworthiness, Justice Molloy found that the joint submission fundamentally departed from the requirement to give primary consideration to the sentencing objectives of s. 718.04:

1) **Victim impact**: The proposed sentence was not proportional to the significant assault sustained by the female victim, in which she was bloodied and experienced psychological injury.[154]

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151 *Ibid* at para 28.

152 Justice Molloy acknowledged the presence of several *Gladue* factors that lessened the offender's moral blameworthiness but did not enumerate them specifically: *ibid* at para 25.

153 The mitigating factors were: (a) the offender entered an early guilty plea that spared the female victim a trial, including having to undergo cross-examination, and (b) the offender relieved the Crown of its requirement to prove the offender's guilt beyond a reasonable doubt. The offender's apology to the victim, given in the immediate aftermath of the assault, was not considered to be mitigating because the offender had no memory of the assault or of making the apology. It was equally plausible that the offender's apology represented an act of contrition as it represented a hopeful attempt by the offender to induce the complainant into not cooperating with the police investigation. Thus, it was a neutral factor in sentencing: *ibid* at paras 22-23.

154 *Ibid* at paras 5, 26.

2) **Significant aggravating factors**: The proposed sentence was not consistent with the significant aggravating factors, including the fact that the offender had an extensive criminal record, including a history of intimate partner violence:
    - The offender's two previous convictions for sexual assault;
    - The offender's previous conviction for assaulting a peace officer;
    - The offender's two previous convictions for uttering threats;
    - The offender's two previous convictions for common assault, including one common assault conviction arising from an assault on a previous intimate partner;
    - The offender's two previous convictions for assault causing bodily harm;
    - The offender's present common assault on an intimate partner conviction was aggravating under s. 718.2 of the *Criminal Code*;
    - The offender's assaults on a peace officer and an intimate partner breached his release conditions (though the Crown withdrew the associated charges of breach of probation and breach of a release order);
    - The offender had received 60 days' imprisonment for his most recent assault, albeit for an act of violence that did not involve an intimate partner.[155]

In light of the above, and accounting for the totality principle, Justice Molloy found a fit sentence to be eight months, as opposed to 90 days. The honourable justice found four to six months to be an appropriate sentence for the act of intimate partner violence, rather than 30 days. A fit sentence for the act of intimate partner violence would have been even higher if there was evidence that the victim was an Indigenous female and were it not for the mitigating circumstances, including the offender's early guilty plea.[156]

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155 *Ibid* at paras 12, 24, 33, 34.

156 *Ibid* at paras 35, 36. Justice Molloy's conclusion that a fit sentence would be eight months as opposed to 90 days increased the proposed sentence by 2.7 times, which means that significantly more than "tinkering" with the joint submission was required to bring the joint submission into conformity with the range of sentence required. This

## C. Sentencing Decision #3: *R v Aklok*

### 1. Decision on Joint Submission and Anthony-Cook Threshold

In *Aklok*,[157] the offender, an Indigenous male, was convicted (after pleading guilty) of two counts of common assault against his intimate partner, who was an Inuit woman, and for one count of breaching his no-contact bail condition with respect to the first assault.[158] The joint submission of counsel recommended 45 days' imprisonment and nine months of probation.[159] Despite Honourable Justice Paul Bychok's conclusion that the joint submission was flawed and represented a demonstrably unfit sentence because it fundamentally departed from the requirement to give primary consideration to the sentencing objectives in s. 718.04, the honourable justice found that the high threshold for the rejection of a joint submission from *Anthony-Cook* precluded his judicial discretion and required him to accept the joint submission:

> This case is an example of the real-world effect that the "so unhinged" test can bring about. Reasonable and informed Nunavummiut would conclude, as I have, that the justice system broke down in Mr. Aklok's case. That breakdown ought to have permitted me to decline to implement the joint submission. However, I felt constrained from rejecting the joint submission because two recent appellate decisions in Nunavut have expressly endorsed the "so unhinged" test. It is indeed unfortunate that the Court of Appeal has not provided constructive guidance to front-line judges on how to square this circle [footnotes omitted].[160]

Acceptance was required by the new legal landscape set down by the Supreme Court of Canada in *Anthony-Cook,* notwithstanding that the joint submission was significantly flawed in failing to adequately reflect the "reality" of intimate partner violence committed against Inuit women in Nunavut, in minimizing the severity of the violence committed against the

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supports the argument that there was a legal basis for Justice Molloy to substitute his opinion for the considered agreement of counsel: *Anthony-Cook*, *supra* note 6 at para 63.

157 *Supra* note 5.

158 *Ibid* at para 7.

159 Counsel provided no case authority to justify the lenient sentence recommended on the joint submission: *ibid* at para 24.

160 *Ibid* at para 89.

Inuit female victim, and in devaluing the lives of Inuit female victims.[161] These facts, according to Justice Bychok, justified incarceration:

> This is clearly a case where Mr. Aklok ought to have been separated from society for a jail term proportionate to the seriousness of his two violent crimes against his intimate Indigenous partner and his high degree of responsibility. That I was, as the judge responsible for the sentence, unable lawfully to resist this joint submission is the subject of the next section of my decision. [footnotes omitted][162]

While acceptance of the joint submission would bring the administration of justice into disrepute in Nunavut,[163] the "so unhinged" test was not met. First, gross negligence had not been committed by counsel in the preparation of the joint submission. Second, the justice system could not be said to be operating in a dysfunctional manner from the point of view of a reasonable observer.[164] This is because the Crown, defence counsel, and an impartial judge were participating in a routine court sitting involving a joint submission. Despite his serious reservations, Justice Bychok found that he was "constrained from rejecting the joint submission because two recent appellate decisions in Nunavut had explicitly endorsed the 'so unhinged test'."[165] And that no single sentencing submission accepted by a trial judge, however unfit, could meet the "so unhinged" test from *Anthony-Cook*. Justice Bychok cited the following statement of Justice Gorman of the Provincial Court of Newfoundland and Labrador in *R v J.B.* in support of his position: "It is hard to imagine any single sentencing submission ever having this effect and what do the words 'a break down in the proper functioning of the criminal justice system' mean?"[166]

The reasons cited by Justice Bychok for finding that the "so unhinged" test was not met are unconvincing. Indeed, they belie the circumstances of the joint submission and belie his assertion that "A judge's inability to impose a just and principled sentence constitutes a breakdown in the justice system."[167] First, gross negligence may have been committed by counsel in

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161 *Ibid* at paras 69, 71.

162 *Ibid* at para 77.

163 *Ibid* at para 44.

164 *Ibid* at para 87.

165 *Ibid* at para 89. With respect to the appellate authorities, Justice Bychok adverted to *R v Kippomee*, 2019 NUCA 03 at para 45 and *R v Kuliktana*, 2020 NUCA 7 at para 84.

166 2018 NLPC 1318A0036, as cited in *Aklok*, *supra* note 5 at para 86.

167 *Aklok*, *ibid* at para 88.

their preparation of the joint submission based on highly troubling omissions from the Crown's sentencing submissions, including a failure to refer to the primacy of the objectives of denunciation and deterrence in s. 718.04:

> In this case, I found several omissions from the Crown's submissions to be troubling. For example, the Crown did not mention that Parliament has mandated the primacy of the objectives of denunciation and deterrence, both general and specific, to perpetrators of intimate partner violence such as Mr. Aklok; the Crown did not refer to the fundamental principle of sentencing, proportionality; the Crown did not mention Parliament's direction in section 718.04 that the victim's vulnerability must be considered; the Crown did not know whether any of Mr. Aklok's prior convictions involved an intimate partner; and the Crown did not demonstrate how the joint submission addressed the prevalence of intimate partner violence, as well as the harm done to the victim and community.
>
> The joint submission endorsed by the Crown also failed adequately to address rehabilitation. Clearly, there was and continues to be a need to seek this 39-year-old male Inuk's rehabilitation. However, the joint submission only called for me to impose a short nine months of probation, little time for Mr. Aklok to wrestle with – under Court supervision – his lifelong issues of dysfunction and alcoholism.[168]

Second, because the joint submission was found to have ignored the objectives of denunciation and deterrence in s. 718.04, to have ignored the principle of proportionality contained in s. 718.1, to have placed too much weight on the mitigating factors (the offender's early guilty plea and the gap in the offender's criminal record), and to have failed to address many aggravating factors (including the offender's admitted choking of the victim),[169] the criminal justice system in accepting the joint submission was operating in a dysfunctional manner. This is because no reasonable observer of the justice system would accept that a single sentencing submission could be imposed that was so far out of bounds with the sentencing objectives directed by Parliament in the *Criminal Code*. Some of these sentencing objectives seek to address the gendered and systemic intimate partner violence plaguing Indigenous women in their communities. It could not have been the Supreme Court of Canada's intention in *Anthony-Cook* for trial judges to treat joint submissions as impossible to reject where the joint submission does not adhere to the purpose, objectives, and principles of sentencing, including the requirements of s. 718.04.

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168 *Ibid* at paras 63-64.

169 *Ibid* at paras 10, 63, 68, 70.

Third, a trial judge's decision on sentence should not be seen as an isolated event. Indeed, such a view undercuts the principle of parity in sentencing. For example, if a trial judge were to order a decidedly low sentence and to give minimal (or no) primacy to the sentencing objectives in s. 718.04, it could lead to other trial judges adopting similarly low sentences in similar cases involving offences of abuse against Indigenous females. Justice S. Keyes's words in *Mattess* are apposite: "The inevitable result of accepting an unfit sentence in one case must necessarily be the proliferation of unfit sentences in similar cases. The result of that proliferation is the breakdown – or rather the abdication – of the administration of justice, particularly for Indigenous women."[170] Such an approach to sentencing would cause a reasonable member of the public to believe the proper functioning of the criminal justice system had broken down.

**2. Cultural Joint Recommendation or True Plea Bargain**

With respect to the joint submission, there was a lack of *quid pro quo* that might make the joint submission acceptable in the sense of being a true plea bargain between the parties. While the propriety of the joint submission was in question because the Crown had insufficient knowledge of the facts and was relying on a file that lacked the necessary details,[171] no mention was made of a weakness in the Crown's case that required the Crown to accept the joint submission to ensure the certainty of the prosecution. Accordingly, this was a cultural joint recommendation that should have been rejected by the trial judge because it represented a fundamental departure from the requirement that primary consideration be given to sentencing objectives in s. 718.04. This is because it breached the proportionality principle in s. 718.1, and because it misapplied the mitigating and aggravating factors.

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170 *Mattess*, *supra* note 22 at paras 164-166.

171 *Aklok*, *supra* note 5 at para 70.

**3. Reservations Expressed as to Compliance with s.718.04**

Notwithstanding the presence of *Gladue* factors[172] and mitigating factors[173] lessening the Indigenous offender's moral blameworthiness, Justice Bychok found that the joint submission fundamentally departed from the requirement to give primary consideration to the sentencing objectives of s. 718.04:

1) **Victim impact**: The proposed sentence was not proportional to the physical and psychological injuries sustained by the Indigenous female victim:
    - On August 2, 2020, while under the influence of alcohol, the offender committed a common assault against his intimate female partner involving numerous acts of violence: punching, head-butting, kicking, and banging her head on a floor;[174]
    - On August 21, 2020, the offender, while out on bail for the first assault, and in breach of his bail conditions (requiring the offender to have no contact with the victim) committed a more serious act of intimate partner violence against the same intimate female partner. For these acts, the offender was charged with choking, strangling, or suffocating, but was convicted of the lesser charge of common assault. The victim was found by the police hiding outside her house. The choking, which was admitted by the offender, left the victim with wounds and contusions and left her visibly shaken and scared. For the breach of his release conditions, the offender faced an additional charge.[175]

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172 The *Gladue* factors cited were: (a) the offender was exposed to significant violence in the family home, perpetrated by his father against his mother; (b) the offender experienced physical abuse from his father; (c) the offender was picked on and excluded at school; (d) the offender's father had a lengthy history with the criminal justice system; and (e) the offender's father committed suicide: *ibid* at paras 26-28.

173 The mitigating factors cited were: (a) the offender's early guilty plea, and (b) the gap in the offender's criminal record: *ibid* at para 70.

174 *Ibid* at paras 14-15.

175 *Ibid* at paras 17-20. Before the offender pled guilty to the second incident, the more serious charge of choking, strangling, or suffocating in connection with this incident

2) **Significant Aggravating Factors**: The proposed sentence was not consistent with the significant aggravating factors, increasing the offender's moral blameworthiness:
    - Both assaults involved intimate partner violence;
    - The offender had abused at least one intimate partner previously;
    - The offender's violence toward the victim was serious;
    - The offender's victim was a vulnerable female Inuk;
    - The offender committed a second assault on his intimate partner only 19 days after the first assault;
    - The offender breached his bail requirement not to have contact with the victim when he abused her the second time;
    - The offender was highly intoxicated during the second assault (and had decided to consume alcohol knowing he could not consume it responsibly);
    - The offender choked the victim during the second assault.[176]

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was downgraded by the Crown to the offence of common assault (the offence charged in the first incident). This was accomplished through a Crown amendment to the second information involving the Court deleting the references to choking, strangling, or suffocating. While this action by the Crown was not consistent with the legislative intent of s. 718.04, because the admitted facts supported the original and more serious charge of choking, the Crown also undermined s. 718.04 by not referring to the fact of choking as an aggravating factor in sentencing (or to the majority of aggravating factors). These actions had been taken by the Crown notwithstanding the offender's admission to the choking and notwithstanding that a lenient sentence was being proposed by counsel: at paras. 9-10. According to Justice Bychok: "This failure by the Crown to allege the admitted choking as an aggravating factor minimised the extent of the violence, its impact on the victim, and Mr. Aklok's responsibility for his criminal actions": at para 68; The Crown's actions, aforementioned, are concerning since they obfuscated the heinous nature of the violence and harm committed against the Indigenous female, impeding a proper judicial sanction from being ordered. Thus, the Crown's actions helped perpetuate the institutional indifference toward intimate partner violence sustained by Indigenous females in their communities. Such institutional indifference was also evidenced by the Crown's failure to make any effort to secure a victim impact statement prior to sentencing, contrary to s. 722(1) of the *Criminal Code*, requiring the trial judge to order an adjournment to ensure that the statutory requirement was met: *Aklok*, *supra* note 5 at paras 11-12.

176 *Aklok*, *supra* note 5 at para 67.

Justice Bychok stated that Inuit women, and all Nunavummiut, are entitled to a justice system that "meaningfully addresses gendered violence."[177] While not indicating what quantum of sentence would have been appropriate, he emphasized that he was "troubled" by the joint submission (45 days' imprisonment and nine months of probation) but was bound to accept it by virtue of appellate direction from the Nunavut Court of Appeal explicitly endorsing the "so unhinged" test from *Anthony-Cook*, which he found could not be met on the facts before him.[178] With respect, and for the reasons already stated, the high threshold from *Anthony-Cook* did not preclude the use of Justice Bychok's discretion to reject the joint submission given that it contravened both ss. 718.04 and 718.1.

## D. Sentencing Decision #4*: L.R.*

### 1. Decision on Joint Submission and Anthony-Cook Threshold

In *L.R.*,[179] the offender, an Indigenous male, was convicted (after pleading guilty) of three *Criminal Code* offences: common assault of his former spouse (who was a vulnerable Indigenous female and his intimate partner), uttering a threat against a peace officer, and committing an assault against a peace officer with a weapon. These charges arose from a violent conflict with his former spouse, C.L.[180] The joint submission of counsel proposed a global sentence of 90 days' jail, one year of probation and two mandatory ancillary orders, along with a DNA order and a mandatory weapons prohibition with exemptions for sustenance hunting.[181] Justice J.T. Doulis rejected the proposed sentence, finding it to be contrary to the public interest. He cited three reasons:[182]

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177 *Ibid* at para 92.

178 *Ibid* at para 94.

179 *LR #1*, *supra* note 122; *R v LR*, 2021 BCPC 7 [*LR #2*].

180 *LR #2*, *ibid*, at paras 6, 80; *LR #1*, *supra* note 122 at para 1. In addition to the *Criminal Code* information, which was being resolved by joint submission, there was another information that had been laid against the offender under the *Motor Vehicle Act*, RSBC 1996, for driving while prohibited, which was also being resolved by joint submission: *LR #1* at paras 1-2. The trial judge took no issue with the proposed sentence on the latter information, since it represented the statutory minimum: *LR* #1 at para 67.

181 *LR #1*, *supra* note 122 at para 34.

182 *Ibid* at para 36.

1. First, no victim impact statement had been obtained from the victim, either in writing or verbally, so there was an absence of information about the victim. In particular, there was no information on her possible Indigenous background, her age, whether she had sustained any physical, emotional, or psychological injury, or whether she had any support in the community;[183]
2. Second, the 90-day global sentence was unduly lenient. Barring exceptional circumstances, the authorities provided for a sentence range of one to five years for violent offences against police officers with a weapon, contrary to s. 270.01;[184]
3. Third, the 90-day global sentence, to run concurrently for the two assault charges (common assault against an Indigenous female and assault of a police officer with a weapon), breached s. 270.03 of the *Criminal Code*.[185] This section requires that a sentence ordered for assault of a police officer with a weapon must run consecutively to any other penalty imposed for an offence arising out of the same transaction or series of transactions.[186]

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183 *Ibid* at para 44. The missing information, in particular, knowing whether the female victim was Indigenous, was required to give effect to the requirements of ss. 718.201 and 718.04. Information as to the nature of the injuries was relevant to the proportionality principle in s. 718.1. Undoubtedly, the lack of information about the victim frustrated the trial judge's ability to apply the relevant sentencing principles.

184 *Ibid* at para 68. Curiously, while Justice Doulis recognized that exceptional circumstances can permit a trial judge to deviate from a sentencing range of one to five years for violent offences against police officers with a weapon, the honourable justice did not engage in an analysis of whether the evidence before him supported the presence of such exceptional circumstances. This may be because the joint submission, in recommending concurrent rather than consecutive sentences for the act of intimate partner violence and the police officer assault was statutorily prohibited from being accepted under s. 270.03.

185 *Ibid* at para 43. Section 270.03 of the *Criminal Code* reads:

> A sentence imposed on a person for an offence under subsection 270(1) or 270.01(1) or section 270.02 committed against a law enforcement officer, as defined in subsection 445.01(4), shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events.

186 *LR #1*, *supra* note 122 at para 43.

As a result of his concerns with the joint submission, Justice Doulis invited counsel to have further discussions and to address whether the offender should be allowed to withdraw his guilty plea.[187] The offender did not apply to withdraw his guilty plea and Justice Doulis indicated that he was remaining seized of the sentencing hearing.[188]A new joint submission from counsel, proposing a global sentence of 180 days, followed:

- 90 days' jail, to run concurrently, for the two counts involving the act of intimate partner violence and the offence of uttering a threat against a police officer;
- 90 days' jail, to run consecutively to the two other counts, aforementioned, for the count involving the offence of committing an assault against a peace officer using a weapon, together with the mandatory ancillary orders on this count;
- 18 months' probation on all three counts, aforementioned.[189]

While clearly an improvement on the old joint submission (and a good faith attempt by counsel to keep the offender out of jail), Justice Doulis still found the proposed sentence to be unfit, "perhaps demonstrably unfit."[190] Nonetheless, the honourable justice found that he was bound to accept the sentence because the high threshold from *Anthony-Cook*, represented by the "so unhinged" test, was not met:

> In sum, the sentence the Crown and Defence propose is still not one, absent a joint submission, I would otherwise impose. The question I must now answer is whether the joint submission is one I should accept given the stringent public interest test for its rejection. I can only depart from a joint submission if it is so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons to believe that the proper functioning of the justice system had broken down. Although I believe the joint submission for 180 days jail sentence is unfit, perhaps even demonstrably unfit, I am unable to conclude its acceptance would cause a reasonable person to conclude "the proper functioning of the justice system had broken down." Accordingly, I

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187 *Ibid* at para 69.

188 *Ibid* at paras 76-77.

189 *LR #2*, *supra* note 179 at para 75. On the new joint submission, the Crown was anticipated at the conclusion of the sentencing hearing to direct a stay of proceedings on the five remaining *Criminal Code* counts appearing on the eight-count *Criminal Code* information: at para 7.

190 *Ibid* at para 133.

> will follow the joint submission as advocated by counsel on January 8, 2021.[191] [Citations omitted]

It is submitted that the new joint submission of counsel was flawed because it was decidedly too low to ensure that appropriate consideration was given to the sentencing objectives in s. 718.04. This should have caused the honourable justice to find that the proposed sentence met the "so unhinged" test since mandatory sentencing objectives, legislated by Parliament and designed to protect vulnerable Indigenous women from intimate partner violence, were not being followed. While stating that joint submissions are not "immutable or sacrosanct" and can be rejected in "exceptional circumstances,"[192] and while stating that the sentencing objectives of denunciation and deterrence were the "paramount considerations" under the sentencing provisions he had to apply,[193] Justice Doulis proceeded to treat the new joint submission as though it was incapable of rejection based on his interpretation of the standard represented by the "so unhinged" test. This represented an error in principle.[194]

**2. Cultural Joint Recommendation or True Plea Bargain**

With respect to the new joint submission, there was a lack of *quid pro quo* that might make it acceptable in the sense of being a true plea bargain between the parties. The Crown's case was strong, if not impervious. There were independent eyewitnesses, including two intervening staff members (from the school where the offences took place), and three police officers. There was confirmatory physical evidence such as the baton and knife; L.R.'s warned statement to the police; and L.R.'s letters of apology prepared while in custody. While the offender did provide an early guilty plea, in exchange for the Crown being anticipated to direct a stay of proceedings on

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191 *Ibid.*

192 *Ibid* at para 128.

193 *Ibid* at para 80.

194 Curiously, even though the joint submission of counsel had been amended to bring it into compliance with s. 270.03, it still contravened s. 718.04 and could have been rejected on this basis. Lest the institutional indifference with respect to acts of violence committed against Indigenous women be further perpetuated by giving the perception that the sentencing requirements in s. 270.03 are being more faithfully followed than the sentencing requirements in s. 718.04.

five out of the eight offences charged,[195] the guilty plea was not required by the Crown to ensure the certainty of the prosecution. Thus, the bargain between the parties represented nothing more than a cultural joint recommendation and should have been rejected. This is because a proposed sentence of 180 days was decidedly too low to ensure that primary consideration was given to the objectives of denunciation and deterrence, as required by s. 718.04 and three other sentencing provisions of the *Criminal Code*.[196]

**3. Reservations Expressed as to Compliance with s.718.04**

Notwithstanding the presence of *Gladue* factors[197] and mitigating factors[198] lessening the Indigenous offender's moral blameworthiness, the

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195 *Ibid* at para 7.

196 See *ibid* at para 80.

197 The *Gladue* factors cited were: (a) the offender's father had a traumatic childhood and abused alcohol until he was 41 (the offender, himself, committed most of the crimes while he was impaired from a night of drinking alcohol and consuming cocaine); (b) the offender was 28 years old and had not yet completed high school; and (c) the offender's actions were explainable by the systemic and background factors impacting Indigenous people in Canadian society (generally) and impacting the offender within his own family upbringing (specifically): *ibid* at para 93; *LR #1*, *supra* note 122 at paras 24, 25.

198 The mitigating factors cited were: (a) the offender was a relatively young offender; (b) the offender pled guilty to the crimes early in the process, saving the witnesses the trauma or inconvenience of re-living these events at trial and saving significant public resources; (c) there were relevant *Gladue* factors, diminishing the offender's moral blameworthiness; (d) the offender had a strong support network, comprising of immediate family members and long-term friends to support him in his rehabilitation efforts; and (e) the offender expressed remorse by penning letters of apology to the victim of the intimate partner violence, to his son, and to his parents, immediately following his arrest and detention: *LR #2*, *supra* note 179 at para 98; While Justice Doulis found that the offender's substance addictions contributed heavily to his offending, he refused to find that the interaction between the offender's addictions and mental illness constituted a mitigating factor. The offender was not mentally ill; he was acting out of provocation. Specifically, he had been provoked into violence by his intimate partner showing him salacious pictures of herself participating in sexual acts with other men. While Justice Doulis did not find the act of provocation to be a mitigating factor, he did state that it supplied a context to the offence: *ibid* at paras 100, 122.

presence of exceptional circumstances,[199] and the presence of an important collateral consequence,[200] Justice Doulis found that the new joint submission was decidedly too low to meet the requirement in s. 718.04 (and in three other sentencing provisions) that primary consideration be given to the sentencing objectives of denunciation and deterrence:

1) **Victim impact**: Neither victim indicated that the incident had a significant effect on their physical or psychological well-being. Therefore, the proposed sentence was not disproportionate to the injuries suffered by the victims.[201]
2) **Demonstrably unfit sentence to address the scourge of intimate partner violence against Indigenous women in Canada**: While the quantum of the proposed sentence, 90 days' jail, to run concurrently for the act of intimate partner assault and for the offence of uttering a threat against a police officer, was not dissimilar to sentences imposed for crimes of intimate partner violence,[202] the honourable justice found the proposed sentence to

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199 The exceptional circumstances included but were not limited to the following: (a) the offender had no criminal record; (b) the offender had to address the cultural consequences of his actions to the Indigenous village government before he could return to his home community; and (c) the COVID-19 pandemic impaired the offender's rehabilitation by virtue of the mobility constraints and social distancing protocols ordered by BC's Provincial Health Officer. While the trial judge accepted the evidence of exceptional circumstances and found that a departure from the normal range of sentence was justified for the offence of assault with a weapon against the police officer (*ibid*: at paras 108-13), this did not vitiate the judge's obligation to ensure that the joint submission of counsel give primary consideration to the sentencing objectives in s. 718.04.

200 The important collateral consequence was that the offender was banished from his home community, the only community in which he had ever lived. The banishment resulted in the offender having to relocate to a new community and to his parents having to relocate to the same community to support him and to extricate themselves from the social ostracization that they were experiencing in the home community. Indeed, the social ostracization was so significant that the offender's parents expressed reservations about whether they could ever return to the home community even after the banishment was lifted: *ibid* at para 103. While Justice Doulis did not explain the specific effect of the banishment on his sentencing decision, there is no doubt that it was ameliorating.

201 *LR #1*, *supra* note 122 at para 45.

202 *LR #2*, *supra* note 179 at para 114. Justice Doulis's finding that there was parity in the

be demonstrably unfit to address the "scourge" of intimate partner violence against Indigenous women in Canada. Justice Doulis acknowledged the difficulty in sentencing for violent offences where both the offender and the victim are Indigenous people. This is because of the tension between s. 718.2(e), which requires the court give specific attention to Indigenous offenders, and s. 718.04, which requires the court give primary consideration to the sentencing objectives of denunciation and deterrence.[203]

3) **Significant aggravating factors**: The proposed sentence was not consistent with the significant aggravating factors, increasing the offender's moral blameworthiness:
    - After encountering his intimate partner in an elementary school parking lot with their younger child, the offender's partner told him that she had shared nude (or "almost nude") photographs of herself with several friends and relatives, which caused the offender to get angry and to start arguing with her;
    - At this point, the offender grabbed his partner's cell phone and ripped off her necklace;

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sentence being proposed for the act of intimate partner violence, based on two sentencing decisions he considered where the offenders received non-custodial sentences, is questionable. This is because the facts in both of those decisions are distinguishable. In *R v Geraghty*, 2019 BCPC 202, the violent assaults were committed against an adult male that the offender's spouse was having an affair with. They were not against an intimate partner. Second, the offender's intimate partner was not identified as a vulnerable Indigenous female, meaning s. 718.04 was not triggered. Third, the offender was not identified as an Indigenous person, meaning s. 718.2(e) was not triggered. In the result, the offender was sentenced to a conditional sentence of imprisonment and to two years' probation. In *R v Delgren*, 2019 BCSC 396, while an Indigenous male was found to have committed violent assaults against his intimate female partner over a four-day period, the victim was not identified as a vulnerable Indigenous female, meaning s. 718.04 was not triggered. Therefore, there was no requirement that the sentence give primary consideration to the objectives of denunciation and deterrence. In the result, the offender was sentenced to a conditional discharge and to two years' probation; With respect to the offence of assaulting a police officer with a weapon, while Justice Doulis found that 90 days' imprisonment was outside of the normal sentencing range for the offence (one to five years), there were exceptional circumstances justifying its imposition: *LR #2*, *supra* note 179 at para. 113.

[203] *Ibid* at para 115.

- This resulted in the offender's partner fleeing to the school office and asking the receptionist to call the police;
- In a fit of rage, the offender chased after his partner and caught up with her in the school office;
- Undeterred by the presence of others, the offender proceeded to grab his partner's hair and started punching her in the head, even though she was holding their two-year-old child;
- He then threw his intimate partner on the floor and started kicking her in the ribs;
- When two administrative staff members observed the violent altercation and attempted to intervene, the offender pushed them away;
- Eventually, the staff was able to separate the offender from his partner;
- The offender took the child and fled the school;
- The staff made a report to the RCMP, who attended at the school and found the offender's intimate partner;
- Thereafter, the offender fled to a friend's house, culminating in a dangerous stand-off with police where the offender tried to induce police to shoot him (known as "suicide by cop");
- Eventually, the standoff ended and the offender was arrested;[204]
- In summary, the offences were "violent, prolonged, and uninhibited."[205]

While Justice Doulis found the proposed global sentence of 180 days to be "unfit, perhaps demonstrably unfit," the honourable justice found that because the "so unhinged" test from *Anthony-Cook* was not met, the new joint submission had to be accepted.[206]

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[204] *Ibid* at paras 9-17.

[205] *LR #1*, *supra* note 122 at para 47.

[206] *LR #2*, *supra* note 179 at para 133.

## VI. Joint Submission Sentencing Decision in *Mattess*: The Correct Interpretation and Application of the High Standard for Rejection of a Joint Submission from *Anthony-Cook*

### 1. Decision on Joint Submission and Anthony-Cook Threshold

In *Mattess*,[207] the offender, an Indigenous male, was convicted (after pleading guilty) of break and enter into a dwelling house with intent to commit an indictable offence. Specifically, the offender's intent on the evening in question was to commit a sexual offence (using a weapon) against an Indigenous female while she slept in the dwelling house. This offence would have been completed fully but for the victim awakening in her bed and interrupting the crime while it was in progress. The offender was never charged with sexual assault, even though his intention was to commit a sexual offence.[208] The joint submission of counsel initially recommended nine to twelve months, followed by a period of probation. As the offender's time in pre-sentence custody increased, counsel revised their joint position to 36 months, less time served of almost 33 months.[209] Counsel did not provide any authority to justify either the old or new joint submission on sentence.[210]

While recognizing that "joint submissions are rarely questioned and are routinely followed by the court," and the good reasons for this[211]— and while recognizing the high threshold for rejection of a joint submission from *Anthony-Cook*[212]— Justice S. Keyes nonetheless found that the new joint submission proposing 36 months, less time served, was unsatisfactory on its face. Justice Keyes indicated that the old joint submission proposing nine

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207 *Supra* note 22.

208 *Ibid* at paras 1-7.

209 *Ibid* at para 159.

210 *Ibid* at para 143.

211 *Ibid* at para 137. The honourable justice, *ibid*, recognized that joint submissions were important to the administration of criminal justice since they offered a degree of certainty and promoted the efficiency of the administration of justice but that these reasons did not justify accepting a joint submission that fundamentally departed from the principles of sentencing appropriate to a case.

212 *Ibid* at para 138.

to twelve months was similarly unacceptable on its face. This is because, among other things, the old and new joint submissions fundamentally departed from the requirement that primary consideration be given to the sentencing objectives contained in s. 718.04:

> I am obliged by s. 718.04 of the Criminal Code to give primary consideration to the objectives of denunciation and deterrence in this case. In my view, the proposed sentence of nine to 12 months' incarceration will not serve those objectives at all, nor will the new sentence submission of 36 months, less time served. But more significantly, a sentence in this range will not serve to protect women from Mr. Mattess – it will not come anywhere close to doing that. I find that the joint submission of nine to 12 months, or even the new joint submission of 36 months – the same sentence that was imposed for his previous conviction for sexual assault – which is almost equivalent to his time already served, is still manifestly unfit.[213]

As per *Anthony-Cook*,[214] since the honourable justice was faced with a joint submission that he found to be unacceptable on its face for being decidedly too low, he had to inquire with counsel into the circumstances that led to the making of the proposed sentence, including the existence of any *quid pro quos*. Accordingly, the honourable justice offered defence counsel an adjournment to consider whether the offender should be permitted to withdraw his guilty plea, or to make additional submissions with reference to case law or the existence of a *quid pro quo* that might justify the proposed sentence.[215] The offender chose not to withdraw his guilty plea, and there was no *quid pro quo* to justify the proposed sentence.[216] As a result, the joint submission had to be rejected because it did not give primary consideration to the sentencing objectives in s. 718.04 and failed to meet the fundamental purpose of sentencing, which is to protect the public:

> The proposed joint submission runs contrary to the principles of sentencing and has little denunciatory or deterrent effect, both specifically and generally. I find the proposed sentence is inconsistent with the directive in s. 718.04 and undermines the fundamental purpose of sentencing – which is to protect the public. The need for specific and general deterrence is pressing, given the prevalence of this sort of offence in northern communities and Mr. Mattess' prior

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213 *Ibid*.

214 *Anthony-Cook*, *supra* note 6 at paras 49-60.

215 *Mattess*, *supra* note 22 at para 144.

216 *Ibid* at para 151.

> convictions for two violent sex offences against a girl and a woman in his community, the last of which drew a sentence of three years.[217]

**2. Cultural Expedience or True Plea Bargain**

With respect to the joint submission, there were no weaknesses to the prosecution's case known to the Crown, or triable issues, in existence at the time that the offender's guilty plea was entered (about six weeks after the offence was committed). Therefore, Justice Keyes found that there was a lack of *quid pro quo* required to make the joint submission acceptable in the sense of being a true plea bargain between the parties.[218] The trial judge's finding did not change after it was learned at the sentencing hearing (over a year after the guilty plea was entered) that the complainant was suffering from drug addiction, was uncommunicative, and might not have been responsive had the matter proceeded to trial:

> With the greatest of respect to counsel, the simple acceptance by the accused of the initial sentence position by the Crown does not magically become a negotiated plea for the purpose of defending a challenged joint submission. The suggestion that a victim is suffering from addictions and is uncommunicative, more than a year after the guilty plea was entered, cannot retroactively become a *quid pro quo* for the guilty plea already entered.[219]

Thus, the joint submission of counsel was nothing more than a cultural joint recommendation that was not entitled to deference and that was correctly rejected by Justice Keyes.

**3. Reservations Expressed as to Compliance with s.718.04**

Notwithstanding the presence of *Gladue* factors[220] and mitigating factor[221] lessening the Indigenous offender's moral blameworthiness, Justice

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217 *Ibid* at para 168.

218 *Ibid* at paras 148-149.

219 *Ibid* at para 150.

220 The *Gladue* factors cited were: (a) a history of sexual abuse by extended family members as a child, and (b) the sociological considerations that apply to Indigenous offenders generally: Indigenous persons have been negatively influenced by the history of colonialism and residential schools forced upon them: *ibid* at paras 57-60.

221 The mitigating factor cited was the offender's guilty plea, which spared the victim and her daughter the harm of having to testify. However, the lack of any stated remorse for the crime committed against the victim, meant that the guilty plea could not necessarily be interpreted as an expression of regret for the offence committed, which would have

Keyes found that the joint submission did not meet the sentencing objectives of 718.04:

1) **Victim impact**: The proposed sentence was not sufficient to address the ongoing psychological harm likely to be suffered by the Indigenous female victim as a result of the acts of sexual violence, since the offender's actions ruined any sense of safety that the victim could have in her own home. It was also not sufficient to address the likely ongoing psychological harm caused to the victim's six-year-old daughter, who had observed a male sexually violating her mother, and who will likely never feel safe in her home again. The offender had violated the sanctity of the victim and her daughter's home, the one place where a person should be able to feel safe.[222]
2) **Lack of parity:** The quantum of the proposed sentence was not consistent with the sentences imposed for similar crimes in the same court jurisdiction, which indicated a range between seven and a half and eight years. Similar crimes would include an offender who invades a house of a sleeping woman armed with a knife, enters her room with the intention to sexually assault her, sexually assaults her using the knife, and has a prior criminal record for two serious sexual assaults against other Indigenous females.[223]

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been further mitigating: *ibid* at paras 30, 40-53. The offender's diminished intellectual capacity was not mitigating because it prevented him from learning anything from treatment programs that are designed to reduce his risk of re-offending sexually against women in his community: at para 54. The offender's sexual victimization as a child was not mitigating because there was an absence of evidence showing that victims of childhood sexual abuse are more likely to sexually assault children than others but was still a relevant fact in determining sentence: at para 55. Unlike his previous sexual offences, the offender's choice to refrain from additional acts of violence such as choking or threats of death when the victim resisted his sexual assault was not mitigating. While the presence of additional acts of violence would have been aggravating, their absence was a neutral consideration: at para 56.

222 *Ibid* at paras 72-74. It is important to note that the victim impacts identified by the honourable justice were based on reasonable inference. The victim never made a victim impact statement since she was suffering from grief over the death of her husband when the sexual offence occurred. Additionally, she was suffering from substance abuse, which was likely a side effect of the trauma she was experiencing: at para 71.

223 *Ibid* at paras 121-22.

3) **Significant aggravating factors**: The proposed sentence was not consistent with the significant aggravating factors, increasing the offender's moral blameworthiness:
    - The dwelling house was occupied at the time the break and enter occurred—the offender, knowing that the dwelling house was occupied, used violence against the victim by sexually assaulting her by cutting the crotch of her tights with his knife (even though no injuries to the victim were caused);[224]
    - Even though the offender was not charged with sexual assault, the offender committed a sexual assault against the victim after committing the act of break and enter;[225]
    - The offender armed himself with a knife to facilitate the act of sexual violence he intended to commit;[226]
    - The offender continued his sexual violence against the victim even when the victim's six-year-old daughter, who was present in the room, observed him with his pants down and awakened her mother. The offender continued the offence until the victim confronted him and chased him away.[227]
4) **Maximum penalty:** The proposed sentence of 36 months, less time served, was substantially lower than the maximum penalty available for the commission of the offence of break and enter with an intent to commit an indictable offence, being eight years, based on the aggravating factors and the other relevant facts of the case.[228]

In light of the above, and accounting for the mitigating factors, including the offender's early guilty plea, his cognitive difficulties, and the *Gladue* factors, Justice Keyes rejected the joint submission of counsel of 36 months, less time served, and substituted a sentence of six-and-a-half years, less time

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224 *Ibid* at paras 67, 69. These facts were found to be a statutorily aggravating factor pursuant to s. 348.1 of the *Criminal Code*.

225 *Mattess*, *supra* note 22 at para 67.

226 *Ibid* at para 70.

227 *Ibid* at para 72.

228 *Ibid* at para 170.

served.[229] Unlike in the previous four sentencing decisions considered, the honourable justice found that the "so unhinged" test from *Anthony-Cook* was met and required the rejection of the joint submission:

> I have considered the effect of this joint submission from the point of view of a reasonable, informed person with the requisite attitudes. I am of the view that this is a sentence proposal which is so unhinged that, if imposed, it would lead a reasonable, informed member of the public to conclude that administration of justice had in fact broken down. This is Mr. Mattess' third sexually motivated offence – this time involving a home invasion and a knife, in the presence of a child. Had the Crown appeared before me seeking a dangerous offender designation and an indeterminate sentence for Mr. Mattess, I would not have been surprised; such a sentence would be appropriate, given the need to protect women from Mr. Mattess.[230]

## VII. CONCLUSION

This article has demonstrated that while the *Anthony-Cook* framework, in particular the "so unhinged" test, sets a high bar for rejection of a joint submission on sentence, it should not be interpreted as making it impossible to reject a joint submission. Where a joint submission is decidedly too low to meet the sentencing objectives in s. 718.04, the joint submission should be rejected precisely because the "so unhinged" test is met. This is because a reasonable person would find that the proper functioning of the criminal justice system had broken down, *i.e.*, that s. 718.04—containing important and mandatory sentencing objectives—was being contravened.

It follows that trial judges should not continue to use the high threshold from *Anthony-Cook* as a justification for imposing unduly lenient joint submissions against offenders who engage in acts of abuse against Indigenous women. The systemic benefits of joint submissions for the criminal justice system, while noteworthy and desirable, should not be

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229 *Ibid* at paras 170-71. Justice Keyes' conclusion that a fit sentence would be six-and-half years as opposed to 36 months increased the proposed sentence by approximately 2.2 times, which means that significantly more than "tinkering" with the joint submission was required to bring the joint submission into conformity with the range of sentence required. This supports the argument that there was a legal basis for Justice Keyes to substitute his opinion for the considered agreement of counsel: *Anthony-Cook*, *supra* note 6 at para 63.

230 *Mattess*, *supra* note 22 at para 167.

allowed to obfuscate the mandatory, remedial, and fundamentally important nature of the sentencing objectives contained in s. 718.04. These sentencing objectives are not superfluous; they were passed specifically because trial judges were not sufficiently addressing the need to denounce and deter crimes of abuse against Indigenous females. If the previous sentences had been sufficient, there would have been no need for the new legislative enactments.[231]

Notwithstanding the high threshold set in *Anthony-Cook*, Parliament did not exempt joint submissions from the requirements of s. 718.04. This is why Justice Keyes, in *Mattess*, when sentencing the offender for acts of sexual violence against an Indigenous female, did not permit *Anthony-Cook* to prevent him from rejecting the joint submission of counsel to ensure that the sentence imposed had sufficient denunciatory and deterrent effect. This resulted in a sentence that was more than twice as long as the proposed sentence of counsel (six and a half years as opposed to 36 months). That said, where the Crown's case is flawed, accepting a contentious joint submission may be justified to ensure the certainty of the Crown's prosecution. However, where no *quid pro quo* exists, and the joint submission merely promotes expedience, s. 718.04 should be strictly enforced, and the joint submission should be rejected. Failing to do so risks undermining Parliament's directive, which is rooted in the findings of the National Inquiry into Missing and Murdered Indigenous Women and Girls, and may allow the systemic abuse of Indigenous women to continue unchecked.

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[231] *Ibid* at para 81.