SUPREME COURT OF YUKON

Citation: *R v Nuyaviak,* 2015 YKSC 51

Date: 20151106
S.C. No. 15-AP007
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ELAINE JODY COCKNEY NUYAVIAK

Appellant

Before Mr. Justice L.F. Gower

Appearances:
Kevin MacGillivray — Counsel for the Respondent
Lauren Whyte — Counsel for the Appellant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an appeal from a sentence imposed by a Deputy Territorial Court Judge on May 29, 2015, on charges of mischief, refusing to provide a breath sample and breach of undertaking. The appellant acknowledged that she is an alcoholic. Crown and defence counsel jointly recommended the following sentence: a 12-month probation order for the mischief; a 30-day intermittent jail term and a two-year driving probation for the refusal offence; and 15 days consecutive intermittent jail for the breach of undertaking. The judge imposed this sentence, including all the conditions sought by

counsel in the probation order, one of which was that she seek alcohol counselling, as directed by her probation officer.

[2] However, the sentencing judge then "jumped" the joint submission by imposing an additional three-year probation order for the refusal offence, which included a condition that the appellant abstain from alcohol for the first four months of the order, and after that, that she not be under the influence of alcohol in a public place for the remainder of the order. (This condition was inaccurately recorded on the original three-year probation order and the order was subsequently amended)[1]. The sentencing judge also imposed a condition that the appellant not attend any premises where the primary purpose is the sale of alcohol. Finally, the sentencing judge imposed a condition that the appellant is not to operate a motor vehicle anywhere in Canada until her outstanding fine from a previous impaired driving offence in 2014 ($1,300) and the victim fine surcharges imposed for the current offences (totalling $300) have been paid in full.[2]

[3] The sentencing judge said the following, just before setting out the conditions of the three-year probation order:

> In addition to that, there will be an adult probation order. And that is going to be fixed at a period of three years, notwithstanding any agreement between the Crown and defence, and there is a reason for that.

Both counsel agree that the sentencing judge failed to provide this reason. Indeed, he ultimately gave no reasons whatsoever for departing from the joint submission. Counsel further agree that this constitutes an error in principle.

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[1] The amended probation order is dated October 14, 2015. The amended condition now reads: "For the first four (4) months you are not to possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor and thereafter not be under the influence of alcohol in a public place."

[2] Crown counsel conceded that this condition in the three-year probation order was demonstrably unfit and ought to be set aside.

LAW

[4] The cases are all in accord that a sentencing judge is not bound to accept a joint submission, but the instances in which a judge departs from such a submission will usually be rare. However, there is some disagreement in the cases about the circumstances which will justify a departure from a joint submission.

[5] One line of cases holds that this should only be done where acceding to the joint submission would be contrary to the public interest or would bring the administration of justice into disrepute: *R. v. T.M.N*., 2002 BCCA 468; *R. v. Cerasuolo*, (2001), 140 O.A.C. 114. This language arises from the *Martin Committee Report* in 1993, which acknowledged that plea-bargaining has become a routine part of the criminal justice system and that the process is undermined if joint recommendations are too readily rejected by the sentencing judge (*Ontario Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Queens Printer for Ontario, 1993), *Recommendation 58* (Chair: The Honourable G. Arthur Martin).

[6] Another line of cases holds that departure may be justified if the sentencing judge concludes that the proposed sentence is simply "unfit": *R. v. Bezdan*, 2001 BCCA 215; *R. v. C.(G.W.)*, 2000 ABCA 333; and *R. v. Webster*, 2001 SKCA 72. Arguably, this may be seen as a slightly lower standard than the one arising from the *Martin Report*: see *R. v. Anthony-Cook*, 2015 BCCA 22, at para. 23.

[7] However, in *R. v. Douglas* (2002), 162 C.C.C. (3d) 37 (Q.C.A.), Fish J.A. (as he then was) suggested that the difference in terminology may be more of a matter of form and substance, stating, at paras. 43 and 51:

> [43] Whatever the language used, the standard is meant to be an exacting one. Appellate courts, increasingly in recent years, have stated time and time again the trial judges should not reject jointly proposed sentences unless they are "unreasonable", "contrary to the public interest", "unfit", or "would bring the administration of justice into disrepute".
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> …
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> [51] … I do not believe that the Ontario standard [i.e. that the jointly recommended sentence is contrary to the public interest and would bring the administration of justice into disrepute] departs substantially from the test of reasonableness articulated by other courts, including our own…. (my emphasis)

[8] In the Yukon, the standard thus far seems to be whether the joint submission would be contrary to the public interest or bring the administration of justice into disrepute: *R. v. Dennis*, 2014 YKSC 14, at para.4.

[9] In *R. v. Sinclair*, 2004 MBCA 48, Steel J.A. , speaking for the Manitoba Court of Appeal, helpfully summarized the law with respect to joint submissions, at para.17, as follows:

> (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.
>
> (2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
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> (3) In determining whether cogent reasons exist (i.e., in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum

> among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
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> (4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.
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> (5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like. (my emphasis)

[10] Section 687(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, (the "*Code*") sets out the powers of the court on an appeal against sentence:

> 687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
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> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
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> (b) dismiss the appeal. (my emphasis)

[11] *R. v. Shropshire*, [1995] 4 S.C.R. 227, held, at para. 46, that a sentence is not fit when it is "clearly unreasonable".

[12] *R. v. C.A.M.*, [1996] 1 S.C.R. 500, followed *Shropshire* and concluded at para. 90:

> [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit…

On its face, this paragraph would suggest that grounds for intervention might be either an error in principle (which for the sake of argument might include a failure to consider a factor or an overemphasis of another factor), on the one hand, or when the sentence is demonstrably unfit. In other words, the passage suggests a disjunctive test.

[13] However, in *R. v. Johnson* (1996), B.C.A.C. 261, the British Columbia Court of Appeal interpreted this passage as creating a conjunctive test, such that even where there is an error in principle, the appeal court must still consider the fitness of the sentence. At para. 37, the Court stated as follows:

> 37 By these words I understand the court to have meant that without an error in principle the appeal court should only disturb a sentence if it can be said to be unreasonable (demonstrably unfit); that is, clearly outside the range of sentences imposed for the type of offence and the type offender. If the appellant demonstrates an error in principle the question remains whether that error led the trial judge to impose a sentence that was unfit. Although the discretion of a trial judge in sentencing should not be interfered with lightly deference plays a less important role where there is an established error in principle. The question becomes whether the errors in principle led the trial judge to impose a sentence which was demonstrably unfit.

[14] With great respect, this paragraph is confusing. The corollary of the first sentence is that with an error in principle it is permissible for the appeal court to intervene to disturb the sentence, regardless of the fitness of the sentence. However, the Court then

goes on in the second half of the paragraph to say that even where there is an error in principle, that alone is not sufficient to vary the sentence. Rather, the appeal court must also determine the additional question of whether the error resulted in an unfit sentence.

[15] The Court of Appeal of Yukon, of course comprised principally of the members of the British Columbia Court of Appeal, recently applied this passage in *Johnson* in *R. v. Dickson*, 2015 YKCA 17, stating at para. 32:

> [32] Even if the judge had committed the error alleged by the Crown [overemphasis of a particular factor], the appellant must still establish that the error resulted in an unfit sentence: *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 (B.C.C.A.) at para.37.

[16] In a slightly earlier decision, *R. v. Schinkel*, 2015 YKCA 2, the Court of Appeal of Yukon again applied *Johnson*, but used somewhat different language to describe the process for determining a fit sentence. At paras. 16 to 18, the Court stated:

> 16 The determination of a fit sentence is entitled to deference. The standard of review of the fitness of a sentence is unreasonableness: *R. v. Shropshire*, [1995] 4 S.C.R. 227 and *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500. Thus, an appellate court may only intervene if it can be said the sentence is "clearly unreasonable" (*Shropshire* at para. 46). A sentence is demonstrably unfit or clearly unreasonable if the judge erred in principle by employing an irrelevant factor, overlooking or overemphasizing a relevant factor, or imposing a sentence in "substantial and marked departure" from the range of sentences imposed for similar offences and similar offenders (*Shropshire* at para. 50; *M. (C.A.)* at paras. 90 and 92).
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> 17 It is not open to an appellate court to interfere with a sentence simply because it would have weighed the relevant factors differently. The question is whether the trial judge, in weighing the factors, exercised his or her discretion unreasonably: *Nasogaluak* at para. 46.

> 18 Where the appellant establishes an error of principle and/or that the sentence is in "substantial and marked departure" from the range of sentences imposed for similar offences and similar offenders, he or she must still establish this resulted in an unfit sentence: *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 at para. 37 (B.C.C.A.); *Nasogaluak* at para. 44. (my emphasis)

[17] The reference by the Court of Appeal of Yukon in the above paragraphs to *R. v. Nasogaluak*, 2010 SCC 6, is interesting, because the Supreme Court of Canada in that case arguably affirmed that an appeal court may intervene to vary a sentence if either the sentence is unfit or it reflects an error in principle, in other words the disjunctive test. At para. 46 of *Nasogaluak*, the Supreme Court stated:

> 46 Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (at para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:
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> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate

> court interfere with the sentence on the ground the trial judge erred in principle. (my emphasis)

[18] In between *Dickson* and *Schinkel*, the Court of Appeal of Yukon decided *R. v. Heathcliff*, 2015 YKCA 15, which referred back to the Supreme Court of Canada decision in *C.A.M.,* cited above, and again used language suggesting that the test for intervention to various sentence is disjunctive. At para. 6, the Court stated:

> 6 The applicable standard of review is one of deference. An appellate court may intervene to vary a sentence only if the trial judge erred in principle, failed to consider a relevant factor, overemphasized or gave inadequate weight to a relevant sentencing factor, or if the sentence is demonstrably unfit: *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para 90… (my emphasis)

[19] The British Columbia Court of Appeal again applied the conjunctive approach in *R. v. Doiron*, 2015 BCCA 408, a case which also referred to the two bases for dealing with the rejection of a joint submission. *Doiron* is an interesting case because both Crown and defence agreed that the sentencing judge committed an error by failing to permit the appellant to address the court, even when he expressly requested the opportunity to do so, contrary to s. 726 of the *Code*. In that sense, *Doiron* is similar to the case at bar, in which both Crown and defence agree that the failure of the sentencing judge to provide reasons amounts to an error in principle. The Court stated, at paras. 13 and 14:

> 13 Reference was made to the two approaches to dealing with the rejection of joint sentence submissions: one, a sentencing judge should depart from a joint submission only if acceptance would bring the administration of justice into disrepute (*R. v. T.M.N.*, 2002 BCCA 468 at paras. 13-14); two, a joint submission should be rejected only if the proposed sentence is unfit (*R. v. Bezdan*, 2001 BCCA 215 at

> para. 15). The latter approach requires the judge to give considerable weight to the submission.
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> 14 The appellant states that it is not necessary to attempt to reconcile these approaches because on either approach the judge erred in rejecting the joint submission. The Crown agrees that it is unnecessary to reconcile the approaches because the judge having erred in failing to give the appellant an opportunity to address the Court, this Court must determine whether the sentence imposed "is demonstrably unfit or clearly unreasonable". (my emphasis)

Ultimately, the Court of Appeal concluded that it was not clear on the record that Crown and defence counsel were in fact proceeding on the basis of a joint submission. Therefore, the criteria for rejecting same were not engaged (para. 18).

[20] The Supreme Court of Canada more recently touched on this issue in *R. v. Sipos*, 2014 SCC 47, where it made the following comment at paras. 25 and 27:

> 25 It is worth pausing here to contrast appellate review of a dangerous offender designation with that of what I will refer to as "regular" sentence appeals. In indictable matters, the offender may appeal the sentence passed by the trial court unless the sentence is one fixed by law: s. 675(1)(*b*). On the appeal, the court of appeal is to "consider the fitness of the sentence" and may "on such evidence, if any, as it thinks fit to require or to receive", vary the sentence or dismiss the appeal: s. 687(1). This allows for appellate review for error in principle **and** for whether the sentence is demonstrably unfit or manifestly wrong. This is a highly deferential standard of review. As Lamer C.J. put it in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
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> > ... absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a [page 436] sentence imposed at trial if the sentence is demonstrably unfit.
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> (See also *R. v. Shropshire*, [1995] 4 S.C.R. 227, at paras. 45-50; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17.)
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> …

> [27] …On a regular sentence appeal, the appellate court's role is to determine the legality and fitness of the sentence imposed at trial. If the court of appeal finds that there are grounds requiring its intervention, it imposes a fit sentence in what amounts to a new sentencing hearing: *Criminal Code*, s. 687. (my emphasis)

Paragraph 25 suggests that the test is conjunctive, in that the appeal court must consider both whether there was an error in principle and whether the sentence was unfit. On the other hand, paragraph 27 suggests that the test is disjunctive, because, if the appeal court determines that the sentencing judge made an error in principle, then that would be a ground requiring intervention and the appeal court would then move on to determine what fit sentence should be imposed. I suppose at that stage, one of the options open to the appeal court would be to take a fresh look at the sentence appealed against to determine whether it is fit, regardless of the error in principle. In that way the appeal court would satisfy the mandatory requirement in s. 687(1) of the *Code* to "consider the fitness of the sentence appealed against".

[21] Despite this apparent divergence of approach, it is perhaps more helpful to remember that sentencing is an exercise in discretion in which the sentencing judge weighs various factors and determines where the sentence should fit on the spectrum of reasonable sentences. In the case of a joint sentence, the sentencing judge should give very serious consideration to the proposed sentence. If the sentencing judge chooses to exercise his or her discretion by departing from the joint submission, then he or she should provide cogent reasons and consider the other procedural issues recommended by the Manitoba Court of Appeal in *Sinclair*, cited above. With both divergent and joint sentence submissions, the sentence imposed is entitled to high or considerable deference, because the sentencing exercise is one of discretion. However, if the

sentencing judge exercises his or her discretion unreasonably, then that constitutes an error in principle, and justifies appellate court interference with the sentence: see Laskin J.A. quoted in *R. v McKnight* (1999), 135 C.C.C.(3d) 41 (Ont.C.A.), referred to with approval by the Supreme Court in *Nasogaluak* at para. 46. Thus, an error such as an error in principle, a failure to consider or an overemphasis of a relevant factor, or employing an irrelevant factor all result in a lowering the standard of review of the fitness of the sentence, which is mandatory under s. 687(1) the *Criminal Code*, from high deference to a lesser degree of deference, depending upon the nature of the error. A serious error in principle may result in little or no deference. However, something less serious may not significantly reduce the level of deference by the appeal court.

ANALYSIS

[22] In the case at bar, we have the unusual circumstance of the sentencing judge imposing a result which departed from the joint submission without giving any reasons whatsoever for doing so. Both Crown and defence counsel referred to this as an error in principle, and I agree with that description. Further, it seems to me that the consequence of this error is that it is not possible for this appeal court to give any deference to the sentencing decision as a whole, since it is not possible to examine how or why the sentencing judge weighed or balanced the relevant factors leading him to impose a sentence arguably more severe than that jointly proposed by counsel. For the same reason, it cannot be said that the sentencing judge exercised his discretion reasonably, since it is axiomatic that such discretion must be exercised judicially, which by definition requires a weighing of the relevant factors and the provision of reasons.

[23] How then is it possible to assess the fitness of the result imposed by the sentencing judge? I am unable to see how such an assessment can be done in a vacuum, i.e. by looking solely at the result without knowing the rationale for it. I therefore conclude that it is not possible to say that the result is fit. In this sense, I conclude that the so-called error in principle by the sentencing judge led to a sentence which is demonstrably unfit.

[24] Thus, regardless of whether the standard for departing from a joint submission in the Yukon is that acceding to the submission would: (1) be contrary to the public interest or would bring the administration of justice into disrepute; or (2) lead to an unfit sentence, the failure to give reasons ought to be sufficient reason to intervene and vary the sentence. The next step then is to determine what that variation should be. Since both Crown and defence counsel agreed in the Territorial Court that the joint submission was a fit sentence, then logically that should be my starting point as an appeal court. Further, I am unable to say that the joint submission would be contrary to the public interest or would bring the administration of justice into disrepute. Nor would the joint submission lead to an unfit sentence. Therefore, I feel bound to accept it. Accordingly, I allow the appeal and set aside the amended three-year period.

[25] Crown counsel on this appeal submitted that despite the fact that the sentencing judge committed an error in principle by failing to provide any reasons for departing from the joint submission, that alone is not sufficient to justify intervention and variation by this Appeal Court. Rather, the Crown submitted that it is still necessary for this Court to consider whether the sentence imposed was nevertheless fit. In this regard, Crown appeal counsel took a different position from Crown counsel at the original sentencing.

In particular, he submitted that the additional three-year probation order is rehabilitative and that the abstention clause and the other alcohol-related conditions may be characterized as assisting the appellant in her recovery from her alcoholism.

[26] In my view, the Crown's position on this appeal is untenable for two reasons. First, as I concluded above, it is logically not possible to determine whether the sentence imposed below is fit, because we have no reasons at all from the sentencing judge providing a rationale for the sentence. In any event, it must be remembered that the appellant only had one related conviction (driving over 80) on her criminal record prior to the sentencing hearing. She had no breaches of process and had been on a strict undertaking between the entry of her guilty pleas and her sentencing, without any transgressions. Here, I agree with defence counsel that the public is protected from the appellant's struggles with alcoholism by the two-year driving prohibition and the one-year probation order. Objectively, there does not appear to be any need for the appellant to be supervised for a further period of two years.[3]

[27] Second, it is unfair for the Crown, in these particular circumstances, to repudiate the position that it took before the sentencing judge. The Québec Court of Appeal in *R. v. Valiquette*, [1990] J.Q. no. 1070, was addressing the issue of when a sentencing judge may depart from a joint submission and commented as follows:

> While a sentencing judge is in no way bound by a joint recommendation of crown and defence counsel as to sentence, trial judges usually pay a good deal of attention to a common recommendation by experienced and competent counsel. Very often these recommendations are followed and, where they are acted on and the suggested sentence has been imposed by the sentencing judge, the parties should not lightly be heard to repudiate in appeal the

[3] Obviously, the three-year probation order would have run concurrently with the one-year probation order.

> positions they have taken before the sentencing judge. This principle has been applied more strictly to the crown than to the accused, however… (p. 6, my emphasis)

[28] Further, the Prince Edward Island Court of Appeal, in *R. v. MacArthur*, [1978] P.E.I.J. No. 95, quoted with approval Hugessen J. in *R. v. Roy*, 18 C.R.N.S. 89, as follows:

> "The Crown, like any other litigant, ought not to be heard to repudiate before the appellate court the position taken by its counsel in the trial court, except for the gravest possible reasons. Such reasons might be where the sentence was an illegal one, or where the Crown can demonstrate that the counsel had in some way been misled, or finally, where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the crime and the gross insufficiency of the sentence." (para. 6, my emphasis)

In the case at bar, Crown counsel on the appeal put forward no justification for repudiating the position taken by Crown counsel in the Territorial Court.

[29] In *Cerasuolo*, cited above, Finlayson J.A., speaking for the Ontario Court of Appeal, stated at para. 9:

> [9] The Crown and the defence bar have cooperated in fostering an atmosphere where the parties are encouraged to discuss the issues in a criminal trial with a view to shortening the trial process. This includes bringing issues to a final resolution through plea-bargaining. This laudable initiative cannot succeed unless the accused has some assurance that the trial judge will in most instances honour agreements entered into by the Crown.

To this I would add that it is similarly important for the Crown to honour its commitments in the plea-bargaining process. Resiling from positions taken at the first instance, when such matters proceed to appeal, can only serve to undermine the effectiveness of that process: see also *Sinclair*, cited above, at para. 8.

CONCLUSION

[30] The appeal is allowed. The amended three-year probation order is set aside. The balance of the original sentencing orders, including the 30-day intermittent sentence and associated probation order, the two-year driving prohibition, the fine/surcharge order, and the one-year probation order remain [4]. This restores the original joint submission as the sentence imposed.

GOWER J.

[4] The original one-year probation order of May 29, 2015 was amended for a typographical error on October 14, 2015. It is this order which will now govern.