SUPREME COURT OF YUKON

Citation: *R v Silverfox*
2024 YKSC 56

Date: 20241004
S.C. No. 20-01517C
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

WAYNE SILVERFOX

Before Chief Justice S.M. Duncan

Counsel for the Crown — Leo Lane

Counsel for the Defence — Amy Steele

This decision was delivered in the form of Oral Reasons on October 4, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): Wayne Silverfox was found guilty by a jury of impaired driving (operating a conveyance while impaired by alcohol) contrary to s. 320.14(1)(a) on January 13, 2023. The jury also convicted him of dangerous driving (s. 320.13(1)) and flight from police (s. 320.17). I must decide a fit sentence for these convictions.

[2] I must also decide the Crown's application that Mr. Silverfox be declared a long-term offender under s. 753.1 of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*" or "*Code*"), and the length of any long-term offender supervision order. In order to declare Wayne Silverfox a long-term offender, I must impose a period of

imprisonment of at least two years and order that he be subject to a long-term supervision order for a maximum period of 10 years (s. 753.1(3)). If I do not find him to be a long-term offender, I must impose a sentence in the normal course (s. 753.1(6)).

[3] The Supreme Court of Canada in *R v LM*, 2008 SCC 31, stated that "[p]arliament intended that the judge determine the appropriate sentence first" no doubt because one of the prerequisites to a finding that a person is a long-term offender is the imposition of a period of two years or more of imprisonment. While some courts, including this one, have in some cases determined the outcome of the long-term offender application first and the appropriate sentence after, those are generally cases where a sentence of more than two years is indisputable.

[4] In this case, the Crown's position is that a sentence of three years be imposed, while defence position is that a sentence of less than two years be imposed — in fact, time served plus probation. Given this difference of views and the implications of a finding that the sentence in its totality be more than two years, I will determine the appropriate sentence first and then turn to the long-term offender application. I have considered all of the evidence provided for and during the sentencing hearing for both parts of this sentencing.

[5] I will first address the facts/circumstances of the offence; the purpose and principles of sentencing; the positions of Crown and defence; the circumstances of Mr. Silverfox, including *Gladue* factors; other sentencing decisions for people charged with similar offences; aggravating and mitigating circumstances in this case; and then the appropriate sentence. I will then address the long-term offender application; the

legal framework; the evidence of the assessor; relevant additional evidence from Mr. Silverfox's criminal and personal history; and then my conclusion.

[6] Before doing this though, I want to address the context of the 2018 amendments to the *Criminal Code* to driving offences and, in particular, the impaired driving provision (s. 320.14(1)(a)), as this is relevant to both the appropriate sentence and the long-term offender application. Section 320.14(1)(a) is the predicate offence, that is, the offence that gives rise to the long-term offender application.

Legal Context

[7] In December 2018, Bill C-46, that introduced amendments to driving provisions of the *Criminal Code*, became law (*An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts,* SC 2018, c 21 (Part VIII.1)). All of the offences with which Mr. Silverfox was charged and convicted were included in these amendments: impaired driving (s. 320.14(1)(a)), dangerous driving (s. 320.13(1)), and the flight from peace officer (s. 320.17). These s. 320 offences were also added to the *Criminal Code* as designated offences.

[8] The amendments increase the maximum sentence from five years to 10 years for the offence of impaired driving when proceeded by way of Indictment. This 10-year maximum allows the prosecution to bring an application for a repeat offender to be designated a long-term (or dangerous) offender. Before the amendments, this was not possible because the maximum penalty was five years, and one of the criteria for a long-term offender application is that the offence be punishable on Indictment by 10 years' imprisonment or more.

[9] It is instructive to review the preamble to Bill C-46, and the recognition and declaration provision in s. 320.12, which were summarized in *R v Boily*, 2022 ONCA 611. It is quoted in *R v Romaniuk*, 2024 MBCA 20 ("*Romaniuk")* at para. 31:

> The preamble to Bill C-46 sets out nine considerations motivating the reforms, including the fact that dangerous driving and impaired driving injure and kill "thousands of people in Canada every year"; the need to denounce dangerous driving and impaired driving as "unacceptable at all times and in all circumstances"; and the importance of simplifying the procedures around detecting impaired and dangerous driving and deterring people from engaging in this conduct.
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> Section 320.12 of the *Criminal Code* – a statement of principles – is thematically consistent with the preamble to Bill C-46, and emphasizes the fact that driving is a "privilege that is subject to certain limits in the interests of public safety". The statement of principles also recognizes that "the protection of society is well served by deterring" drivers from operating conveyances in a way that is dangerous to the public or while impaired "because that conduct poses a threat to the life, health and safety of Canadians".

[10] At the proceedings on May 10, 2018, of the Senate Standing Committee on Legal and Constitutional Affairs, the Department of Justice Criminal Law Policy counsel testified as follows about the amendments:

> The underlying approach to penalties in this bill is to treat impaired driving as the serious offence that it is, the one that kills and injures more Canadians than any other criminal offence. It is reflected in several ways, not the least of which is raising the penalty for impaired driving causing bodily harm to 14 years and the increase in penalty to 10 years on indictment for routine no bodily harm and no death injuries.
>
> Behind that is the requirement that the person must be facing 10 years on an offence for which he's convicted before we can bring in a dangerous offender or a long-term offender application. We are currently in the situation where a person who has half a dozen or a dozen offences, we have to wait for them to kill or injure someone before we can try to

> get them permanently off the road as possibly a dangerous offender.

[11] Statistics Canada information as of July 27, 2023, provided that from 2003-2022, the rate of impaired driving incidents in Canada generally decreased from a five-year average of 243 incidents per 100,000 people to 199 incidents. In the Yukon from 2003-2022, the rate of impaired driving increased from a five-year average of 963 incidents per 100,000 people to 1,584 incidents. This is eight times higher than the national rate.

[12] The Supreme Court of Canada has said in sentencing decisions, that a balance must be struck by sentencing judges to achieve proportionality, the moral blameworthiness of the offender, the circumstances of the offender, the societal goals of sentencing, and the needs and current conditions of the local community must all be taken into account (*R v M (CA)*, [1996] 1 S.C.R. 500 at para. 91).

[13] Parliament's 2018 *Criminal Code* amendments reflect a change to the public understanding of impaired driving offences, among other things. The increased concerns about repeat impaired driving offenders have resulted in the acknowledgement and recognition that protection of society can be accomplished by deterring drivers from driving while impaired. And as noted by the Manitoba Court of Appeal in the *Romaniuk* decision:

> [32] … The changes to the legislation resulting from Bill C-46 are important … to the extent that they defined and expressed the intent of Parliament and increased the penalties for the offences at issue.

Facts/circumstances of the offences

[14] This was a jury trial. As a result, the Court is required to accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty and, as well,

may find any other relevant fact disclosed by the evidence at trial to be proved. In other words, the jury must have been satisfied beyond a reasonable doubt of the facts necessary to prove the essential elements of the offences (s. 724(2)).

[15] The offences occurred on September 4, 2020. At that time, Mr. Silverfox was prohibited from operating a motor vehicle on any public road, pursuant to s. 259 of the *Criminal Code*. He was also subject to an undertaking prohibiting him from consuming alcohol and driving a motor vehicle arising from other charges of impaired driving from 2017 and 2018.

[16] There was a significant amount of video evidence shown at trial from the police officers' vehicle cameras as well as from security cameras in public places, such as the gas station.

[17] Shortly after 8 p.m. on September 4, 2020, Mr. Silverfox drove an older white Mazda pickup truck to the Tempo gas bar in the Riverdale subdivision of Whitehorse. He got out of the truck, walked around it unsteadily, then got back in the driver's seat and drove away. A witness called the police, describing the vehicle, telling them that the driver looked drunk and was driving quickly toward downtown.

[18] Mr. Silverfox drove his truck through downtown Whitehorse on the two main arteries (Second Avenue and Fourth Avenue). An RCMP officer pulled up behind him and activated the police vehicle lights and siren in an attempt to stop Mr. Silverfox's truck. Mr. Silverfox activated his right turn signal but, instead of pulling over, he continued driving downtown at a high speed with the police car following him.

[19] Mr. Silverfox's truck was captured on video near a busy intersection veering into the opposite lane, driving into oncoming traffic, and running a red light. He turned left on

another red light at the intersection of Second and Fourth Avenue, narrowly missing a vehicle coming into the intersection. He drove at excessive speed southeast along Fourth Avenue, and he illegally used the centre turning lane to pass vehicles.

[20] At that time of the evening, there were vehicles and pedestrians on the streets of downtown Whitehorse. Mr. Silverfox's route included passing a playground and the downtown emergency shelter, where at that time many people congregated outside and crossed the streets adjacent to the shelter.

[21] The police officer was advised by his superior to stop pursuing Mr. Silverfox's truck through downtown for public safety reasons.

[22] Another police officer spotted the white truck on a road east of downtown. The truck pulled out of a wooded driveway and attempted to drive past the police officer in the direction of downtown. The police officer deliberately drove his car into Mr. Silverfox's truck so that the truck came to a stop against a tree. Mr. Silverfox was not hurt. He got out of the truck on the passenger side and was arrested.

[23] In the police car and at the arrest processing unit, Mr. Silverfox showed the following signs of intoxication by alcohol: he smelled of alcohol, his speech was slurred, he was very lethargic and kept saying he wanted to go to sleep while slumping over, he refused to provide breath samples, and he needed two police officers to help him stand up and walk down a hallway. In the breath-testing room, Mr. Silverfox laid his head on the desk and appeared to fall asleep.

[24] Mr. Silverfox was in custody for the offences in this case from September 4, 2020, to February 13, 2022.

[25] In November and December 2020, he pled guilty and was sentenced for two pre-existing impaired driving charges. He served those sentences while in remand for the charges in this case.

[26] He was released in February 2022 to enter a treatment program, which involved residing at the Supervised Housing and Reintegration Program ("SHARP"), a supervised residential facility on the grounds of the Whitehorse Correctional Centre ("WCC") and run by Connective.

[27] His trial proceeded from January 9-13, 2023, and the jury found him guilty of dangerous driving, flight from police, and impaired driving. He had earlier severed and pled guilty to charges of driving while disqualified and breach of undertaking from the same incident and the Crown stayed the charge of refusing to provide a breath sample because of a *Charter* breach.

[28] On May 8, 2023, this Court granted the Crown's application for a dangerous offender ("DO") (or a long-term offender ("LTO")) assessment and appointed forensic psychiatrist Dr. Philip Klassen to conduct the assessment.

Purposes and principles of sentencing

[29] The objectives and principles of sentencing are set out in the *Criminal Code*, and I must be guided by those principles when imposing any sentence.

[30] The fundamental purpose of sentencing is twofold: first, to protect society; and second, to contribute to respect for the law and maintenance of a just, peaceful, and safe society through the imposition of sanctions.

[31] These purposes are governed by objectives, which are also set out in the *Criminal Code*:

(i) denouncing unlawful conduct and the harm to victims or community caused by that unlawful conduct;

(ii) deterring the offender and other persons from committing offences;

(iii) separating the offender from society where necessary;

(iv) assisting in rehabilitating offenders;

(v) providing reparations for harm done to victims and the community; and

(vi) promoting a sense of responsibility in offenders and acknowledging the harm done to victims or the community.

[32] The Supreme Court of Canada in *R v Parranto*, 2021 SCC 46, summed up the goal of sentencing in each case by saying:

> [10] The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. ...

[33] What “proportionality” means is that the Court must ensure that the sentence imposed is proportionate to the gravity, or the seriousness, of the offence and the degree of responsibility, or moral blameworthiness, of the offender (s. 718.1). Proportionality is “closely tied to the objective of denunciation”. It promotes justice for victims and it seeks to ensure the public confidence in the justice system.

[34] The sentencing judge must also consider other principles set out in the *Criminal Code*. These include the principles of parity, restraint, and totality.

[35] “Parity” means that an imposed sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (s. 718.2(b); *R v Friesen*, 2020 SCC 9 (“*Friesen”)*).

[36] “Restraint” refers to an approach that the length of the sentence imposed should not be more than is necessary to achieve the relevant objectives of sentencing. All available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders (s. 718.2(d)).

[37] “Totality” is to ensure that the total sentence does not eliminate the rehabilitation potential of the offender. A fit sentence is always defined by the totality of the circumstances.

[38] A sentencing judge must consider increasing or reducing a sentence if there are aggravating or mitigating circumstances relating to the offence, the offender, or the victim.

[39] A sentencing judge must determine which objective deserves the greatest weight in the circumstances of the case. There is no mathematical formula to follow. Sentencing is an individualized process. The nature of the crime and the characteristics of the offender in each individual case will inform the judge of the relative importance of each objective.

Positions of Crown and Defence

[40] The Crown revised its position during the sentencing hearing. I will refer only to its final position. Recognizing the presence of significant *Gladue* factors for Mr. Silverfox and balancing them against the risk to society of his continuing to drink and drive, as evidenced by the convictions for these offences, the Crown seeks a sentence of three years for the impaired driving offence and one year each concurrent for the

dangerous driving and flight from police, applying the principle of totality. The Crown says this length of sentence responds to the need for denunciation and deterrence for these offences of impaired driving, as well as recognizing the reduction in moral blameworthiness resulting from the *Gladue* factors.

[41] Mr. Silverfox is entitled to credit of 357 days for time served, calculated at 1.5:1. This would reduce Mr. Silverfox's time to two years and eight days. The Crown suggests a further reduction of nine days, on the basis of the totality principle, making it possible for Mr. Silverfox to serve his time in the Yukon and not in a penitentiary. This sentence would be combined with a long-term supervision order for six years.

[42] Defence argues for time served (357 days) plus a three-year probation order, requiring Mr. Silverfox to reside at SHARP. Defence points to the outstanding rehabilitative progress Mr. Silverfox has made over the past two and a half years while living at SHARP.

[43] Defence says that denunciation, deterrence, and public protection can be best served by a structured support system for Mr. Silverfox, as has been in place for him since February 2022 and under which he has succeeded. No long-term supervision order is required. A probation order with strict conditions is sufficient control for him that will protect the public and assist in his rehabilitation.

[44] Defence says this is a unique case because of the significant changes that Mr. Silverfox has demonstrated. He has done exceptionally well over the last two and a half years, and this needs to be recognized in determining an appropriate sentence and considering a long-term offender supervision order.

Circumstances of Wayne Silverfox

[45] Mr. Silverfox was born in 1956 and at the time of the sentencing hearing was 68 years old. He has lived in Whitehorse most of his life. He is a member of the Little Salmon/Carmacks First Nation.

[46] Mr. Silverfox is a victim of the Indian Residential School system. He attended three residential schools: Choutla Residential School in Carcross for four years, beginning in 1962; Yukon Hall in Whitehorse in 1966; and St. George's Residential School in Lytton, British Columbia, in 1967. He was returned to Whitehorse in 1969. He suffered severe physical and sexual abuses in residential school. His culture was denigrated and he was not allowed to speak Northern Tutchone. He later received $120,000 in compensation under the Indian Residential Schools settlement process.

[47] His parents were significant users of alcohol. He had a good relationship with his mother, who spoke Northern Tutchone and lived a traditional lifestyle. He never met his biological father, who was white. He and his stepfather did not have a good relationship. Although there was violence and alcohol misuse in the home, Mr. Silverfox has good memories of his early childhood, especially of spending time in the bush. His stepfather mainly worked cutting wood and died in 1985 due to alcohol misuse. His mother died in 2005 of cancer.

[48] He was unable to live with his mother and stepfather upon his return to Whitehorse in 1969 because of their alcohol use and instead lived with his grandparents. He attended school until Grade 10.

[49] He has worked as a labourer, auto mechanic, painter, campground attendant, and woodcutter. He took a course to become a stationary engineer and did some work

in that area. He has been in custody approximately 50% of the time over the last 50 years and, as a result, his employment record has been sporadic.

[50] He has been married once and has had several common-law relationships. He has four biological children with whom he is not in contact. He also has grandchildren. He is in a current romantic relationship with Eileen Atlin. She was present in court during the trial and the sentencing, and I note is present today.

[51] He has seven siblings who have different biological fathers from him. His three brothers had alcohol-related deaths. Three of his four sisters are still alive. One died of cancer, and one lives in Ottawa and has difficulties with alcohol and cocaine use. He has a good relationship with the sister who lives in Whitehorse, who has no trouble with alcohol. The other sister lives in Saskatchewan and he has little contact with her.

[52] Mr. Silverfox began drinking alcohol when he was a child, but it did not become a problem until his teenage years. He was surrounded by others who used alcohol. He would regularly binge drink for three days every week or every other week.

[53] Mr. Silverfox has attended residential treatment for substance misuse three times, the first time in or around 1980 at Crossroads. He also received residential treatment at Whitehorse Alcohol and Drug Services. At Mental Wellness and Substance Use Services, he received day treatment in 2022 through the Pine Intensive Day Treatment Program, consisting of approximately 14 hours of therapeutic programming weekly between February 14th and March 18th. He reportedly completed these programs successfully and testified he generally remained sober for the following six to 10 months before relapsing due to “lowering his guard.” He completed programming at Probation Services and Whitehorse Correctional Centre, including alcohol, drugs, and

driving; change and transition; lifestyle balance; rational thinking; substance use; and strategies for success. He also participated at White Bison Indigenous Alcoholics Anonymous while in custody.

[54] He has never been hospitalized or medicated for mental health reasons. In 2017, he suffered a heart attack.

[55] Over the last few years, Mr. Silverfox has enjoyed a good therapeutic relationship with a counsellor, Svenja Curial, assigned through the Indian Residential School Resolution Health Support Program. She wrote a letter of support for him, confirming he attended 13 sessions with her during which they worked on his processing and integration of his developmental and relational traumas. She wrote that “this process has helped him develop healthier neural pathways and erase old pathways connected to problematic emotional experiences.” She confirmed her view that he has continued to be successful in living a sober lifestyle and has reintegrated into society, demonstrating many prosocial behaviours. Their relationship ended when Ms. Curial went on maternity leave. Mr. Silverfox tried meeting with another counsellor but became frustrated with the required repetition and found the sessions too shallow, so stopped attending.

[56] Mr. Silverfox has been sober since September 2020, and testified that this is the longest period of sobriety he has had since he began consuming alcohol. He testified at his sentencing hearing that he has made a decision to change his ways, to stay out of the “system”, to stay on this path. He says reading self-help books about metaphysics, such as the book he was reading at that time by Don Miguel Ruiz, and his stubborn willpower will assist him in doing so.

[57] Mr. Silverfox has an extensive criminal record beginning in 1973 when he was 17. In summary, he has been convicted of 83 offences as follows;

- 21 property, such as theft, break and enter;
- 5 assault or assault causing bodily harm;
- 2 sexual assault;
- 2 take motor vehicle without consent;
- 12 impaired driving, refusal to provide a breath sample, over 80 blood alcohol;
- 1 flight from police;
- 9 drive while disqualified;
- 23 breaches of undertakings or failure to attend court; and
- 8 other offences.

[58] In 1983, 1989, 2005, and 2009, Mr. Silverfox received penitentiary-length sentences. In the 1980s, it was for sexual violence, and the other two were driving-related offences (2005: 33 months; and 2009: 40 months). Other lengthy sentences for driving offences were in 1982: 12 months; November 2020: 8 months; and December 2020: 14.5 months.

[59] In the *Gladue* report prepared in 2018 for sentencing on another offence, Mr. Silverfox reportedly said, “Every time I come to jail it’s when I drink, when I don’t drink, I don’t go to jail.”

[60] Mr. Silverfox has been subject to strict terms and conditions while living at SHARP and has complied successfully with all of them. Ryan Lee, the director of the program, describes Mr. Silverfox as someone who role models what is expected from

residents. Mr. Lee thinks highly of Mr. Silverfox, noting his high level of commitment and accountability to the goals set for him.

Range of sentence from similar cases

[61] I have reviewed the cases provided by Crown and defence. Most of them pre-date the 2018 amendments. The range for impaired driving offences, where the offender has previous convictions, appears to be from approximately 15 months to approximately five and a half years. In the Yukon, a two-year sentence is at the high end of the range for repeat offenders, pre 2018 amendments.

[62] I find the following cases most relevant to this case, bearing in mind that sentencing is an individualized process.

[63] In *Romaniuk*, the Court of Appeal considered the 2018 amendments to the *Code* and how they affect the approach to sentencing in these kinds of cases. Parliament clearly intended the principle of general deterrence, denunciation, and protection of the public to be emphasized for driving and drinking offences.

[64] The Manitoba Court of Appeal also said that these considerations take on even more significance in sentencing repeat offenders. The Court's review of the range for repeat offenders was from nine months to four years before the 2018 amendments, and from nine months (which was increased on appeal from four months for a third-time offender) to six years (where there were *Gladue* factors) in cases decided post 2018 amendments.

[65] The Manitoba Court of Appeal in the *Romaniuk* case imposed consecutive periods of imprisonment consisting of nine months for operation while prohibited; two years operation while impaired; 15 months for a second operation while prohibited,

reduced to nine months under the principle of totality; and two years for a second operation while impaired. The offender in that case had eight previous driving convictions and was not Indigenous.

[66] In *R v Hotomanie*, 2022 SKCA 119, the Court upheld a sentence of two years' imprisonment plus three years' probation. The offender, who was Indigenous, pled guilty to nine offences where he was driving while impaired or driving while prohibited. He had at least 13 previous drinking and driving convictions, although he had no such offences for the previous seven years.

[67] He had significant *Gladue* factors, including being a victim of family violence at home due to his parents' use of alcohol; attending residential school when he was six years old, a boys' school and foster care in later years, and he was a victim of physical and sexual abuse in each place. He had turned to alcohol to cope with his traumatic upbringing. He was 55 years old and had expressed a desire to quit drinking and had demonstrated some positive rehabilitative efforts in the past.

[68] The sentencing judge noted that, absent the *Gladue* factors, a sentence in the range of four to six years would be appropriate. His moral culpability was reduced due to the reasons for his use of alcohol.

[69] The Court of Appeal noted that the penalty in total was:

> [62] … a five-year submission to the state's supervision, under conditions that significantly restrict Mr. Hotomanie's activities when he is not in custody, combined with a ten-year driving prohibition. …

[70] I note that in that case no reference was made to or analysis done of the Bill C-46 amendments.

[71] In *R v Joe*, 2017 YKCA 13, Mr. Joe, an Indigenous man, was convicted at trial of impaired driving and pled guilty to refusal to provide a breath sample and breach of undertaking. This was his 13th drinking and driving offence. On appeal, his sentence of 43 months and 5 days less credit for pre-sentence custody was reduced to 23 months and five days less credit. The sentencing judge had not sufficiently considered the effect of the significant *Gladue* factors on Mr. Joe's moral culpability, and he under-emphasized the sentencing objective of assisting in rehabilitation.

[72] In *R v Mose*s, 2006 YKTC 109, the offender was sentenced to two years plus a ten-year driving prohibition after a joint submission. He pled guilty to driving while his blood alcohol exceeded the legal limit. He was 68 years old, a member of the Kwanlin Dün First Nation, had 12 previous related driving convictions, and a medical condition.

[73] Finally, in *R v Pearson*, 2006 YKTC 109, the offender was sentenced to two years plus a five-year driving prohibition. He drove intoxicated and landed in a ditch, and pled guilty to impaired driving and failing to appear. He had 10 previous related driving offences. He admitted he was an alcoholic and sought a two-year sentence so he could access alcohol treatment programming available only in federal institutions.

Aggravating and Mitigating Circumstances

[74] The aggravating factors in this case are:

- Mr. Silverfox was highly intoxicated;
- Mr. Silverfox was driving aggressively through downtown Whitehorse at high speeds;
- Mr. Silverfox was driving while prohibited from doing so; and
- Mr. Silverfox was on bail.

[75] The mitigating factors in this case are:

- Mr. Silverfox's exemplary compliance with strict and restrictive conditions while on remand and post conviction, and his status as a role model for others; and
- Mr. Silverfox's apparent commitment to rehabilitation and sobriety.

Analysis

[76] In sentencing for offences involving drinking and driving, the goals of denunciation and deterrence and the protection of the public must be emphasized (*Romaniuk* at para. 37). This is consistent with the intention of Parliament recently stated in the amendments to the *Code* in Bill C-46 that, among other things, increased the penalty for impaired driving from five years to 10 years.

[77] The Supreme Court of Canada in *Friesen* said:

> [100] To respect Parliament's decision to increase maximum sentences, courts should generally impose higher sentences than the sentences imposed in cases that preceded the increases in maximum sentences. … Sentencing judges and appellate courts need to give effect to Parliament's clear and repeated signals to increase sentences imposed for these offences.

[78] I accept that pre Bill C-46, the sentence range in this jurisdiction in cases such as this, where a repeat Indigenous offender, with significant *Gladue* factors and prospects for rehabilitation, is convicted for impaired driving is between two and three years, generally closer to two years.

[79] The advent of Bill C-46 and the messages to sentencing judges from the Supreme Court of Canada in *Friesen* and from other appellate courts, such as the Manitoba Court of Appeal in *Romaniuk* and the Ontario Court of Appeal in *R v Serré*,

2020 ONCA 311, means that the principles of deterrence, denunciation, and protection of society must be emphasized with these offences. The fact that no one was harmed as a result of Mr. Silverfox's driving is fortuitous for all but does not reduce the need for deterrence and denunciation.

[80] The Yukon statistics showing an increase in the rates of impaired driving over an average five-year period and eight times the national average is a local community concern.

[81] And as was noted by the Court in *R v Donnessey*, [1990] YJ No 138 (YKCA) at para. 8:

> … it is the conduct of the accused, not just the consequences, that is the criminality [that is being] punished. If such an approach acts as a general deterrent then the possibilities of serious and tragic results from such driving are reduced. [R v Wise, [1988] BCJ No 1990 (BCCA)].

[82] The potential danger must be kept in mind.

[83] At the same time, the goal of rehabilitation has to be considered. A fit sentence must take into account the rehabilitative efforts made by the offender, as well as the future potential for rehabilitation. A sentence in appropriate circumstances must be crafted in a way that assists the rehabilitation of the offender.

[84] The principle of proportionality requires that I also consider and take judicial notice of the unique, systemic, or background factors that played a part in bringing Mr. Silverfox before the Court. This context must inform my assessment of the case specific facts. No causal link is required to be made between these factors and the offence. The factors must be considered in assessing whether imprisonment would serve to deter or denounce crime in a sense that would be meaningful to the community to which the offender belongs (*R v Gladue*, [1999] 1 SCR 688 at para. 69; *R. v. Ladue*,

2011 BCCA 101 ("*Ladue*") at para. 43). While all the principles and purposes of sentencing must be weighed and considered, when sentencing an Indigenous offender, consideration must be given to the principles of rehabilitation, restorative justice, and promoting a sense of responsibility in the community.

[85] In *Ladue*, the Court of Appeal of British Columbia put it this way:

> [55] In *Gladue*, at para. 80, the court suggested some questions a judge can answer in order to achieve a fit sentence:
>
> > As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances? [Emphasis in original.]

[86] Mr. Silverfox has experienced a traumatic upbringing surrounded by alcohol at a young age, enduring horrendous physical and sexual abuse, as well as a denigration of his culture and language at three different residential schools over a period eight years beginning at the vulnerable age of six.

[87] His alcohol use throughout his life is a symptom of these tragic circumstances of his upbringing. The alcohol use has led to his commission of criminal offences resulting in a significant amount of time in prison over his life.

[88] Mr. Silverfox's rehabilitative efforts since moving to SHARP in February 2022 are commendable. His compliance with strict release conditions and commitment to sobriety are exemplary. Ryan Lee's testimony confirms this, as does the support letter from his former counsellor, Svenja Curial.

[89] I want now to address defence counsel's argument that Mr. Silverfox should be given "enhanced credit" due to lockdowns while he was in custody at WCC. She submitted daily observation reports that indicated there were 28 days between June 26, 2021, and February 11, 2022, where Mr. Silverfox was locked up for at least 17 out of 24 hours. There is no evidence of the reasons for the lockdown, nor is there evidence of the impact of those lockdowns on Mr. Silverfox.

[90] Based on cases of *R v Duncan*, 2016 ONCA 754 and *R v Marshall*, 2021 ONCA 344, that are referenced in *R v McEwan*, 2023 ONSC 1608 ("*McEwan*"), the impact of harsh custodial conditions is a mitigating factor on a sentence.

[91] In *McEwan*, the impact of lockdowns on inmates awaiting trial was accepted by the Court as unduly harsh. In that case, the offender was subject to partial lockdowns on 21 days and full lockdowns on 126 days. The lockdowns were due to staffing shortages and a COVID outbreak. The Court found that:

> [101] … where the lockdown ratio is reaching 50% and where more than 50% percent [as written] of the lockdowns are related to staffing issues, there is a problem.

[92] The offender described these multi-day lockdowns as “torture:”

> [44] … Contact with family was limited. Access to fresh air was limited to 20 minutes at most. Access to personal hygiene supplies and facilities was very limited. …

[93] The “*Duncan*” test, as it is referred to in the cases for further credit, is not met in this case. It is different from the 1.5:1 credit which is designed to take into account the difficult and restrictive circumstances offenders encounter during pre-trial custody. This credit is a deduction from what is determined by the sentencing judge to be an appropriate sentence because it reflects part of a sentence that has been served already by the offender, and it is statutorily capped.

[94] By contrast, the “*Duncan*” credit is to address exceptionally punitive conditions that go well beyond the normal restrictions associated with pre-trial custody. It is not a deduction from an otherwise appropriate sentence, but it is a mitigating factor to be considered in determining an appropriate sentence. It cannot justify the imposition of a sentence which is inappropriate (*Marshall* at paras. 50-52).

[95] In this case, there is an absence of evidence about the reasons for the WCC lockdowns, how far from the usual number and length of lockdowns this represented, the conditions during the lockdowns, and their impact on Mr. Silverfox. Without this evidence, it is impossible to assess whether these represented “exceptionally punitive conditions” that would be a mitigating factor in the sentence. As a result, I will not take this factor into account in determining the appropriate sentence.

[96] In summary, balancing these goals, principles, and applying them to Mr. Silverfox’s facts, I conclude that 30 months (two years and six months) less credit of 357 days after a 1.5:1 calculation for pre-trial custody is an appropriate sentence for s. 320.14 (operating a conveyance while impaired), which is also the predicate offence

for the long-term offender application. Were it not for the *Gladue* factors and the mitigating factor of his compliance with strict release conditions and his rehabilitative efforts, the sentence would be within the 3.5 to 4.5 year range.

[97] I agree with the Crown's submission that the range for the other two charges (flight from police and dangerous driving) is approximately one year for each and the suggestion that, given the *Gladue* and other factors in this case and the principle of totality, serving those sentences concurrently would be appropriate, acknowledging that more often they are served consecutively.

[98] So, I will sentence Mr. Silverfox to one year concurrent for each of the other two offences.

[99] There are no ancillary orders, as Mr. Silverfox is subject to a lifetime driving prohibition.

Long-term offender application

[100] In the written decision I will provide, I will write out the entire section of s. 753.1(1) to (3) and s. 753.2(3), but I will not read all of that out today. I will just summarize parts of it that are relevant for the rest of my decision.

Statutory provisions

[101] The relevant statutory long-term offender provisions are:

> 753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> > (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
> >
> > (b) there is a substantial risk that the offender will reoffend; and

(c) there is a reasonable possibility of eventual control of the risk in the community.

Substantial risk

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if

(a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 163.1(2) (making child pornography), 163.1(3) (distribution, etc., of child pornography), 163.1(4) (possession of child pornography) or 163.1(4.1) (accessing child pornography), section 170 (parent or guardian procuring sexual activity), 171 (householder permitting sexual activity), 171.1 (making sexually explicit material available to child), 172.1 (luring a child) or 172.2 (agreement or arrangement — sexual offence against child), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) 273 (aggravated sexual assault) or 279.011 (trafficking — person under 18 years) or subsection 279.02(2) (material benefit — trafficking of person under 18 years), 279.03(2) (withholding or destroying documents — trafficking of person under 18 years), 286.1(2) (obtaining sexual services for consideration from person under 18 years), 286.2(2) (material benefit from sexual services provided by person under 18 years) or 286.3(2) (procuring — person under 18 years), or has engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual matter including that involved in the commission of the offence for which the offender has been convicted, has shown a

> likelihood of causing injury, pain or other evil to other persons in the future through similar offences.
>
> **Sentence for long-term offender**
>
> (3) If the court finds an offender to be a long-term offender, it shall
>
> (a) impose a sentence for the offence for which the offender has been convicted, which must be a minimum punishment of imprisonment for a term of two years; and
>
> (b) order that the offender be subject to long-term supervision for a period that does not exceed 10 years.
>
> ...
>
> 753.2(3) An offender who is required to be supervised, a member of the Parole Board of Canada or, on approval of that Board, the offender's parole supervisor, as defined in subsection 99(1) of the *Corrections and Conditional Release Act*, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant.

Legal principles of a long-term offender designation

[102] The following general principles are applicable to the determination to be made in this case.

[103] The Supreme Court of Canada stated in *R v Steele*, 2014 SCC 61:

> [30] … The purpose of the long-term supervision provisions is twofold: to protect the public and to rehabilitate offenders and facilitate their reintegration into the community.

[104] The Supreme Court of Canada in *R v LM*, 2008 SCC 31, noted:

> [39] … the exceptional nature of the finding that an offender is a *long-term* offender. … the strictness and precision of the rules applicable to this supervisory mechanism necessarily limit the number of people to whom it will apply. … [Emphasis in original.]
>
> …
>
> [42] … This measure, which is less restrictive than the indeterminate period of incarceration that applies to dangerous offenders, protects society and is at the same time consistent with [TRANSLATION] "the principles of proportionality and moderation in the recourse to sentences involving a deprivation of liberty" (Dadour, at p. 228).

[105] The designation of long-term offender remains discretionary. Even if all of the criteria in s. 753.1 are met, the Court has the discretion not to designate the offender as a long-term offender (*R v JJP*, 2020 YKCA 13 at para. 89).

[106] Section 753.1(2) is not to be interpreted as restricting s. 753.1 to apply only to offenders convicted of one of the listed offences in s. 753.1(2).

[107] As the Saskatchewan Court of Appeal said in *R v Weasel*, 2003 SKCA 131:

> [56] … subsection (2) is to not to be seen as defining the term "substantial risk" appearing in subsection 753.1. Rather, it is to be seen as creating a conclusive presumption of "substantial risk" in those circumstances to which paragraphs (a) and (b) of the subsection are addressed, leaving the issue of such risk in other circumstances to be determined without the aid of the presumption.

[108] Quebec and Ontario courts of appeal have upheld long-term offender designations for offenders convicted of assaults and unlawful confinement, attempted murder, and bank robbery.

[109] The Department of Justice Canada wrote in the backgrounder to the Bill C-46 amendments in August 2019 that:

> … The ten-year maximum [penalty for driving offences] makes it possible for the prosecutor to bring an application for an offender to be designated a Dangerous Offender (DO) or a Long Term Offender (LTO). This may be appropriate in cases of persistent repeat offending, particularly where the driver refuses treatment. (at 33)

Have the long-term offender criteria been met for Wayne Silverfox?

[110] The two preconditions for a long-term offender supervision order have been met. Mr. Silverfox was convicted under s. 320.14(1)(a) — operating a conveyance while his ability to operate it is impaired to any degree by alcohol — and it now allows a long-term offender application to be made. An assessment report has been provided.

[111] I have found in this case that the criterion in s. 753.1(1)(a) — imprisonment of two years or more for the predicate offence — has been met. The Crown has proved beyond a reasonable doubt that the sentence imposed for this offence should be more than two years.

[112] The criterion in s. 753.1(1)(c) — reasonable possibility of eventual control of the risk in the community — is there to address "whether the offender qualifies for a long-term offender designation as opposed to the more onerous dangerous offender designation" (*R v FED*, 2007 ONCA 246 ("*FED*") at para. 53). It allows the Court to exercise discretion to impose a less restrictive sanction where the objective of protecting the public can be met.

[113] In this case, the recent history of Mr. Silverfox's compliance with strict release conditions and the conclusions of the assessor, Dr. Klassen, that Mr. Silverfox's age of 68 has reduced and will continue to reduce his risk in the community are sufficient to

meet this condition, especially given that it is not required to be proven beyond a reasonable doubt by the Crown (*R v Johnson*, [2008] O.J. No. 4209 (ONSC); *FED*).

[114] The primary disputed issue here is whether Mr. Silverfox meets the long-term offender criteria of a substantial risk of reoffending (s. 753.1(1)(b)).

Determination of substantial risk

[115] Determination of substantial risk requires the Crown to prove beyond a reasonable doubt that there exists a substantial risk that Mr. Silverfox will reoffend, not that he will reoffend as that standard would be impossible to meet (*R v Currie*, [1997] 2 SCR 260).

[116] Substantial risk has been defined as "a risk the reality of which is well-grounded in the evidence" (*R v Mentuck*, 2001 SCC 76 at para. 34). "Black's Law Dictionary defines 'substantial' as and including 'of real worth and importance, of considerable value, belonging to substance, actually existing, real, not seeming or imaginary.'" (*Catholic Children's Aid Society of Metropolitan Toronto v AD and WG*, [1993] OJ No 3129 at para. 32).

[117] Determining substantial risk to reoffend requires a consideration of the whole of the evidence pertaining to this issue. This includes the assessment report as well as the offender's history of offending (*R v McLean*, 2009 NSCA 1 at para. 28). As stated by the Court in *R v Moore*, 2016 MBQB 116 at para. 17, "[t]he past is often a reliable predictor of the future". Past conduct provides the evidentiary basis for assessing the future threat, and it is the future threat that the long-term offender parts of the *Code* is aimed at curbing (*R v Knife*, 2015 SKCA 82 at para. 55).

[118] The risk assessment is ultimately a judicial one. The question of whether an offender has a substantial risk to reoffend is one of fact. It is necessarily, and by statute, informed by expert evidence, which forms an integral part of any long-term offender application (*R v JWR*, 2010 BCCA 66 at para. 40).

[119] In this case, I have reviewed the evidence of the expert assessor; the criminal record of Mr. Silverfox; his rehabilitative efforts, recent and past; the evidence of Ryan Lee of SHARP; and Mr. Silverfox's testimony at the sentencing hearing, as well as statements he has made to the courts over the years. I conclude that there is a substantial risk that Mr. Silverfox will reoffend.

Assessment of Dr. Klassen

[120] Dr. Klassen interviewed Mr. Silverfox for 5.25 hours, and reviewed historic and recent court records, correctional records, and recent reports from the SHARP program and from Mr. Silverfox's counsellor. Dr. Klassen concluded Mr. Silverfox is at a substantial risk of reoffending.

[121] Dr. Klassen's observations of Mr. Silverfox's functional and mental status included: good attention and concentration; good vocabulary, processing speed, and memory function. His mood and affect were subjectively and objectively good: he was very pleasant and congenial. There was no disturbance of thought form, thought content or perception, to suggest any psychosis. He was alert and oriented and assessed to be of average intelligence. Dr. Klassen noted he presented as "somewhat of a raconteur" and his discourse tended to extol his virtues.

[122] After reviewing his personal, medical, employment, and legal history, Dr. Klassen found that Mr. Silverfox met the DSM-5 criteria for anti-social personality disorder and

substance use disorder (alcohol). The symptoms of an anti-social personality disorder may be exacerbated by psychosocial stress, an unstructured living situation, alcohol or substance misuse, and non-adherence with mental health treatment. He has used alcohol in situations in which it is physically hazardous (such as driving), and alcohol use has contributed to occupational challenges.

[123] Dr. Klassen conceded there is no structured or actuarial instrument to assess risk of recidivism for driving while impaired. The closest tool is the Psychopathy Checklist-Revised (known as "PCL-R") which Dr. Klassen describes as being of some predictive value to assess response to treatment and adherence to conditions of community supervision. He acknowledged it began as a diagnostic tool, but in the course of its development was found to have predictive value.

[124] It is not clear whether it may overpredict risk in Indigenous persons. Mr. Silverfox fell within the 71st percentile, meaning that 71% of offenders in North America show fewer characteristics of psychopathy and therefore less risk than Mr. Silverfox. Exercising clinical judgment, Dr. Klassen noted that Mr. Silverfox continues to express a strong wish to drive, and he continued to consume alcohol until stringent release conditions were imposed.

[125] Dr. Klassen further noted that Mr. Silverfox enjoys driving, is frustrated by not driving, and that he is going to be exposed to alcohol again in the community without controls. Dr. Klassen observed that in the past Mr. Silverfox has had no success in stopping drinking and driving when he has had no external controls. While his current period of sobriety is lengthy for him, it is not a lengthy period in general. To change

behaviour, Dr. Klassen estimated a five- to ten-year period is necessary to consolidate demonstrable change.

[126] While Mr. Silverfox is not in denial of the problems alcohol causes for him, Dr. Klassen's view is that he risks being over-confident about his abilities to avoid temptation. His strong autonomy drive can be beneficial as long as he is disciplined, but it can also result in an inability to recognize when he needs more external controls.

[127] Dr. Klassen did not recommend further psychotherapy or counselling as he believes he has received all that he can from it.

[128] Dr. Klassen, finally, opined that he was unable to detect skills that Mr. Silverfox has acquired and is employing/implementing to remain sober.

[129] Dr. Klassen notes that in the past Mr. Silverfox exhibited a restlessness and sensation-seeking behaviours that appear to have lessened in recent years as Mr. Silverfox ages. This in turn is likely to reduce his risk of consuming alcohol and engaging in reckless behaviour as time passes.

Criminal record

[130] I will not repeat Mr. Silverfox's significant criminal record, which I have already referenced and summarized. I will only note that he has been committing offences related to driving under the influence or driving while prohibited for more than 30 years, amounting to 12 previous driving offences. While there was a gap in those offences between 1982 and 2005, I note that he received penitentiary-length sentences in 1983, 1989, and 2005. Between 2005 and 2020, he committed six driving-related offences. In his most recent sentencing for driving offences, he received a 14 and a half-month jail sentence and a lifetime driving prohibition.

Rehabilitative efforts

Recent efforts

[131] As I noted, Mr. Silverfox has lived at SHARP while on bail from February 13, 2022, to the present. SHARP is a 24/7 single-staffed resource that supports men involved in the justice system with reintegrating into society. It provides residents with basic necessities of food and shelter, as well as an individualized service plan to assist them with growth opportunities and to follow conditions of release. It bridges the gap for people between the correctional system and the community.

[132] SHARP provides services to people within the territorial justice and correctional system, as well as to those who are on parole from the federal penitentiary system and through Correctional Service Canada. Five of the 20 beds are reserved for clients of the federal system. At the time of the hearing in August, only one of those five beds was occupied.

[133] As I have also noted, Mr. Silverfox has been subject to strict and structured conditions of release. Those include abiding by house rules, providing specific locations when he leaves the residence, checking in by phone every four hours when he is outside the residence, completing a breath scan to detect alcohol use upon waking up in the morning and on arrival to the residence, complying with a nightly curfew between 10 p.m. and 7 a.m., and working at chores.

[134] When he is in the community, he visits with Eileen Atlin, attends appointments, rides his bike, goes to the library and Well-Read Books, and does some repair and selling of bicycles. He gets rides with Eileen, takes the bus, a taxi, cycles, or walks. He has complied consistently with all of the conditions and has never breached.

[135] Along with noting his role-modelling behaviour, Mr. Lee testified at the sentencing hearing that Mr. Silverfox has been exemplary on check-ins and the only resident who does so regularly, he always returns to the residence early, he is never in an elevated state, always calm and removes himself from intense situations, gets along with others quite well, is pleasant and not a provoker. Mr. Lee also spoke positively about Mr. Silverfox connecting with elders, such as Joe Migwans, his pursuit of counselling, his work, and his general high level of accountability.

[136] Mr. Silverfox testified at his sentencing hearing. He attributed his current rehabilitative success and ongoing sobriety since September 2020 to several things. He says he has made a decision to turn his life around. All of his past experiences within the criminal justice system and his “slipping and sliding” have been building blocks towards a better life and have not been a waste. He says he is not proud of “being in the system all the time”, is tired of it, and wants it to come to an end. He has been assisted by the counselling he has received and by reading self-help books about “metaphysics” (which he explains as finding balance within himself), and by at least one friend who was a serious alcoholic but is now sober and a role model.

[137] He says he has a stubborn will and a strong motivation within himself to do what he needs to do to stay on the road he is currently on. He recognizes the wrong choices he has made in the past and the negative consequences of drinking on his relationships and his life in general. He says this time is different because he is more serious within himself. He says he will not let himself down, has kept his word so far, and has willpower.

[138] Mr. Silverfox, when asked about driving during cross-examination at the sentencing hearing, indicated a desire to get his licence back, confirming an ongoing desire to drive, which he had also expressed to Dr. Klassen.

[139] While I do not doubt the sincerity of Mr. Silverfox's words and intentions — and, indeed, they have been borne out by his actions over the last two and a half years — this is not the first time that the courts and others have heard these assertions and commitments from him.

[140] On cross-examination at the sentencing hearing, Mr. Silverfox confirmed many of his past sentencing decisions.

[141] In 1992, a report from Correctional Service Canada on the cancellation of his statutory release included a comment from his counsellor whom he was seeing on statutory release from the penitentiary. She stated that instead of receiving substance use treatment or counselling, he was "getting guidance and support from his belief in metaphysics and ... it appeared as though he had been very successful in maintaining a pro-social lifestyle as a result of his involvement with metaphysics."

[142] The new release plans at that time included a statement from Mr. Silverfox that he would maintain a low profile, live with his wife and children, and abide by the terms and conditions of this release until its completion.

[143] In 1998, in his sentencing for the offence of uttering a threat and possessing a firearm, he said he may have turned a corner in his life, had been reading the Bible, and wanted to take some anger management courses and do something about his liquor problem.

[144] In 2004, a pre-sentence report for use in court in February 2005 stated that Mr. Silverfox told the pre-sentence report writer that he has lost work and relationships through his substance use, has completed the Crossroads treatment program, has taken the Substance Abuse Management course at Whitehorse Correctional Centre in June/July 1983, is seeing an addictions counsellor regularly, and has been reading some self-help books.

[145] In 2009, in a sentencing decision for the offences of driving while disqualified, driving while impaired, and failing to stop his vehicle while being pursued by a police officer, along with a breach of probation while drinking, the Court noted that Mr. Silverfox addressed the Court, saying that he has been battling alcohol for a long time and had denied he had a problem for many years. He told the Court that he has now come to understand that he simply “cannot drink” and that Kevin Barr of the White Bison Indigenous Alcoholics Anonymous Program is willing to work with him on his sobriety.

[146] In 2018, a probation officer completed a community wellness plan for Community Wellness Court and wrote that Mr. Silverfox stated he “wanted to change his ways.” He had “made a serious decision” while at WCC that he would get sober and stay out of the criminal justice system for good. He said further that he was hopeful that his wellness journey would result in a sober life, noting that he would like to be a role model and turn his situation into a positive one that others may learn from.

[147] In a report from counsellor Nicole Bringsli in June 2019, he reported that he was sober (by virtue of the environment in WCC since January 2018) and said, “misery is the best teacher” and he does not feel like being miserable anymore. He is aware that

alcohol has cost him most of his family members, his freedom, time, and money. At one of the counselling sessions, Mr. Silverfox spoke to Nicole Bringsli about his “learning about metaphysics and how it had helped him with his journey of healing and learning about himself.”

[148] In June 2020, a report from a probation officer conducting the Substance Abuse Management Program Mr. Silverfox attended, noted that facilitators believed he had mastered the information in the program and they believed he would not find himself in similar situations if he chooses to internalize the concepts discussed by applying them to his personal life.

[149] Finally, in a sentencing decision of November 17, 2020, for the offences of operating a motor vehicle while his blood alcohol exceeded the legal limit and possessing a stolen motorcycle, the Court noted that he accepted responsibility for the offences, was noted to be extremely motivated, and was largely successful at addressing sobriety and programming needs for just over one year in Community Wellness Court. In that case, he had completed various treatment programs in February 2019, Living without Violence in July 2019, as well as the Substance Abuse Management Program in March 2020.

[150] The point of reviewing all of this is to show that as early as 1992, Mr. Silverfox has been saying similar things as he is saying in this sentencing hearing about his commitment to change his ways — especially about not drinking; the assistance that he receives from reading about metaphysics that counselling and programming have provided him; about his awareness of the consequences of continuing to drink alcohol

on his relationships, employment, and general well-being; and about his decision to take a different path.

[151] I appreciate the realities of addressing addictions, that it can take many, many attempts and failures and retries — the “slipping and sliding”, as Mr. Silverfox so aptly called it — before the demons are conquered. I am mindful of the significant trauma experienced by Mr. Silverfox in his youth and the enormous ongoing strength, effort, and willpower required to overcome such trauma, strength that he has demonstrated at various times throughout his life.

[152] However, I note that Mr. Silverfox’s recent and past successes in maintaining sobriety have a common element — and that is external structure. External structure alone is not enough to keep Mr. Silverfox on this path. His own internal motivations and commitment to change are also necessary. In his case, both are needed, at least for now. His stated internal motivations and commitments, which I believe to be absolutely honest and sincere, are still not enough to ensure his ongoing sobriety and that he stays away from driving. Mr. Silverfox still needs the external controls and management. In his testimony, he confirmed his understanding of the consequences of breaking the rules imposed by the Court and of not complying with the conditions imposed upon him.

[153] As a result of my review of all of this evidence, I conclude that there is a substantial risk for Mr. Silverfox to reoffend in the absence of the external controls similar to those currently imposed upon him.

[154] Defence has requested a three-year probation order, in which he would live at SHARP under similar strict conditions as he has currently. Defence counsel’s main

argument against a long-term offender designation is that it is not necessary given how well he has done under the current structure.

[155] There is absolutely no doubt that Mr. Silverfox has done extremely well, for which he is to be congratulated. Any fit sentence needs to take this into account. However, there are three concerns about the imposition of a three-year probation order instead of a long-term offender declaration.

[156] The first is the amount of time. As Dr. Klassen noted, in order to affect a fundamental transformation or change of a long-standing behaviour, a consistent period of time of that change between five and ten years is necessary, in his view. In order to solidify Mr. Silverfox's ability to remain on the path he has been on since February 2022 (date of his release), in my view, he needs longer than three years.

[157] The second reason is that the parole board, who will manage and structure the conditions applicable to Mr. Silverfox, has more robust tools available to them than the Yukon Community Corrections tools. The parole board's oversight is broader and more comprehensive. Given Mr. Silverfox's risk level, and his recent demonstrated success with and responsiveness to external controls while awaiting trial and sentence, a strengthening of such controls is warranted, especially without the spectre of trial and sentencing as a deterrent factor.

[158] Thirdly, the consequences for breach are more significant when the parole board is managing the conditions. Without the deterrence provided by a trial and sentencing, the risk of Mr. Silverfox not complying may increase. The community supervision information package provided as evidence in the sentencing hearing by Erin Jamieson, a parole officer with Correctional Service Canada, sets out their process in detail and

shows the useful information gathering, assessing, monitoring, supervising, managing, and supporting functions of parole officers for long-term offenders. The spirit of the long-term offender designation is the reasonable possibility of eventual control of risk into the community, and all tools and supports are designed and implemented with this ultimate goal in mind.

[159] For all of these reasons, including the objectives of the Bill C-46 amendments, and considering the significant rehabilitative potential of Mr. Silverfox, I designate him to be a long-term offender and impose an order for a term of four years. This is less than the six years the Crown has requested because of Mr. Silverfox's advancing age and therefore likely reduction in his predilection to risky behaviours, as well as his compliance with conditions over the last two and a half years, including sobriety, and the prison term I have imposed of approximately 18 months after the credit has been deducted.

[160] The amount of supervision that Mr. Silverfox will have over this entire period of time will hopefully solidify the behavioural changes once it has been completed.

[161] I note that in that package provided by Erin Jamieson, a long-term offender supervision order can come into effect once an offender serves their sentence in a provincial/territorial prison. And as I have noted, there are five beds reserved for the Correctional Service of Canada at SHARP. This means, if that is chosen as to where he should live, that Mr. Silverfox can continue to live in Whitehorse and access many of the same activities and supports he has now while completing his sentence.

[162] Mr. Silverfox, would you please stand.

[163] On Count 1 of the Indictment:

> On or about the 4th day of September 2020, at the City of Whitehorse … did operate a conveyance in a manner that was dangerous to the public, contrary to Section 320.13(1) of the *Criminal Code*,

I sentence you to one year concurrent.

[164] On Count 2, that you:

> On or about the 4th day of September 2020, at the City of Whitehorse … did operate a motor vehicle while being pursued by a peace officer and did fail, without reasonable excuse, to stop the motor vehicle as soon as was reasonable, contrary to Section 320.17 of the *Criminal Code*,

I sentence you to one year concurrent.

[165] And on Count 3, that you::

> On or about the 4th of September 2020, at the City of Whitehorse … did operate a conveyance while [your] ability to operate it was impaired by alcohol contrary to Section 320.14(1)(a) of the *Criminal Code*,

I sentence you to two years and six months less credit of 357 days.

[166] And I also declare that you are a long-term offender and impose a long-term offender supervision order for a period of four years.

[DISCUSSIONS]

[167] MR. LANE: Your Honour did mention no ancillary orders. A driving prohibition is mandatory. There is no discretion.

[168] THE COURT: Okay. But it has already been imposed?

[169] MR. LANE: It was imposed on a previous sentencing —

[170] THE COURT: Right.

[171] MR. LANE: — but the *Code* does require Your Honour to impose a prohibition order.

[172] THE COURT: Okay.

[173] MR. LANE: Because of an error in the paperwork, the maximum statutory order is simply three years. There was an issue with the notice to seek greater punishment. So, I would simply ask that attached — the only one that has a mandatory order is Count 3, the impaired operation, so I'd simply ask for a three-year driving prohibition to comply with the *Code*.

[174] THE COURT: Yes, I will. That should be added, then, to the order.

[175] Thank you for that, Mr. Lane.

[DISCUSSIONS]

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DUNCAN C.J.