Citation: *R. v. Charlie*, 2014 YKTC 17

Date: 20140423
Docket: 13-00104
Registry: Whitehorse

TERRITORIAL COURT OF YUKON
Before His Honour Judge Cozens

REGINA

v.

FRANKLIN JUNIOR CHARLIE

Appearances:
Joanna Phillips — Counsel for the Crown
André Roothman — Counsel for the Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): I will say at the outset that this is a difficult matter.

FACTS

[2] Franklin Charlie has entered a guilty plea to having committed the offence of robbery contrary to s. 344 of the *Criminal Code*.

[3] As set out in an Agreed Statement of Facts, on May 12, 2013, Mr. Charlie, in the company of two female youth and a 21-year-old adult, all of whom were intoxicated to some degree, went to the Ross River residence of Little Charlie Dick and knocked on his door. Mr. Charlie and the others were looking for alcohol which they believed Mr. Dick kept in his residence. Although not invited in by Mr. Dick, they entered his residence after knocking. When Mr. Dick refused to provide any alcohol, either

Mr. Charlie or the other male pushed Mr. Dick to the ground. Mr. Dick, who was 78 years old at the time, then left his residence and went to another residence where police were called.

[4] After Mr. Dick left the residence, the others entered it and broke into his bedroom, which was locked. Mr. Dick's jacket, which contained his wallet and medication was taken, as was a mickey of liquor. The jacket was recovered on a trail near Mr. Dick's residence. Missing from the wallet, however, was $1,700. The medications were recovered, however the alcohol was not.

[5] Mr. Charlie was observed at the Dena store in Ross River later that day with an undetermined number of $100 bills. The other three individuals provided statements to the RCMP. These statements were not entirely consistent; however each individual denied any knowledge of the wallet being taken. They all stated that Mr. Dick was harassed or roughed up. They all indicated that Mr. Charlie was present and a participant in these events, although there was no additional detail provided as to exactly what Mr. Charlie's involvement was.

[6] Mr. Charlie states that due to his level of intoxication, he has no recollection of these events.

[7] A warrant was issued for Mr. Charlie's arrest. He was arrested on this warrant on July 12, 2013.

[8] Put before the court as an aggravating factor pursuant to s. 725 of the *Code* is information that Mr. Charlie was on probation at the time he committed this offence and

that he had failed to comply with the term of the probation order that he report as directed.

[9] On May 9, 2013, Mr. Charlie received written direction to report on June 5, 2013. He failed to do so on that date or up to his arrest on the warrant that had been issued. He has been in custody ever since that day.

[10] It appears on the information provided that Mr. Charlie was the only individual prosecuted for the commission of this offence, although I cannot be certain that this is, in fact, the case.

CRIMINAL HISTORY

[11] Mr. Charlie has an extensive criminal history.

[12] As a youth he was convicted in 1999 of one offence under s. 348(1)(a), break and enter with intent to commit an indictable offence, and five offences under s. 348(1)(b), break and enter and commits an indictable offence, as well as a s. 430, offence of mischief. He was sentenced to four months' secure custody for these offences to be served concurrently.

[13] In 2000, he was convicted of a s. 334(b) theft charge.

[14] In 2001, he was convicted of two charges under s. 335, take motor vehicle without consent, and one under s. 355(a), possession of property obtained by crime over $5,000. He was also convicted of a s. 145(3) offence for failing to comply with an undertaking.

[15] In 2004, as an adult, Mr. Charlie was convicted of two s. 733.1(1) offences for failing to comply with his probation order; a s. 145(3) offence; a s. 177 offence for trespassing at night; and an offence contrary to s. 145(1)(a) for escaping lawful custody.

[16] In 2006, Mr. Charlie was convicted of further s. 733.1(1); s. 430; and s. 145(3) offences.

[17] In 2008, he was convicted of two offences under s. 348(1)(b) and two offences under s. 354 for possession of stolen property under $5,000. He was also convicted of two offences under s. 249(1)(a), dangerous operation of a motor vehicle; one offence under s. 249.1(1), flight while pursued by a police officer; two s. 430 offences; three s. 145(3) offences; one s. 145(2)(b) offence; and a s. 733.1(1) offence. For all of these 2008 offences, which were dealt with at one sentencing hearing, he received a sentence of two years plus one day on a s. 348(1)(b), after having been granted credit for eight months pre-trial custody, with concurrent sentences of varying months on the remaining charges. This is in *R. v. Charlie*, 2008 YKTC 9.

[18] In 2011, Mr. Charlie was convicted of a s. 344 offence, robbery; a s. 145(3) offence; and a s. 145(2) offence. The circumstances of the s. 344 offence are set out in the decision of Lilles J., *R. v. Charlie*, 2012 YKTC 5, and summarized below.

[19] After running out of alcohol while at a party in Whitehorse, Mr. Charlie concocted a plan with two other individuals to hold up John McPhee in an attempt to obtain more alcohol. Mr. McPhee was a 50-year-old individual noted to be "frail" by Lilles J. Mr. Charlie, in the company of the two others, went to Mr. McPhee's residence and knocked on his door. Mr. Charlie had armed himself with a tree limb. Mr. McPhee let

Mr. Charlie in, but once inside the residence a struggle ensued in which Mr. Charlie struck Mr. McPhee twice with the tree limb, scratching his face and arm.

[20] Mr. Charlie threatened to kill Mr. McPhee. He demanded alcohol and money from him, as well as the keys to his car. Mr. Charlie obtained $30, some alcohol, and Mr. McPhee's vehicle. The vehicle was subsequently recovered and had been badly damaged.

[21] In sentencing Mr. Charlie, Lilles J. noted the offence to be premeditated. He stated it is not uncommon in cases involving a "home invasion" for a penitentiary sentence of four to eight years to be imposed. For Mr. Charlie, he stated that a five-year penitentiary sentence would not be out of line. However, after considering Mr. Charlie's personal circumstances as set out in a *Gladue* report, an FAS evaluation, and a psycho-educational assessment, and reviewing the purposes, objectives, and principles of sentencing, Lilles J. imposed, in effect, a sentence of two years and nine months, plus three years' probation.

[22] In paragraphs 35 to 40 Lilles J. stated the following:

> 35 In finding a just and appropriate sentence for Mr. Charlie, I must consider the circumstances that have brought him before the Court, both individual and systemic. In the course of my consideration of an appropriate sentence, I must ask the following questions:
>
> > 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 systematic 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? (*Gladue, supra*, para. 80)

36 While not couched in terms of proportionality, these questions highlight the centrality of an individual's experience as an Aboriginal person to a determination of a fit and just proportionate sentence and again relate back to s. 718.1 of the *Criminal Code.* (*R. v. Jacko*, 2010 ONCA 452, para. 91)

[23] And again quoting from Judge Lilles' decision:

> 37 As demonstrated by the *Gladue* Report filed in this matter and as discussed earlier in this decision, Mr. Charlie's FASD is a direct result of the residential school policies of the Federal Government. There is an indisputable link between his Aboriginal status and his disability.
>
> **Conclusion**:
>
> 38 As stated in the MediGene FAS Evaluation:
>
> > FASD is not an excuse for antisocial behaviour. Franklin should be held accountable for his behaviours and salient consequences must be provided.
>
> This means that the consequences should be meaningful, proportionate to the seriousness of the offence and his moral blameworthiness, and reflect his experience as an Aboriginal person. Except in those few instances where concerns relating to protection of the public overwhelm these

> considerations, the punitive aspect of the sentence imposed will be reduced for offenders like Mr. Charlie.
>
> 39 I have already discussed the impact of Mr. Charlie's FASD diagnosis has on the relevant sentencing objectives. Denunciation and general deterrence are not apt, as, given Mr. Charlie's limitations, they can have little application to other members of the community. Similarly, because of his limited understanding of the big picture or the impact of his behaviours, specific deterrence will not be met by punitive sanctions.

[24] And finally:

> 40 Mr. Charlie is not affected by prison as others might be. As pointed out in the FAS Assessment, he finds it a safe place with clear rules and expectations. He functions well in that setting. But it is not a rehabilitative environment for him, because the programs do not recognize and build on his strengths. As a result, after spending two years in a penitentiary, he reoffends again, almost immediately. As stated in the MediGene assessment, prison and cognitive-based programming do not contribute to specific deterrence or rehabilitation of most FASD offenders like Mr. Charlie. When he is released from prison again, he will reoffend again, unless he is provided with the supervision, structure and programming identified in his FAS Evaluation.

POSITIONS OF COUNSEL

[25] Mr. Charlie has been in custody on remand for 286 days since his arrest on July 12, 2013. Crown counsel points to the report from Whitehorse Correctional Centre regarding Mr. Charlie as not providing a basis for enhanced credit at 1.5:1 based upon the reasoning in *R. v. Vittrekwa*, 2011 YKTC 64 but acknowledges that based upon the reasoning in *R. v. Cardinal*, 2013 YKCA 14 the possibility of enhanced credit nonetheless exists. Crown counsel submits that regardless of what credit Mr. Charlie has provided for time spent in remand, he should be sentenced to an additional period

of custody of two years less one day to be followed by three years' probation. Assuming, for the moment, that Mr. Charlie receives 1.5:1 credit, this would result in a sentence of approximately 38 months.

[26] Counsel for Mr. Charlie submits that Mr. Charlie should be credited at 1.5:1 for his time on remand and that a sentence of time served would therefore be appropriate. Again, assuming maximum credit is provided for his time in remand, this would result in a sentence of approximately 14 months.

CIRCUMSTANCES OF MR. CHARLIE

[27] Mr. Charlie is a 29-year-old Aboriginal offender. He has been diagnosed as suffering from the effects of FASD. His parents attended residential school and the negative impacts of this upon Mr. Charlie are apparent and very real. As Lilles J. noted in the case before him, and as I also find, Mr. Charlie is an offender whose circumstances cause him to fall squarely within the principles established in *R. v. Gladue* , [1999] 1 SCR 688, when considering the application of s. 718.2(e) of the *Criminal Code*.

[28] Section 718.2(e) states as follows:

> [A]ll available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[29] Filed in the sentencing hearing are the *Gladue* report authored by Caroline Buckshot and the MediGene FAS Diagnostic Clinic FAS evaluation and

Psycho-Educational Assessment, both of which were prepared for the sentencing hearing before Lilles J. on September 23, 2011. Also filed was an updated *Gladue* report prepared by Mark Stevens for the original February 14, 2014 sentencing hearing in this matter and a psychiatric assessment of Mr. Charlie conducted by Dr. Shabreham Lohrasbe dated March 7, 2014. The psychiatric assessment was conducted pursuant to an order made under s. 672.11 that Mr. Charlie be assessed to determine whether there was evidence that he may have been suffering from a mental disorder at the time of the commission of this offence such that he was not criminally responsible. The conclusion of the assessment was that Mr. Charlie was not suffering from a mental disorder and the matter proceeded to a sentencing hearing.

[30] In his decision, Lilles J. went into great detail regarding Mr. Charlie's background, in particular those factors relevant to *Gladue* considerations and the factors noted in the MediGene evaluation and assessment. I do not feel the need to repeat at length what Lilles J. has already stated in his decision.

[31] However, briefly stated, both Mr. Charlie's parents were taken from their homes at the age of six and placed into residential schools where they remained in schooling until the ages of 14 and 15 years. While at residential school, they were both victims of physical and sexual abuse.

[32] The fear that Mr. Charlie's parents experienced at being taken from their homes is apparent in their statements to the authors of the *Gladue* reports. I cannot even begin to comprehend the profound impact upon both Mr. Charlie's parents, and, in turn, upon their parents, of them being taken away from their homes at such a young age.

[33] I feel that it is too easy, sometimes, to consider the fact that children were taken from their parents and placed in residential schools, and all too often suffering emotional, physical, and sexual abuse while there, in the abstract, in a somewhat faceless manner, without appreciating the emotional consequences on the child, the parent, and the community. This is simply wrong and disingenuous. The hurt and the harm was all too often traumatic, devastating and tragic, and the consequences far-reaching, both horizontally, in the present, and vertically down through succeeding generations.

[34] I heard this hurt and this harm in the voice of Nora Ladue, Mr. Charlie's mother, as she addressed the court for her and her husband, a mother quietly but clearly sharing her pain and love for her son. But even her and her husband's 27 years of sobriety, started in response to losing their children to Family and Children's Services, shortly after Mr. Charlie's birth, and their continuing commitment to change theirs and their children's lives, cannot undo the hurt and the harm that was caused. These are real people experiencing real pain, not abstract entities.

[35] I quote the following from the decision of Lilles J.:

> [9] This history of Franklin Charlie's family is important because it identifies a direct link between the colonization of the Yukon and the government's residential school policies to the removal of children from their families into abusive environments for extended periods of time, the absence of parenting skills as a result of the residential school functioning as an inadequate parent, and their subsequent reliance on alcohol when returned to the communities. Franklin Charlie's FASD is the direct result of these policies of the Federal Government, as implemented by the local Federal Indian Agent. Ironically, it is the Federal Government who, today, is prosecuting Mr. Franklin Charlie

> for the offences he has committed as a victim of maternal alcohol consumption.
>
> [10] This connection between the residential school system and the social problems in aboriginal communities today was recognized in Prime Minister Harper's apology on behalf of the Canadian Government on June 11, 2008. While it was directed to the former residents of the residential school system, it stated:
>
> > ... The consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language. ... The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.

[36] A fit and just sentence for Mr. Charlie's offence must take into account his circumstances as an Aboriginal offender, not just with respect to how his past circumstances have contributed to his being before the court today, but also with respect to how the sentence I impose will contribute to where he goes from here.

[37] In attempting to impose such a sentence, I consider Mr. Charlie's diagnosis of FASD as detailed in the MediGene evaluation and assessment, in the context of the psychiatric assessment prepared by Dr. Lohrasbe. To some extent, Dr. Lohrasbe found Mr. Charlie to present as being different from the individual he expected to see, based upon the documentation he had been provided. Other than not receiving the *Gladue* report prepared by Ms. Buckshot, Dr. Lohrasbe reviewed all of the above-listed documents, in order to provide his assessment, as well as some additional material.

[38] Dr. Lohrasbe quoted the following passages from the FAS evaluation:

> Franklin's FA[S]D diagnosis indicates that he has underlying brain dysfunction. He has pockets of skills that appear to be intact, but also has areas where the wiring is faulty and he struggles to use all his skills to advance himself. Franklin's general cognitive ability falls within the extremely low range of intellectual functioning.
>
> Franklin presented as much younger than his 26 years. In general, his presentation was much more in keeping with someone who was 10 to 12 years of age. When language and expectations were altered to that level, Franklin appeared to understand more of what was expected of him and was more at ease and compliant with requests and instructions. This age can be used as a general reference for managing Franklin. Alter language, expectations, responsibilities, accountability, and the supervision to the same level as you would at 10 to 12-year-old to build success and reduce behaviours.

[39] And then later in the MediGene report:

> Do not be fooled by Franklin's ability to simply repeat what he has heard. Repeating or parroting back of information does not require any thinking. The information essentially goes directly from the year to the mouth with no interpretation. Without processing there is little chance that Franklin will be able to recall what has been said.

[40] However, Dr. Lohrasbe notes that other sources present a somewhat different picture of Mr. Franklin. In the Pre-Sentence Report prepared by Duane Esler, Mr. Franklin is noted to have completed Grade 10 and 11 at FH Collins High School in Whitehorse with good attendance, an enjoyment of school and learning, and positive peer associations.

[41] In the *Gladue* report prepared by Mark Stevens, it is noted that Mr. Franklin, on his own initiative with support from his First Nation, successfully completed a heavy equipment operator training program, despite being aware of the expectations of failure

from members of his community. A student advisor at the Kelowna school provided information that Mr. Charlie:

> ...displayed a good level of operating skill on the equipment and his assessments were consistently average without notable fluctuation. There were no noted behavioural or attendance issues....

[42] Mr. Charlie also obtained a number of industrial safety certificates, including Workplace Hazardous Materials Information System; Construction Safety Training System; Ground Disturbance; Transportation of Dangerous Goods; and the Oil Sands Safety Association Regional Orientation Program.

[43] Again, Dr. Lohrasbe quoting from Mark Stevens' report noted that:

> In 2011, he was diagnosed with Fetal Alcohol Spectrum Disorder (FASD). This diagnosis is significant because it raises questions about Franklin's ability to lead a safe and healthy life. It also raises questions about our ability as a society to support people like Franklin who are suffering from organic brain injuries caused by prenatal exposure to alcohol. The consensus among the physicians and psychologists who have worked with Franklin is that he requires a level of support that does not exist in his home community.
>
> However, those who are close to him and know him well feel that Franklin may have abilities and supports that were not factored into his FASD assessment. His mother, Nora Ladue knows that Franklin is facing along uphill slog, but she also believes that his bush skills and his demonstrated ability to learn in a practical hands-on environment might be his salvation. She also says that he has a number of healthy people in his life who are committed to giving Franklin the support he needs. Understanding this dichotomy between what the professionals say about Franklin and what his family and friends believe he is capable of will be key to crafting any disposition that has either community-based or therapeutic components.

[44] Dr. Lohrasbe prepared for the interview with Mr. Charlie having the MediGene evaluation and assessments in mind, in particular regarding Mr. Charlie's intellectual and cognitive limitations. He writes, however, that:

> Mr. Charlie came across far less impaired intellectually, cognitively, and interpersonally, than the individual I expected to meet after reading the FAS assessment reports. His demeanour was entirely appropriate when he entered the room, shook my hand, sat down and listened quietly as I went through the standard cautions and explanations. While he came across as youthful and immature, those clinical impressions were not especially striking nor especially unusual among incarcerated men. There were no attempts to intimidate me whatsoever and a rapport was easily established.
>
> He did not have significant problems with understanding my questions and on those occasions that he did, he appropriately asked me to clarify a phrase. In general, he was able to articulate his answers. There were only a few occasions when he hesitated and corrected himself. His answers were always responsive to the question. His vocabulary was limited, but the content of his speech was appropriate.
>
> He was fully oriented as to time, place, person, and situation. He was aware of the charges against him, was able to accurately tell how long he had been in custody, and was able to name his counsel with no hesitation whatsoever.
>
> He was mildly distractible, but not to the point where it interfered with the assessment process. He was not fidgety or restless. He had mild facial stigmata associated with the syndromes that can follow maternal consumption of alcohol during gestation and at one point he spontaneously stated, 'I know I have FAS'.
> When asked how he spent time at WCC, Mr. Charlie stated, I go to school, I work out, I play cards and I play Crib, I play chess, I watch TV, and I try to read sometimes.

[45] Dr. Lohrasbe noted that Mr. Charlie was asked to expand on each of those activities and readily did so.

[46] Dr. Lohrasbe goes on to provide concrete examples of where Mr. Charlie's abilities were apparent, including Mr. Charlie's interest in chess, stating that:

> Mr. Charlie told me that he had learned to play chess in 2007 while incarcerated and he has since become a pretty good player. He was able to name the pieces on a chessboard and rank their relative values without difficulty. He became enthused when discussing various opening chess moves and expressed a preference for using a knight in his early moves and bringing out his rock before his opponent anticipates that move. He added that he regularly defeats other inmates.

[47] Dr. Lohrasbe goes on to state that:

> Mr. Charlie's clinical presentation, during our interview, responses to basic tests of cognitive functioning and descriptions of his activities were at odds with the man portrayed in the FAS evaluation.

[48] He noted that Mr. Charlie's score on the Montréal Cognitive Assessment, which is a rapid screening instrument for mild cognitive dysfunction, was within the normal range.

[49] Dr. Lohrasbe concluded that the central and primary diagnosis for Mr. Charlie is FASD, Fetal Alcohol Spectrum Disorder. He notes that substance abuse "...has obvious implications for restraint and self-control in a man who has a wide range of deficits and behaviours associated with FASD."

[50] He stated, however, that "It is difficult to reconcile Mr. Charlie's clinical presentation with the recommendations from the FAS assessment that he be treated like a 10- to 12-year-old child."

[51] Dr. Lohrasbe concludes that Mr. Charlie's cognitive capacities "...were clearly far more advanced than a child of 10 to 12 years."

[52] Further, contrary to what was stated in the FAS assessment, Dr. Lohrasbe found Mr. Charlie to be "...capable of thinking, interpreting, and processing, not just parroting."

[53] Dr. Lohrasbe noted that on the day he interviewed Mr. Charlie, the observation of the correctional officer he spoke with was that Mr. Charlie was "having a good day." He was also advised that at other times Mr. Charlie is noted as being irritable, uncooperative, and hostile. Mr. Stevens told Dr. Lohrasbe that Mr. Charlie's mental state fluctuates to a considerable degree, and with it his cognitive functioning. Dr. Lohrasbe characterizes his interview with Mr. Charlie as seeing him "at his best."

[54] I note that in the *Gladue* report prepared by Mr. Stevens, he references the following comments from Mr. Charlie's college instructor for the courses Mr. Charlie is taking while in remand at WCC. The instructor admitted that while Franklin is a challenging student because he is functionally illiterate, he says that Franklin is trying. Mr. Kennedy says that Franklin would benefit enormously from one-to-one tutorial support and he is looking for funding from the Ross River Dena Council to see if additional support could be provided. In addition to basic upgrading, the campus has also been running a number of industrial safety courses, however Mr. Kennedy felt that Franklin was not a good candidate for those courses because of his literacy issues, and he has difficulty focusing, which Mr. Kennedy believes is consistent with the diagnosis of ADHD.

[55] Dr. Lohrasbe also recognized that there is often a significant gap in individual functioning as measured within a structured testing situation and more natural, real life situations, with, however, no predictability as to which situation each individual will do well in.

[56] Dr. Lohrasbe is in agreement with the following comments in the MediGene materials:

> Franklin's concrete, egocentric approach to life is consistent with the significant weaknesses and variability and executive functioning in higher order thinking skills: the ability to engage in goal-directed behaviour; to plan; to use past, present, and future learning and experiences to guide decisions, to develop and alter strategies or rules based on feedback and to manage time and space. Franklin deals with the information directly in front of him and struggles to see the big picture, the present, and long-term impact of decisions and behaviours, the feasibility of ideas being present or discussed.

[57] He also agrees with the following recommendations that were made:

> To help compensate for Franklin's weaknesses and executive functioning, he will require ongoing external supports and external controls. Teaching him very specific, concrete systems that apply to a specific situation will allow for success in that situation. Providing him with a broad base of these systems will increase his overall success. Use of pictorial protocols that guide his progress to concrete tasks is recommended. Increased structure, direction, and predictability in his life will allow Franklin to operate on autopilot and reduce his struggles with the in-the-moment judgment and problem solving issues on a daily basis.

[58] Lilles J. addressed these concerns in paragraph 40 of his judgment, as noted above, and went on to state in paragraph 42:

> It is my expectation that during the remaining time of his custodial sentence, his Probation Officer, Health and Social Services, his parents, his First Nation, FASSY, and other supporting agencies will work together to develop a treatment, supervision and support plan to take effect upon his release. It is imperative that a transition plan be put in place before he is released, and that there are responsible individuals present on his release to receive him....

[59] It appears that Mr. Charlie was released in late April 2012. I note that Mr. Stevens' *Gladue* report states he was released in late April. This offence occurred on May 12, 2013. Between the time of his release and his incarceration for the present offence, Mr. Charlie was able to complete his heavy equipment operator schooling and obtain his workplace certifications. He was unable to obtain employment as a heavy equipment operator however, due to a lack of experience. He worked for a while building houses for the First Nation in Ross River until he quit, due to teasing about only getting the job as his father worked at the Band office. He re-commenced a relationship with his son's mother and drank very moderately. That relationship, however, ended in March 2013 and Mr. Charlie started drinking heavily in May 2013. He stated that at the time of the offences he felt lost, that his life was "fucked up" and that he "didn't give a shit no more" and that he just felt like giving up.

[60] I wonder how much of what Lilles J. recommended was, in fact, followed up on and put into place. It appears that according to Mr. Stevens' *Gladue* report, little in fact was done. As Mr. Stevens states in the report:

> In his decision, Judge Lilles did his best to provide some judicial motivation for the development of a treatment supervision and support plan for Franklin....Unfortunately, in spite of Judge Lilles' encouragement, this plan was either never developed or implemented.

[61] In his conclusion, Mr. Stevens states that Franklin:

> ....like so many aboriginal offenders with disabilities who find themselves at odds with the law, runs a risk of being penalized twice by a system that is at least partially responsible for putting Franklin where he is today. It is right and proper that Franklin should be sentenced for his role in the robbery for which he is being sentenced today. His evaluators were unequivocal in stating that FASD is not an excuse for his behaviour and that he should be held accountable for his behaviour and salient consequences must be provided. But Franklin may end up being penalized a second time precisely because of the lack of support services available for people with his level of disability. Without adequate supports in place, Franklin may find himself incarcerated by default and, as we all know, Franklin's continued incarceration can only be a short-term solution for him and for society. If doing the same thing over and over again and expecting different results is one of the definitions of madness, then we might all be crazy.

[62] While to some extent there appears to be a divergence in opinion as to the extent to which Mr. Charlie requires support and supervision, when considering the viewpoint of the professionals in his family and some within his community, it is clear to me regardless in reconciling the various viewpoints, that a structured and encouraging support system would provide Mr. Charlie the stability he needs in order to maintain a steady life that does not rise and fall with the fluctuations in his behaviours that have been noted. The absence of such a system will invariably result in Mr. Charlie finding himself in conflict with the law and further incarcerated.

[63] The simple reality is that society can either choose to put the resources into providing stable housing and employment opportunities for individuals like Mr. Charlie within the broader community, or society can put its resources into providing stable housing and employment for these individuals at the Whitehorse Correctional Centre.

For some reason, we, that is society, choose, for the most part, to put some limited resources into these pro-social areas while yet failing to put forth the kind of concerted effort that is necessary to develop the resources to effect the kind of real and substantial change that is required, in fact, the change that we have a positive responsibility and obligation to make.

[64] Without such a concerted and continuing effort to repair to the best of one's abilities to do so, the harm caused to another by one's actions, any apology for the harm done is to a large extent insincere and lacking.

[65] As I have stated previously in other cases, *R. v. Quash*, 2009 YKTC 54, for example, in reference to the Canadian government's June 11, 2008 apology to the Aboriginal peoples of Canada, when you apologize to someone for the harm your actions have caused, it is incumbent on you to then take such steps as are possible to try to repair or compensate for the damage. The Canadian government's underlying agenda and actions that included, but were not limited to, the placement of Aboriginal children in the residential school system, did not just impact individuals, but communities of individuals and struck at and devastated a way of life and a way of believing for those affected. It is not enough by way of compensation to hand out cheques to surviving individuals who were forced to attend residential schools; reparations require rebuilding, to the extent possible, the foundation that was torn away, not just for one generation but for the generations that follow.

[66] This is an obligation that we, as a society, have failed miserably at.

SENTENCING PURPOSE AND PRINCIPLES

[67] The purpose and principles of sentencing are set out in s. 718 to 718.2 of the *Code*. I do not intend to repeat them at length here, but reserve the right to insert them in any written decision.

[68] Applying these purposes and principles in sentencing an FASD offender such as Mr. Charlie, however, requires additional considerations in how these purposes and principles are to be applied.

[69] Denunciation and deterrence, generally leading objectives when dealing with offences of violence, are less applicable to individuals such as Mr. Charlie (*R. v. Harper*, 2009 YKTC 18, Lilles J. decision in *Charlie*, paras 43 to 47).

[70] Offenders suffering from the effects of FASD can be viewed as having a lesser degree of moral culpability, and thus their sentences should be reduced in accordance with s. 718.1, which reads that "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." This has been noted in cases such as *Harper* and *Quash*.

[71] The Alberta Court of Appeal in *R. v. Ramsay*, 2012 ABCA 257, stated the following with respect to the sentencing of individuals suffering from Fetal Alcohol Spectrum Disorder:

> 15 FASD has been described as "a non-clinical umbrella term that refers to a range of cognitive deficits associated with disabilities incurred when a mother uses alcohol during her pregnancy. Such disabilities are permanent and can result in a range of symptoms including poor memory,

> impulsiveness, [and] inability to appreciate fully the consequences of one's actions"...
>
> 16 Crafting a fit sentence for an offender with the cognitive deficits associated with FASD presents at least two identifiable challenges: accurately assessing the moral blameworthiness of the offender in light of the adverse cognitive effects of FASD; and balancing protection of the public against the feasibility of reintegrating the offender into the community through a structured program under adequate supervision. Medical reports assessing the prospect of the offender's rehabilitation and reintegration into the community are essential to the task and must be carefully analyzed.

[72] This notion is concisely captured by Roach and Bailey, in "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing", (2009) 42 U.B.C. L. Rev. 1, as quoted by the Court of Appeal,

> The determination of an appropriate sentence for the FASD offender is a challenging task for courts. Although it is increasingly recognized that FASD is a disability that can have a profound impact on the level of an offender's moral culpability, the mitigation that this consideration would normally have on the length of a sentence is frequently tempered by the practical need to protect the community. [Yet often] the programming available to an FASD-affected offender is inadequate and the resources to support and monitor such an individual in the community are severely lacking ...

[73] The Court of Appeal goes on to state, at paragraph 18, that:

> 18 These challenges must be placed within the principles and objectives of sentencing. The fundamental principle of sentencing is proportionality: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 19 Further, s. 718.2(a) of the *Criminal Code* requires that a sentence should be increased or reduced to account for

> any relevant aggravating or mitigating factors relating to the offence or the offender. Therefore, to the extent that FASD is demonstrated to have attenuated or diminished the moral blameworthiness of the offender, it must be taken into account.
>
> 20 Moreover, sentencing is an individualized process and courts should craft sentences for FASD-affected offenders with awareness of their unique neurological deficits and abilities. ... Courts in dealings with persons with cognitive defects in the spectrum will encounter a "wide range of effects resulting from prenatal alcohol exposure".... This broad diversity in the severity of impairments accounts for the marked disparity in IQ and other quantifiable indicia of cognitive ability among persons diagnosed with FASD, which should in turn alert courts to the "danger of ignoring differences that may be relevant to the appropriate policies applied in each case".
>
> 21 Accordingly, in assessing the offender's moral culpability, the sentencing judge must have regard to the cognitive deficit of the particular offender. This is consistent with the approach of this court in sentencing offenders suffering from a mental disability. Ordinarily, "where an offender is found to be criminally responsible, but suffering from a serious mental illness, a more lenient disposition reflective of the offender's diminished responsibility is called for" ... Mental disorder can also be, on much less frequent occasions, a factor that may escalate the objective of protection of the public, but in such cases Parliament and the common law require strict proof and clear fact finding. (*R. v. Arcand*, 2010 ABCA 363, 499 AR 1, para. 164)
>
> 22 A diagnosis of FASD also affects the principles of denunciation and deterrence (both specific and general).

[74] The submission of the appellant in *Ramsay* was that it was:

> 22 ... inappropriate to emphasize deterrence when Dr. Yee's assessment indicates that specific deterrence is lost on the appellant. Moreover, the importance of general deterrence ought to be diminished where an offender's cognitive abilities undermine his capacity to restrain antisocial impulses and to understand why his behaviours have brought him into contact with the criminal justice

> system. The appellant also says that denunciation should not be paramount where an offender is of reduced moral culpability.

[75] The Court considered how other courts have dealt with a submission in this nature and stated:

> 23 Other courts, and in particular the Yukon Territorial Court, have addressed this issue. In *R v Harper*, the court observed that "[t]he role of specific deterrence in sentencing FASD-affected offenders decreases in proportion to the severity of the offender's cognitive deficits" (at para 43). In *R v Quash*, 2009 YKTC 54 at para 70, [2009] YJ No 72 the Yukon Territorial Court noted that "[t]he greater the cognitive deficits of the offender, the less role specific deterrence should play".
>
> 24 Where the cognitive deficits experienced by the offender significantly undermine the capacity to restrain urges and impulses, to appreciate that his acts were morally wrong, and to comprehend the causal link between the punishment imposed by the court and the crime for which he has been convicted, the imperative for both general deterrence and denunciation will be greatly mitigated (*Quash* at para 71; *Harper* at para 47).

[76] The Court of Appeal goes on to say:

> 24 ... We agree with the observation of the court in *Quash* that:
>
> > That is not to say that the principles of general deterrence and denunciation have no place in sentencing FASD offenders. In certain cases there may be a role, depending on the nature of the offence and the degree of moral culpability of the offender, based upon the extent of his or her cognitive difficulties" (at para 72).

[77] Finally the Court of Appeal stated that:

> 25 The degree of moral blameworthiness must therefore be commensurate with the magnitude of the cognitive deficits attributable to FASD. The more acute these are shown to be, the greater their importance as mitigating factors and the less weight is to be accorded to deterrence and denunciation, all of which will serve to "push the sentence ... down the scale of appropriate sentences for similar offences" (for the careful application of this sliding scale to an especially severe case of FASD, see R v FC, 2012 YKTC 5 at paras 24-29, 38-43.

[78] There is considerable information before me regarding Mr. Charlie's challenges and his capabilities. It may be that, on a good day, and with the structured supports in place, he can operate at a level above the 10- to 12-year-old range the MediGene evaluation concludes he functions at and that was relied upon by Lilles J. in sentencing him. However, in the absence of such supports, it is clear from the materials provided that Mr. Charlie struggles to control his behaviours. As noted in these materials, when Mr. Charlie consumes alcohol, things deteriorate quickly and his negative behaviours are magnified. Underlying Mr. Charlie's decision to consume alcohol are, of course, the cognitive limitations he has as a result of his suffering from FASD. It is a circle from which the avenues of escape are narrow and limited and one that Mr. Charlie is often drawn back into, in large part due to a lack of support. Notwithstanding the strength and capabilities that Dr. Lohrasbe knows Mr. Charlie to, at least at times, and in pockets, possess, I find that Mr. Charlie is an individual of diminished moral culpability to whom the objectives of denunciation and deterrence are of somewhat limited applicability.

[79] Further, while repeat offenders, generally speaking, receive greater sentences for subsequent offences, in my view, the "step principle" as it is known, should have little application to offenders such as Mr. Charlie. To a large extent this principle is

based upon the notion that an individual should have been deterred from committing further offences because of having received a sanction for an earlier offence. If the objective of specific deterrence is less applicable to Mr. Charlie, he cannot therefore be subject to the normal application of the step principle for his failure to have been specifically deterred.

[80] More difficult is the principle of separation from society. Is it necessary to separate Mr. Charlie from society? Doing so will protect society for the period of time that he is in custody. If this time in custody is utilized properly, with Mr. Charlie able to access and participate in suitable programming that meets his particular needs, perhaps the protection offered society extends to the period of time after his release. If not, however, then the protection is only temporary and, upon Mr. Charlie's release, the risk continues as it was or perhaps at an even more elevated level, if his time in custody is not only not beneficial to him but negative in impact.

[81] I must consider the degree of violence that Mr. Charlie participated in, either directly or as a party, on the facts before me in order to assess the extent to which the separation of Mr. Charlie from society by the imposition of a jail sentence is necessary. The greater the degree of violence and physical and psychological harm that resulted, the greater the risk of substantial harm if Mr. Charlie were to reoffend.

[82] This is not Mr. Charlie's first such act of violence. Should I accede to the sentence proposed by Crown counsel, society -- at least society outside of WCC -- will be protected from any further acts of violence by Mr. Charlie for up to two years less one day, or up to one-third less than that if he earns remission while in custody.

[83] When considering the necessity of separating Mr. Charlie from society, the objectives of rehabilitation, providing reparation for harm done and promoting a sense of responsibility in Mr. Charlie and an acknowledgment of the harm done through the commission of this offence, must also be considered.

[84] Rehabilitation, in the sense that Mr. Charlie can be "cured" from the effects of FASD, is of course not possible. It is, however, possible for him to be rehabilitated, in that he can learn to make choices that are acceptable and not conducive to an anti-societal and pro-criminal lifestyle. If Mr. Charlie can learn to make positive choices and reject the impulse to make negative ones, then there is a much greater likelihood that the remaining objectives of sentencing will be achieved. This, of course, requires more than just willpower on Mr. Charlie's part; it requires a supportive structure to assist and guide him.

[85] To some extent, Mr. Charlie has, at times, greater capabilities than what may have been earlier thought. While potentially raising to some degree his moral culpability, it also brings to the forefront the fact that he may actually have greater abilities to operate pro-socially than people may have thought and may respond better to structure and supports than people may have believed, and this should encourage these supports and structures to be put in place for him.

[86] Mr. Charlie comes before the court with little in the way of a concrete plan for his next steps. There is some information as to employment prospects and that a job at Tsow Tse Lum is said to be waiting for him, but I know little about the structure and duration of this employment. There is little information about his having a stable and

structured residence. He has much in the way of family support, but little in the way of a plan that would demonstrate that there is a well-structured support network established to assist him in living a non-criminal lifestyle. Mr. Charlie expresses how being in jail is "no fun anymore" and how the impact of a significant crime he witnessed several years ago has just recently been fully realized by him. He has articulated clearly that he wants a different life and a better life. While all of this shows some promise for improvement in Mr. Charlie's situation, the extent to which it does so is perhaps not as pronounced as one would hope.

[87] In some ways, there is less put before me with respect to a plan for Mr. Charlie than there was before Lilles J.

[88] This was an offence of violence, although I find the circumstances of the offence to be significantly less aggravated than those that existed when Mr. Charlie was being sentenced by Lilles J. In that case Mr. Charlie armed himself with a weapon in what was clearly a premeditated plan to rob the victim. In the present case there is little evidence that would support a finding of premeditation in the use of force and the degree of violence that resulted was much less. I do not know whether Mr. Charlie pushed Mr. Dick to the ground or whether the other male did so. I have little detail on what was meant by Mr. Dick being "harassed" or "roughed up" or by whom this was actually done. There is no evidence of any injury to Mr. Dick. I do not consider this to be a "home invasion" per se, as that term is generally understood and for which lengthy prison sentences are imposed.

[89] Notwithstanding that this is Mr. Charlie's second conviction for robbery, I find that a fit sentence for this offence is less than in the circumstances of the offence that was before Lilles J.

REMAND

[90] Mr. Charlie has struggled while in remand custody awaiting sentencing. He has been convicted of a number of internal offences and there are numerous reports of negative behaviour. This stands somewhat at odds with what his behaviour appeared to be before Lilles J. He had two brief periods of employment while on remand and took some programming, although he chose not to attend the Violence Prevention Program despite it having been offered to him. To sum up his time on remand, it can be said that he often struggled. So is it reasonable to expect that Mr. Charlie will spend any further time in custody without significant difficulty? I do not think so.

[91] On analysis of *Vittrekwa*, *Cardinal*, and the recent Supreme Court of Canada cases of *R. v. Summers*, 2014 SCC 26, and *R. v. Carvey*, 2014 SCC 27, I am satisfied that Mr. Charlie's circumstances, both with respect to the loss of remission and as an Aboriginal individual suffering from the effects of FASD justify him receiving enhanced credit. I credit him at 1.5:1 for his time in pre-trial custody and I assess Mr. Charlie's time in custody on remand therefore to constitute 14 months.

[92] I find it necessary to consider the quality of Mr. Charlie's time in remand custody when determining the extent to which a further jail sentence is warranted.

[93] To the extent that Mr. Charlie struggled with behavioural issues and made little progress while in remand custody, it is quite likely there will not be a substantial difference for him in serving a further period of custody. I recognize that a proper consideration and application of the purposes of principles of sentencing requires much more than just a consideration of the impact of a jail sentence upon Mr. Charlie. It is finding the appropriate balance between the, at times, apparently competing interests that presents the greatest difficulty in sentencing an offender such as Mr. Charlie.

SENTENCE

[94] I note that any time that I sentence Mr. Charlie to serve in excess of his time in remand is required to be served in a correctional facility as the provisions of the *Criminal Code* do not allow for the imposition of a conditional sentence.

[95] The degree of violence Mr. Charlie engaged in is at the lower end of the spectrum, even considering that this took place inside the victim's residence. I find that the risk of further violence that would result in significant harm is towards the lower end of the spectrum.

[96] I find that, in the circumstances of this offence and this offender, that a penitentiary sentence is not necessary or warranted.

[97] When I consider whether a further period of custody is necessary, I recognize that this is April and the opportunities for employment for Mr. Charlie and for his being on the land are greater than in mid-winter. Were I to impose a sentence that results in Mr. Charlie being in custody at WCC for an additional lengthy period of time, the

opportunities for him to obtain employment and benefit from being on the land are diminished. Mr. Charlie's best prospects for entering into the community and working and spending time in the bush are unfolding in the next few months, and not in late summer or fall. I find that it is not necessary in accord with the purposes, objectives, and principles of sentencing to impose a sentence that will result in Mr. Charlie remaining in custody for a further lengthy period of time. While a sentence in the range of 18 to 20 months would have the result of having Mr. Charlie released in time for the late spring and summer of 2015, and the result of separating Mr. Charlie from society for a further period of time, I find that such a sentence would be disproportionate for this offence committed by this offender.

[98] As such, in addition to the 14 months he has served in custody on remand, I impose an additional nine weeks of custody. This should allow for his release in June. This additional time in custody has the benefit of allowing the present somewhat unstructured and detailed plan for Mr. Charlie to be strengthened. It also has the benefit of allowing Mr. Charlie to put into practice what he has said he wishes to do with respect to employment and with respect to dealing with his issues of substance abuse.

[99] Notwithstanding that Mr. Charlie is currently on probation pursuant to the decision of Lilles J., I will place him on probation for a period of three years. While I understand the rationale for Lilles J. using "plain language" terms on Mr. Charlie's order, I decline to do so. I have information before me that Lilles J. did not have, and this information satisfies me that Mr. Charlie is capable, they are properly explained to him on more than one occasion, of understanding the terms that I impose, notwithstanding his illiteracy.

[100] The terms of probation are:

1. You will be required to keep the peace and be of good behaviour, to appear before the Court when required to do so by the Court;

2. You are to notify the Probation Officer in advance of any change of name or address, and promptly notify the Probation Officer in advance of any change of employment or occupation;

3. You are to remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;

4. You are to report to a Probation Officer immediately upon your release from custody and thereafter when and in the manner directed by the Probation Officer;

5. You are to reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;

6. You will abide by a curfew by remaining within your place of residence between the hours of 10:00 p.m. and 6:00 a.m. daily, except if in the company of a responsible adult approved in writing in advance by your Probation Officer or as otherwise permitted in writing by your Probation Officer;

7. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

[101] I am placing you under curfew for the entire three years, although not because I intend that you stay on a curfew for three years, it is simply easier for me to eliminate that term later and impossible for me to add it should it become necessary. I expect with work and any education or treatment that you will have no difficulty being allowed outside of your residence for a good reason. If you do not have a good reason to be outside of your residence, then it provides you some structure and stability. This curfew, of course, can be altered or removed upon a further review. And if you are doing well, Mr. Charlie, I would fully expect that an application would be brought at some time to alter this curfew term or perhaps even to remove it, but that will depend on how well you are doing. This provides you some structure and support, insofar as the court is able to, that should assist you in making proper and correct choices. It is not meant to punish you or unfairly limit you, but to simply guide you.

8. You are to abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner.

[102] I understand and appreciate that you have a substance abuse issue. You have been in custody for a substantial period of time, you have a little bit longer in custody, the simple reality is that if you do drugs and drink you will commit further criminal offences. I do not consider this as setting you up for failure as I believe you are sincere

in your desire not to drink and do drugs. And as I believe that this clause is required in order to provide you with the support and structure to encourage you to make the right choices when faced with the opportunity to drink alcohol or consume drugs and not make the wrong choices.

9. You are not to attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol.

10. You are to take such alcohol and drug assessment counselling or programming as directed by your Probation Officer;

11. Having given the court your consent, which I note in the documentation I have been provided, you are to attend and complete a residential treatment program as directed by your Probation Officer. You are to take such other assessment counselling or programming as directed by your Probation Officer.

12. You are to have no contact directly or indirectly or communication in any way with Little Charlie Dick, except with the prior written permission of your Probation Officer.

13. You are not to attend within five metres of the property or residence of Little Charlie Dick, except with the prior written permission of your Probation Officer.

[103] There may be no need for you to ever be granted permission, or there may be, I am quite content to leave that in the hands of the Probation Officer.

14. You are to participate in such educational or life-skills programming as directed by your Probation Officer;

15. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

16. You are to provide your Probation Officer with consents to release information with regard your participation in any programming, counselling, employment, or educational activities that you have been directed to do pursuant to this probation order.

17. You are not to have in your possession any firearm, ammunition, explosives substance, or weapon, as weapon is defined in the *Criminal Code*, except with the prior written permission of your Probation Officer or in accordance with any order that may be made pursuant to s. 113 of the *Criminal Code*.

[104] Do you understand those terms? It is very important that you have someone talk with you and ensure regularly that you understand each one of those terms. You should wake up every day knowing what the conditions you are required to live within that day are. There are a lot of conditions; they are not difficult conditions. If you do not drink alcohol and do drugs, you should have no problem complying with all of these conditions. If you choose to do so, that is the choice to come back into custody.

[105] This is a designated offence for the purpose of DNA. You will provide a sample of your DNA.

[106] This is also an offence for which the mandatory s. 109 prohibition order takes place and, as this is the second such offence, this prohibition order is for life. I say this subject to the ability of Mr. Charlie to bring an application before the Court under s. 113 to be allowed to possess a firearm for the purposes of sustenance hunting. As I understand it, that is not an application counsel is prepared to deal with yet, but may at a future date wish to revisit.

[107] Due to Mr. Charlie's circumstances I am going to wave the victim fine surcharge.

[108] Remaining counts --

[109] MS. PHILLIPS: Stay of proceedings.

[110] THE COURT: -- stay of proceedings and remaining counts.

[111] Do you have any questions or anything you wish to say, Mr. Charlie, at this time? I am simply giving you an opportunity, you do not have to.

[112] MR. CHARLIE: [indiscernible - no audible response]

[113] THE COURT: What I will say, as though I have not said enough already, is that you have abilities, but they are not always connected in a way that lets you live your life away from jail and the justice system. In order for you to do that and connect all your abilities and live a positive life, you need help and you need to be willing to take advantage of that help and to go ask for that help when you need it. If you do that,

there is every reason to believe that you can do well; if you do not, there is every reason to believe you will not do well.

[114] All right, that is it.

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COZENS T.C.J.