Citation: *R.* v. *Elias*, 2009 YKTC 59

Date: 20090513
Docket: 08-00493
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

VICTORIA ANNE ELIAS

Appearances:
Peter Chisholm — Counsel for Crown
Nils Clarke — Counsel for Defence

REASONS FOR SENTENCING

[1] COZENS T.C.J. (Oral): Victoria Elias has entered a guilty plea to assault with a weapon, contrary to s. 267(a) of the *Criminal Code of Canada*.

[2] Reduced to the bare essentials, the circumstances are that on October 20, 2008, Ms. Elias, while intoxicated, came to the residence of a Mr. Moustakas. At that time he took a bottle of vodka away from Ms. Elias. Ms. Doreen Ouelett, who was sober, was in the residence and in the kitchen at the time. Ms. Elias subsequently obtained the vodka bottle, took some drinks from it and became angry when Mr. Moustakas asked her to leave. He called the police, which further angered Ms. Elias. She then picked up a large, serrated, ten-inch kitchen knife and slashed Ms. Ouelett in the face, causing a seven-centimetre cut to her left cheek, from the corner of her mouth to the upper-portion

of the cheek.

[3] This cut, although narrow at its beginning, widens to a gap of approximately one centimetre on Ms. Ouelett's cheek, exposing the fat or tissue. Ms. Ouelett required ten stitches to close this wound. She also received a cut on her hand which required nine stitches to close.

[4] There was no previous history of animosity between Ms. Elias and Ms. Ouelett, and I have been informed by defence counsel that there is no animosity at present. This was a violent, unprovoked and, apparently, somewhat random attack that likely has left Ms. Ouelett with permanent scarring to her face. I say "likely" based upon the photographs I have observed and Ms. Ouelett's unwillingness to participate in the prosecution of this matter, thus not allowing for follow-up medical information to be obtained.

The previous circumstances of Ms. Elias

[5] Ms. Elias is 29 years of age. She is of Inuvialuit ancestry.

Criminal record

[6] Ms. Elias has an extensive criminal record. Of most significance are the entries for convictions for acts of violence. In 1996, as a youth, an assault on a police officer, s. 270, sentenced to one day open custody. In 1997, youth, two assaults on a police officer, s. 270s, sentenced to 60 days closed custody on each, concurrent. Adult offences: 1998, s. 264.1(1), utter threats, sentenced to two months consecutive to a sentence served; 1999, s. 266 assault, sentenced to 15 days; 2003, s. 266 assault,

sentenced to 19 days; 2004, s. 266 assault and s. 270 assault on a police officer, sentenced to three months plus nine months probation on each; 2005, s. 266 assault, sentenced to three months plus nine months probation; and, 2008, s. 266 assault, sentenced to three months time served. The remaining of her total of 49 offences consists of three impaired driving offences, numerous failures to comply with recognizances and probation orders, property-related offences and a single possession of illegal drugs. The longest period of custody she has been sentenced to is 90 days or three months.

[7] It appears that the longest period of time that Ms. Elias has continually spent in custody has been in remand for the current offence, this being a total of 204 days.

Pre-sentence report

[8] A pre-sentence report has been prepared. It is clear from the conflicting information in the report that Ms. Elias's ability to self-report with accuracy is questionable at best. For example, in a previous pre-sentence report in 2004 she reported to a very difficult childhood, while in the present report she described having had a very good upbringing. Her sister, Wendy Elias, addressed the Court in the sentencing hearing and indicated that their shared upbringing was hard.

[9] Ms. Elias has a grade seven education. She has virtually no employment history or prospects. She has a serious and longstanding addiction to alcohol, which at times has been interspersed with cocaine use.

[10] Medical staff at Whitehorse Correctional Centre have expressed concern that she is strongly suspected of accessing and using drugs while in custody and there is a

report that Ms. Elias has been moved several times to decrease her drug use. Ms. Elias denies using drugs after learning she was pregnant and states that she sometimes stated that she used drugs to staff for the purpose of being transferred within Whitehorse Correctional Centre at times when she actually was not using drugs.

[11] She is currently pregnant, with a due date of July the 11th. I was advised that there is no history of accommodation within Whitehorse Correctional Centre for a mother and infant child, although I understand that for the birth of the child the arrangements are made to have the inmate placed within the Whitehorse General Hospital.

[12] The pre-sentence report states that Family and Children's Services have indicated that they intend to apprehend the child immediately after its birth in July. A previous child to whom Ms. Elias gave birth was apprehended immediately after birth in 2007. This first child has significant physical and cognitive problems.

[13] The pre-sentence report indicates that Ms. Elias has mostly kept to herself while in remand at WCC. It states that she has seldom participated in any of the programming available to her there, including the parenting program. Ms. Elias advises otherwise, to the extent that she states that she has done some of the programming and some one-on-one counselling as well as attend bible studies.

[14] The LS/CMI, Level of Service/Case Management Inventory, risk assessment places Ms. Elias at the high range, perhaps the highest range possible, as it indicates that there is a 100 percent probability of reoffending, with the risk factors being substance abuse, lack of structure, criminal associates and attitude towards offending

behaviour. I note that this is a probability, that if in fact the risk factors are managed or not present, clearly the risk would be significantly reduced.

[15] Also of significance is the recognition that Ms. Elias appears to be suffering from a cognitive deficiency. Quoting from the report:

> It has been suggested in the past that it may be prudent at some point for the Court to order a psychological assessment to determine what, if any, learning disabilities Ms. Elias may have. It is believed, based on information provided by Ms. Elias and her sister to Probation Officers in the past, that Ms. Elias is most likely suffering from FAS or FAE. However the writer has made several attempts to engage Ms. Elias in assessments without any success.

And later, in the conclusion of the report:

> Ms. Elias does appear to have some cognitive difficulty. … She did not appear to understand the consequences of her actions.
>
> …
>
> It is the writer's view that she is not cognitively capable of engaging in any type of treatment currently offered in Whitehorse.

[16] Sheldon Miller and Wendy Elias, who are partners, spoke and offered their support for Ms. Elias. They are prepared to have Ms. Elias reside in their home. Mr. Miller assures that it will be a sober home if she is there. He is prepared to not have any alcohol in the home. Wendy Elias has been sober for three years, with some slips this year. She states that she wants to maintain her previous sobriety and work with her sister to find help for them both. She has not yet engaged in any counselling to assist herself, but says that she will. I have no problem, based on what I heard from Wendy Elias, that she fully intends to take what steps she can to maintain her sobriety and

provide what assistance she can to her sister.

Submissions of counsel

[17] Briefly, the submissions of counsel. Crown is suggesting that a sentence of 15 to 18 months custody be imposed in the circumstances, and it would appear clear to me that in suggesting this range of 15 to 18 months, which given the criminal history of Ms. Elias and the violence that is found there, takes into account factors such as her First Nations heritage and the cognitive difficulties that are recognized in the pre-sentence report. Certainly, a range in excess of 18 months could have been sought in this case, for this kind of offence of serious violence with this kind of criminal history.

[18] Defence counsel is suggesting that a sentence on the lower end of the 15 to 18 month range, or perhaps slightly below it, be imposed. In conjunction with this suggestion is the submission that Ms. Elias be given more than the usual 1.5 to one credit for her pre-custody status. One reason provided by defence counsel for this is the deferential circumstance for female inmates at Whitehorse Correctional Centre, whether they be on remand or in general population as serving prisoners. Defence counsel suggests that after giving Ms. Elias additional credit for her remand status that a sentence of 30 to 60 days would be appropriate.

[19] Now, were I to accede to defence counsel's submission and grant Ms. Elias two to one credit for her remand time, she would receive credit for 408 days in custody, which is approximately 13 and a half months. At a rate of 1.5 to one, she would receive credit for 306 days custody, which is just over ten and a half months. The problem I have with defence counsel's submission on this point is that Ms. Elias's status on

remand is essentially the same as if she was a serving prisoner. She has the same access to programming that female inmates serving sentences do. To credit her above the 1.5 to one would be to grant her credit not available to serving female inmates. If, in fact, the conditions for female inmates at Whitehorse Correctional Centre are more difficult than for male inmates, and I note that I have no clear and cogent evidence before me of this being the case for the time period that Ms. Elias was in custody on remand status, then the correct way to reflect this unequal treatment would be to reduce the sentences for all female offenders from the sentences given to similarly situated male inmates. In order to accede to such a submission for a reduced sentence for an offence committed by a female offender I would require sufficient evidence on the deferential treatment of female prisoners at WCC to be before me.

[20] So, as such, I find that Ms. Elias should be given credit for just over ten and a half months, which, in the circumstances, I will calculate at 11 months credit for pre-trial custody.

Case law

[21] Counsel filed a number of authorities which indicate that the range of sentences involving assaults with a knife can be, from the lowest, a conditional discharge, in what was considered to be a rare circumstance, ***R.*** v. ***Vermette***, 2008 YKTC 27, to sentences within or above the range suggested by Crown in this case, such as ***R.*** v. ***Sinclair***, [1993] B.C.J. No. 1850.

[22] ***Sinclair*** was considered by Judge Faulkner in ***R.*** v. ***Perez***, May 31, 1996, Territorial Court, Yukon, in which a sentence of one year followed by one year probation

was imposed upon a 26-year-old male who somewhat spontaneously broke a beer bottle across the face of the victim in a bar, causing devastating physical and emotional consequences for the victim. Mr. Perez had entered a guilty plea and had taken steps to deal with his alcohol abuse and anger management issues. He was steadily employed and had impressive testimonials as to his character and work habits. He supported two children. There is no indication that he had any criminal record. Now, this was a s. 268, aggravated assault, and Judge Faulkner considered the flight of Mr. Perez from the bar to be a significantly aggravating factor.

[23] There are, of course, as there always are in such cases, differences between the ***Perez*** case and this case, such as the nature of the consequences on the victim in ***Perez,*** for which there was clear evidence as compared to what we have here, which is only the physical evidence of what we can see and what we would reasonably deduce from what we saw there. There is no indication that Mr. Perez was of First Nations status. Then there are indications that his antecedents, coming into the offence for which he was sentenced, certainly did not demonstrate conflict with the law or any prior history of violence. He also had a lot of positives going for him in his employment history and the testimonials he was given. Such differences are not unusual, and every case that was filed before me, which I do not propose to go through in any detail at all, all contain principles that are applicable and sentences that vary from case to case and circumstance to circumstance.

[24] I consider, in these circumstances, including the nature of the offence, the consequences of the assault upon Ms. Ouelett to the extent that we can assess these, the mitigation of the guilty plea and the criminal record of Ms. Elias, which clearly

indicates a propensity for violence in certain situations, which situations tend to be the abuse of alcohol as I understand it, the range sought by the Crown is appropriate and, as stated earlier, certainly not at the high end of the range that could have been sought.

[25] In sentencing Ms. Elias I must consider her First Nations status. I apologize to Mr. Clarke who has just recently heard much of this verbatim, but I do not propose to synthesize the wording that I used in ***R.*** v. ***Quash***, 2009 YKTC 54, so recently after having given that decision:

> [51] Section 718.2(e) states that:
>
> > (e) All 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.
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> [52] The following quote from the Ontario Court of Appeal in *R.* v. *Whiskeyjack*, 2008 93 O.R. (3d) 743 [C.A], underscores the balancing act that needs to take place when considering an appropriate sentence for a First Nations offender in the context of a serious offence of violence:
>
> > The task of the sentencing judge is to weigh the aboriginal offender's circumstances and his or her interest in rehabilitation or restorative justice with the community's interest in deterrence, denunciation and the need for social protection. In the case of serious and violent offences, even for aboriginal offenders, the balance will often tilt in favour of the latter interests. (Paragraph 31)
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> [53] Even in very serious offences, however, the analysis set out in *R.* v. *Gladue*, (1999) 1 S.C.R. 688, applies in all cases where the offender is of First Nations ancestry, although the application of a different methodology for a First Nations [or aboriginal] offender will not necessarily end up with a different result than … the case of a non-First Nations [or aboriginal] offender. This is *Whiskeyjack*, paragraphs 29

and 30, referring to the case of *R.* v. *Kakekagamick* (2006), 81 O.R. (3d) 664, C.A., at paragraphs 56 and 66.

[54] It is important to consider the context in which [s.] 718.2(e) is to be [considered] today in light of the apology offered by the Canadian government on June 11, 2008, to former students of residential schools in Canada for the government's role in the residential school system. In this apology, Prime Minister Harper recognized that the damage went beyond the negative impact on the individual, stating that:

> …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.

[55] In accepting responsibility for their role in causing such a negative impact on First Nations individuals, their families and their communities, the Government of Canada implicitly should be seen as also accepting responsibility for ongoing participation in ameliorating the consequences of this impact on [aboriginal] individuals, their families and their communities. All too often it is in the criminal justice system where these negative impacts are to be found, not just in the victims of criminal activity but in the offenders who commit the crimes.

[56] It is not enough to apologize for harm done without making reparation for the harm. This reparation must reach beyond the payment of monies to former students of the residential schools. It must extend to how we treat [aboriginal] peoples involved in the criminal justice system, regardless of their role within it. Legislation designed to "get tough" on crime must not lose sight of the fact that the very individuals that suffered harm, either directly or indirectly, perhaps as children of students of residential schools, may be the same individuals who are committing the crimes and who are, under such legislation, the individuals that the justice system will "get tough" on.

[57] True justice requires proportionality, and it is incumbent on the criminal justice system to strive to achieve this proportionality in each case for each offender.

[26] I do not know a lot about the Inuvialuit background of Ms. Elias and what, if any, role residential schools or other actions of government may have contributed within her community and her peoples to the kinds of devastating effects that Prime Minister Harper referred to in his apology. I am satisfied on what I know from my involvement in the justice system that the impact is widespread and reached far beyond First Nations or aboriginal peoples in only certain segments of Canadian society, and certainly has had, I would say, a significant and often negative impact on aboriginal peoples in the most northern of Canadian communities.

[27] I must also consider any mitigation that may result from what appears to be, although not formally assessed, a cognitive disorder and the impact this cognitive disorder may have on Ms. Elias's moral blameworthiness. This issue was recently canvassed in depth by Judge Lilles in the ***R.*** v. ***Harper***, [2009] Y.J. No. 14, decision, and more recently by myself in the ***R.*** v. ***Quash***, *supra*, decision of May 11, 2009. In both these cases there was a formal diagnosis of FASD, Fetal Alcohol Spectrum Disorder, through an FAS diagnostic report. We do not have such a report or diagnosis in the present case. We do, however, have observations in the pre-sentence report which appear to provide some basis for a finding that, to some extent, Ms. Elias suffers from a cognitive defect which causes her to fail to understand, fully, the consequences of her actions.

[28] In both ***Harper*** and ***Quash*** there was a reduction in the sentence imposed, as a result of the FASD diagnosis of the offenders, from the sentence which would normally have been imposed. Are the principles in ***Harper*** and ***Quash*** similarly applicable to Ms. Elias? Perhaps, but, in the absence of a formal diagnosis, to a somewhat lesser

degree. It always remains a balancing act between the personal circumstances of the offender, the seriousness of the offence committed and the risk of harm for further offences committed by the same offender, and, in particular in offences of violence, the protection of society from the commission of further offences of violence; and balanced against the personal circumstances and found within them are the prospects of rehabilitation of the offender.

[29] Ms. Elias is young, 29 years of age, and rehabilitation, as initially suggested by Crown counsel as a factor that needs to be considered and also a factor raised by defence counsel, must be recognized, and Ms. Elias should be given every opportunity to pursue her rehabilitation to the extent, given that we do not know what, if any for certain, cognitive difficulties Ms. Elias may have. It may not be the form of rehabilitation found in individuals who do not suffer from any cognitive defects or limitations. This rehabilitation needs to be balanced carefully against public safety, and in Ms. Elias's case there is, unfortunately, no solid track record, even since her time in custody, that indicates that rehabilitation is well on the way.

[30] I say this recognizing that it is one thing to have physical opportunity to access programming and take advantage of counselling opportunities and other educational opportunities. It is another thing to have all the tools, or sufficient tools, to take advantage of those opportunities. There were some submissions before me related to how there is perhaps a greater emphasis on ensuring or making every effort to have serving inmates access the programs available by the staff at Whitehorse Correctional Centre than there necessarily is for a remand prisoner. In other words, there is a little more pressure on a serving prisoner to try to take advantage of the programs they have

got than there is on a remand prisoner.

[31] In the case of individuals who are not cognitively challenged, they need to be self-motivated, but I can accept that individuals who have cognitive difficulties may not have the same tools to exercise the same will power to take the same programs that are available. So there is opportunity, but that opportunity for certain individuals is going to need a little more help from others than it would in the case of individuals who are not so challenged. So I am not going to put any significant sort of negative spin on this against Ms. Elias for her not taking advantage of all the programming available to her. But, that said, I do not have the positive benefits that I could take in her favour if I did have this evidence. I want to make it clear that that is the balance that I am striking between the two.

[32] As such, there is no indication before me of the ability to lower the risk factors that lead to the high risk in Ms. Elias's case. I note the support of the family members that were here, and I appreciated hearing from Mr. Miller and Wendy Elias and I believe that they have a lot to offer Victoria. The question is whether Victoria, with the assistance of any others, is going to be able to take full advantage of that. At least it is there, and it is meaningful.

[33] I recognize the concerns put forward by defence counsel with respect to the July birth of Ms. Elias's child and what may or may not happen there, and I certainly have no intention, at this point in time, with respect to what involvement Family and Children's Services may have, in saying anything that would impact on what may occur between Ms. Elias and Family and Children's Services in July of this year. That will play itself out

in a different forum than this. But in the circumstances, I believe it is most appropriate to also not, in any significant way, factor that into this decision. I have given careful thought and consideration to this, to see if I could impose a sentence that, for lack of better words, centred around the timing of the birth of Ms. Elias's child, and I have decided that I cannot alter the sentence that I believe is fit, taking into account all of the circumstances of this case, both the aggravating and the mitigating, and assigning mitigating factors to both the Inuvialuit heritage of Ms. Elias and to the cognitive difficulties which I believe she has.

[34] As such, the sentence that I am imposing is a 15-month sentence less 11 months credit for time served, which leaves four months to go. This will be followed by two years of probation.

[35] I concur with defence counsel that the probation should be as minimally intrusive as possible and should be designed to make it as clear as possible so that Ms. Elias, who does not have a good track record of following any kind of court order, can do the best she can to follow this one. I do not wish to set her up for further failures or breaches, recognizing the limitations that are clearly indicated in the pre-sentence report. This is designed for one primary purpose, which is the rehabilitation of Ms. Elias, which will, ultimately, best protect society and anyone close to Ms. Elias.

[36] The terms of the order will be the statutory terms, which I will not change from their plain wording:

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

3. To notify the probation officer in advance of any change of name or address, and promptly notify the probation officer of any change of employment or occupation.

To quote from the ***Harper***, *supra*, case, in plain language, Ms. Elias, this means:

1. … Do not do anything that will get you in trouble with the police.
2. You must come to court when the judge or your probation officer tells you to.
3. You must tell your probation officer if you go to live somewhere else, change your name or change jobs.

[37] The next clause will be:

4. You must go to the probation office and speak to a probation officer as soon as you are released from custody.
5. You must meet with your probation officer in person or by telephone when your probation officer tells you to. If you are going to be late or cannot make the meeting, you must telephone your probation officer and ask for another meeting time.
6. You will live where your probation officer tells you to live and not move unless they tell you you can move.
7. You will go to all places or meet with any people that your probation officer tells you to, to help you address your alcohol addiction problem.
8. You will go to such places or speak to such people that your probation officer tells you to, to help you with any other problems.
9. You will take a psychological assessment if your probation officer tells you

to.

10. You will do your best to improve your education.

11. You will do your best to find a job.

12. You will talk to your probation officer about all your efforts to improve your education and find a job.

13. You will also sign a paper that will allow any doctor you see or any of the counsellors you see to tell your probation officer how you are doing.

[38] Are there any other terms that are considered? Ms. Treusch, are there any other terms that you would consider?

[39] ROBIN TREUSCH: No, I think that pretty much covers it.

[40] THE COURT: I do not propose to put an abstain clause on there. I had thought about a curfew. You know, I am of two minds on that, and that is one issue I wanted to raise with counsel. From the Crown's point of view?

[41] MR. CHISHOLM: The only purpose that I would see for a curfew, even if it's for a limited duration during the probation order, would be to offer some structure to her. But I wouldn't propose that any curfew be for the full term of the probation order.

[42] THE COURT: I was thinking of a transitional period of a curfew, and not a particularly restrictive one. I was thinking of something in the area of one month to two months tops, Mr. Clarke, and then it was purely for the purpose of transitioning.

[43] Before I say that, one of the things I wanted to say, Madam Clerk, is:

6. You will live where your probation officer tells you to and not move without

their permission --

I meant to add on:

-- and you will obey the rules of any place where you are living.

I meant to have that on the reside clause.

[44] ROBIN TREUSCH: Your Honour, can we add “with written permission”; unless without -- “unless with written permission”?

[45] THE COURT: On the?

[46] ROBIN TREUSCH: Reside.

[47] THE COURT: With written permission?

[48] ROBIN TREUSCH: Yes.

[49] THE COURT: Reside and not move without written permission? I sort of considered that implicit, as where they move has to be where you direct them to, but it might make it easier for her, “with written permission”, so she understands. So we can add that:

6. … not move unless your probation officer gives you written permission to do so …

Or tells you in writing that you can move.

[50] I will put a curfew on.

14. For the first six weeks, the curfew is going to be ten o’clock in the evening until seven in the morning.

That is purely to give Ms. Elias some structure at the front end. Frankly, Ms. Elias, if you get through the first six weeks of this with this curfew and no problems, I think that you are well on your way to starting to deal with your history and become perhaps more what you may wish to become. But that, of course, will be up to you.

[51] There will be a s. 109 firearms prohibition for ten years. There will also be the mandatory DNA order in this case. The victim fine surcharge will be waived.

[52] Is there anything else?

[53] MR. CHISHOLM: Direct a stay of proceeding to Count 2.

[54] MR. CLARKE: The only comment I would have, I've heard your reasons with respect to, I suppose, the totality of the sentence and I understand the Court's in a difficult position with respect to, perhaps, ultimately not considering other proceedings which might occur, but one aspect that Your Honour did recognize in your reasons with respect to the correctional facility was the -- and Ms. Treusch, to a certain extent, substantiated that, was that remand prisoners, and people who have been in remand for a long time, which is my client who's been in remand for a long time, may still -- even though they've been in remand for a long time, it doesn't mean that they're necessary like senior remand prisoners. They're still remand prisoners with respect to, I suppose, focussing on a game plan, focusing on counselling, focussing on rehabilitation, treatment, coming up with a plan. So what Ms. Treusch I understood to say, and she can certainly confirm this once again, and Your Honour did aver to this in your reasons, is that they may, in fact, sort of be shuffled to the bottom of the pile with respect to the --

[55] THE COURT: Priority of programming.

[56] MR. CLARKE: Well, the cliché is -- the, respectively, clichés that you hear about, lack of access to programming, which is perhaps less of a cliché; it's actually a truism. It's actually true. So that if there are delays in a person getting to trial or, you know, witness availability, non-releasable for whatever reason, they're in remand, and there actually is an objective, substantive difference. So I understand your analysis vis-à -- with respect to it making no sense for defence counsel to come and say, without objective evidence, saying that women are treated differently because WCC was never designed to house nine or ten or 11 women. They're working on it. It's not there yet. But, ultimately, women who are sentenced have to deal with that. So you need to make a bigger presentation to the Court, that I get. But what, I believe, has been presented here, somewhat objectively, is that remand prisoners, perhaps, are dealt with slightly differently, with respect to what you hear, perhaps, on a daily basis, which is this issue about access to programming, access to, ultimately, rehabilitation, treatment, programming, getting their lives on track, so, yeah.

[57] THE COURT: I can say that I addressed that in two ways in my approach to this sentencing. One, there was an additional two weeks credit given on what would have been, really, about ten and a half months; there was two weeks there.

[58] Secondly, frankly, the lower end of the range was brought into play, and in picking a sentence within the lower end of the range -- well, the lowest end of the range the Crown suggested and, frankly, in these circumstances, that, as I indicated in my reasons, took into account, I would say, many of the mitigating factors, as far as

diminished capacity, as pointed out, or diminished responsibility due to cognitive issues and First Nations heritage; it also, in my mind, took into account what Ms. Treusch said about the possibility of there being perhaps less prioritizing, which in the case of offenders who are less motivated due to cognitive difficulties can actually have an impact such that it does make remand status not the same as it would be as if they were serving inmates.

[59] That is an issue that I believe in cases of remand prisoners may well be worth looking into further in future cases, and providing the Court with a little bit more specific detail on that. I was not, and am not, prepared to alter what I believe appropriate remand credit in this case, in these circumstances, more than I did, the additional two weeks that I gave. But I did factor it in, in picking a sentence at the lowest end of what I consider to be the appropriate range. But I look forward to finding out more about what Ms. Treusch said on that issue in future cases, because I believe that that is a very, or could be a very persuasive argument for considering remand credit in appropriate cases, in particular, I would say, as it relates to cognitively challenged individuals. Individuals who are not will have a greater responsibility to take advantage themselves of the programs that may be available to them. I am not shutting the door on that, but I am saying that in cases of cognitively-challenged individuals, in particular those who have been diagnosed with Fetal Alcohol Spectrum Disorder, it would seem to me that in order, at least prior to any amendments that may come to the *Criminal Code* taking effect and what impacts they may have on this, it would seem that there may be more responsibility, if, in fact, it is going to be said that they have the same access to programming, to then ensure that they have the same structure set up for them to

ensure that they are able to and encouraged to facilitate that access to programming.

[60] But I hear you very clearly on that, Mr. Clarke, and I believe it is a legitimate issue to be raised in considering remand status in cases such as this. It just is one that I would like to see more information on. I appreciate that I had good, what I consider to be objective, evidence to a point in this case, on a general sense of what happens. But I did take that into account in my decision.

[61] Thank you, counsel.

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COZENS T.C.J.