Citation: *R.* v. *Joe,* 2016 YKTC 31

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Docket: 13-00833
14-00459
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Luther

REGINA

v.

ARTHUR FRANKIE JOE

Appearances:
Eric Marcoux — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR SENTENCE

[1] On 22 April 2016, I sentenced Mr. Joe to 43 months and five days imprisonment less a credit of 19.5 months for custody prior to sentence. Brief oral reasons were given at the time with a commitment to file written reasons. The following are the reasons for sentence.

[2] This offender is before the Court being sentenced for refusing to comply with a breathalyzer demand along with a breach of undertaking from 31 January 2014 and an over 80 charge from 10 October 2014.

[3] On the s. 254(5) and s. 145(5.1) charges he pleaded guilty. He was convicted after a trial on the s. 253(1)(b) charge.

[4] The key facts on the January 2014 refusal charge included considerable erratic driving just after midnight on the two busiest avenues in Whitehorse. There was property damage to the driver's side mirror after Mr. Joe drove over a traffic island and struck a sign. A conscientious citizen, who phoned the police, spoke to the offender who initially claimed his nephew was driving. The citizen noticed that Mr. Joe was unsteady on his feet, had slurred speech, and the smell of alcohol on his breath. These observations were made known to the police who also noticed his bloodshot eyes.

[5] Despite ample instructions and warnings, Mr. Joe refused to provide a sample of his breath into the Alco-sensor FST (ASD). At the time, Mr. Joe was on an undertaking that required him to abstain from the possession or consumption of alcohol. He was arrested and later released on a promise to appear. Mr. Joe entered guilty pleas to these charges on 28 January, 2016.

[6] The trial and judgment on the October 2014 s. 253(b) charge took place between July and September 2015.

[7] Again, Mr. Joe's truck was on 2nd and 4th Avenues around midnight. He claimed he was not driving, which remarkably he also told the conscientious citizen on the other case. His truck stalled-out on 4th Avenue and in a stopped position was at an angle to the curb. The offender was out of his truck to switch over the fuel tank "changing gas line" when the police approached him. Mr. Joe was intoxicated and very angry about being "arrested for nothing". The issue of care and control was closely examined by the court. Mr. Joe was found to be the driver. Even if I were wrong in that assessment of the evidence he was nonetheless in care or control of his own truck that night. Mr. Joe

was taken to the detachment and there he blew 150 and 140 at 12:51 a.m. and 1:11 a.m. respectively.

[8] The Crown sought a global sentence of four to five years for the two drinking and driving offences. The defence felt that two to three years would be sufficient. Both acknowledged the 19.5 months credit for time in custody prior to sentence.

[9] This offender has a horrendous record of 12 previous convictions for drinking and driving offences plus four convictions for driving while prohibited and 14 convictions for failing to comply with court orders. His criminal history also includes violent and property related offences. The driver's abstract from the Territorial government reveals a lengthy history of vehicle impoundments and suspensions, but no moving violations.

[10] Without any doubt whatsoever the principles of sentencing applicable to these cases are denunciation, deterrence and separation from society. Rehabilitation takes a back seat and is of little concern except insofar as it may piggy-back on specific deterrence.

[11] Section 718.1 of the *Criminal Code* reads as follows:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[12] Although *R. v. C. (A.M.),* [1996] 1 S.C.R. 500 was decided before s. 718.1 was enacted, comments by Chief Justice Lamer at pp. 557-558 reflect the same principle and are relevant in this situation:

> Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment

> which properly reflects the moral culpability of the offender having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates the principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

[13] Courts all over the civilized world have expressed great concern about the consequences of drinking and driving. Judge Gorman in *R. v. O'Connell* (2015), 369 Nfld. & P.E.I.R. 274 (Nfld. P.C.) quoted from an Australian case: "It 'would be fatuous to suggest that any person in the community in the present day did not understand the very great risk to life and limb posed by people driving whilst intoxicated' (see *Pasznyk v. The Queen*, [2014] VSCA 87 at paragraph 68."

[14] The Supreme Court of Canada in *R. v. Bernshaw,* [1995] 1 S.C.R. 254, *R. v. Beaudry*, 2007 SCC 5 and *R. v. Lacasse*, 2015 SCC 64, has in no uncertain terms condemned drinking and driving. In both *Lacasse* and *Beaudry*, the Supreme Court returned to the "sad situation" as outlined by Cory J. in *Bernshaw* at para. 16.

> Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

[15] In October 2009, a majority of the United States Supreme Court decided not to review a decision of the Virginia Supreme Court on the issue of detailed public tips given to the police and how the driver's fourth Amendment rights against unreasonable search and seizure were infringed: *Virginia v. Harris,* 558 U.S. 978 (2009).

[16] Chief Justice Roberts along with the late Justice Scalia would have reviewed the case. In the course of the reasons of the Chief Justice, he paid special heed to the dangers of drinking and driving including 13,000 deaths and State initiatives to encourage tips:

> There is no question that drunk driving is a serious and potentially deadly crime, as our cases have repeatedly emphasized. No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion.

[17] I mention this observation from the United States Supreme Court only for the purpose of showing international concern for the drinking and driving issue.

[18] In a neighbouring jurisdiction, the Court of Appeals of Alaska also wrote of the seriousness of these crimes in *Miller v. State of Alaska*, 1996 WL 685760, an unpublished opinion. *Miller,* like in *R. v. Woloshyn,* 2006 BCCA 228 (as discussed in paragraph 36)*,* involved impaired driving causing death, in fact two deaths caused by Miller and one by Woloshyn. Unlike Woloshyn, Miller had no prior felony record but several speeding offences and a previous impaired conviction. The predicate offence involved the operation of a boat. Miller was sentenced to serve 12 years with an additional "32 years of suspended time".

[19] The Alaska court spoke of the courts' duty to expressly disapprove "the reckless acts of drinking drivers".

> If the criminal justice system is to reduce the alarming frequency of drunken driving manslaughters, clear and consistent notice must be served that the conduct involved in such cases will not be tolerated by the law…both as an expression of community condemnation and as a deterrent to other potential offenders…

[20] *R. v. Richardson and others*, [2006] EWCA Crim 3186 is a decision from England. The Court dealt with four men and one woman and addressed the aspects of sentencing for drinking and driving causing death. In the course of their reasons at paragraph 22, the Court discussed the obvious central concern, namely driving after consuming alcohol:

> The consumption of alcohol is deliberate. Everyone knows, or should know, that the consumption of even small quantities of alcohol undermines the ability of any driver to apply his full concentration to the road. Where the consumption is high, it is effectively extinguished. Alcohol makes a driver personally unfit to drive, and the car of which he is in con becomes as dangerous with him at the wheel as if it were subject to a serious known, potentially fatal, mechanical defect. Looking at the matter broadly, there is never any acceptable excuse for driving a vehicle when the ability to do so properly is impaired by alcohol or drugs. That is the critical ingredient of this offence. …

[21] The cases from the Supreme Court of Canada, other courts throughout Canada, and the world generally are universal in their condemnation of drinking and driving. It is a totally needless and senseless offence, causing untold and immeasurable harm. While rehabilitation must never be completely lost sight of, the paramount considerations on sentencing are denunciation and deterrence.

[22] There was some glimmer of hope expressed in 2007 by the Supreme Court in *Beaudry* at para 42:

> The situation in Canada has improved since Cory J. made this damning observation, but only because both the authorities and society itself have made extensive efforts to raise public awareness and crack down on impaired driving.

[23] In *R. v. Schmidt*, 2012 YKSC 17, Veale J. analyzed some statistics and observed the following with excerpts from paragraphs 25 and 26:

> [25] … Despite the statistics fluctuating from year to year, one can conclude that the problem of alcohol – involvement or drinking and driving in the Yukon is, at the very least persistent.
>
> [26] … Alcohol and drug impaired driving is a concern in the Yukon.

[24] Just two months later in *R. v. Vallee,* 2012 YKTC 92, I expressed agreement with the observation of Mr. Justice Veale.

[25] In *R. v. Lacasse*, three-and-one-half years later, the Supreme Court of Canada overturned a Quebec Court of Appeal decision and largely restored the sentencing decision of Judge Couture of the Court of Quebec. Judge Courture had considered the local situation as a factor in his decision and emphasized that impaired driving was a [translation] "scourge" in the area. Indeed, in the Beauce region in which Mr. Lacasse committed his offences, there were a "large number of offences related to drinking and driving." Any inclination that the situation of impaired driving crimes was going down was certainly not alluded to by the Supreme Court of Canada as it was in *Beaudry*.

[26] In the present case, unlike *Schmidt*, no statistics were presented. Nonetheless, it is my observation, as a longstanding deputy judge in this jurisdiction, that the problem is certainly not getting any better. For example, while presiding in the Whitehorse docket court on 11 May 2016, there were 35 individuals on the list. Of all the federal statutes including the *Controlled Drugs and Substances Act*, 1996 c. 19 and the *Criminal Code*, and of all the Territorial statutes, clearly seven of the 35 were facing at least one drinking and driving charge.

[27] *R. v. Donnessey* (Y.T.C.A.), [1990] Y.J. No. 138 is a decision of the Yukon Court of Appeal which has offered substantial guidance over the last 25 years or so. The respondent had six prior drinking and driving offences, was 60 years old, married, steadily employed and was in danger of "losing his trapline".

[28] Mr. Donnessey was on an access road and his lights "were turned on and off as the vehicle passed the patrol car." There were no other driving irregularities. He blew 180 and 200.

[29] The Yukon Court of Appeal quoted with strong approval the statement set forth in *R. v. Wise*, [1988] B.C.J. 1990 (C.A.), from *R. v. McVeigh,* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.).

[30] In *McVeigh*, MacKinnon A.C.J.O. made it abundantly clear how courts should deal with offences at the "lower end":

> …it is the conduct of the accused, not just the consequences, that is the criminality punished. … The public should not have to wait until members of the public are killed before the courts' repudiation of the conduct that led to the killing is made clear. It is trite to say that every drinking driver is a potential killer.

[31] The Yukon Court of Appeal allowed the Crown appeal and increased the *Donnessey* sentence from three months imprisonment plus one-year driving prohibition to two years less a day imprisonment and a three-year driving prohibition.

[32] The pendulum does not always swing to the left. Most courts have responded responsibly to the carnage so unnecessarily caused by impaired drivers.

[33] Since *McVeigh* in 1985, the Ontario Court of Appeal made the following pronouncement in *R. v. Junkert*, 2010 ONCA 549 at para. 46:

> In recent years there has been an upward trend in the length of sentences imposed for drinking and driving offences. The reasons for this trend can be attributed to society's abhorrence for the often tragic consequences that result when individuals choose to drink and drive, thereby putting the lives and safety of others at risk.

[34] [35] In the nationally highly publicized case of Marco Michael Muzzo, Madam Justice Fuerst in her decision, *R. v. Muzzo*, 2016 ONSC 2068 at paragraph 69 had this to say:

> The second proposition that emerges from the jurisprudence is that sentences for impaired driving causing death have increased in recent years. This reflects society's abhorrence for the often tragic consequences of drinking and driving, as well as concern that even though the dangers of impaired driving are increasingly evident, the problem of drinking and driving persists. …

[35] The Court in *Woloshyn* reminded us of what sets drinking and driving apart from most other offences. Madam Justice Ryan referred to her decision in *R. v. Johnson*,(1996) 112 C.C.C. (3d) 225 (B.C.C.A.), where she stated at paragraph 30:

> Drinking-driving causing death or bodily harm offences are senseless crimes because they are so easily avoided and at the same time they are so easily committed by ordinary citizens. They are unlike any other crimes in the sense that nothing much can be offered to justify driving drunk. Crimes of theft may be motivated by poverty, crimes of assault may be motivated by fear, but what excuse can be offered for driving drunk, except that alcohol allowed the offender to lose all sense of judgment? It is for this reason that the communities rightfully express their outrage when victims are killed or injured as a result of such conduct. It is for this reason that both deterrence and denunciation are legitimate objectives to pursue for this type of offence.

[36] Further in *Johnson*, Madam Justice Huddart added the following reasoning at paragraphs 59 and 60:

> [59] In assessing moral blameworthiness, I would, however, place the emphasis less on the horrific consequences that are a risk undertaken by every person who drinks and drives, and more on that which makes the drunk driver morally culpable.
>
> [60] The moral blameworthiness of a drunk who drives is in not seeking treatment for his alcoholism, in getting behind the driver's wheel of a motor vehicle, and in not putting in place safeguards to prevent him from driving when drunk, just as would a person with other health problems that make driving an exceptionally dangerous activity. It is that irresponsible behaviour society seeks to denounce. It is that irresponsible behaviour that encroaches on our society's code of values as expressed in the *Criminal Code.*

[37] The British Columbia Court of Appeal in *Woloshyn* made it abundantly clear that "there are cases where the rehabilitation of the offender will take precedence as the appropriate objective in sentencing. This is not one of those cases … because the gravity of the offence and the moral blameworthiness of the offender are so great that the sentence must communicate society's condemnation of this conduct". (paras. 18 – 19).

[38] Similarly here, as to rehabilitation taking precedence, "this is not one of those cases".

[39] In *Woloshyn* the sentence was increased by the Court of Appeal from two years' to four years' imprisonment, and in *Johnson* from three years' to five years' imprisonment. Both of these cases involved deaths, as did *Lacasse*. However, it is important to always bear in mind the overall sentencing scheme and to impose

meaningful sentences even when there is no death or bodily harm caused (*Donnessey*, *McVeigh*, *R. v. Vold*, (1990) CanLII 1201 (BCCA)).

[40] It is not necessary for Parliament to have increased this particular maximum punishment for the courts to impose generally higher sentences recognizing the harm done to society by drinking drivers. Thus, offenders such as Mr. Joe with horrendous records will be approaching sentences in the upper range. Their culpability and moral blameworthiness are extremely high.

[41] This offender is not a hopeless alcoholic with nothing going for him. He is a well-spoken, highly talented artist and was able to stay sober for eight and one half years.

[42] The Crown's position is for a global sentence in the range of four to five years less time served. Realistically, Mr. Joe and other notorious repeat offenders should be looking at seven to eight years; however, there are a number of mitigating factors and the totality principle to deal with.

[43] The late guilty plea on the refusal charge is a minor consideration. More important are the age and health of Mr. Joe. While rehabilitation is far less important, it is recognized that there would be far more control over him and better protection for the public if he were subject to a lengthy driving prohibition order and the maximum probation order of three years with strict and practical terms. Furthermore, by allowing him to serve a territorial sentence, he would have community and family supports nearby and not be in an isolated way in B.C.

[44] The imposition of a seven year sentence, for example, three years on the refusal charge with four years consecutive on the breathalyzer charge would probably be considered excessive and represent on my part a rejection of the totality principle.

[45] The highest court in Newfoundland and Labrador in *R. v. Hutchings,* 2012 NLCA 2, set out an exhaustive set of guidelines for the totality principle at paragraph 84:

> 84 The foregoing analysis, as well as the fact that the Ruby formulation which was referred to in *M.(C.A.)*, pre-dated ss. 718.1 and 718.2(c), requires a restatement of the applicable approach. I would state the following as guidelines for the analytical approach to be taken henceforth:
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> 1. When sentencing for multiple offences, the sentencing judge should commence by identifying a proper sentence for each offence, applying proper sentencing principles.
>
> 2. The judge should then consider whether any of the individual sentences should be made consecutive or concurrent on the ground that they constitute a single criminal adventure, without consideration of the totality principle at this stage.
>
> 3. Whenever, following the determinations in steps 1 and 2, the imposition of two or more sentences, to be served consecutively, is indicated, the application of the totality principle is potentially engaged. The sentencing judge must therefore turn his or her mind to its application.
>
> 4. The approach is to take one last look at the combined sentence to determine whether it is unduly long or harsh, in the sense that it is disproportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 5. In determining whether the combined sentence is unduly long or harsh and not proportionate to the gravity of the offence and the degree of responsibility of the offender, the sentencing court should, to the extent of their relevance in the particular circumstances of the case, take into account, and balance, the following factors:
>
> (a) the length of the combined sentence in relation to the normal level of sentence for

the most serious of the individual offences involved;

(b) the number and gravity of the offences involved;

(c) the offender's criminal record;

(d) the impact of the combined sentence on the offender's prospects for rehabilitation, in the sense that it may be harsh or crushing;

(e) such other factors as may be appropriate to consider to ensure that the combined sentence is proportionate to the gravity of the offences and the offender's degree of responsibility.

6. Where the sentencing judge concludes, in light of the application of those factors identified in Step 5 that are deemed to be relevant, that the combined sentence is unduly long or harsh and not proportionate to the gravity of the offences and the offender's degree of responsibility, the judge should proceed to determine the extent to which the combined sentence should be reduced to achieve a proper totality. If, on the other hand, the judge concludes that the combined sentence is not unduly long or harsh, the sentence must stand.

7. Where the sentencing court determines that it is appropriate to reduce the combined sentence to achieve a proper totality, it should first attempt to adjust one or more of the sentences by making it or them concurrent with other sentences, but if that does not achieve the proper result, the court may in addition, or instead, reduce the length of an individual sentence below what it would otherwise have been.

8. In imposing individual sentences adjusted for totality, the judge should be careful to identify:

(a) the sentences that are regarded as appropriate for each individual offence applying proper sentencing principles, without considerations of totality;

> (b) the degree to which sentences have been made concurrent on the basis that they constitute a single criminal adventure; and
>
> (c) the methodology employed to achieve the proper totality that is indicated, identifying which individual sentences are, for this purpose, to be made concurrent or to be otherwise reduced.
>
> 9. Finally, the sentencing judge should indicate whether one or more of the resulting sentences should be further reduced to reflect any credit for pre-trial custody and if so, by how much.

[46] That decision acknowledged the preference of the general approach taken in *R. v. Li*, 2009 BCCA 85. Mr. Li was sentenced to 13 years imprisonment on five serious drug charges. The sentence was upheld on appeal. In the course of their reasons the B.C. Court of Appeal wrote at paragraphs 28 and 52:

> 28 Thus, there is a two-stage approach to sentencing an offender convicted of multiple offences. The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591.
>
> …
>
> 52 Thus, it is the principle of proportionality, as applied through the totality principle, which governs the imposition of a "just and appropriate" sentence. That requires an overall consideration of the gravity of the offence and the culpability of the offender.

[47] With regard to the two drinking and driving offences before me, the maximum sentence is five years on each. While various maximum sentences for such offences

have been increased by Parliament over the years since *Donnessey* in 1990, the five-year maximum by indictment remains the same.

[48] The Court is well aware of *R. v. Cheddesingh*, 2004 SCC 16. We are not attempting to place labels such as “worst offender” or “worst offence”. Rather, what is truly important is the harm caused by impaired drivers and the moral blameworthiness of this offender. His moral blameworthiness is compounded by his efforts to avoid blame by falsely claiming that someone else was driving on both occasions.

[49] Remaining to be judicially considered is s. 718(2)(e) of the *Criminal Code* which reads as follows:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> > **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[50] We have had the benefit of a thorough, detailed and reliable *R. v. Gladue,* [1999] 1 S.C.R. 688 Report prepared by Mark Stevens which clearly helps us understand something of the life and family background of Arthur Joe.

[51] The fact that Mr. Joe was horribly abused as a child in residential schools does not relieve him from responsibility for these offences. Nor, in my view, does it “reduce his moral culpability, in keeping with the jurisprudence” (see para. 33 of *R. v. Charlie*, 2015 YKCA 3).

[52] The degree of moral blameworthiness is extremely high. Unlike Franklin Charlie, this offender does not suffer from Fetal Alcohol Syndrome. Indeed, as pointed out above, Mr. Joe is very aware of his issues, is well spoken, and despite being an alcoholic, was able to remain sober for eight and one half years according to his *Gladue* Report. This is reflected in his criminal record showing a gap between 2005 and 2014, only a part of which was time being served in a federal penitentiary.

[53] In *R. v. Schinkel*, 2015 YKCA 2, at paras. 25, 26 and 27, the Court wrote of *Gladue* considerations and proportionality.

[54] The background of this particular offender is rife with *Gladue* factors as were the backgrounds of Mr. Ipeelee and Mr. Ladue (paras. 2, 3, 19-21 of *R. v. Ipeelee*, 2012 SCC 13).

[55] Born in the winter of 1952, Arthur Joe hails from a noble line of the Champagne and Aishihik First Nations. His great-grandfather, Chief Isaac, had profitable dealings with the gold rush stampeders almost 120 years ago. Grandparents, Albert Isaac and Elsie Johnson, largely raised Arthur Joe, whose biological father was "likely a member of the Canadian Air Force" and had no involvement. His mother, Jenny Joe Isaac, and stepfather drank, and "Jenny froze to death when Arthur was nine years old". Thus, he was largely raised in a good, traditional home by his grandparents, and spent solid quality time with them also on the land absorbing an "idyllic" life and learning his First Nation's language.

[56] His life was shattered at age five when he was removed and sent to the Lower Post residential school in northern B.C. "one of the more repressive and brutal

residential schools in Canada" where he was forced to stay for 10 years. This deeply affected him ever since. His brother and a sister were compelled to attend there too. The latter committed suicide while the former "drank herself to death".

[57] The sexual and physical abuse unmercifully and criminally forced on him built up a lot of hatred in this youth towards the Roman Catholic Church and the RCMP. As Mr. Joe explained:

> It's just people in uniforms that trigger me off. Everything happened to me … any and all the abuse there is. I suffered the mental, the physical, the spiritual, the emotional, [and] the sexual.

[58] Even a move to Coudert Hall in Whitehorse for a couple of years did not improve his victimized lot. His drinking started possibly as early as five years of age and by his late teens he was an alcoholic, unable to hold down regular employment.

[59] His relationships suffered. Another heavy tragedy was visited on him when his second partner, who had longstanding alcohol abuse issues, died in police cells of bronchial pneumonia. She had, at least one time before, during her many stays in the cells, shown that she was "prone to seizures." Thus, to this day, Mr. Joe feels strongly that the RCMP was responsible for her death.

[60] Towards the end of the *Gladue* report under the heading Next Steps, Mr. Stevens presented a succinct summary:

> Arthur readily admits that he has to overcome a number of barriers to success, not the least of which is his addiction to alcohol. He is also still clearly struggling with the trauma of residential school and other events in his life, including the untimely death of his mother, two of his siblings, and the death of his partner in police custody. He carries with him a huge amount of resentment towards representatives of the justice system,

> which he believes is a self-propagating instrument of colonialism designed to oppress First Nations' people in ways that will not promote their rehabilitation. He has not fully accepted responsibility for the offences he is dealing today because he feels that he has been "railroaded" by a system that is inherently racist. Given his life circumstances, Arthur's anger and resentment are entirely understandable.

[61] The Supreme Court of Canada has reminded trial judges of their duties in paragraphs 86 and 87 from *Ipeelee*:

> 86 In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(*e*) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The *Code* does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 Osgoode Hall L.J. 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(*e*) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the [page486] sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.
>
> 87 The sentencing judge has a statutory duty, imposed by s. 718.2(*e*) of the *Criminal Code*, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

[62] I am not suggesting that drinking and driving offences be categorized as "serious", as opposed to various crimes of violence. Who is being sentenced here is Mr. Joe for the crimes he committed. In this rare case of a notoriously repeat drinking driver, it is my view that he should have almost no particular consideration afforded to him as an aboriginal offender, regardless of how lifelong miseries were forced on him by residential schools and integration. While not totally ignoring *Gladue*, I would rate it as infinitesimal in and of itself. It was but one of other factors which kept him away from a federal penitentiary.

[63] For a person with now 14 drinking and driving offences, there is really no other option than a lengthy period of imprisonment. Given the universally accepted grave and serious concerns about impaired driving, it cannot be said that with such repeat offenders there is an "overreliance on incarceration". Indeed there is no evidence before me that aboriginal offenders are over-represented in jail on account of drinking and driving offences.

[64] It is only because of his sincere desire to help others, age, health and ability to support himself through his considerable artistic talent that I am not sentencing him to a global sentence of seven years. The Crown had sought a sentence of four to five years in a federal penitentiary while the defence pressed for two to three years. Both acknowledged the 19.5 months of credit for time spent in custody prior to sentence.

[65] Mr. Joe's only family, community and current professional support is here in this territory.

[66] I use the phraseology of Rothstein J., dissenting in part in *Ipeelee* at paragraph 154. *I do not absolve Mr. Joe for his own conduct*. Also in the dissent at paragraph 131:

> …However, as in all cases, this must be done with protection of the public as the paramount concern; Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal. …

[67] Indeed what must be remembered in this case, is that we are dealing with drinking and driving offences on two of the busiest thoroughfares north of 60. The public to be protected includes First Nations people, other Canadians and tourists from all over the world.

[68] Given his age and unconscionable record, I believe the ends of justice are best served by curtailing the freedoms of Mr. Joe for as long as reasonably and fairly possible in terms of imprisonment, strict probation and a prohibition order which will effectively prevent him from lawfully driving for the rest of his life.

[69] As to s. 259 the maximum duration would be life. It is not unheard of to impose prohibition orders of 10 years or more. In *R. v. Hunt* (2001), 207 Nfld. & P.E.I.R. 104 (Nfld. S.C.), LeBlanc J. of the Supreme Court Trial Division imposed a 15-year driving prohibition on a 47-year-old man with a far lesser criminal record than Mr. Joe and on a similar breathalyzer offence.

[70] Mr. Arthur Frankie Joe is hereby sentenced to 22 months' imprisonment on the s. 254(5) offence from January 2014, five days consecutive on the s. 145(5.1) offence and 21 months consecutive on the s. 253(1)(b) offence from October 2014. On the latter

charge, he is given credit of 19.5 months for pre-sentence custody. There are concurrent 10-year driving prohibitions on the s. 254(5) and s. 253(1)(b) offences. The 10 years is "plus any period to which the offender is sentenced to imprisonment" pursuant to s. 259(1)(c) and further to the directions of the Supreme Court of Canada in *Lacasse*. Driving on a highway is a privilege, not a right. This is a privilege which is essentially taken away from this offender on account of this order, his age, and the unlikelihood that he would ever be insurable.

[71] The victim surcharges are set at $200 where we are dealing with procedure by indictment. Mr. Joe will have the means to pay if given sufficient time. I am not making these surcharges payable forthwith. The funds go towards worthwhile programmes in this territory. Accordingly, this offender will be given three years to pay $600.

[72] By imposing a very high territorial sentence, the Court is able to better control the behaviour of Mr. Joe for a longer time. If the Court had accepted the Crown's position even at the high end, five years with the time served, the offender would have gone to a federal penitentiary for about 40 months and thus not be subject to a probation order at all. With this sentence there is a realistic control and supervision of Mr. Joe for about 59 months, not taking into account in either scenario early release from the penitentiary or the prison.

[73] The probation order of three years is comprehensive but not oppressive. Serious consideration was given to the conditions based on the *Gladue* Report, his record and his abilities. The order has been carefully crafted to discourage Mr. Joe from

committing further offences and thereby protect the public. It also gives him an opportunity to help people out, as he so adamantly stated he wants to do.

[74] The following are the probation conditions:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Notify the Probation Officer, in advance, of any change of name or address, and, promptly, of any change in employment or occupation;

4. Remain within the Yukon unless you obtain written permission from your Probation Officer or the court;

5. Report to a Probation Officer immediately upon your release from custody and thereafter, when and in the manner directed by the probation Officer;

6. Reside as approved by your Probation Officer;

7. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor. Provide a sample of your breath for the purpose of analysis upon demand by a peace officer who has reason to believe that you may have failed to comply with this condition;

8. Not attend any premises whose primary purpose is the sale of alcohol including any liquor store, off sales, bar, pub, tavern, lounge or nightclub;

9. Attend and actively participate in all assessment and counselling programs as directed by your Probation Officer, and complete them to the satisfaction of your Probation Officer, for the following issues: alcohol abuse, and anger management, and provide consents to release information to your Probation Officer regarding your participation in any program you have been directed to do pursuant to this condition;

10. Perform eighty (80) hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. This community service is to be completed no later than one (1) year before the end of this order. Any hours spent in programming may be applied to your community service at the discretion of your Probation Officer; and

11. Not to be present in any motor vehicle when an occupant has any alcohol in his or her body.

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LUTHER T.C.J.