

Citation: *R. v. Tom*, 2012 YKTC 55

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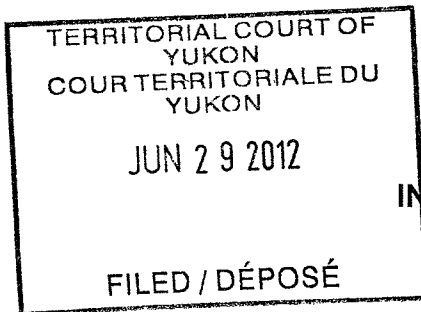
Docket: 08-00055

08-00119

10-00778

11-00483

Registry: Whitehorse



IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Cozens

REGINA

v.

DAVID ALEX TOM

Appearances:

John Phelps

Kim Hawkins

Counsel for the Crown

Counsel for the Defence

REASONS FOR JUDGMENT

[1] David Tom is before the court for sentencing, having plead guilty to the following

Criminal Code offences:

Information 08-00055:	s. 253(b)	(over .08)
Information 08-00119:	s. 253(a)	(impaired)
Information 10-00778:	s. 253(1)(b)	(over .08)
	s. 259(4)(a)	(driving while disqualified)
	s. 733.1(1)	(breach of probation)
Information 11-00483:	s. 253(1)(b)	(over .08)
	s. 259(4)(a)	(driving while disqualified)

[2] An Agreed Statement of Facts was filed which sets out in detail the

circumstances underlying the commission of these offences, and provides information

regarding the personal circumstances of Mr. Tom and the background leading up to the sentencing hearing.

[3] I will not repeat in detail the factual circumstances regarding the commission of these offences that Mr. Tom has admitted to. Instead, paragraphs 6 - 21, 30 - 37 and 42 - 51 of the Agreed Statement of Facts are attached as Appendix "A" to this decision.

[4] Briefly put, on April 11, 2008, Mr. Tom was operating a motor vehicle, with two passengers, one being a child, on the Alaska Highway between Teslin and Whitehorse. Pursuant to the RCMP response to a complaint, he was arrested for impaired driving and subsequently provided breath samples of 160 mg%.

[5] On May 23, 2008 Mr. Tom was operating a motor vehicle in Carmacks while clearly impaired by alcohol.

[6] Mr. Tom was granted a curative discharge in respect of these two offences on August 27, 2010 and placed on probation for three years and disqualified from driving for four years.

[7] On February 6, 2011, Mr. Tom was operating a motor vehicle and drove it into a ditch. He was arrested for impaired driving and he provided breath samples with readings of 170mg%. He was also in breach of the condition of his probation order that required him not to possess or consume alcohol.

[8] Mr. Tom was accepted into Community Wellness Court ("CWC") on May 9, 2011. On that date he entered guilty pleas for the February 6 offences and there was agreement between the parties that the curative discharge previously granted for the

2008 offences would be revoked. As a discharge can only be revoked when the offender is subsequently convicted of an offence while bound by the probation order (See *R. v. Martin* 2004 YKTC 100 at paras. 8 and 9), and Mr. Tom was not convicted of the offences to which he plead guilty until the date of his sentencing hearing on June 6, the actual date of revocation is therefore June 6, 2012.

[9] Mr. Tom continued in CWC until he was arrested on October 15, 2011 for operating a motor vehicle on the Robert Campbell Highway, again while disqualified from doing so, and for impaired driving. He subsequently provided breath samples with readings of 160 and 150mg%.

[10] Mr. Tom has a criminal record which includes prior convictions for impaired driving offences in 1990, 1995, 1996, 1997 and 2005. Notably, Mr. Tom received a sentence of 4 months custody for the 1997 offence and 90 days to be served conditionally in the community for the 2005 offence.

[11] Mr. Tom served 93 days in custody after his arrest for the February 2011 offences. He was in custody on consent remand from his arrest on October 15, 2011 until he was detained after show cause on April 23, 2012, for an additional total of 191 days. He has since been in custody for 59 days. A section 524 application was made on October 24, 2011. Crown and defence counsel have agreed that Mr. Tom should be given 12 months credit for his time in pre-sentence custody.

[12] Crown counsel has exercised his discretion not to file a Notice of Intention to Seek Greater Punishment, so as not to preclude the option of the imposition of a conditional sentence or sentences. Crown counsel's position is that, after providing Mr.

Tom twelve months credit for remand in relation to certain of these offences, a further sentence of territorial time in the two year less a day range should be imposed, followed by the maximum probation order of three years. I note that the Crown elected to proceed by indictment on all the charges. Counsel acknowledged that the issue of whether the sentence should be served conditionally in the community is clearly on the table. He is also seeking a three year driving prohibition.

[13] Defence counsel's position is that the appropriate sentence, after crediting Mr. Tom twelve months for his time on remand, should be one year, to be served conditionally in the community. Counsel does not oppose the Crown request for a lengthy probation order.

[14] Mr. Tom's sentencing hearing took place in a sentencing circle in Carmacks. On the day of sentencing, the Little Salmon Carmacks First Nation General Assembly took place, and all employees of the First Nation were required to attend it. As such, a number of community members could not attend the circle, either in its entirety or for portions. This said, there were still a significant number of family and community members present to participate, as well as other individuals who had worked with Mr. Tom in a professional capacity. I am satisfied that the participation of the many individuals present provided a strong community perspective on Mr. Tom and powerfully represented the community's concerns for his crimes and the consequential impact of these crimes, whether actual or potential.

Personal Circumstances of Mr. Tom

[15] In the Agreed Statement of Facts, Crown counsel and counsel for Mr. Tom jointly provided the court with numerous documents and reports regarding Mr. Tom's background, some prepared in relation to his curative discharge application, and others regarding his participation in the CWC, as well as a *Gladue* Report prepared by Mark Stevens, who works for the Carcross/Tagish First Nation (Tab N, Agreed Statement of Facts). As such, there was considerable information regarding Mr. Tom's personal circumstances before the court.

[16] Mr. Tom is a 47-year-old member of the Little Salmon Carmacks First Nation ("LSCFN"). He has lived in Carmacks for much of his life. He has been employed throughout his life doing carpentry work, and has been employed by LSCFN since 1997 in that capacity.

[17] He and his partner, Delores Landstrom (nee Silverfox), have been together since 1985. They have no children, although they have often been caretakers for Ms. Landstrom's niece. When she is not drinking, Ms. Landstrom is considered to be a good support for Mr. Tom.

[18] Mr. Tom and his twin brother Michael are the youngest of four children. His two sisters were present and participated in the sentencing circle. His father died in 2006 and his mother in 2009.

[19] Mr. Tom says that his parents did not have issues related to alcohol abuse, however he was surrounded by extended family members who did. While he

remembers little about his childhood, Mr. Tom believes that his parents stopped drinking alcohol when he was two or three years old.

[20] As stated in the *Gladue* Report:

At the time David was growing up, the community of Carmacks was struggling to come to terms with the fact that many of the First Nation's children had been sent away to residential school against their parents' will. In some cases, the RCMP literally rounded up the children like cattle and loaded them onto buses so they could be transported to the residential schools in Whitehorse or Carcross. Understandably, the trauma this caused the parents had a profound effect on the community's well-being. From the late 1940's to the 1970's, alcohol abuse became commonplace in the community as people struggled to come to terms with the loss of their children, many of whom were enduring physical and sexual abuse at the hands of their teachers in residential school. "The RCMP used to come into people's houses, look under beds and open cupboards" says Rachel Byers, who is a contemporary of David's and is now the Director of Health and Social Programs for the Little Salmon/Carmacks First Nation. "I remember the buses that picked up the kids to take them away to residential school, and I remember the crying and drinking that happened after they left".

[21] Mr. Tom's parents did not attend residential school, and his father refused to allow Mr. Tom and his siblings to attend residential school, with the exception of his sister Trudy who attended for one year. Mr. Tom had a very good relationship with his parents. He was raised traditionally, was taken out onto the land and learned the Northern Tutchone language. He continues to practice his traditionally-based spirituality. His parents' deaths left a huge emotional void in Mr. Tom's life.

[22] Mr. Tom witnessed much violence as a youth. In his teens until his early twenties, he saw one uncle run over and killed by a car driven by a drunk driver. He witnessed another uncle get severely burned in a house fire, and was nearby when the same uncle subsequently died in another house fire. A third uncle drowned after

drinking, a fourth uncle passed out and died in bed while Mr. Tom was drinking with him, a fifth uncle was paralyzed in a motor vehicle accident and an aunt froze to death after passing out while drunk. Mr. Tom and Ms. Landstrom witnessed her father receive severe burns after passing out while drinking, and these injuries resulted in his death shortly afterwards.

[23] In the *Gladue* Report, Psychologist Bill Stewart is noted as having mentioned the profound effect on Mr. Tom of what he perceived as the injustice of the response to the killing of his uncle by a drunk driver, given his perspective of the quality of the initial police response and the minimal punishment accorded the driver. Mr. Stewart stated that "That incident has left David with very little respect for non-First Nation authority figures...he especially distrusts the justice system".

[24] Mr. Tom told Bill Stewart that he, as well as other family members, ...learned to defend against grief and other painful emotions through the use of alcohol. In the absence of other learned coping strategies, alcohol abuse eventually became a patterned response to any uncomfortable emotions for Mr. Tom. (Tab D, Agreed Statement of Facts)

[25] Mr. Tom has struggled with alcohol addiction from the time he was 13 years old. He first started drinking alcohol at the age of 9, with encouragement from his uncles. As an adolescent he was frequently arrested in relation to alcohol-related offences. He quit school in grade 8 due to his alcohol abuse.

[26] He has attended treatment centers for his alcohol addiction on several occasions in the 1980s and 1990s, including Crossroads and the St. Paul's Treatment Center in Alberta. He has more recently attended the Tatla Mun Lake Cultural Centre on several

occasions, the Jackson Lake Healing Camp and completed the Alcohol and Drug Services Inpatient Treatment Program.

[27] Mr. Tom has also completed the White Bison and Gathering Programs while previously incarcerated at WCC, and more recently finished the Substance Abuse Management Primer.

[28] Mr. Tom has managed to maintain lengthy periods of sobriety at various times, including a period from January, 2009 until February 6, 2011 with a brief relapse in August, 2009 after his mother died. In Mr. Tom's words, "Mom died of stomach cancer just 10 days after I finished [alcohol] treatment...When she died, I was drunk for three days" (*Gladue Report*).

[29] Mr. Tom has at times been noted to have "...been diligent and consistent in his motivation, scheduling and follow-through on counselling sessions ... [and] increasingly demonstrated not only utilizing skills to manage those emotions that have, in the past, triggered relapses, but also actively reached out to others for support". (Tab D, Agreed Statement of Facts)

[30] The Alcohol and Drug Services Report dated February 23, 2010 notes that Mr. Tom "...seems to understand the severity of his alcohol dependence and expressed the desire and intention to be sober for the rest of his life." (Tab G, Agreed Statement of Facts)

[31] Psychologist Bill Stewart notes in his February 20, 2010 report that

It must be recognized, however, that Mr. Tom was socialized into alcohol and violence at a very early age. As a consequence of growing-up in a somewhat chaotic post Indian Residential School environment, it will likely

require a great deal of time, focus, perseverance and support to develop new patterns of thinking, acting, interacting and feeling that will preclude future relapses into drinking. (Tab D, Agreed Statement of Facts)

[32] In the Community Wellness Summary dated April 23, 2012, (Tab I, Agreed Statement of Facts), it is noted that:

Mr. Tom struggled with his emotional management and coping strategies and all the treatment summaries identified that Mr. Tom is quite defended against vulnerability employing denial, distraction, social withdrawal, anger, aggression and substance use to avoid feeling[s] of vulnerability... The assessments of Mr. Tom indicate a low cognitive functioning where a structured living arrangement and support tailored to meet his deficits would provide him with the foundation to begin working through the significant trauma he has suffered and start to make the behavioural changes he needs to be successful.

[33] In Bill Stewart's Assessment Summary of June 21, 2011 (Tab L, Agreed Statement of Facts) he notes that during the Tatla Mun Cultural Centre 12-day land-based addictions treatment program, Mr. Tom:

...presented during this program as less defended, more engaged, more attentive, more introspective, more open-minded, more open in his self-disclosures, more active in his learning style and more motivated to learn and explore change. In addition, Mr. Tom presented as more willing to experiment with new styles of relating to self and others, taking significant personal and interpersonal risks both within the group sessions and during land based activities. He clearly articulated his eagerness to develop a skill set that might enable him to successfully manage triggers and urges to use alcohol ... He presented as highly motivated to understand and change his current patterns of relating to self and others. In addition, Mr. Tom presented as much more introspective and realistic in his appraisal of his risk of relapse. He acknowledged that he may never really be free from the risk of relapsing, and that there is a continuous need for a vigilant mindfulness of risk factors that could undermine his sobriety.

[34] Bill Stewart noted that the Addictions Severity Index indicated a significant level of concern and supported a diagnosis for Mr. Tom of Alcohol Dependence Disorder (Sustained Partial Remission). Improvements were noted in Mr. Tom's scores between

the commencement of the program and its conclusion. Improvements were also noted in Mr. Tom's scores in the Wellness Wheel, which is a circular First Nations approach to understanding and healing imbalances of the mind, body, heart and spirit. Mr. Stewart references Mr. Tom's disappointment in himself about relapsing and letting his supporters down. Mr. Tom expressed these feelings by apologizing to his community for his actions at the LSCFN General Assembly in mid-June.

[35] The November, 2011 report from Suzie Kuerschner of Strategies for Prevention, Intervention & Resilience in Teaching for Success (Tab M, Agreed Statement of Facts) notes Mr. Tom presenting as:

...an individual who has difficulties appreciating and understanding what constitutes change and the actions necessary to create that change. These difficulties appear to be further compounded by the trauma and resulting grief he has experienced. ... Mr. Tom's multiple charges for impaired driving, and repeating the same offense in the same manner with the same results raises the question of his ability to fully appreciate the dynamic of cause and effect. While he seems to understand the concrete concept of "When I drink I end up in jail," Mr. Tom seems unable to understand the more abstract ramifications of why this is so. ...some of his processing, retrieval and comprehension characteristics suggest a profile commensurate with the central nervous system impact of organic brain damage.

[36] Psychologist Nicole Smith Bringsli met with Mr. Tom on February 21 and 22, 2012 to assess his cognitive functioning and provided a report (Tab K, Agreed Statement of Facts). Mr. Tom performed within the borderline range of adult intellectual ability with a full scale IQ score of 79. The significant split between his verbal and performance IQ "...may indicate a neurological deficit due to prenatal exposure to alcohol or another form of brain injury or learning disability". There is a plan for Mr. Tom

to be assessed for FASD in the future. Mr. Tom meets the criteria for Borderline Intellectual Functioning as defined in the DSM-IV-TR.

[37] The *Gladue* Report makes a critical observation regarding Mr. Tom as follows:

Furthermore, Mr. Tom has made it clear that there are certain aspects of his life that he does not want to discuss. His reluctance to provide full disclosure regarding his life circumstances will undoubtedly make the Court's job more difficult.

[38] Mr. Tom is considered to be very helpful and an asset to his community. It is very apparent that there is strong support for Mr. Tom from his First Nation. Many individuals have traveled from Carmacks to Whitehorse for Mr. Tom's court appearances. According to the *Gladue* Report Mr. Tom states that: "He hopes that his sentencing circle will give him the opportunity to make amends with his community by accepting responsibility for what he did."

The Circle

[39] In *R. v. Van Bibber* 2010 YKTC 49 I wrote in some detail about circle sentencing purposes and process (see paras. 31, 32, 78, 79). I will not repeat these comments here other than to reiterate that "each First Nations Community has its own traditions and cultural uniqueness, and the processes governing circle sentencing hearings may, in a particular community, follow established written procedures, while in others, no such procedures may exist".

[40] In this case the circle was less structured than some others I have participated in, yet it was no less effective. It is important to always keep in mind that each offender

and community is unique and it should be expected that each circle will be equally unique with its procedures adaptable to the situation.

[41] Between the opening and closing prayers, the participants were provided opportunities on more than one occasion to speak to Mr. Tom directly or to the circle generally, without interruption or time constraints. The participants shared their experiences and stories, and also spoke to Mr. Tom about their relationship with him, their expectations for him, the support they have provided him, and the support they will continue to provide him.

Observations and comments of the participants

[42] The following is a summary of many of the comments and observations of the participants, without, in most cases, attribution to any individual in particular. Many of the participants had themselves struggled with alcohol addiction and abuse for years before making a decision to become sober.

- the charges are serious and Mr. Tom needs to understand this
- he is fortunate to have never killed anyone; it is shocking it hasn't happened yet
- impaired driving is like playing Russian Roulette
- if you drive again after drinking you should be locked up and the key thrown away
- I'll give you a bullet if you want to drink and drive
- two participants lost a brother to impaired driving, another an uncle, another a sister
- more than one was previously convicted of impaired driving before deciding to maintain sobriety
- we are better people than alcohol addicts. We are a spiritual people who learned better values growing up but lost them along the way somewhere
- turning to counselling, traditional circles and ways, teachings and values, and community culture helped one participant turn away from alcohol addiction
- sobriety is a daily thing on a lifetime journey
- the elders pointed the way to sobriety through a higher power

- people will let us down in life despite having good intentions; God will not
- miracles can happen
- you must open up and face the seriousness of what you have done
- you must learn to accept the things that can't be changed
- you are the only one who can make the decision to change
- healing is 80% self choice and 20% support
- the bars will continue to be open even if you decide not to drink
- young lives look up to you as one of their teachers
- when one participant turned away from alcohol it turned his children's lives around for the good
- I will always be there for you and will help you learn the tools
- you need to call for help before something happens, when something can be done, not afterwards
- you need to go back to the time you started to feel different and work your way back up
- strong drink is for those who are perishing and for whom there is no hope
- the things you have left out of your life when seeking help are important and must come out for you to get the help you need; you must open up about your underlying issues
- you have to relive the past to let go of it
- forgetting the bad also means you forget the good
- all First Nations peoples have suffered and had loss thorough alcohol and drugs
- you need to accept and receive the support in the room
- everyone in the room who once struggled with loss and tragedy resulting from alcohol and drug abuse is here by working through it. Their job now is to give others hope
- for many First Nations people loneliness is the trigger for relapse into substance abuse
- as soon as you tell someone how you feel the feeling changes
- you need to get connected to everything around you
- once I started to blame myself I had no-one else to blame and no excuses
- accepting responsibility brings change because it brings power and control
- you need to help others by learning to help yourself so the supports you now have can spend their time helping others
- you are alive and should always find the good in life

[43] One of Mr. Tom's oldest and closest friends spoke to Mr. Tom about how he must chose, on his own, to change. He is there to support Mr. Tom, who he believes has the ability to change, but he said Mr. Tom has to want it enough to do so. He himself struggled with alcohol until he chose sobriety 13 years ago. While he once did not know how to change, he used a higher power to find a way, and there is a way for

Mr. Tom. He relayed the information that the Chief and Council of the LSCFN have not given up on Mr. Tom.

[44] Mr. Tom's sister, Lily, spoke. She has been sober for 24 years and works on her sobriety every day. She wishes Mr. Tom would do the same and quit drinking. She knows her brother misses their mom and struggles with this, but she and her son need him in their lives. He is a good provider, not only for her but for the community.

[45] Mr. Tom's other sister, Trudy, spoke about the importance of Mr. Tom connecting with supports when he is in the community and receiving counseling and training and learning to grieve. He needs to bring out the past, maybe by writing down what is hard for him to say and providing this to his counsellors.

[46] Delores Landstrom told Mr. Tom that he is a good person. She said she will always be there for him, and that supports are important when you feel like you are going to fall. She also said that if he falls, he has to get up again. She said it is very hard at home without him.

[47] A very powerful and emotional moment in the circle was when one of the participants shared a recurring dream about being killed by a drunk driver. This individual shared how he did not want the driver to be Mr. Tom, and that, if for nothing else, Mr. Tom should change for him.

Contract for Change

[48] In January 2012 David Tom entered into a Contract for Change based upon his willingness to take responsibility for his actions and a genuine desire to change his behaviour. Other individuals signed this Contract for Change and committed

themselves to be members of a Support Team for Mr. Tom. These individuals committed to meeting at least once per month with Mr. Tom and each other, to make adjustments to Mr. Tom's treatment plan as necessary and to hold Mr. Tom accountable for the choices he makes each month. The Contract for Change sets out a number of commitments Mr. Tom agreed to follow through on and abide by. A copy of this Contract for Change is attached as Appendix "B" to this judgment. While this Contract was made in hopes of Mr. Tom re-entering into the CWC, it clearly sets out what Mr. Tom will need to do on a daily basis if he wants to be successful in his healing journey.

[49] Mr. Tom spoke to the circle and stated that everything said was true. He acknowledged his alcoholism and that he has done stupid things that he knows are wrong. He wants to change his lifestyle and believes that with the help of his supports, he can. He acknowledged that he cannot return to Carmacks yet. He spoke of how his mother was proud of him and happy for him when he told her that he wasn't going to drink anymore. He also spoke of how lonely he feels at times now that she is gone, and how, when he was in Carmacks, some mornings he would at first think she was in her home next door before remembering that she was gone.

[50] Mr. Tom thanked the participants in the circle and spoke of how he hoped he could be in the same place as they were in 10 years, helping someone else as they are helping him.

[51] The plan for Mr. Tom, should he be allowed to serve any further sentence conditionally in the community, is for him to live in Whitehorse at his sister Lily's residence and/or at Jackson Lake. He will meet and consult with his support team and

participate in transition planning before returning to Carmacks to live. He will not attend Carmacks without prior permission. He will follow through on the commitments he made in the Contract for Change and abide by any court ordered conditions, include blood testing.

Case Law

[52] The case law filed by Crown and defence counsel spoke clearly to the appropriate range of sentence in the Yukon for repeat impaired driving offenders and the principles applicable to the sentencing of aboriginal offenders in such cases. In the case of *R. v. Allen*, 2012 YKTC 36, I stated the following in paras. 19 – 25, which, lengthy as they are, I will, in the circumstances, repeat in their entirety:

19 Impaired driving is an offence for which the sentencing purposes of denunciation and deterrence, both specific and general, are at the forefront. As I have stated in *Van Bibber*, supra, in paras. 71 and 72:

I could go on at length and cite numerous excerpts and case law and publications that attempt to capture the full nature and impact of this crime. I will not, and will leave it at this: Drinking and driving offences are commonly committed crimes that all too often cut a destructive and devastating swath through Canadian society, and which all too frequently have horrendous and far-reaching consequences. This is especially true in communities such as the Yukon or within the Yukon, which, I take judicial notice of, is often said to have alcohol addiction rates above the national average. Small communities such as Pelly Crossing are particularly susceptible to suffering from the problems that arise from substance abuse issues, of which alcohol is at the forefront and impaired driving all too common.

As such, general and specific deterrence as well as denunciation are always very important and generally at the forefront in the sentencing of impaired drivers, in particular, repeat offenders. The protection of the public from these offenders is of paramount consideration.

20 I reviewed the general range of sentencing for repeat impaired driving offenders in paras. 52 to 67 of *Van Bibber*, supra, and concluded in para. 67 that:

It is clear from all the above cases that there is a wide range of sentence available for repeat impaired driving offenders and each case will be marked by the similarities and differences between it and other cases.

21 718.2(e) of the Criminal Code says that:

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.

22 This section has been recently considered by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 S.C.J. No. 13. In para. 80 the Court stated:

An examination of the post-*Gladue* jurisprudence applying s. 718.2(e) reveals several issues with the implementation of the provision. These errors have significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*.

23 With respect to the error of requiring that an offender establish a causal connection between his or her background factors in the commission of the current offence, the Court stated in paras. 82 and 83 that:

This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*. As the Ontario Court of Appeal states in *R. v. Collins*, 2011 PMCA 182, 277 O.A.C. 88 at paras. 32 to 33:

There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence. ...

As expressed in *Gladue*, *Wells* and *Kakekagamick*, 2006 O.J. No. 3346, s. 718.2(e), requires the sentencing judge to "give attention to the unique background and systemic factors which have played a part in bringing the particular offender before the courts:" *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.

As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever

establish a direct causal link between his circumstance and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

24 With respect to the irregular and uncertain application of *Gladue* principles to serious or violent offences, the Court stated, in para. 85:

Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear, at para. 82, that sentencing judges have a *duty* to apply s. 718.2(e): "There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence. Similarly in *R. v. Wells*, [2001] 1 S.C.R. 207, Iacobucci reiterated at para. 50 that

[t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

Finally, the Court stated, in paras. 86 and 87, that:

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.

Moving down:

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 the sentencing judge can deem any number of offences to be 'serious.'" ... 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 the courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all 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 sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

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.

25 While it is true in the case of every offender that the sentencing judge must not deprive an offender of liberty if less restrictive sanctions are appropriate and, further, that all available sanctions that are reasonable in the circumstances must be considered, it is necessary that particular attention be paid to the circumstances of Aboriginal offenders. Doing so in many cases will require creative resolutions that give effect to all the purposes and principles of sentencing. It is a required part of defence counsel's role, unless otherwise instructed by their client, and of Crown counsel's role in their quasi-judicial function, unless the offender waives his or her *Gladue* rights to give effect to s. 718.2(e) in their preparation for and submissions at the sentencing hearing. Finally, the sentencing judge shall pronounce a sentence that reflects a consideration of the unique circumstances of the Aboriginal offender that is before him or her. While mandatory minimum sentences and the unavailability of conditional sentences for some offences may limit the options available to

the sentencing judge, such options that are available must be considered and can be utilized in determining the appropriate sentence so long as the sentence, in the end, is just and fair, and finds and strikes an appropriate balance and consideration of all the applicable purposes and principles of sentencing in the circumstances of the case.

[53] I will not review the sentences imposed upon specific offenders in the cases filed and referred to for the purposes of comparing Mr. Tom's circumstances to other offenders in order to arrive at an appropriate sentence.

[54] It is clear that there is a wide range of sentence available. It is also clear that a substantial period of custody is required to denounce Mr. Tom's actions and to deter him and others from committing the same or similar offences. This is required regardless of the importance of the objective of rehabilitation and the recognition of the principles of restraint and consideration of the circumstances of Mr. Tom's aboriginal heritage.

[55] Mr. Tom comes before the court with a significant amount of community support, both professionally and culturally. This is not provided to Mr. Tom to demonstrate support for him despite his actions; it is intended to support him through the journey of change that he has expressed a sincere desire to travel. While those who know him may continue to love and care for him regardless of his future choices, their support for his journey of change is contingent upon Mr. Tom working in unison with them. I am satisfied that he sincerely desires to do so and, further, that he has the capacity to do so. He has managed to maintain sobriety for long periods of time in the past.

[56] One of the things holding Mr. Tom back from closing the door of alcohol abuse and keeping it shut has been his reluctance to be completely open about issues that

trouble him. This point was raised by several of the circle's participants as being critical for Mr. Tom's recovery. I was therefore glad to hear defence counsel's submissions at the conclusion of the circle that very recently Mr. Tom has begun to discuss matters that he has never openly discussed before, a fact that many of the circle's participants would not have been aware of. Lois Joe was able to confirm this to be true and, in my opinion, if Mr. Tom continues to openly share what he has so long refused to do, there is a very strong likelihood that he may be able to achieve and maintain a life of sobriety. It is still early in the process, but sometimes, once inertia is overcome and a start made, a powerful journey can take place.

[57] This is not to leave the impression Mr. Tom is just starting on his healing path; he, with the assistance of others, has done much already. Were this not the case, the major issue before me in imposing sentence would have been the length of the time Mr. Tom needed to be incarcerated. Mr. Tom's efforts, and the efforts of his support team and others in his family and the community, no doubt provided Crown counsel a basis to exercise his discretion in this case in a manner which, in my opinion clearly gives full recognition to s. 718.2(e) and the reasoning in *Ipeelee*.

[58] It is clear from *R. v. Joe*, 2005 YKTC 21 in paras. 16-18, that when a curative discharge is revoked and sentence imposed, the curative discharge cannot be treated as a previous punishment for the purposes of sentencing. The efforts made by an offender towards obtaining the curative discharge, and in attempting to comply with the probationary terms attached to the discharge, remain relevant in determining the appropriate sentence. I consider Mr. Tom's efforts in this regard to be considerable.

Sentence

[59] With respect to the sentences I am imposing on Mr. Tom for each of his offences, I am mindful of the principle of totality, and, as such, the individual sentences for certain of these offences may not be what they would have been if sentenced separately for each. I am also aware that, strictly speaking, the step principle does not apply as it would have, had Mr. Tom committed each subsequent offence after having been sentenced for the prior ones.

Credit for Pre-Sentence Custody

[60] I will state at the outset that I will accede to the agreement of counsel that Mr. Tom should be granted 12 months credit for his time on remand, regardless of what credit I may have granted should the issue of appropriate credit been argued before me.

[61] There was certainly room to adduce evidence and argue that Mr. Tom should be credited as much as 485 days (or 16 months) for his pre-trial custody, based upon the reasoning in *R. v. Vittrekwa*, 2011 YKTC 64 and Mr. Tom's consent remand status for all but 59 days of his pre-trial custody. The plain wording in s. 524(8) limiting credit for pre-trial custody to 1:1 requires that the justice or judge order the accused detained after being provided a reasonable opportunity to show cause why detention in custody is not required. This only occurred on April 23, 2012. Whether the maximum of one day credit for one day served for the 59 days Mr. Tom was detained after show cause, as limited by s. 719(3.1), would have survived a constitutional challenge is a question that may be answered in another case on another day.

[62] There was obviously considerable discussion between counsel that resulted in the guilty pleas proffered, the decision by Crown not to file the Notice of Intention to Seek Greater Punishment and not to oppose the imposition of a conditional sentence, and the matter proceeding to a sentencing circle. The circumstances are not such that I am inclined to inquire further into counsels' joint position on credit for pre-sentence custody, in particular as I find that I have the flexibility to impose a sentence for each offense that, in the end, results in a fit sentence in totality.

Sentence imposed

[63] For the s. 253(b) offence from April 11, 2008, given that Mr. Tom's last impaired driving conviction was in 2005, I impose a sentence of six months time served.

[64] For the s. 253(a) offence from May 23, 2008, I impose a sentence of four months time served, consecutive.

[65] For the two s. 259(4) offences, I impose sentences of one month time served on each, consecutive to each other and to the above offences.

[66] For the s. 733.1(1) offence, I impose a sentence of one month time served, concurrent to the one month imposed for the February 6, 2011 s. 259(4) offence.

[67] For the two 253(1)(b) offences from February 6, 2011 and October 15, 2011, while I had considered the benefits of imposing sentences on each to be served consecutively, I will instead impose concurrent sentences of 20 months, to be served consecutively to the sentences previously imposed.

[68] I am satisfied, however, that in all the circumstances, allowing Mr. Tom to serve these sentences conditionally in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[69] Some would argue that the safety of the community is endangered because Mr. Tom could not drive a motor vehicle while impaired if in custody at WCC, whereas, if serving his sentence in the community he certainly could choose to breach his conditional sentence order and do so. It is true that, in the short term, there is a greater risk to community safety if Mr. Tom serves his sentence conditionally in the community instead of in custody at WCC. In imposing sentence on Mr. Tom, however, I am also required to consider the long-term safety of the community. If I sentenced Mr. Tom to two years less a day in custody at WCC he would, in all likelihood, be back in the community within approximately 16 months. If his struggles with alcohol still existed, then there is a high probability he would be found operating a motor vehicle while impaired again, and maybe this time someone would be injured or killed.

[70] Forced sobriety for an extended period of time in custody is not a cure for alcohol addiction, it only delays what may well be the inevitable. While there would be supports and counseling available for Mr. Tom while incarcerated, and potentially he could gain insight and benefit from them, incarceration is not real life. Right now, Mr. Tom has a significantly strong support network available in the community which will help him get to the roots of his alcoholism in the world he lives in. This provides an immediate opportunity for Mr. Tom to overcome his alcohol addiction. Such an outcome best protects society.

[71] It would be wrong to impose a sentence that has the potential to provide better long-term protection for society if the short-term risk of harm was too great. I am satisfied, however, that in this case the steps Mr. Tom has taken and the supports available and committed to him alleviate my concerns about there being an undue short-term risk if Mr. Tom is allowed to serve his sentence in the community. As such, I find that a conditional sentence is appropriate.

[72] The terms of the conditional sentence order will be as follows:

1. Keep the peace and be of good behaviour and appear before the Court when required to do so by the Court;
2. Report to a Conditional Sentence Supervisor immediately upon your release from custody and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
3. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court;
4. Notify the Supervisor or the Court in advance of any change of name, address and promptly notify the Supervisor or the Court of any change of employment or occupation;
5. Reside as approved by your Supervisor and not change that residence without the prior written permission of your Supervisor;
6. For the first 12 months of this order remain within your place of residence, except with the prior written permission of your Supervisor or if in the direct company of an individual approved in writing by the Supervisor in consultation with your support team. You must present yourself at the

door or answer the telephone during reasonable hours to ensure you are complying with this condition. Failure to do so will be a presumptive breach of this condition;

7. For the next four months of this order abide by a curfew by remaining within your place of residence between the hours of 11:00 p.m. and 7:00 a.m. daily, except with the prior written permission of your Supervisor or except in the actual presence of such persons as have been approved in advance by your Supervisor in consultation with your support team.
8. For the remaining four months of this order abide by a curfew by remaining with your place of residence between the hours of 12:00 p.m. and 7:00 a.m. daily, except with the prior written permission of your Supervisor or except in the actual presence of such persons as have been approved in advance by your Supervisor in consultation with your support team.
9. 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;
10. 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;
11. Not attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol;

12. Comply with any request by your Supervisor or a peace officer to supply on demand a sample of your breath, blood or urine suitable for testing for the presence of alcohol;
13. Take such alcohol assessment, counseling or programming as directed by your Supervisor and attend and complete a residential treatment program as directed by your Supervisor;
14. Take such other assessment, counseling and programming as directed by your Supervisor;
15. Have no contact directly or indirectly or communication in any way with such individuals as are identified in writing to you by your Supervisor in consultation with the RCMP and your support team;
16. Perform 60 hours of community service as directed by your Supervisor or such other person as your Supervisor may designate. At least 10 of these hours must be completed through your involvement with youth in traditional activities. Any hours spent in assessment, programming or counseling, up to a maximum of 30 hours may, in the discretion of the Supervisor, be counted as community work service hours. These community work service hours are to be completed within 18 months from the start of your conditional sentence;
17. Participate in such educational or life skills programming as directed by your Supervisor;
18. Make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;

19. Provide your Supervisor with consents to release information with regard to your participation in any assessment, programming, counseling, employment or educational activities that you have been directed to do pursuant to this conditional sentence order;
21. Not to drive a motor vehicle at any time; and
22. Comply with your obligations under the Contract for Change.

[73] The conditional sentence will be followed by the maximum probationary period of three years. The terms of the probation order are as follows:

1. Keep the peace and be of good behaviour; appear before the Court when required to do so by the Court;
2. Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
3. Remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
4. Report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;
5. Reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
6. 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;

7. Not attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol;
8. Take such alcohol and drug assessment, counseling or programming as directed by your Probation Officer and, having given the Court your consent, attend and complete a residential treatment program as directed by your Probation Officer.
9. Take such other assessment, counseling and programming as directed by your Probation Officer;
10. Have no contact directly or indirectly or communicate in any way with such persons as are indicated in writing by your Probation Officer in consultation with the RCMP and your support team;
11. Perform 80 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate. At least 15 of these hours must be completed through your involvement with youth in traditional activities. Any hours spent in assessment, programming or counseling, up to a maximum of 40 hours, may, in the discretion of the probation officer, be counted as community work service hours. These community work service hours are to be completed within 24 months from the start of your probation order;
12. Participate in such educational or life skills programming as directed by your Probation Officer;
13. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

14. Provide your Probation Officer with consents to release information with regard to your participation in any programming, counseling, employment or educational activities you have been directed to do pursuant to this probation order: and
15. Not drive a motor vehicle at any time.

[74] Mr. Tom is prohibited from operating a motor vehicle on any street, road, highway or other public place for a period of three years. This attaches to all the s. 253 offences.

[75] I wish to make one further remark. In light of the comments of the Supreme Court in *Ipeelee*, I resile from my comments in *R. v. Stick* 2009 YKTC 86 in para. 8 to the extent that I indicated there that there was some requirement by an offender to show a connection between their aboriginal ancestry and the commission of the offence for which the offender was being sentenced, in order for *Gladue* principles to be fully applied. These comments were incorrect.

[76] This said, it remains important to have as much information before the court regarding an offender's aboriginal background and circumstances as possible, and, as I stated in *R. v. Blanchard*, 2011 YKTC 86 in paras. 25 and 26:

25 I note that the onus of ensuring sufficient information about an aboriginal individual's particular circumstances rests on all of us, Crown, defence, and the sentencing judge. In the absence of a true *Gladue* Report, it is critical that pre-sentence reports contain some details about an offender's aboriginal status and circumstances. Where the pre-sentence report does not contain sufficient relevant information, defence and Crown should be prepared to make submissions and, if necessary, call relevant evidence. In *R. v. Kakekagamick*, (2006), 81 O.R. (3d) 664, the Ontario Court of Appeal stated in paragraphs 52 and 53:

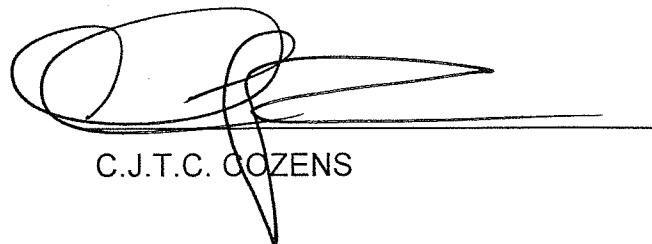
The original pre-sentence report in this case was deficient in that it failed to address adequately aboriginal circumstances and alternative approaches (as described in the second report ordered by this court after the appeal was heard). I would note that the Criminal Code was amended in 1996 to include s. 718.2(e) and *Gladue* was decided in 1999. One would expect that Correctional Services, Probation and Parole would by now fully appreciate the nature and scope of the information required in a pre-sentence report for an aboriginal offender.

Given the deficiencies in the pre-sentence report, counsel and the trial judge should have considered the desirability of a further report or other evidence. Counsel, and perhaps especially the Crown, could and should have raised the issue in this case. They did not, and it fell to the sentencing judge to consider whether or not further inquiries were either appropriate or practicable. No such inquiry took place.

26. Again, in *R. v. Gladue*, [1999] 1 S.C.R. 688, the Court stated in paragraph 83:

83. Where a particular offender does not wish to have such evidence to be adduced, [*Gladue* evidence] the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfill their role and assist the sentencing judge in this way.

[77] I wish to make it clear that in Mr. Tom's case, counsel took all the appropriate steps to ensure that the court was provided with the required information. I thank counsel for their efforts, as I also thank the other officers of the court and all the individuals who participated, whether in their professional or personal capacities, in this case.



C.J.T.C. COZENS

4. TOM has been involved in the criminal justice system since his youth and comes before the Court again facing several drinking and driving-related charges.
5. Attached and marked Exhibit "A" to this Agreed Statement of Facts is TOM's criminal record.

Court File No: 08-00055

Offence: s.253(1)(b) CCC

6. On April 11, 2008, at approximately 2 PM, Constable Natasha Dunmall ("Cst DUNMALL") was contacted by the "M" division RCMP Operational Communication Center ("OCC") and advised of a complaint that an intoxicated male with a young child was attempting to drive a grey truck at the Yukon Motel in Teslin, Yukon.
7. Cst DUNMALL and Cst SPLINTER attended the Yukon Motel and were advised by a staff member that the grey truck headed westbound on the Alaska Highway. The vehicle was located at Johnston's Crossing. RCMP activated their emergency lights and followed the vehicle into the parking lot of the Shell Gas station.
8. Cst DUNMALL approached the driver's side of the vehicle and asked the driver for his license, registration and insurance. The driver stated that he did not have a valid driver's license, but provided his Status Card identifying himself as David Alex Tom ("TOM"), of Little Salmon Carmacks First Nation.
9. TOM removed his sunglasses. Cst DUNMALL observed watery bloodshot eyes, a relaxed face, and a strong odour of air freshener being emitted from within the vehicle.

10. Cst DUNMALL asked where TOM and the other two occupants were travelling from. TOM provided stammering answers, appeared to be at a loss for words, with slow speech and long pauses.
11. When Cst DUNMALL asked TOM to exit the vehicle, TOM was unsteady on his feet and held on to the frame of the vehicle to support himself. His gait was slow and deliberate, and he emitted a strong odour of liquor from his breath.
12. Cst DUNMALL gave TOM the Approved Screening Device Demand ("ASD"). TOM provided a suitable breath sample that resulted in a fail. Cst DUNMALL detected a strong odour of liquor emitting from TOM's facial area.
13. TOM was arrested, chartered, and transported to the Teslin detachment.
14. TOM provided two suitable breath samples at 160 mgs%.

Court File No: 08-00119

Offence: s.253(1)(a) CCC

15. On May 23, 2008, at approximately 1:30 AM, Corporal Wayne Cork ("Cpl GORK") was conducting a traffic stop in Carmacks, Yukon. During the stop, Cpl GORK received information from Bill Johnnie ("JOHNNIE") that TOM was drinking alcohol at the Carmacks Hotel. JOHNNIE informed Cpl GORK that he suspected TOM was going to drive.
16. Cpl GORK observed a grey pickup truck depart from the parking lot of the Carmacks Hotel. While following the vehicle, Cpl GORK observed it swerving several times from the center line to the shoulder of the road. Cpl GORK activated his emergency lights and siren. The vehicle failed to stop for approximately 1 km until it parked into the driveway of TOM's residence.
17. TOM was the lone occupant of the vehicle and exited the vehicle wearing sunglasses.

18. Cpl GORK observed TOM stagger while exiting his vehicle. Cpl GORK detected a strong odour of liquor on TOM's breath when conversing with him. TOM had watery bloodshot eyes, and slurred speech.
19. TOM was read the ASD demand. He was provided instructions and a demonstration on how to provide a proper sample.
20. A "NO GO" resulted on three attempts by TOM to provide a sample. Cpl GORK observed TOM attempting to suck air out of the instrument on two occasions while conducting the ASD.
21. TOM was arrested and transported to the detachment where he contacted counsel and was later released.

Curative Discharge

22. On August 27, 2010, TOM received a curative discharge for the above offences. TOM was sentenced to 3 years probation and a 4 year driving prohibition.
23. Attached and marked Exhibit "B" to this Agreed Statement of Facts is a copy of the curative discharge.
24. Attached and marked Exhibit "C" to this Agreed Statement of Facts are the reports of Dr. de La Mare dated: August 13, 2010; February 8, 2010; February 1, 2010; Sept 17, 2009.
25. Attached and marked Exhibit "D" to this Agreed Statement of Facts is a Report by Bill Stewart, Registered Psychologist, dated February 20, 2010.
26. Attached and marked Exhibit "E" to this Agreed Statement of Facts is a Pre-Sentence Report, by Mirelle Simon, Probation Officer, dated May 27, 2010.
27. Attached and marked Exhibit "F" to this Agreed Statement of Facts is a Letter by Mary Tulk, Community Wellness, Little Salmon Carmacks First Nation, dated February 20, 2010.
28. Attached and marked Exhibit "G" to this Agreed Statement of Facts is a Letter by Brian Caverhill, Addictions and Mental Health Counsellor, Alcohol and Drug Services, dated February 23, 2010 and Certificate of Completion for the Alcohol and Drugs Services Inpatient Treatment Program.

29. As set out below, new impaired driving charges arose February 6th, 2011. As a result, the curative discharge was revoked May 9, 2011.

Court File No: 10-00778

**Offences: s.253(1)(a) CCC
 s.253(1)(b) CCC
 s.259(4)(a) CCC
 s.733.1(1) CCC x 4**

30. On February 6th, 2011, at approximately 7:30PM, Constable Jean-Francois Cyr ("Cst CYR") of the Carmacks RCMP received a complaint of a motor vehicle collision that occurred on the North Klondike Highway, by the Visitor Center in Carmacks. The driver was identified as TOM and was possibly impaired. Cst CYR was aware that TOM was prohibited from driving at this time. Constable Lynch ("Cst LYNCH") was off-duty at the time, but heard the complaint on the radio and attended the scene with Cst CYR in a marked police vehicle.

31. Upon arrival, Cst CYR noted a tractor trailer trying to pull a pickup truck out of the ditch, and recognized TOM standing beside the grey pickup.

32. Officers exited the police vehicle and asked TOM what happened. TOM stated that his wife was driving and she had left on foot, pointing in the direction she went. Officers observed no other footprints around in the snow.

33. Cst CYR detected a very strong odour of alcohol on TOM's breath, and very watery and bloodshot eyes. At one point, TOM had tried to go back to the pickup truck while it was still running, but officers informed him that he was under arrest for operation of a motor vehicle while impaired and driving while disqualified.

34. Cst LYNCH searched the truck and found two 26 ounce bottles of Wiser's whiskey. One was unopened and the other was almost empty.

35. A failed ASD sample was provided after 3 attempts.
36. At 10:26 PM and 10:46 PM, two breath samples were obtained at 170mg%.
37. At approximately 7:10 AM the following morning, TOM admitted that he had driven the truck to Hotel Carmacks. TOM also admitted that he purchased two bottles of whiskey, and almost drank one bottle while driving his truck before landing in the ditch. Lastly, TOM also stated that his wife had nothing to do with the incident.

Community Wellness Court

38. TOM was referred to the Community Wellness Court ("CWC") due to his wellness related problem with alcohol and officially accepted into CWC on May 9, 2011.
39. A Community Wellness Plan was ordered, June 13, 2011.
40. Attached and marked Exhibit "H" to this Agreed Statement of Facts is Community Wellness Plan, by Jody Morey, Probation Officer, dated June 27, 2011.
41. TOM continued attending CWC between May 9th, 2011 and October 15, 2011, as new impaired driving charges arose as described below.

Court File No: 11-00483

Offences: s.253 (1)(a) CCC
 s.253 (1)(b) CCC
 s.259 (4)(a) CCC
 s.145 (3) CCC

42. On October 15, 2011 at approximately 8:00 PM, Faro and Carmacks RCMP detachments received a complaint of an impaired driver on the Robert Campbell Highway. Constable Terleski ("Cst TERLESKI") was informed by Constable Bedard ("Cst BEDARD") that the subjects of the complaint were most likely TOM and his spouse, Delores Landstrom, and that the vehicle

had left Drury Creek approximately one hour prior and was headed towards Carmacks.

43. Cst TERLESKI began to travel eastbound on the Robert Campbell Highway towards Faro for approximately 10 minutes and then turned his police vehicle around in a pullout on the highway.
44. At this point, Cst TERLESKI observed a set of headlights appear in his rear-view mirror. The vehicle was speeding and approaching him rapidly from behind. Cst TERLESKI increased his speed to 120 km/hour, but the vehicle continued to rapidly close in on him. Cst TERLESKI braked and completed a U-turn at Carmacks airport.
45. The suspect vehicle came to a sudden stop in it's lane in front of the police vehicle and Cst TERLESKI activated his emergency lights and parked.
46. The two occupants were a male driver later identified as TOM and a female passenger.
47. TOM stumbled immediately as he exited the vehicle. Cst TERLESKI asked him to return to his vehicle and observed TOM wobbling on his feet. A smell of liquor emanated from TOM's breath, and he had bloodshot glossy eyes.
48. TOM was arrested, chartered, and given the opportunity to speak to counsel to which he declined.
49. TOM was transported to the Carmacks detachment and continued to emit a strong odour of liquor from the back of the police vehicle. His speech was slurred.
50. At 10:23 PM and 10:51 PM, TOM provided two suitable breath samples at 150mg% and 160mg% respectively.
51. TOM advised Cst TERLESKI that he consumed his first drink at 6:30PM and consumed his last just before police had stopped him.

David Tom - Contract for Change

Recognizing that David Tom ("David") is willing to take responsibility for his impaired driving offences, and that David genuinely wants to change his behaviour, Lois Joe, Executive Director, Northern Tutchone Council, ("Lois"), Bill Stewart, Psychologist, The Psychology Centre, ("Bill"); Johnny Brass, Alcohol and Drug Counsellor, Jackson Lake ("Johnny"); Joe Migwans, Drum Maker, Skookum Jim Friendship Centre ("Joe"), Vern Swan, CAIRS ("Vern"); agree to act as a Support Team for David. In addition to other meetings with David, the Support Team commits to meet once every month with David and each other, to communicate with each other, to make adjustments to David's treatment plan as necessary, and to hold David accountable for the choices he makes each month.

It is expected that David's lawyer, (at this time Kim Hawkins), and David's CWC Bail Supervisor will also be present at monthly team meetings.

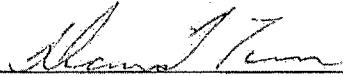
David's Commitments:

- (1) Recognizing that David has not been able to successfully avoid reoffending when in Carmacks, David is willing to live in Whitehorse for at least one year.
- (2) Recognizing that David needs a lot of structure and support at this time, David is willing to live at the YARC while he is in Whitehorse, or at the Jackson Lake Treatment Centre facility.
- (3) Recognizing that there are many emotional triggers for David in Carmacks, David agrees that he will not go to Carmacks unless a Support Team meeting has taken place to plan appropriately for any visit to Carmacks. As a general rule it is expected that these trips will be day trips, not overnight trips, and that David will be supervised by a member of the Support Team at all times if he is Carmacks. David's spouse, Delores Landstrom ("Delores") is not included as a member of the Support Team and will be not be considered as a supervisor.
- (4) Recognizing that David sometimes hides from his emotional issues by escaping to programming, David agrees that he will participate in programming only when a Support Team meeting has taken place and everyone agrees that there are specific, strategic, therapeutic goals for such programming.
- (5) Recognizing that David's coping skills are improving, but that he needs to continue to build and practice these skills, David commits to meet with Bill, or another therapist, for one-on-one therapy sessions, twice every week.

- (6) Recognizing that David is often triggered to relapse because of emotions and grief surrounding past traumas and losses, David agrees to challenge past avoidance behaviours and openly confront his historic trauma and grief in his weekly sessions with Bill or another therapist.
- (7) Recognizing that David is willing to access supports to help him deal with grief and trauma, David commits to meet with Jonny Brass once every week for culturally appropriate counselling.
- (8) Recognizing that David needs to have structure during his days, David agrees that he will meet with Vern at CAIRS two to three times every week to participate in cultural activities.
- (9) Recognizing that it is difficult for David to resist drinking alcohol, David agrees to attend AA meetings at least 4 times each week. David also agrees to choose an AA sponsor within one month of starting AA. If David is tempted to drink alcohol he will ask for help by immediately telephoning his AA sponsor or a member of his Support Team.
- (10) Recognizing the importance of being accountable to his Support Team David agrees that he will participate in monthly blood work to monitor his alcohol use and will agree to consent to release the results of that blood work to his Support Team. David will also discuss other possible medication with his doctor.
- (11) Recognizing that employment is important for David's self-esteem, David will look for work, and will attend the Job Ready Program at the Wellness Centre if asked to do so by the Support Team or his Probation Officer.
- (12) Recognizing that David's addictive behaviour has affected his relationship with Delores, and that David and Delores may need help jointly to work towards a healthier relationship, David will participate in family treatment if asked to do so by the Support Team or his Probation Officer.
- (13) Recognizing that there may be other programs that will help David to lead a healthier life, David agrees to attend other treatment programs if asked to do so by his Probation Officer.
- (14) Recognizing that David's ability to benefit from treatment, as well as David's ability to follow court conditions, may be limited by organic problems which are outside of his control, David agrees to participate in further assessments which will allow his Support Team to tailor his treatment to his abilities. The particular assessments to be completed will be discussed between Bill, Suzie Kuerschner, FASD Consultant/Trainer, and David's Probation Officer, but may include the following:
 - a. Assessment for brain injury;
 - b. Assessment of cognitive abilities;
 - c. Assessment of mental health.


(15) Recognizing that David's actions have hurt a lot of people in his community, and that he has to take responsibility for this, David agrees to participate in a circle process with members of the Carmacks community, to be organized and facilitated by Bill and Lois.

(16) Recognizing the importance of being accountable to his team, David agrees to attend monthly team meetings and to honestly share information about his activities and progress each month with team members.



David Tom

Date:



Lois Joe

Date: 12/01/21



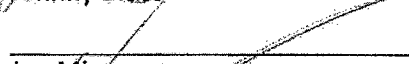
Bill Stewart

Date: Jan 23, 2012



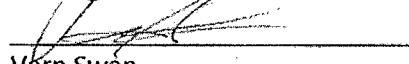
Johnny Brass

Date: Jan 23/2012



Joe Migwans

Date:



Vern Swan

Date: 1/20/12