SUPREME COURT OF YUKON

Citation: *R. v. McDiarmid,* 2014 YKSC 9

Date: 20140210
S.C. No. 12-01507
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

MARK LEE MCDIARMID

Before: Mr. Justice L.F. Gower

Appearances:

Jennifer Grandy	Counsel for the Crown
Mark McDiarmid	Self-Represented
Jennifer Cunningham	Appearing as *Amicus curiae*

REASONS FOR SENTENCE

INTRODUCTION

[1] Mr. McDiarmid was found guilty on two of eight counts on an indictment, following a trial by a judge and jury in Dawson City, which took place between April 22 and May 3, 2013. The first of the two offences was Count #4 on the indictment, which reads:

> "On or about the 22nd day of March 2011, at or near Dawson City, Yukon Territory, did commit an offence in that: he did operate a motor vehicle on the Boutilier Road in a manner that was dangerous to the public, contrary to Section 249 (1) of the *Criminal Code*."

The second of the two offences was Count #8 on the indictment, which reads:

> "On or about the 22nd day of March, 2011, at or near Dawson City, Yukon Territory, did commit an offence in that: he did being at large on his Undertaking given to or entered into before a Peace Officer or an Officer in Charge and being bound to comply with a condition of the Undertaking directed by the said Peace Officer or Officer in Charge, fail without lawful excuse to comply with that condition, to wit: (1) Have no contact direct or indirect with Lance BRITNEY or Anne-Marie DE TILLY, contrary to Section 145 (5.1) of the *Criminal Code*."

[2] Sentencing was adjourned to allow for the preparation of a pre-sentence report ("PSR") and other related material. The offender also indicated that he planned to bring a *Charter* challenge to s. 719(3.1) of the *Criminal Code,* R.S.C. 1985, c. C-46, (the "*Code*") and required time to obtain background materials to prepare the application. He said that he intended to ask for more than 1.5-to-1 credit for his pre-sentence custody. The offender was detained in custody on the present charges from March 24 to April 1, 2011, for a total of nine days, inclusive. Following his release, he was subsequently arrested and detained on additional charges on October 21, 2011, and has been remanded in custody since then. Therefore, to and inclusive of today, February 10, 2014, the offender has spent a total of 853 days in pre-sentence custody.

[3] At the repeated requests of the offender, the scheduling of this sentencing hearing was put off over a series of case management conferences. On October 29, 2013, I made a direction that the offender would have to file and deliver to the Crown his *Charter* application and supporting materials by January 22, 2014, failing which the sentencing would proceed on February 6 and 7, 2014. The offender failed to comply with that direction, but nevertheless sought a further adjournment of this sentencing. I dismissed

his adjournment for oral reasons provided on February 6, 2014, which have not yet been transcribed or filed.

[4] The offender has been representing himself throughout these proceedings. For that reason, and particularly because he elected to proceed with his trial before a judge and jury, I appointed an a*micus curiae* ("*amicus*") on December 3, 2012. I amended the terms of that appointment by an order on April 4, 2013, specifying, among other things, that the *amicus* was not to act on the instructions of the accused, as the previous order had considered. Nevertheless, I made it clear that I expected the *amicus* to represent the interests of the accused and to assist him wherever possible in order to safeguard his fair trial interests.

[5] At the outset of the hearing on February 6, 2014, after hearing the offender's initial submissions on the adjournment application, which took approximately 30 minutes, I proceeded to hear submissions from the *amicus* on the issue of the adjournment. The offender began to repeatedly interrupt the *amicus* during her submissions and would not abide by my directions to refrain from doing so, even after I indicated that I would provide him with an opportunity to reply. The offender continued with his interruptions and I warned him that if he did not abide by my directions I would have him removed from the courtroom. I also warned him that it would not be in his best interests for the sentencing to proceed in his absence. The offender continued with his interruptions and I ordered him removed.

[6] I am cognizant here of the right of the offender to be present during the whole of his trial pursuant to s. 650(1) of the *Code*. However, I am relying on my authority under s. 650(2)(a), which states:

> "The court may…cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;"

[7] Following his removal from the courtroom and after a short adjournment, I asked the *amicus* to inquire of the offender whether he was prepared to abide by my directions in order to return to the courtroom. The offender replied that he would return on the condition that he be allowed to make further submissions on the role of the *amicus* in this matter. I asked the *amicus* to relay my reply to the offender that I, and not he, would set the conditions of his return to the courtroom. I further asked the *amicus* to relay to the offender that, if at any time he should change his mind and agree to abide by my directions, then I would allow him to return to the courtroom. The offender's response was to request an opportunity to make a written submission on the issue of the role of the *amicus*. I allowed that request.

[8] Following the lunch break, I addressed the offender's written submission on the *amicus* issue, heard further submissions from the *amicus* and Crown counsel on the adjournment application, and made my ruling denying the adjournment. The sentencing hearing then continued in the absence of the offender. I reminded the *amicus* that, as I have indicated throughout the trial, I expected her to make her best efforts to ensure that the fair trial interests of the offender continued to be represented in the sentencing hearing.

[9] I am also cognizant here of the right of the offender to speak to sentence pursuant to s. 726 of the *Code*. Obviously he is not able to do so if he is not present in the courtroom. However, in my view, the interests of justice also require that I have control over the proceeding before me. Mr. McDiarmid's conduct in this sentencing hearing

created an environment that was simply chaotic and unmanageable. Although he was given the opportunity to comply with my directions and return to the courtroom, he refused. I view this as a voluntary waiver of his right to speak to sentence.

CIRCUMSTANCES OF THE OFFENCES

[10] Pursuant to s. 724 of the *Code*, and being cognizant of the comments of McLachlin C.J. in *R.* v. *Ferguson*, 2008 SCC 6, at paras. 16 -19, I make the following findings of fact.

[11] The offender was placed on an undertaking on September 12, 2010, with a condition to have no direct or indirect contact with Lance Britney. On March 22, 2011, the offender was driving his red 2006 GMC Sierra 2500 pickup truck (the "truck") and observed Lance Britney in a motor vehicle parked on Boutilier Road, in Dawson City. At that time, the offender lived in a residence owned by his mother on Boutilier Road. The offender had a previous history with Mr. Britney, and perceived Mr. Britney as someone who had wronged him in the past and was continuing to harass him. It was this history which gave rise to the undertaking. The offender got out of his vehicle and approached Mr. Britney's vehicle while holding the tire iron in one hand. He had a conversation with Mr. Britney, essentially asking him to leave the area. After the offender left the immediate scene, Mr. Britney called the RCMP and made a complaint about the nature of the contact the offender had made with him. RCMP Constables Nielsen and Marentette responded to the call at about 7:30 PM.

[12] Constable Nielsen was in a marked RCMP SUV (the "SUV") equipped with emergency lighting. He entered Boutilier Road from the south entrance where it intersects with the Alaska Highway. As is apparent from photographs entered at the trial

(e.g. Exhibits 6 and 19), the road was snow-packed and had been plowed, leaving snow banks on either side between four and five feet high. The width of the road had been narrowed as a result, to approximately 1½ vehicle widths. There were signs posted at each end of the road indicating that the speed limit was 30 km/h. Constable Nielsen stopped and, after speaking with Mr. Britney, made a decision to arrest the offender.

[13] Constable Nielsen then re-entered his police SUV and drove ahead a few meters when he observed a red truck, which he believed to be Mr. McDiarmid's, coming towards him. According to Constable Nielsen, whose evidence I accept on this point, the road in front of him was straight for approximately 75 to 100 m, before it started to curve. This evidence is also largely corroborated by the photographs of the scene. Constable Nielsen stopped the police SUV, turned on the red and blue emergency police lights on the roof of the vehicle, and also caused the headlights to flash in a strobe-like fashion. The SUV was parked more or less in the middle of the roadway. At about the same moment as Constable Nielsen activated the emergency lighting, he noticed the front end of the red truck rising. Based upon his experience in traffic enforcement, he concluded, and I accept, that the front end of the vehicle was rising because it was accelerating. At that point the red truck was about 50 to 75 m away from Constable Nielsen, but was accelerating towards him. Constable Nielsen testified that he felt like the red truck was going run head-on into his vehicle and that the driver was trying to kill him. Constable Nielsen radioed Constable Marentette saying two times "He's ramming me".

[14] When the red truck was about 20 m (or 60 feet) in front of him, Constable Nielsen could clearly recognize the driver as Mr. McDiarmid. At that point, the red truck was still heading straight towards him. Constable Nielsen braced his arms on the steering wheel,

and at the very last second, the red truck veered past the right passenger side of the SUV, and became stuck in the snow bank. It came to a stop slightly behind the SUV in such a position that the rear bumpers of the two vehicles were roughly beside one another. When Constable Nielsen got out of his police SUV, the engine of the red truck was still running and the rear wheels were still spinning.

[15] The photographs in evidence indicate that the distance between the red truck and the SUV as the truck went past was about two feet, more or less. The offender testified, and I accept, that the weight of the red truck was 7600 pounds and the box was fully loaded with firewood, weighing somewhere between 1350 and 1800 pounds.

[16] The offender testified that he had been awake for about 30 hours at that time. Earlier in the day he had an accident with the red truck in which he hit his head on the windshield and he felt like he was suffering from a concussion. Also, after his encounter with Mr. Britney, the offender admitted that he was “shaking and vibrating” and felt “angry and trapped and desperate”. He also said that he was “running on pure adrenaline” and was “not in a rational state of mind” as he was driving south on Boutilier Road. He also admitted to seeing the lights on the SUV. I find as a fact that the offender was referring to the emergency lighting on the SUV in making this admission. He further admitted that when he was about 60 feet (20 m) away from the front of the SUV, he decided to accelerate and veer to the left in order to get around the vehicle, as that was “the only way not to have an accident”. He also claimed that it was only at that time that he saw that Constable Nielsen was inside the SUV.

[17] I find as a fact that the offender had sufficient time to decelerate his vehicle and safely bring it to a stop in front of the police SUV. However, rather than doing so, he

began to accelerate towards the SUV, when he was between 50 and 75 m away from it. It remains unclear what the offender's purpose was as he did so. Indeed, he testified that he was not in a rational state of mind at the time. Nevertheless, that conduct, given the heavy weight of the red truck, the snow-packed road conditions, the narrow width of the roadway, and the position of the SUV in the roadway, establishes that the offender was operating his motor vehicle in a manner that was dangerous to the public, having regard to all the circumstances at that time and in that place.

CIRCUMSTANCES OF THE OFFENDER

[18] The offender was 32-years-old at the time of the offences. He is presently 35 years of age. He is a member of the Tr'ondek Hwech'in First Nation. He was raised in Dawson City and attended school there until grade 10, when he quit. He has subsequently attended various colleges to take heavy equipment and mining equipment operating courses. He claims he completed his GED exam when he was 26 years old.

[19] The PSR is very thorough, detailed and relatively lengthy, at 21 pages. There are also a number of attachments to the original PSR, which I have entered separately as exhibits in this sentencing. I do not propose to go into the extensive details of the offender's circumstances more than is necessary to address what I see as the main issues in the case at bar. The summary at p. 20 of the PSR captures many of the essential points of the offender's circumstances:

> "…He described a chaotic upbringing which included some alcohol abuse, the death of his father at a young age and the lack of structured parenting. He left home at a young age to go to work to support himself. He left Dawson City as a young adult and worked in the oil fields of Alberta for about ten years. During this time he began drinking alcohol fairly heavily and became addicted to cocaine. His drug abuse resulted in being admitted to a psychiatric unit in the Foot

> Hills Hospital in Calgary, Alberta [where, I would add, he was placed on anti-psychotic medication generally used for the treatment of schizophrenia as well as bipolar disorders].
>
> In 2009 after his release from hospital Mr. McDiarmid returned to live and work in Dawson City, Yukon. Shortly after his return he began to have problems with some of the residents which resulted in frequent contact with the Dawson City RCMP and eventually the charges that bring him before the court.
>
> It appears that Mr. McDiarmid has had an undiagnosed mental illness for many years. During the interviews [over 12 hours] the writer frequently observed Mr. McDiarmid's rigid fixed beliefs, delusional ideations including persecution ideations and paranoid ideations, rationalizations and hostility directed at the RCMP, the victim and other residents of Dawson City. Many examples of these features were presented through out [*sic*] this report. Although he has had several contacts with mental health professionals over the years he has yet to have an in-depth comprehensive psychiatric assessment. It is the writer's view, that until a psychiatric assessment has been completed and recommendations of such an assessment have been addressed Mr. McDiarmid will continue to have delusional ideations and continue to act on these delusions which will continue to bring him into contact with the law."

[20] The offender does not believe that he has any mental health issues, only headaches (PSR, p. 16).

[21] At page 19 of the PSR, under the heading "Attitude and Willingness to Make Amends", the author reports:

> "Mr. McDiarmid maintains that any person with the experiences he had would have stood up for themselves. "I know what I did I had no choice. I think, I know that I was right to defend myself." He does not think he has been treated fairly by the police or the Courts.…
>
> … He clearly does not take any responsibility for his actions and readily blames others for the circumstances….

> Mr. McDiarmid was questioned about the possibility of a community disposition. He indicated he would rather do jail time. He stated "I don't need people knowing I'm on conditions and fucking me up". Mr. McDiarmid was adamant that he would not abide by any conditions imposed by the Court by way of a community disposition."

[22] Finally with respect to the PSR, the author notes that the offender's criminogenic risk assessment shows that the offender "has major emotional problems that need to be addressed."

[23] An attached document which was generated on July 25, 2010, long before the date of the present offences, is entitled "Brief Mental Status Evaluation and Risk Assessment". It is authored by Craig Dempsey, M. Sc. and contains an assessment of Mr. McDiarmid under three different psychological assessment instruments. Mr. Dempsey reported:

> "…He has elevated scales indicating evidence of psychotic features such as paranoia and persecution and also anger and hostility. These features are consistent with individuals who suffer from schizophrenia, schizoaffective disorder and mania.
>
> ...
>
> Mr. McDiarmid opined that his current conflict with the law and mood instability is due to ongoing frustration with one particular person (the victim) who has reportedly been harassing him for approximately one year. He is further frustrated by his perception that the RCMP has done very little to address the situation….
>
> ... Mr. McDiarmid scored in the low risk range for future violent behaviour.
>
> Mr. McDiarmid would benefit from further psychological and/or psychiatric observation in order to determine any ongoing mental health concerns…".

[24] I believe "the victim" referred to in Mr. Dempsey's report is Lance Britney.

[25] In a report dated February 16, 2013, Dr. Shabehram Lohrasbe was contracted by the Whitehorse Correctional Center ("WCC") to assess the offender. However, the offender refused to meet with him. Accordingly, Dr. Lohrasbe, proceeded to complete a summary report based on what appears to be an extensive review of a large number of documents relating to the offender. In response to an objection by the offender at the outset of this sentencing hearing, I have redacted four paragraphs in the report which refer to information provided by Dr. Heredia, as that information may have been obtained during the course of Mr. McDiarmid's private confidential retainer of Dr. Heredia (see also my reasons for denying the adjournment). Nevertheless, Dr. Lohrasbe appears to have reviewed a significant amount of other information, besides that of Dr. Heredia, and ultimately expresses the opinion that "Mr. McDiarmid may have a mental disorder, but it remains undefined to date."

[26] When the PSR was ordered, the offender submitted a document to the court objecting to a particular probation officer preparing the PSR. The document is dated June 10, 2013, and contains the following statements:

> "Jail has not had any positive effect on me and has only made me into a hateful, angry person now prone to violence at a moments [*sic*] provocation or insult…
>
> …
>
> … I am a victim of the Justice System not working as it was intended to.
>
> …
>
> I cannot and will not live under any conditions when eventually released…

…

> … I will not work with ANY probation officer telling them where I am working, who they are [*sic*] or when I can leave and return to a residence…"

[27] The offender also submitted a letter from Sarah Ratel, Supervisor of Offender Services at the Whitehorse Correctional Center, dated June 25, 2013. That letter provided a summary of his time in custody at WCC from his admission into custody on October 28, 2011 to the date of the letter. It addresses three areas relating to the issue pre-sentence credit and the potential loss of earned remission: behaviour; involvement in internal work programs; and involvement in programming generally. With respect to behaviour, Ms. Ratel reports that, as of June 25, 2013, there were a total of 635 entries in the offender's progress log, 40 of which were negative (i.e. approximately 6%) and make reference to behaviours such as:

- covering the camera and windows of his cell;
- refusing the direction of Correctional Officers;
- throwing his meal tray onto the floor;
- being rude and disrespectful to nursing staff; and
- kicking the wall and door of his cell.

Some of the Correctional Officers described the offender as being "needy" consuming a lot of their time and resources. His progress log indicates that he complains a great deal.

[28] The positive entries indicate that the offender is friendly and talkative and gets along with other inmates and staff. He has been described as "unfailingly polite" with

Correctional Officers and that, when he does complain, he does so in an appropriate and respectful manner.

[29] As for working inside WCC, Ms. Ratel reported that the offender was a member of the Inside Cleaning Crew between March 15, 2012 and October 21, 2013, a period of over a year and a half. She notes that his performance was good.

[30] With respect to programming, Ms. Ratel reported that the offender has attended AA, a program offered by the "Blood Ties" organization, and a program entitled "Project of Heart Program". She also notes that he has met with the pastor and has visited with Elders.

[31] Lastly with respect to the offender's personal circumstances, he has submitted 62 letters of reference from various individuals in Dawson City, many of whom have known him for his entire life. These include a letter from the Chief of the Tr'ondek Hwech'in First Nation, the Tr'ondek Hwech'in Council, and five other individuals who appear to be Elders or employees of the First Nation. There is also a letter from the present member of the Legislative Assembly for the Klondike electoral district. The other authors of the letters are friends, co-workers, business people and customers of the offender's woodcutting business. The letters generally refer to the offender as someone with the following characteristics:

- a generous, respectful and kind-hearted individual;
- an honest, reliable and hard-working man;
- a soft-spoken, courteous and very pleasant individual;
- helpful, conscientious and polite;

- well-rounded;
- responsible;
- has a good reputation in the community;
- always calm and well-tempered; and
- has never been known to be aggressive or harmful to anyone.

POSITIONS OF COUNSEL

[32] Crown counsel seeks a global jail sentence of six months for both offences, plus a 12 month driving prohibition under s. 259(2) of the *Code*. She acknowledges that there is sufficient evidence from the offender to justify consideration for enhanced credit for his pre-sentence custody pursuant to s. 719(3.1) of the *Code*, though perhaps not to the full extent of 1.5 days for each day in remand.

[33] Crown counsel submits that the aggravating factors are principally two-fold. First, she says that the no-contact breach involving Mr. Britney was not a trivial matter. Rather, there was a significant history of unpleasantness between the offender and Mr. Britney. Further, Mr. Britney was sitting in his vehicle at the time, essentially minding his own business, when the offender approached him holding a tire iron. Finally, it is apparent that the offender was extremely upset at the time, as he described himself as feeling “angry” and “vibrating” after the encounter.

[34] Second, with respect to the dangerous driving offence, the Crown submits that the offender created a significant risk of severe property damage and physical injury by driving his fully-loaded truck at a high speed directly towards the police SUV on a snow-packed, narrow road. However, the Crown fairly concedes that it cannot prove beyond a

reasonable doubt that the offender knew Constable Nielsen was in the SUV when he started to accelerate his truck towards it.

[35] The *amicus* submits that the offender should receive a jail sentence of 30 to 60 days, with full credit for pre-sentence custody at the rate of 1.5-to-1. She says that the mitigating factors in this case include:

- the 62 letters of reference, which she characterized as “truly extraordinary”;
- the absence of a criminal record; and
- the positive aspects of the offender’s performance at WCC.

[36] The *amicus* also urges me to consider the application of s. 718.2(e) of the *Code*, as the offender is an Aboriginal person. Unfortunately, there are very few *Gladue* factors in evidence beyond the fact that the offender is Aboriginal. The *amicus* explained that she had a conversation with the offender about his Aboriginal background, but that in the end, he indicated he would object to her making any *Gladue* submissions to the Court. It also appears that he was not willing to waive privilege in regard to the factors and the *amicus* has not sought any further direction from this Court under the *amicus* order of April 4, 2013. The *amicus* nevertheless urges me to take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, as discussed in *R.* v. *Ipeelee*, 2012 SCC 13. That case generally requires courts to take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance suicide, and higher levels of incarceration for aboriginal peoples.

[37] Finally, the *amicus* submits that I should exercise my discretion under s. 259(2)(c) of the *Code* and refrain from imposing a driving prohibition. She argues that this would unduly interfere with the prospect of the offender's rehabilitation and would be unnecessarily punitive.

CASE LAW

[38] In *R.* v. *Bhalru*, 2003 BCCA 645, Finch C.J.B.C., speaking for the British Columbia Court of Appeal, was dealing with a case of criminal negligence causing death in a street racing context. Nevertheless his comments at para. 28 are equally applicable to the offence of dangerous driving:

> "The level of moral culpability is determined in part by considering the intentional risks taken by the offenders, the degree of harm that they have caused, and the extent to which their conduct deviates from the acceptable standard of behaviour: see *C.A.M.*, supra [paragraph] 80; *R.* v. *Johnson* (1996), 112 C.C.C. (3d) 225 [paragraphs] 33, 84 B.C.A.C. 261…."

Finch C.J.B.C. then continued, at para. 47:

> "…Courts have repeatedly recognized that general deterrence and denunciation will be "paramount objectives" in sentencing for impaired or dangerous driving offences: *Biancofiore*, *supra* [paragraph] 19; *Tang*, *supra* [paragraph] 43; *R.* v. *Muskett* (26 March 1999), Vancouver Registry No. C2628502-DC (B.C. Prov. Ct.); *R.* v. *Berg* (18 December 2000), Vancouver Registry No. CC991413 [paragraph] 18, 26 (B.C.S.C.). Indeed, in *Proulx*, *supra* [paragraph] 129, the Supreme Court singled out dangerous driving and impaired driving as types of offences where the inference that harsher sentences effect greater general deterrence may hold true…." (my emphasis)

[39] As the Supreme Court of Canada in *R.* v. *Proulx*, 2000 SCC 5, stated at para. 129:

> "… [D]angerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by

> otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties. …"

[40] In *R.* v. *Smith*, 2010 YKTC 67, Cozens J. was dealing with case of dangerous driving and operating a snowmobile without a valid licence. At para. 21, he stated:

> "There is a serious risk of harm to the community that flows from driving offences such as this and from the disregard of either court orders, licence suspensions, police directions to stop, which all increase the risk to the community. They are not necessarily insurmountable risks but they are risks that call out for sentences that denounce such conduct and are to be imposed to ensure that specific deterrence is met, and general deterrence…." (my emphasis)

[41] *R.* v. *Desjarlais*, 2004 ABPC 26, was a case of dangerous driving causing bodily harm to a police officer. Allen P.C.J. observed, at para.19, that the most aggravating factor in the case before him was that the victim of the offence was a police officer who was doing her duty. He then continued:

> "…The police have a difficult job to do. My colleague Judge Marshall had the following comments in *R.* v. *Beaudry* (1995), 171 A.R. 149 (Alta. Prov. Ct.) (*Beaudry*) at paras. 46 - 48 that aptly describe the duties of the police and the dangers they face:
>
> > 'As stated by Gilbert & Sullivan years ago a policeman's lot is not a happy one'.
> >
> > In situations of danger a police officer tells the members of the public to go away from the trouble, but the police officer must remain there. It is his or her duty to enforce the law and to maintain law and order, often, as here, at great risk to his or her own life or personal safety. Police officers accept that risk when they put on their uniform. There is no way that 1,200 or so police officers can maintain law and order in a City of some 625,000 people unless they enjoy the support of the public and, unless they are seen to

> have the solid backing, of the courts, in circumstances, as here, when they are entitled to it.
>
> In a democracy it is the police force that stands between a civilized society and anarchy. The public must know that when a police officer on duty requires someone to stop that they must do so or they will face heavy penalties. Society cannot exist in an orderly fashion if a person being required to stop by a police officer, can weigh the odds and make a conscious decision that he will be dealt with more leniently if he runs away than if he remains to face the situation. That is particularly so when the running away puts at risk the life or well-being of a police officer as a foreseeable consequence.'" (my emphasis)

[42] The case law in this area suggests that there is a broad range of sentences available, including: an absolute discharge (*R.* v. *Angelov*, 2013 ONCJ 117); a suspended sentence and probation (*R.* v. *Bragnalo*, [2005] O.J. No. 1495 (C.A.)); fine (*R.* v. *Colavita*, [2001] O.J. No. 2813 (S.C); *R.* v. *Glithero*, 2009 ONCJ 541; *R.* v. *Overland*, 2011 ONSC 7563; and *R.* v. *Sauve*, 2013 YKTC 54); a conditional sentence (*R.* v. *Kassim*, 2011 ABPC 266); and custodial jail sentences of varying duration.

[43] In *R.* v. *Burton* (2012), 322 Nfld. & P.E.I.R. 47 (P.C.), Gorman J. spoke of the range of sentences for dangerous driving within Newfoundland, at para. 44:

> "In *R. v. Rogers* (2008), 274 Nfld. & P.E.I.R. 159 (N.L.C.A.), the Court of Appeal indicated that for "simple dangerous or impaired driving, sentences range from a $1,000.00 fine in *Denney*, [2007] N.J. No. 218, to two months imprisonment in *Penney*, [2001] N.J. No. 320, three months in *Giovannini*, [2007] N.J. No. 336, six months in *Antle*, [1993] N.J. No. 176, and *Oliver***,** [1996] N.J. No. 322, and twelve months in *Fry* (conditional), [2005] N.J. No. 353."

The authorities submitted by counsel in the case at bar generally reflect this wide range as well.

[44] Determining an appropriate sentence is made more difficult by the fact that the dangerous driving offences reflected in the caselaw are often charged together with multiple other offences, and the circumstances of the offenders and offences vary widely.

[45] Jail sentences have been imposed for dangerous driving even when the offender had no prior criminal record: *R.* v. *Lane*, 2013 YKTC 2; *R.* v. *Markozashvili*, 2010 ONCA 52; and *Burton*, cited above, albeit in *Burton* a conditional jail sentence was imposed.

[46] Of the 19 case authorities which I have reviewed, there were only four in which driving prohibitions were not imposed. However, they are almost all distinguishable for the following reasons. In *Bragnalo*, cited above, the Crown did not pursue the failure to impose a driving prohibition on the appeal, apparently because of a trial-level communication between Crown and defence counsel. In *Colavita*, cited above, the issue simply is not raised in the case report at all. In *R.* v. *Berg*, 2001 YKSC 528, Veale J. of this Court was persuaded that the proposed three month driving prohibition would constitute cruel and unusual punishment. In *R.* v. *Kidd*, 2004 ABPC 100, while there was no driving prohibition, there was a one-year probation order.

[47] *R.* v. *McLeod*, 2003 YKSC 70, is a case I decided. It is helpful on the length of sentence issue, as it would seem to establish that the six-month global sentence sought by the Crown in the case at bar is probably at the high end of the appropriate range for this type of offence. Mr. McLeod had pled guilty to four offences: failing to stop while being pursued by a peace officer; failing to provide a breath sample; breach of recognizance; and failing to attend court. He was seen travelling in downtown Whitehorse at approximately 120 km/h in a 70 km/h zone. He refused to pull over, despite being chased by two marked police cars. He was eventually forced to stop when

one of his tires deflated after he drove over a spike belt. The police noted a strong smell of alcohol on his breath and other signs of impairment. There were four passengers in the vehicle. The offender only had a learner's permit and had taken his father's vehicle without permission. The offender was 25 years old and had six previous convictions, including breach of recognizance and joy riding. Indeed, he was on a recognizance at the time of the offences and had already breached that recognizance twice before. Despite the serious circumstances, I recognized in mitigation that the offender had entered guilty pleas, had admitted a substance abuse problem, had an employment history and supportive family members, and had expressed a desire to follow a positive direction his life. In the result I imposed a jail sentence of seven months on the failing to stop charge, less credit for remand time. The global jail sentence on all charges was six months, plus a one-year driving prohibition and probation for two years.

ANALYSIS

[48] I begin my analysis by acknowledging the fundamental purpose of sentencing set out in s. 718 of the *Code*:

> "718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and

> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community."

[49] I also acknowledge that the fundamental principle of sentencing under s. 718.1 of the *Code* is that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[50] Finally, I have given due regard to the other sentencing principles set out in s. 718.2 of the *Code,* including in particular the requirement under para. (e) to consider all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of Aboriginal offenders.

[51] I generally agree with the assessment of the aggravating and mitigating factors referred to by counsel.

[52] I recognize that the offender has no criminal record and that, according to the numerous letters of reference, these offences would at first glance appear to be out of character for him. Normally, these factors would suggest that the offender would respond well to specific deterrence and would be a good candidate for successful rehabilitation. However, for the reasons which follow, that does not appear to be the case.

[53] Returning to the aggravating circumstances, it is apparent from the evidence at trial that the history of conflict between the offender and Lance Britney was long-standing, and that the offender's feelings towards Mr. Britney were disturbingly acrimonious. It is difficult, in these circumstances, to characterize the contact between the offender and Mr. Britney on March 22, 2011, as an isolated incident. Furthermore, regardless of any thoughts of justification which the offender may have had in mind when he approached

Mr. Britney, they were objectively misguided and unreasonable. Indeed, had he not done so, the more serious offence of dangerous driving would likely not have occurred.

[54] In addition, it is aggravating that the dangerous driving offence involved a police officer as the victim. Once again, there was no justification for the offender's behaviour. On the contrary, there was every reason for him to slow down and bring his vehicle safely to a stop once he saw the emergency lights on the police SUV. For whatever reason, he did exactly the opposite and created a situation where his heavily-loaded truck effectively became a weapon of intimidation. I agree with the Crown that this created an unacceptable risk of significant property damage and physical injury to a police officer on duty.

[55] While I do not treat the offender's lack of remorse or failure to accept any responsibility as an aggravating circumstance, it remains very troubling to me that the offender continues to feel that he is the victim here, when even on his own evidence regarding the dangerous driving, he clearly created a level of risk of criminal proportions. It is also very troubling that he has stated so adamantly and so often that he will not abide by any conditions imposed by the Court which may be applicable upon his release from jail. Finally, I am very concerned about the opinion of the author the PSR, who spent 12 hours interviewing the offender in significant detail, that the offender's continuing delusions "will continue to bring him into contact with the law", unless and until he undertakes a comprehensive psychiatric assessment. While the offender is still a relatively young man, and while I recognize that these are his first offences, these factors significantly undermine, if not entirely neutralize, the sentencing objective of specific deterrence, as well as the prospect of his eventual rehabilitation.

[56] That leaves the principles of general deterrence and denunciation as the paramount objectives on this sentencing. In assessing the offender's degree of responsibility, I have particular regard to the three factors relating to the level of his moral culpability, as noted in *Bhalru*, cited above, at para. 28. It is indeed fortunate both for Constable Nielsen and the offender that there was no actual harm caused by the offender's actions. However, the remaining factors point to a high degree of moral culpability, i.e. the intentional risk that he took and the extent to which his conduct deviated from an acceptable standard of behaviour.

[57] Even if it cannot be said beyond a reasonable doubt that the offender knew that the police SUV was occupied by a police officer at the time, it was nevertheless highly probable that was the case. And, in any event, the activated emergency lighting system on the police SUV should have signalled caution to the offender. Rather, he seems to have responded more like a bull to a red flag.

[58] Having said all that, the Crown has not persuaded me that the circumstances of this case are as serious as those in *McLeod*, which I discussed above. Therefore, something less than a global sentence of six months would seem to be appropriate. In the result, I impose a sentence of four months in jail for the dangerous driving count and 15 days in jail, consecutive, for the breach of undertaking.

[59] I next turn to the applicability of s. 719(3.1) of the *Code*. As this court held in *R.* v. *Mulholland*, 2014 YKSC 3, the loss of potential to earn statutory remission can, on its own, justify enhanced credit under s. 719(3.1). There is an obligation on the offender to provide evidence or information to the sentencing court, in order to determine whether such a loss of earned remission is likely: *R.* v. *Vittrekwa*, 2011 YKTC 64. The offender

has done so by providing the letter authored by WCC Supervisor Ratel. It seems reasonable to assume that the offender would have received full credit for his employment participation within WCC. Further, while the offender did not take full advantage of the available programming, his participation in that regard was more than nominal. Finally, while there were some negative entries regarding the offender's behaviour, they constitute a relatively small proportion (about 6%) of the total number of entries in his progress log, and the nature of the incidents were relatively minor.

[60] Therefore, it seems likely that, had the offender been a serving prisoner over the period from October 28, 2011 to June 25, 2013, he would have earned full remission. Accordingly, I am satisfied that the loss of this earned remission is a circumstance sufficient to justify the maximum enhanced credit of 1.5-to-1 under s. 719(3.1) of the *Code*. Thus, by my calculations, the amount of pre-sentence custody to be credited against the 4 and 1/2 month sentence in this case would be approximately 90 days.

[61] Lastly, I turn to the issue of the driving prohibition. I acknowledge that such a prohibition is discretionary under s. 259(2) of the *Code,* where the offender has been convicted of dangerous driving under s. 249 of the *Code*. The *amicus* submitted that I should refrain from making such a prohibition because it would be unduly punitive and would interfere with the offender's rehabilitation upon his release from jail, as he will require a driver's licence in order to earn a living. I remain unpersuaded in this regard.

[62] As I read s. 259(2)(c), the court may impose a prohibition "…during any period not exceeding three years plus any period to which the offender is sentenced to imprisonment…" . Thus, as the offender's imprisonment will be deemed served as of today, I expect that the period of the prohibition will commence immediately. I note also

that the offender is presently detained in custody awaiting his trial on other more serious matters, and that trial has recently been adjourned from dates in March 2014, and has yet to be rescheduled. Accordingly, it seems likely that the one year prohibition sought by the Crown will have expired before any possibility of the offender's release from prison arises. That would seem to negate the argument that the prohibition would be unduly punitive.

[63] As for the argument that the prohibition will interfere with the prospects of the offender's eventual rehabilitation, I have already expressed my scepticism whether rehabilitation is even on the offender's radar screen. Moreover, I am persuaded by the Crown that a driving prohibition may indirectly be in the offender's own best interests, given the anticipated involvement of the Yukon Department of Motor Vehicles and/or the Driver Control Board ("Motor Vehicles") in the eventual return of a driver's licence to the offender following the expiration of the prohibition. As I understand it, once a driving prohibition has been imposed, Motor Vehicles flags the offender's file, and when the prohibition expires, there is a process by which Motor Vehicles requires the offender to demonstrate that they are once again a suitable candidate for a driver's licence. I am hopeful that this type of approval process will include some type of consideration of the offender's mental health status. Indeed, in furtherance of that objective, I am directing that a copy of these reasons for sentence be provided to Motor Vehicles along with the paperwork relating to the driving prohibition.

[64] In any event, and for the same reasons, it would seem that a driving prohibition is clearly in the interest of public safety. Accordingly, I am satisfied that it is appropriate to order a driving prohibition under s. 259(2) for a period of 12 months.

[65] I heard no submissions from counsel on the victim surcharge under s. 737 of the *Code*. However, given the offender's current custodial status, it would seem appropriate to waive the imposition of this surcharge.

_____

Gower J.