Citation: *R.* v. *Lommerse*, 2013 YKTC 49 Date: 20130624
Docket: 12-00541
Registry: Whitehorse

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

REGINA

v.

PETRUS MACKENZIE LOMMERSE

Appearances:
Eric Marcoux Counsel for the Crown
David Christie Counsel for the Defence

REASONS FOR SENTENCING

Circumstances of the Offence

[1] Petrus Lommerse has entered a guilty plea to having committed an offence of causing bodily harm while operating a motor vehicle when having a blood alcohol concentration in excess of 80 mg/%, contrary to s. 255(2.1) of the *Criminal Code* (the "*Code*").

[2] On July 21, 2012 at 1:33 a.m. RCMP received information regarding a motor vehicle accident in the Marsh Lake area that had happened approximately 15 minutes earlier. They attended at the scene at 2:14 a.m. Investigation revealed that Mr. Lommerse and four friends had been consuming alcohol. Mr. Lommerse was driving his mother's all-terrain four-wheel Rhino cage buggy (the "ATV") with Dustin Kotylak as

a passenger. They were doing burnouts and doughnuts in the area of the community centre while the other friends watched from behind some boards. Mr. Kotylak stated to the RCMP that Mr. Lommerse wouldn't slow down the ATV when he asked him to do so.

[3] Mr. Kotylak was hanging out of his side of the ATV when it flipped over, pinning Mr. Kotylak under it. Mr. Lommerse and his friends lifted the ATV off of Mr. Kotylak, who stood up and said he was okay. However, Mr. Kotylak began to complain of pain. He was taken to Mr. Lommerse's residence and emergency medical services were contacted. Mr. Kotylak had broken a rib and, more seriously, had punctured his lower intestine. He required surgery for this puncture and remained in hospital for approximately six days. He appears to have fully recovered from these injuries.

[4] Mr. Lommerse told the RCMP that he had been driving the ATV. Based upon Mr. Lommerse's admission that he had been drinking and the smell of alcohol on his breath, the Approved Screening Device demand was made and a breath sample obtained. A "Fail" resulted and Mr. Lommerse subsequently provided breath samples at the RCMP Detachment in Whitehorse which indicated readings of 130 and 120 mg/% alcohol in his blood. Extrapolated back to the time of driving, Mr. Lommerse's blood/alcohol readings would have been between 150 to 180 mg/% when the accident occurred. Crown and defence counsel have agreed that I should proceed on the basis of there being 150 mg/% alcohol in Mr. Lommerse's blood at the time of the accident.

Positions of Counsel

[5] Crown counsel submits that a sentence of four months custody should be imposed, stating that this is at the lowest end of the range for this offence, which he categorized as a somewhat "unique" offence. In additional written submissions filed subsequent to the date of the sentencing hearing, counsel submits that a suspended sentence is not available as the *Code* prescribes a minimum $1,000.00 fine. Crown counsel also seeks a driving prohibition of two years.

[6] Defence counsel submits that a non-custodial disposition is available, however, if custody is imposed, it should be a maximum of 90 days so that Mr. Lommerse could serve the sentence intermittently.

Circumstances of the Offender

[7] Mr. Lommerse is 22 years of age. He was 21 at the time of the offence. He moved to the Marsh Lake area near Whitehorse when he was three years of age and has resided there with his parents ever since.

[8] He has no prior criminal history.

[9] On November 14, 2012, Mr. Lommerse voluntarily entered into a Recognizance that included conditions that he abstain absolutely from the possession and consumption of alcohol and that he not drive a motor vehicle at any time. There is no indication that he has failed to comply with any of the conditions of this Recognizance.

[10] He has a Grade 12 education and he completed a six month welding pre-apprenticeship program at Yukon College when he was 20. He was assessed when he was in Grade Four as having a Written Expression Disorder which causes him some difficulty in transferring thoughts to written form. He was also assessed, however, as being highly intelligent.

[11] He has a sporadic work history, with his last job being at Raven Recycling from July until December 2012. He was laid off due to a work shortage and has done odd jobs in the Marsh Lake area since then. A letter was filed by the General Manager for Energy North Construction indicating that he has employment for them in the Marsh Lake area commencing May 22, 2013.

[12] Mr. Lommerse's closest friends include the victim and the others who were present at the time of the accident. None of his close friends have been in trouble with the law.

[13] Mr. Lommerse attended at Alcohol and Drug Services in August 2012 and he has been seeing a counsellor every Monday since at least October. He states that these counselling sessions have been primarily directed at helping him to manage his stress rather than substance abuse issues, and they have helped him deal with the emotional consequences of the accident. The documentation filed by his counsellor indicates that he has been consistent in his attendance, and has been respectful and open towards the counselling process.

[14] His leisure activities primarily consist of outdoor activities such as snowmobiling, four-wheeling, camping and fishing.

[15] Mr. Lommerse states that he first consumed alcohol when he was 14 years old. He started a pattern of weekend drinking with friends, sometimes at bush parties, that continued until he was 19 years old. He states that he now drinks alcohol approximately once a month. He says that he has never been in the drunk tank, ticketed or fined for alcohol use and is not aware of his drinking resulting in any complaints.

[16] The Problems Related to Drinking Scale showed a moderate level of problems related to drinking, which conclusion seems to have been reached primarily as a result of the commission of this offence.

[17] Mr. Lommerse stated that he first used marijuana at the age of 12 and increased his use over time until quitting at the age of 19. He scored as having a low level of problems related to drug use on the Drug Abuse Screening test.

[18] Mr. Lommerse was assessed using the Adult – Substance Abuse Subtle Screening Inventory ("SASSI") which is a self-reporting psychological screening measure for adults used to identify individuals with a high probability of having a substance dependence disorder. His scores indicate that he has not experienced obvious consequences relating to his substance abuse and has a low probability of substance dependence.

[19] Mr. Lommerse scored as requiring a low level of supervision when assessed using the Yukon Offender Supervision Inventory. He is noted as not requiring any need for improvement in relation to his criminogenic needs factors. His overall risk rating is low. The author of the Pre-Sentence report ("PSR") states that while some criminogenic

needs exist, noting the lack of stable employment, lack of educational or other plans and substance-abuse related accident for which he is being sentenced, these needs are not "…substantial enough to warrant an increase in his needs rating or overall risk rating".

[20] Mr. Lommerse is very remorseful for his role in causing this accident and has accepted full responsibility from the initial stages of the RCMP investigation, throughout his counselling process and during the sentencing hearing.

[21] He has the support of his parents. They have expressed their disappointment in him for his lack of judgment and note how angry he has been with himself for his actions, and note his fear for Mr. Kotylak due to his injuries.

Victim Concerns

[22] Mr. Kotylak remains a close friend of Mr. Lommerse. He was present in court at the sentencing hearing and spoke on behalf of Mr. Lommerse. He confirmed that Mr. Lommerse was by his side the night of the accident and every day while he was in the hospital. He is not, and has never been, upset with Mr. Lommerse for the accident. He states that he feels that the accident was his fault, saying that the buggy probably flipped over because he was leaning way out, thus causing an imbalance. He said they were both participating in the same activity; it just happened that Mr. Lommerse was driving. He says that he and Mr. Lommerse have learned from this incident and are smarter now regarding what they do and where they do it. He does not believe that Mr. Lommerse needs to go to jail for this offence.

Law and Analysis

[23] The s. 255(2.1) offence is indictable by law. The maximum punishment is a term of imprisonment of 10 years. In accordance with s. 255(3.1), the minimum punishment is a $1,000.00 fine. The s. 259 driving prohibition can be for up to 10 years, plus any period of imprisonment the offender is sentenced to serve. There is no minimum driving prohibition.

[24] A conditional sentence is no longer available due to amendments to the *Code*.

[25] Numerous cases were before me which indicate that the sentences imposed in the Yukon for impaired driving causing bodily harm usually fall within a range of four to ten months' incarceration. This is a general range and does not preclude the imposition of sentences that are outside of this range in appropriate circumstances.

[26] In ***R.*** v. ***Dickson***, 2013 YKTC 27, a sentence of five months custody was imposed upon an offender who entered guilty pleas to three counts under s. 255(2.1) arising out of a single motor vehicle accident. She was sentenced to a consecutive sentence of one-half a month for a s. 145(5.1) charge for failing to abstain from the consumption of alcohol while awaiting disposition of the s. 255(2.1) charges.

[27] Ms. Dickson fell asleep while driving, and the vehicle left the road, hit a lamp post and ended up in a ditch. One victim fractured four ribs, another fractured both arms, requiring significant surgery to repair, and the third had soft tissue injuries. Ms. Dickson's blood alcohol reading at the time of the accident was determined to be between 117 and 144 mg/%.

[28] Ms. Dickson was a 31-year-old aboriginal offender who had no prior criminal record. She struggled while on release on an undertaking to comply with her conditions, but had made some progress during her 75 days pre-trial custody with respect to participating in programming, treatment and education.

[29] In ***Dickson***, Lilles J. considered the ***R.*** v. ***Marshall***, 2010 YKTC 81, decision of Ruddy J. and the cases referred to therein. He noted in para. 8 that these cases considered the following factors in determining an appropriate sentence:

(a) The previous criminal record of the accused and, in particular any previous convictions for impaired driving;

(b) The accused's blood alcohol level at the time of driving;

(c) The number of persons injured and the seriousness of their injuries;

(d) The accused's remorse and acceptance of responsibility for what occurred;

(e) The age of the accused and the potential for rehabilitation;

(f) Steps taken by the accused towards rehabilitation since the accident; and

(g) The accused's personal circumstances, including family and community supports.

[30] Lilles J. referred to his comments in ***R.*** v. ***McGinnis***, [1998] Y.J. No. 33 (T.C.) that:

> …the offence contrary to s. 255(2) is a very serious offence. I acknowledge that the case law indicates a wide range of possible dispositions. But consistently, the dispositions imposed for drinking and driving, where bodily harm results, are today much more significant than they were a decade ago. This is primarily a result of less tolerance in our society for drinking and driving and the direction given by Courts of Appeal that general deterrence is to be considered an important sentencing principle for these kinds of offences. That is to say, I must impose a

> sentence today that not only will deter Mr. McGinnis, but will also send a message to others in the community who might drink and drive.

[31] In ***Marshall***, Ruddy J. imposed a sentence of five months incarceration on a 31-year-old British citizen in Canada on a work visa who, while driving a car in the wrong lane of the Alaska Highway at speeds estimated to be approximately 120 km/hr, struck an oncoming vehicle head-on, causing life-threatening and life-altering injuries to the 60- year-old victim and less serious injuries to his wife. They both suffered significant emotional impact and continued to experience post-traumatic stress disorder symptoms. The financial consequences to the victims were devastating. Despite all these consequences, the victims "…demonstrate a generosity of spirit in their attitude towards [the offender], noting that they have no desire for revenge on Lucy Marshall for what has happened: "We simply want her to clearly understand that she must never drive again under the influence of alcohol or drugs"" (para. 19).

[32] Ms. Marshall's blood alcohol level at the time of driving was determined to be 160 mg/%. Ms. Marshall entered a guilty plea, and was genuinely remorseful for her actions and genuinely concerned for the victims. Neither specific deterrence nor rehabilitation were issues of concern.

[33] In para. 15 Ruddy J. stated:

> Overall, the circumstances of Ms. Marshall as an offender are highly unusual to see in our criminal courts, demonstrating once again that impaired driving offences are the one category of criminal offences which cut across all socio-economic lines, bringing otherwise law-abiding, responsible citizens routinely before the courts, and while Ms. Marshall presents as a sympathetic offender, one cannot forget the devastating impact of her actions on the Spencers.

[34] Ruddy J. also quoted Lilles J. in ***McGinnis***, noted the legislative amendments that increased the mandatory minimum sentences for impaired driving, and went on to state in para. 30 that:

> …the case law is clear that in order to achieve the principles of general deterrence and denunciation in such cases, the sentence must be of sufficient length to make it unattractive for others to get behind the wheel when intoxicated. While I do not believe that it can be said that the deterrent impact of a sentence exponentially increases in relation to the length of a sentence, I am of the view that to have a general deterrent effect the sentence must be of sufficient length to be viewed as something more than a slap on the wrist.

[35] In ***R.*** v. ***Vallee***, 2012 YKTC 92, a sentence of 90 days to be served intermittently was imposed on a young offender with no prior criminal record, after a guilty plea to a s. 255(2.1) charge and a s. 145(3) charge for failing to report to a bail supervisor. Mr. Vallee, while having a blood alcohol level of 180 mg/% and driving in the wrong lane, caused an accident which resulted in one individual sustaining a severe concussion, lacerations and bruising. He accepted full responsibility for his actions from the start and was cooperative with investigators. The circumstances of this case were stated by Luther J. as placing Mr. Vallee's situation at the bottom end of the generally established range of four to ten months. He felt, however, that while an intermittent sentence was "…perhaps unusual and certainly not typical", it would not result in an inappropriate sentence (para. 10).

Purpose and principles of Sentencing

[36] Section 718 of the *Code* states that:

> 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 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 acknowledgement of the harm done to victims and to the community.

[37] There is no question about the paramount objectives of sentencing that apply to this case. The sentence I impose must clearly recognize the need to denounce the conduct of Mr. Lommerse and deter others from operating motor vehicles while impaired by alcohol. This does not mean, of course, that the other objectives of sentencing do not also need to be considered.

[38] I am satisfied that specific deterrence and rehabilitation are not significant objectives in this case. I have no difficulty believing that Mr. Lommerse has accepted responsibility for his actions, is clearly remorseful for them, understands what he did was wrong, and will not likely commit another impaired driving offence. While he has actively participated in counselling, he does not appear to need to be rehabilitated, as would be the case if he was struggling with drug or alcohol-dependence issues.

[39] Due to the prevalence of impaired driving offences in the Yukon, and the gravity of harm that is all-too-often caused by impaired drivers, sentences for these offences need, in some way, to provide reparations and to acknowledge the harm done to the

community. With respect to the harm done to Mr. Kotylak, I am satisfied that Mr. Lommerse has done all that he can be expected to have done to make reparations to Mr. Kotylak, and the support of Mr. Kotylak for Mr. Lommerse is a strong indicator of this.

[40] The remaining objective of sentencing refers to the need for separation of Mr. Lommerse from society. Mr. Lommerse is not an offender that needs to be separated from society due to his posing a high risk of causing harm, a risk that can only be controlled by incarceration. I understand, however, that in making a submission that a sentence of four months custody is appropriate, Crown counsel is submitting that it is necessary to separate Mr. Lommerse from society to give effect to the sentencing objectives of denunciation and deterrence, in order to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[41] There are also the principles set out in s. 718.2(d) and (e) that I am required to take into account when determining an appropriate sentence. Section 718.2(d) and (e) read, in part, as follows:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. …

[42] There is no minimum period of incarceration for an offender convicted of a s. 255(2.1) offence. Therefore a non-custodial disposition is available and I must determine whether jail is necessary, in the circumstances of this case, to give effect to the objectives of denunciation and general deterrence. I must determine whether Mr.

Lommerse should therefore be separated from society through the imposition of a custodial sentence, or whether there is an otherwise available and less restrictive sanction that is appropriate and reasonable.

[43] In ***R.*** v. ***Henderson***, 2012 MBCA 12, the Manitoba Court of Appeal upheld a suspended sentence with two years' probation imposed by the sentencing judge following a guilty plea, after preliminary inquiry, to a charge of impaired driving causing bodily harm.

[44] In ***Henderson***, the offender left a bar and drove her vehicle into the back of a City of Winnipeg street-cleaning truck, pinning a City employee between the vehicles. The employee "…suffered horrendous injuries to his legs, from which he will never fully recover".

[45] The offender was significantly impaired and provided breath samples of 200 mg/%.

[46] She was 54 years of age and had no prior driving or criminal convictions.

[47] At the sentencing hearing, evidence was proffered that the offender was suffering from the side effects of a new drug she was taking. These side effects included the onset of various impulse control disorders. The sentencing judge was presented with an expert report provided by a licensed clinical psychologist who concluded:

> …[T]o a reasonable degree of neuropsychological certainty that [the accused's] gambling behaviour, alcohol use, amnesia, and poor judgment, i.e., driving while impaired, was underlied [sic] by the administration of

> Mirapex. The association is well-documented in the peer literature review. In addition, based on [the accused's] self-report that she did not previously engage in such behaviours, it is the side effects of the medication, Mirapex, that most likely underlay her behaviour on that evening.

[48] Crown counsel put forward a range of sentence from a few months incarceration to high provincial time. Counsel conceded that specific deterrence was not a factor, however stated that general deterrence and denunciation were paramount.

[49] Defence counsel sought a suspended sentence, or alternatively, an intermittent sentence, citing exceptional circumstances.

[50] Section 255(3.1) has been in force since July 2, 2008. The offence in ***Henderson*** was committed on April 8, 2008, therefore there was no minimum punishment as there is now.

[51] The sentencing judge accepted the evidence of family, friends and co-workers that the offender was not normally a drinker at all. She found that the drug Mirapex caused the offender to drink that day. She went on to state:

> I therefore find that this is one of those exceptional circumstances where jail is not appropriate. It is unfortunate that conditional sentences are no longer available for this offence. The problem with mandatory minimums and the deletion of conditional sentence availability for certain offences means that the exceptional case frequently cannot be accommodated.

[52] The Court of Appeal agreed with the submission of Crown counsel that general deterrence and denunciation are the paramount principles for drinking and driving offences and that, even for first offenders, a jail sentence will normally be imposed for impaired driving causing bodily harm (paras. 40, 41).

[53] However, after reviewing prior case law, in particular ***R.*** v. ***Gutoski*** (1990), 63 Man.R. (2d) 246 (C.A.), the Court stated in para. 46 that:

> …a sentence for impaired driving causing bodily harm will be a jail sentence unless there are exceptional circumstances that permit the judge to impose a non-incarceratory sentence.

[54] The Court noted the difficulty in establishing what constitutes "exceptional circumstances" in a particular case, citing favourably, in paras. 56 and 57, the comments in ***R.*** v. ***Steeves***, 2005 NBCA 85, a case of theft from an employer, that:

> Absent "exceptional circumstances", a fit sentence for an offence of this nature is one that features incarceration. While a finding of "exceptional circumstances" typically rests upon proof of mitigating factors that tend to lessen guilt or the seeming seriousness of the offence charged, the concept is elastic in meaning and courts have wisely refrained from attempting to precisely delineate its reach.

[55] The Court in ***Henderson*** noted the sentencing judge's findings of fact regarding exceptional circumstances and reduced moral blameworthiness, was satisfied that she understood the paramount objectives of sentencing of denunciation and deterrence, and held that the sentence she imposed was fit (paras. 49, 50, 71, 72).

[56] Crown counsel quite correctly submits that, as the commission of the offence in ***Henderson*** predates the amendments that prescribed a minimum punishment for a s. 255(2.1) offence, in accordance with s. 731(1)(a) of the *Code*, the suspended sentence and probation order upheld in ***Henderson*** is no longer available. However, Crown counsel did not address s. 731(1)(b). Section 731, in its entirety, reads:

> (1)Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence, and the circumstances surrounding its commission,

> (a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or
>
> (b) in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.

[57] Therefore, while a probation order attached to a suspended sentence is not available in this case, due to the mandatory minimum fine, a probation order in addition to a fine is available.

[58] In ***R.*** v. ***Audy***, 2010 MBPC 55, a $1,000.00 fine, 18 months' probation and a two year driving prohibition were imposed upon an offender after a guilty plea to a s. 255(2.1) offence committed April 19, 2010. It involved a single vehicle accident in which one of three passengers in that car suffered a broken arm, extensive bruising and paralysis to the right side of her body, from which she would never fully recover. Another passenger suffered a broken jaw.

[59] Ms. Audy was a 29-year-old Aboriginal offender with no prior criminal record. She had never possessed a driver's license. She had a blood alcohol reading of 140 mg/%. She stated that she was driving that day because "I was the least drunk of everyone so I had to drive" (para. 2).

[60] A Gladue Report was provided to the Court setting out the circumstances of Ms. Audy in relation to her Aboriginal heritage. The sentencing judge commented on her parents having endured residential school and the unstable upbringing Ms. Audy had as a result (para. 12).

[61] Ms. Audy was considered to be at a high risk for re-offending.

[62] The sentencing judge felt that an intermittent sentence was not appropriate as such a sentence would be served at an overcrowded and decrepit 115-year-old facility approximately a four hour drive away. The associated logistics and expense would make an intermittent sentence virtually impossible to serve.

[63] In choosing between a fine and probation order, or a period of incarceration to be followed by a probation order, Slough J., taking into account the offender's lack of a criminal record and personal circumstances, decided that "…deterrence and denunciation can be achieved without the use of incarceration" (para. 13).

[64] In ***R.*** v. ***Riddell***, 2011 SKQB 378, a $2,500.00 fine, three years' probation and a three year driving prohibition was imposed on a 19-year-old offender who entered a guilty plea to impaired driving causing bodily harm contrary to s. 255(2) of the *Code*. Mr. Riddell, who had a blood alcohol level of 190 and 200 mg/%, struck an open car door and caused it to slam on the victim who was placing a child into a car seat. The vehicle was parked facing the wrong direction and sufficiently far enough away from the curb that it required the victim to stand in the driving lane. Mr. Riddell failed to stop and was arrested later at his home. He also admitted to having smoked two bowls of marijuana.

[65] The victim spent three weeks in a wheelchair after the accident and had undergone four surgeries as well as a painful skin graft. He had ongoing knee problems and continued to suffer from significant chronic pain and depression. He was unable to work a year after the accident. He had applied to be a police officer and was about to

take the fitness test when the accident occurred. As a result he had to withdraw his application.

[66] The offender had struggled with physical and mental health problems. He had, however, completed high school, was working, and was waiting for the opportunity to take EMT training. Alcohol was not an ongoing problem for him.

[67] Mr. Riddell was extremely remorseful, and had been significantly impacted as a result of the accident, including withdrawing socially, and having suicidal ideation. His treating psychiatrist stated that the risk of Mr. Riddell committing suicide would be increased were he to be incarcerated.

[68] He was described by a supporter as being "…a young man of character, good conscience and a strong sense of social responsibility".

[69] Crown counsel sought a sentence of six to nine months incarceration to be followed by 18 months probation. Defence counsel sought a suspended sentence, or alternatively, an intermittent sentence.

[70] Gunn J., after a review of numerous cases, found that the principles of sentencing could be met by the imposition of a sentence that did not include incarceration, stating in para. 72:

> …the sentence which I will impose will clearly denounce Mr. Riddell's unlawful conduct, and will, by the conditions imposed, deter others from committing like offences. I do not find it necessary to separate Mr. Riddell from society for the protection of society. I find that Mr. Riddell should not be deprived of his liberty at this time because this is his first offence, he is a youthful offender and this behaviour appears to be an aberration from his normal behaviour. He is still suffering a significant consequence as a

> result of his actions by now having a criminal record. Additionally, I will impose a curfew which will restrict his liberty for some time period. He will forever live with the guilt of his actions, but he should have the opportunity to learn from this most grievous mistake and move forward to be a contributing member of society.

Application to Present Case

[71] On July 21, 2012, Mr. Lommerse made a decision to consume alcohol with his friends to the point where he had a blood alcohol level of 150 mg/%, far in excess of the legal limit of 80 mg/%. He was impaired. He then made a decision to drive an ATV with Mr. Kotylak as a passenger. By doing so he crossed the line of what may perhaps be socially acceptable behaviour and committed a criminal offence. Had no accident occurred, Mr. Lommerse likely would not have come to the attention of the RCMP and would not find himself convicted of a criminal offence. His actions, however, would have nonetheless been criminal. It is for this reason that denunciation and deterrence are almost invariably the leading objectives when sentencing an offender for an impaired driving offence. While impaired driving offences may often go undetected, and may often be committed by individuals with no related criminal history, the risk of harm associated with impaired driving, including the all-too-often grievous and catastrophic harm involving random individuals, is so great that the sentences imposed for impaired driving offences must be meaningful enough to convey a message to the offender and to others in society that has the effect of deterring them from operating motor vehicles while impaired.

[72] Therefore, when an offender is being sentenced for an impaired driving offence in which death or bodily harm has resulted - the result being that which society most

fears in relation to impaired driving - the sentence must clearly reflect society's abhorrence of impaired driving. It is for this reason that custodial dispositions are the norm for s. 255(2.1) offences.

[73] The moral culpability of an offender convicted of impaired driving *simpliciter*, and an offender convicted of impaired driving causing bodily harm is the same; the difference is in the result. In the former case the offender is being sentenced for what happened (being impaired) in part due to society's fear of what could have happened (death or bodily harm); in the latter case the offender is being sentenced for what happened (being impaired and the resulting death or bodily harm), the consequences society most fears having been realized. Assuming offenders whose personal circumstances are sufficiently similar, there is nonetheless generally a significant difference in the sentence imposed for the two offences despite there being no difference in the offenders' respective moral culpability. There is a type of "I told you this could happen; I warned you" societal perspective which calls out for a greater consequence, in hopes that this consequence will denounce the conduct in a way which will deter the offender and others from driving while impaired, thus providing greater protection to the community.

[74] Despite this, there is no minimum period of custody imposed by the *Code* for an offender convicted of either impaired driving causing bodily harm or operating a motor vehicle with a blood alcohol level in excess of 80 mg/% causing bodily harm, unless the offender has been convicted of an impaired driving offence previously and the Crown has served and filed a notice of intention to seek greater punishment. Therefore Parliament has, by not legislating such mandatory minimum jail sentences, decided that

a custodial disposition is not always necessary for offenders convicted of having committed such offences.

[75] I must decide whether it is necessary in accordance with the purposes, objectives and principles of sentencing, and the need to emphasize denunciation and deterrence in particular, to impose a custodial disposition for the offence committed by Mr. Lommerse. In the circumstances of this case, I have decided that it is not, and that the objectives of deterrence and denunciation can be met by the imposition of a fine, a period of probation and a driving prohibition.

[76] There are no aggravating circumstances in this case, outside of those inherent in the offence itself, i.e. that bodily harm resulted. Mr. Lommerse's blood alcohol readings are under the level at which the *Code* requires that they be considered an aggravating factor. I recognize that his readings, however, are not at the low end of such readings and are close to what would be statutorily aggravating.

[77] There are the following mitigating factors:

- Mr. Lommerse's youth;
- His lack of a prior criminal history;
- His guilty plea;
- His remorse and acceptance of responsibility;
- His low level of problems related to alcohol and drug use;
- His low risk of reoffending; and
- His post-offence steps to take counselling through Alcohol and Drug Services

[78] Without minimizing Mr. Lommerse's actions, as I consider them to be very serious, there is a difference between operating a motor vehicle on a street where other vehicles and pedestrians are likely to be present, or on a highway at a high rate of speed where other vehicles are likely to be present, and operating an ATV in a community parking lot in the early morning hours where there is not likely to be anyone present, other than the individuals involved.

[79] It is normal for me to hear, in sentencing proceedings involving impaired driving offences, Crown counsel submit as aggravating factors the time of day and the likelihood of vehicles or pedestrians being present, or the fact that the offender was driving on the Alaska Highway at a high rate of speed where the consequences of an accident were likely to be catastrophic. If such factors are properly to be considered as aggravating due to the increased risk of harm, then surely the absence of such factors should be a matter for consideration as well. I am not saying that this is a mitigating factor; it is simply a factor that distinguishes the circumstances of one offence from another.

[80] Certainly the moral culpability of an offender who chooses to drive impaired through a school zone at lunch time on a school day at a high rate of speed is going to be higher, due to the risk of harm the offender chooses to accept, than the moral culpability of an offender who tries to drive his or her vehicle home late at night through quiet streets at a low rate of speed. While both offenders are sufficiently morally culpable to be convicted of an impaired driving offence, the sentence imposed on the one will be greater than that imposed on the other in accordance with the sentencing

principle in s. 718.1 that “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”.

[81] In accord with this principle, Mr. Lommerse’s moral culpability for operating the ATV where and when he did is lower than the moral culpability of most of the offenders in the cases I have referred to where they were operating motor vehicles on streets and highways where other vehicles were, or were likely to be, present. As such, the sentence to be imposed upon him should reflect this lower degree of moral blameworthiness.

[82] Another factor is the nature of the injuries suffered by Mr. Kotylak. While his injuries were serious and required surgery, the fact that he fully recovered from these injuries in a relatively short period of time places Mr. Lommerse’s offence in a different category from those in which the victims suffered serious and debilitating injuries from which they would never fully recover. As this is a consequence-driven offence, a lesser consequence therefore requires that a lesser sentence be imposed, of course still taking into account all other factors and the affect these factors may have.

[83] I also take into account the views and comments of Mr. Kotylak and his willingness to accept a shared responsibility for the accident. While Mr. Kotylak’s willingness to do so is commendable, it does not diminish Mr. Lommerse’s responsibility for operating the ATV while impaired by alcohol. Had Mr. Lommerse not been impaired, perhaps Mr. Kotylak’s actions may not have contributed to the accident, to any extent that they perhaps did, although this is only speculation. However, Mr. Kotylak’s

comments place this event in context and also assist in the application of s. 718.2(d) and (e).

[84] I also note the support that Mr. Lommerse has from his circle of friends that were there on the night of the accident and present in court during the sentencing hearing. Carson Baker spoke for himself and these friends and expressed his opinion that to some extent all of them were involved in what took place that night; the difference was that they were not driving and Mr. Lommerse was.

[85] This is a somewhat unique case and, as a whole, the circumstances of the offence and the offender are exceptional in comparison to most cases of impaired driving offences resulting in bodily harm which come before this court. While it is not unusual for this court to sentence offenders convicted of impaired driving offences for operating ATV's and the somewhat analogous snowmobile, it is unusual to find the compilation of circumstances that are present in this case.

[86] I appreciate the distinctions in ***Henderson*** from the present case and, in particular, the Court's reference to the importance of the fact that the sentence was suspended and, should Ms. Henderson breach any term of the probation order imposed on her, that she could be brought back before the sentencing judge and sentenced as though the passing of sentence had not been suspended (paras. 66-68). Clearly, by placing Mr. Lommerse on probation, such a remedy is not available for a breach of the probation order and he would face only a charge for breaching his probation under s. 733.1(1), assuming the breach was not a result of the commission of a substantive offence which could result in a separate charge or charges.

[87] I also recognize that the difficulties that would have accompanied the imposition of an intermittent sentence in the ***Audy*** case are not present here.

[88] While it is a principle of sentencing under s. 718.2(b) that there should be parity and consistency in sentences imposed upon similarly situated offenders, sentencing requires a consideration of all the relevant factors in order to determine a just and appropriate disposition. The presence or absence of any particular factor in one case verses another is not necessarily in and of itself determinative of whether the sentence imposed in one case needs to be greater or lesser than in another. It is a balancing of all the relevant factors in the particular circumstances of the case before the sentencing judge that will result in what is a fit and appropriate sentence.

[89] The sentence I impose is a $1,500.00 fine and a $225.00 fine surcharge. Mr. Lommerse will have six months' time to pay the fine and the surcharge.

[90] He is prohibited from operating a motor vehicle on any street, road, highway or public place for a period of 15 months. I take into account that Mr. Lommerse voluntarily entered into the Recognizance in November 2012, in determining the length of the driving prohibition.

[91] He is sentenced to probation for a period of 18 months. The terms of the probation order are as follows

1. Keep the peace and be of good behaviour;
2. Appear before the court when required to do so by the court;

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

4. Report to a Probation Officer immediately and thereafter, as and when 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. For the first four months of this order abide by a curfew by remaining within your place of residence between the hours of 10:00 p.m. and 6:00 am daily except with the prior written permission of your Probation Officer. You must present yourself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so will be a presumptive breach of this condition;

7. For the first four months of this order you are to abstain absolutely from the possession and consumption of alcohol and controlled drugs and substances except in accordance with a prescription given to you by a qualified medical practitioner;

8. For the first four months of this order you are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

9. Take such assessment, counselling and programming as directed by your probation officer;

10. Perform 120 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate;

11. Make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;

12. Provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling or employment that you have been directed to do pursuant to this probation order; and

13. Not drive a motor vehicle at any time unless equipped with an interlock device in accordance with Motor Vehicle Branch of Yukon permission.

[92] Crown counsel has also asked for a firearms prohibition under s. 109 of the Code, citing ***Vallee***, where such a prohibition was imposed upon Crown counsel's request (paras. 13 – 19).

[93] Section 109 states:

> (1) Where a person is convicted…of
>
> (2) (a) an indictable offence in the commission of which violence was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,
>
> …
>
> The court that sentences the person…shall, in addition to any other punishment that may be imposed for that offence…make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order. …

[94] There is no question that a s. 255(2.1) offence is a serious personal injury offence as defined in s. 752 of the *Code*. I concur, however, with the reasoning of Kalmakoff J.D. in ***R.*** v. ***Butterfield***, 2012 SKPC 11, where he states, in para. 44, while sentencing an offender convicted of dangerous operation of a motor vehicle (an airplane) causing death, that:

> Finally, counsel jointly submitted that a firearm prohibition order under s. 109 is mandatory. With the greatest of respect, I disagree. In this case, the offence committed by Mr. Butterfield is a serious personal injury offence as defined in s. 752 of the *Criminal Code* because it involved conduct endangering the life of another person, not because it was a violent offence. Dangerous operation of an airplane causing death is not by definition an offence involving the use or attempted use of violence against another person, and the circumstances of this case did not involve violence or attempted violence in the commission of an offence. For the

> purposes of s. 109 and 110, “violence” involves some directed or intentional application, or threat of application, of force against another person. …

[95] I find that the same reasoning applies to the circumstances of this offence. There is absolutely no rational connection between the offence that has been committed by Mr. Lommerse and the imposition of a firearms prohibition. This was not an offence of violence, as violence is commonly understood and as contemplated by s. 109 and s. 110. Therefore I am not imposing any firearms prohibition.

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COZENS C.J.T.C.