Citation: *R.* v. *Van Bibber*, 2010 YKTC 49

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Registry: Whitehorse
Heard: Pelly Crossing

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

REGINA

v.

GEORGE ALEXANDER VAN BIBBER

Appearances:
Bonnie Macdonald — Counsel for the Crown
David Christie (via teleconference) — Counsel for the Defence

REASONS FOR SENTENCING

COZENS T.C.J. (Oral):

Charges

[1] George Van Bibber has pled guilty and been convicted of having committed offences contrary to s. 254(3), 253(1)(b) and s. 145(3) times two, of the *Criminal Code* of Canada.

[2] The circumstances of the offences are as follows: On June 26, 2001, Mr. Van Bibber was driving a motor vehicle in Pelly Crossing, Yukon at a speed of 126 kilometres per hour in a 90 kilometre per hour zone. RCMP Constable Wallingham formed the opinion that Mr. Van Bibber had consumed alcohol. His opinion was based upon observations he made at the scene. These observations included Mr. Van Bibber having glossy eyes, slurred speech and swaying while outside his vehicle. Also present in the vehicle were beer cans on the floor mat and another can of beer tipped over. Located in the trunk were twelve 26-ounce bottles of vodka and a flat of beer. Mr. Van Bibber provided a breath sample into an approved screening device and a fail result was recorded. As a result, Mr. Van Bibber was taken to the RCMP detachment in order to provide samples of his breath into the breathalyzer. An initial breath sample reading of 140 milligram percentile was recorded. However, Mr. Van Bibber failed to provide a suitable second sample and was charged with a s. 254(3) offence.

[3] Mr. Van Bibber failed to appear at his February 6, 2002 trial date and left the Yukon. An arrest warrant was issued and Mr. Van Bibber was subsequently arrested in December 2007. He was released on a recognizance and a trial date was set in May 2008. Mr. Van Bibber again failed to show up for his trial and a warrant was issued for his arrest. As it was later determined, Mr. Van Bibber was hospitalized on the May trial date. He did not, however, make any efforts upon his discharge from hospital to deal with the outstanding s. 254(3) charge.

[4] On June 22, 2009, Mr. Van Bibber drove a motor vehicle from the Selkirk store onto the Klondike highway without stopping at a stop sign. RCMP Constable Leggett followed Mr. Van Bibber's vehicle across the Pelly River bridge and into the Willow

Creek subdivision. He noted Mr. Van Bibber's vehicle to cross the centre line on one occasion and to make an abrupt and somewhat uncontrolled turn into the subdivision.

[5] Mr. Van Bibber pulled his vehicle over at the direction of Constable Leggett. Mr. Van Bibber was arrested on the outstanding warrant. While speaking to Mr. Van Bibber, Constable Leggett formed the opinion that he had consumed alcohol. Mr. Van Bibber provided a breath sample into an approved screening device and a fail result was recorded. At the RCMP detachment, he provided samples of his breath into the breathalyzer machine and readings of 170 and 160 milligrams percentile were recorded, thus constituting the s. 253(1)(b) offence.

[6] Mr. Van Bibber was released after a show cause hearing on a recognizance. One of the terms of the recognizance required him to abstain absolutely from the possession or consumption of alcohol. A second term required him to report to a Bail Supervisor as directed.

[7] On September 5, 2009, Mr. Van Bibber was a passenger in a vehicle that was stopped in Pelly Crossing by the RCMP. He had consumed alcohol and was very intoxicated, contrary to the terms of the recognizance he was bound by, thus committing a s. 145(3) offence. He was released by the arresting RCMP officer without further conditions being imposed.

[8] Mr. Van Bibber was directed by his Bail Supervisor to report on November 13, 2009. He failed to do so on that date or thereafter, thus committing a second s. 145(3) offence. He was arrested in February 2010 and was detained after a show cause hearing conducted on February the 4th. He has remained in custody since the show

cause hearing. Crown and defence counsel agree that Mr. Van Bibber should receive five months credit towards the sentence to be imposed on May 11, 2010 for his time in pre-trial custody.

Sentencing Hearing

[9] A sentencing hearing was commenced in Pelly Crossing on May 4, 2010. Crown and defence counsel had agreed previously that the sentencing would proceed by way of a circle sentencing hearing. The sentencing circle began at approximately 2:20 p.m. and continued until approximately 9:00 p.m. with only relatively brief breaks taken. Twenty-four individuals participated in the sentencing circle, including myself, Crown and defence counsel and Mr. Van Bibber and RCMP Constable Whiles. Most of the participants remained for the entirety of the hearing, with several leaving briefly to deal with other matters before re-attending, and at least one person leaving after several hours due to an evening commitment.

[10] At the conclusion of the sentencing circle, the matter was adjourned to Whitehorse for Crown and defence counsel to make final submissions. These occurred the afternoon of May 6, 2010. The matter was then adjourned back to Pelly Crossing for my decision.

Positions of the parties

[11] A Notice of Intention to Seek Greater Punishment was filed by Crown counsel on both the s. 254(3) and s. 253(1)(b) offences. As such, the minimum sentence for the s. 254(3) offence is three months imprisonment, and for the s. 253(1)(b) is four months imprisonment.

Crown Counsel

[12] Crown counsel is suggesting that a sentence of five to six months imprisonment be imposed for the s. 254(3) offence. A further sentence of seven to nine months should be imposed for the s. 253(1)(b) offence. These sentences should be consecutive to one another. The total sentence should be between 15 and 18 months imprisonment. The sentences for the two s. 145(3) offences should be structured so as to put the global sentence within that range.

[13] The sentence imposed should be followed by a period of probation, and a driving prohibition of three years should be imposed on the s. 254(3) and s. 253(1)(b) offences. The prohibitions should be consecutive to each other.

[14] Crown counsel points to the following aggravating factors:

A. Criminal record consisting of the following relevant convictions:

- 1978 in Mayo - Drive while ability impaired, contrary to s. 234; $1,000 fine and six months probation was imposed.
- 1982 in Vancouver, British Columbia - Failure to remain at the scene of an accident, contrary to s. 233(2); a $250 fine was imposed.
- May 23, 1991 in Whitehorse - Driving with more than 80 milligrams in blood, contrary to s. 253(b); a $750 fine and a four months licence suspension was imposed.
- October 24, 1991 in Dawson City, Yukon - Driving while ability impaired, contrary to s. 253(a), for which a 30 day sentence and a one year driving prohibition was imposed; and a driving while disqualified, contrary to s. 259(4), for which 45 days consecutive incarceration was imposed and a one year probationary period.
- 1993 in Dawson City - Driving while disqualified, contrary to s. 259(4), for which a sentence of 45 days was imposed.

- 1999 in Pelly Crossing - Driving while ability impaired, contrary to s. 253(a), a sentence of 90 days and a one year driving prohibition was imposed.

I note that there is a 1975 conviction on the CPIC printout for a failure to remain at the scene of an accident, for which a $150 fine was imposed. Mr. Van Bibber denied this was his conviction during the sentencing hearing. Given this late notice, Crown counsel was not in a position to prove this conviction; however, took the position that even if proved, it would not impact upon the sentencing in any event and as such did not request an adjournment.

B. Mr. Van Bibber absconding for eight years and not demonstrating remorse for the s. 254(3) offence as also evidenced in a letter he wrote to Constable Wallingham after leaving the Yukon, which is filed as Exhibit 2 in these proceedings.

C. Speeding at the time of the s. 254(3) offence.

D. Transporting alcohol at the time of the s. 254(3) offence.

E. His warrant status at the time of the s. 253(1)(b) offence.

F. Blood alcohol readings twice the legal limit in the s. 253(1)(b) offence.

G. Having no insurance, registration or licence at the time of the s. 253(1)(b) offence.

[15] In mitigation, Crown counsel points to the guilty pleas, noting, however, that the guilty plea for the s. 254(3) offence occurred on the date of the August 25, 2009 trial, for which Constable Wallingham had attended from out of town. Crown counsel also notes the break in Mr. Van Bibber's criminal record, with the only conviction since 1999 being in 2000 in Vancouver for attempted fraud and failing to attend court.

[16] While recognizing the sentencing principle of rehabilitation, Crown counsel asserts that denunciation and deterrence, as well as protection of the public, should be the primary focus of this Court in sentencing Mr. Van Bibber. Crown counsel also points to the legislative amendments to the *Criminal Code* over the years which have increased the minimum fines and sentences for persons convicted of impaired driving offences, as well as the heightened public awareness and campaigns such as Mothers Against Drunk Driving.

[17] Crown counsel submits that the sentence suggested by the defence counsel is contrary to the sentencing principle that similarly situated individuals should receive similar sentences, as the sentence would be far below the range that is appropriate.

Defence Counsel

[18] Defence counsel is suggesting that the minimum sentence of three months be imposed for the s. 254(3) offence and four months for the s. 253(1)(b) offence. The sentence imposed for the s. 145(3) offences should be such as would allow Mr. Van Bibber to be released on time served, to be followed by probation or, alternatively, on a conditional sentence or sentences consecutive to the time he has served in pre-trial custody.

Circumstances of Mr. Van Bibber

[19] Mr. Van Bibber is 53 years old. A pre-sentence report prepared for an anticipated sentencing date of October 27, 2009 sets out many of his personal circumstances.

[20] He was born in Mayo, Yukon and is a member of the Selkirk First Nation. His parents were both Pelly Crossing residents but moved to Mayo for work and for the children's schooling. Mr. Van Bibber and his mother moved back to Pelly Crossing after his father died in 1977. His mother is still alive and resides in Pelly Crossing. He has three older siblings and a younger sister, all of whom live in Pelly Crossing or Whitehorse, with the exception of his older sister, Marilyn Kiba, who lives in British Columbia, also, as she signed her name on the sheet, Marilyn Van Bibber.

[21] Mr. Van Bibber was raised in a close, caring and loving family. He and his family remain close until this day. Neither he, his siblings or his parents attended residential school, although Ms. Kiba spoke about how other relatives and community members had done so. Mr. Van Bibber was never abused by his parents.

[22] Mr. Van Bibber has a 24-year-old daughter, Ashley, with whom he has a close relationship. He also has a 14-year-old daughter, Jessica. He is not in a relationship with either mother of these children. He is currently in a fairly recent relationship. While he describes this relationship as healthy and excellent, I note that, according to the pre-sentence report, that at the time it was prepared, his new partner had five charges before the court, including two for impaired driving.

[23] Mr. Van Bibber quit school in grade 9 and went to work in the Elsa Mine. He received his ticket as a heavy equipment operator in 1975 and obtained his GED in 1991, while incarcerated. For much of the past 30 years, he has been employed as a heavy equipment operator in the Yukon and Alberta. He has been unemployed since

he quit working at the Minto Mine in March 2009 because of his concerns about the effects of the mining environment on his health.

[24] While most of Mr. Van Bibber's friends have had conflicts with the law, none of his siblings have.

[25] Mr. Van Bibber reports that he has been taking Prozac for depression for the past 20 years. He also reports having some not insignificant health problems, including a compromised immune system that makes him susceptible to pneumonia and for which he currently takes medication. He apparently has the use of only one lung. A letter provided by the community nurse in charge, Jody Saul, indicates, in her opinion, that he has a chronic medical condition that makes him prone to contracting infections. She describes this condition as life threatening. Ms. Kiba, who is a nurse, confirms that Mr. Van Bibber has a compromised immune system which makes him susceptible to infection. I appreciate that there is no medical diagnosis before the Court and, as such, I do not have reliable information as to the extent of Mr. Van Bibber's health condition. That said, it is clear that he suffers from health issues which affect his quality of life. His health, however, is not a factor in my decision.

[26] Since December 2008 until he was arrested in February of 2009, Mr. Van Bibber had been residing with his mother and daughter in his mother's house in Pelly Crossing. He is the primary caretaker for his mother, who suffers from health issues, including a broken arm that has caused her to lose some of the functioning ability of the arm. He has chosen to reside with his mother in order to assist her, notwithstanding that he has

his own residence in Pelly Crossing. His sister, Jean Van Bibber, now resides in his residence.

[27] Mr. Van Bibber was assessed using the Problems Related to Drinking Scale, which is a self-reported questionnaire commonly used in the Yukon in the preparation of pre-sentence reports. It assesses only alcohol issues and does not assess physical dependency. Mr. Van Bibber's score indicated a moderate level of problems related to alcohol abuse. The pre-sentence report indicates that Mr. Van Bibber was reluctant to admit that he may have issues with alcohol. He admitted that he consumes alcohol to socialize; it makes him feel good and it lifts his spirits when he is depressed. Mr. Van Bibber attended the Tsow-Tum Le Lum Treatment Facility in Nanaimo, British Columbia in 1991 for one month. He also attended Poundmakers Lodge in Edmonton, Alberta in 2003 for one month. He admitted to the author of the pre-sentence report that he may benefit from further treatment, as well as expressing a desire to attend treatment in the future in British Columbia. He did not, at that time, wish to attend treatment right away as he did not want to leave his mother alone.

[28] Mr. Van Bibber stated that he last used illegal drugs in 1997 and has not since that date. There is no information before me that would indicate otherwise.

[29] Mr. Van Bibber was also assessed with the Level of Service/Case Management Inventory, which is a commonly used broad-based actuarial risk/needs assessment used to classify offenders according to their risk for criminal conduct and need for treatment. This instrument predicts general and violent re-offending and is considered

useful as a case management tool. Mr. Van Bibber's score places him within the medium-risk range for re-offending.

[30] The author of the pre-sentence report wrote that Mr. Van Bibber is remorseful for his actions, and believes that he would benefit from further alcohol treatment. She is supportive of a community disposition. I do not take this as expressing an opinion as to the sentence that should be imposed, but rather a belief that Mr. Van Bibber has the potential to comply with the conditions that the Court may place upon him.

Circle

[31] 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 procedure may exist. There had been no circle sentencing hearings conducted in Pelly Crossing for a considerable period of time and there are no established procedures to follow. As such, other than ensuring that the required criminal law procedures were followed, such as the presentation and admission of facts, findings of guilt and tendering of exhibits, conduct of the circle was generally left with Lois Joe, who, as executive director of the Northern Tutchone Council, had prepared the community treatment program and work plan for Mr. Van Bibber. Ms. Joe has been working in the addictions field for the Northern Tutchone Council since 1994.

[32] A significant aspect of the circle sentencing process is the importance of providing every participant equal opportunity to speak without interruption. The respect for the right of each participant to speak is recognized in the culturally symbolic

importance attached to the eagle feather. In this case, the eagle feather was held by each speaker and when that speaker had concluded what he or she had to say, the eagle feather was passed to the next speaker. The only person speaking was the person holding the eagle feather. There were no time limits or constraints placed upon any speaker. Each participant was provided more than one opportunity to speak as the eagle feather continued to be passed around the circle. This is a very important aspect of the circle. Not only does each participant get to speak, but they get to listen to others share and thus potentially increase their own insight. By being provided further opportunities to speak after hearing others, a greater depth of insight can be reached, not only by the individual participants but by the circle as a whole.

[33] The circle sentencing hearing began with a prayer led by an Elder. The transcript of the facts that were read in and admitted on August 2, 2009 in Pelly Crossing was read aloud. Crown counsel then provided additional facts for the s. 254(3) and 2. 251(1)(b) offences, as well as the facts relating to the s. 145(3) offences. Each notice of intention to seek greater punishment was filed, as was the correspondence between Mr. Van Bibber and Constable Wallingham in regard to the s. 254(3) offence. Mr. Van Bibber's criminal record was filed. The entries on the criminal record were read aloud to everyone participating in the circle.

[34] Crown counsel briefly stated the Crown's initial position on sentence, which was within a range of up to two years globally.

[35] Chief Darin Isaac next addressed the circle. Mr. Van Bibber was his friend. He stated that he was not there to support Mr. Van Bibber per se but to speak about the

importance of taking responsibility within relationships and changing the thinking processes. He said that Mr. Van Bibber has been running and hiding all of his life and that he has to fundamentally change. Chief Isaac said that he needs to be part of this change, as does the rest of the community.

[36] Defence counsel spoke and briefly outlined his position. He recognized that the statutory minimum sentences of three and four months needed to be imposed but submitted that it was his hope that the ends of justice could be served with less jail. He further submitted that Mr. Van Bibber was in a better position now then he was at the time the pre-sentence report was prepared.

[37] At this point, Ms. Joe provided a feather to several of the Elders, who spoke in turn before the eagle feather was passed around the circle in a clockwise direction to each participant in order to provide them an opportunity to speak. At the outset, Elder and former Chief Danny Joe spoke of the need for the community to work together and to work with the RCMP in order to protect the community.

[38] After the Elders first spoke, the treatment plan was presented by Ms. Joe. She told the circle participants that this work plan is only a part of a larger plan.

Plan

[39] The purpose of the community work plan for Mr. Van Bibber was stated as follows:

> As a community, we recognize that many individuals who come into conflict with the law are also struggling to address a variety of social issues. It is the belief of Northern Tutchone Council staff that many of Mr. Van Bibber's issues

> of past trauma cannot be effectively addressed within the context of the correctional system.
>
> It is our contention that Mr. Van Bibber can best benefit from a highly structured plan and strong community support. This document represents our community work plan for helping Mr. Van Bibber to address some of the many issues that have contributed to his current involvement in the Criminal Justice System. It is a plan that shows how family can help one heal. Getting back to the family the clients have abandoned due to their lifestyle choice.

[40] It was noted that Mr. Van Bibber has received pre-treatment counselling support from psychologist Bill Stewart while incarcerated since February 2010.

[41] The plan proposes that Mr. Van Bibber reside with either his mother in Pelly Crossing or Elders, Danny and Betty Joe in their trapline cabin, on house arrest conditions until he is able to travel to the Tatla Mun Cultural Centre on May 16, 2010. The Tatla Mun Cultural Centre is approximately a three-and-a-half to four-hour trip from Pelly Crossing in the summertime.

[42] From May 16th until May 21st, Mr. Van Bibber will participate in a pre-treatment and after care program. He will attend a five day Alcohol and Drug Services program and regular Alcoholics Anonymous meetings. Bill Stewart will provide a wellness and treatment plan. A practical small engine repair course is available, as is a basic first aid program, which was not mentioned in the filed work plan but by Ms. Joe in speaking. Mr. Van Bibber will then be transported back to Pelly Crossing on May 22nd and leave Whitehorse May 23rd for a six-week residential alcohol and drug addictions treatment program in Nanaimo, B.C.

[43] Upon his return to Pelly Crossing, Mr. Van Bibber will continue to work with Northern Tutchone Council staff and access support from the community support team (whose membership will be determined). He will be provided structured direction, counselling and support to assist and to plan, organize and manage the demands of parenthood, his personal health, employment and community living.

[44] The medical component of the plan requires Mr. Van Bibber to establish a working relationship with a physician to monitor his health issues, to comply with all prescription regimes recommended by his physician and to avoid contact with intoxicated individuals in places where alcohol is served and consumed.

[45] Mr. Van Bibber has agreed to comply with the following conditions required by the Northern Tutchone Council:

A. Mr. Van Bibber will review the conditions of his commitment to making his life right with the law, agree to comply with court order or whatever is decided on.

B. Mr. Van Bibber will agree to participate in regular supervision and monitoring by RCMP or a Probation Officer, if so ordered by the Court.

C. Mr. Van Bibber will commit himself to a treatment plan and one that consists of a residential treatment program.

D. Mr. Van Bibber will address the annual general assembly of the Northern Tutchone Council at Fort Selkirk in July 2010; and express his remorse and apologies for drunk driving and

> endangering the public. The Northern Tutchone Council will be represented by a delegation that consists of Chiefs, Councillors, Elders, Citizens from Selkirk First Nation, Little Salmon Carmacks and Na Cho N'Yak Dun

He has also agreed to attend full or part-time programming at Yukon College in January 2011 to enhance his employability, if required.

Comments and Observations within the Circle

[46] Much was shared over the course of several hours and I will provide only a brief summary of some of the comments and observations of the participants. These also include comments made in letters of support from community members individually or, in one case, signed by 15 community members, some of whom participated in the sentencing circle:

- Mr. Van Bibber's charges are very serious.
- Impaired driving touches everyone.
- It is important to have respect for the law and for the RCMP.
- Jail is a negative environment for healing.
- Mr. Van Bibber is a good person but his family and community need to see a better Mr. Van Bibber.
- Mr. Van Bibber is loved.
- The participants were proud to see that he had agreed to a circle sentencing.
- Alcohol is destructive; it consumes and destroys and tears families apart.
- Some participants had struggled with alcohol addiction and had overcome it; Mr. Van Bibber can do the same.

- He needs to take this opportunity to rise above his past and better himself in order to be of value to others.

- The community and Mr. Van Bibber must look ahead. Both the community and Mr. Van Bibber must be serious about this.

- He must change his friends to change his life. Real friends are those that will help you take the right road.

- He has to be honest with himself and with his community.

- He must commit himself to his treatment plan.

- Spirituality is important in making a real change.

- His mother needs him at home to help her.

- His daughters need a father in their lives.

- His community needs him home.

- Support was offered so that Mr. Van Bibber does not have to face this alone.

- He has been offered a place to live more on the land.

- He has a responsibility to himself and to his community.

- The community has a responsibility to be honest when it says it will work with Mr. Van Bibber.

- These words have to be followed by action.

- Mr. Van Bibber should look around and see the support and love for him to remind him that his family and community are going to try their best to support him.

- Everyone participating in the circle is, by virtue of being there, taking responsibility.

[47] Mr. Van Bibber read a statement he had prepared prior to the circle occurring. The essence of this letter is his desire and intent to redirect his life into a spiritual quest instead of the path that he has been on. He acknowledged that change does not occur overnight and will require a lot of work on his part. He believes that he will succeed and apologizes for his past actions.

[48] He spoke little beyond what he had prepared. This is not surprising, as facing your family and community in a circle can be a difficult experience and each individual processes what they hear in their own way. For someone who appears to have done as much running from responsibility as Mr. Van Bibber has, having the impact of that running on your family and community brought before you, as well as their love and willingness to commit themselves to support you in your efforts to change, can be an overwhelming experience.

[49] Mr. Van Bibber spoke briefly again in Whitehorse after final submissions were made. This time he did not read from a document or statement he had prepared, and his comments, although few, appeared to reflect in both demeanour and content some of the impact the circle has had upon him.

[50] Ms. Joe, Mr. Van Bibber's mother, and Ms. Kiba travelled to Whitehorse for sentencing submissions after the circle. Ms. Kiba spoke and stated that Mr. Van Bibber's problems stem from his addiction. He needs help both clinical and by reconnecting to the land and his culture. It is important that he do so, both for his family and his community. His is not an isolated case within the community. When asked where his addictions stem from, Ms. Kiba stated that although Mr. Van Bibber's early years were marked by a good upbringing, there were others in the community, including extended family members, who were less fortunate, and the trauma they suffered still had an impact on those with close connections to them within the community. She said that, "We did not escape the impact of colonization and residential schools."

[51] Ms. Joe also spoke and made it clear that the treatment plan that has been proposed is not a picnic. Mr. Van Bibber will be confronted and have to face his fears. It will take courage and hard work daily and there will be times he will wish he was back at the Whitehorse Correctional Centre. She emphasized the importance of the apology he will be required to make at the annual general assembly of the Northern Tutchone Council, stating that this apology will not be easy.

Analysis

[52] General sentencing ranges have been established in the Yukon over the years for repeat impaired driving offenders. The number of prior convictions, the time between convictions and the presence of aggravating factors other than the prior criminal history are all important factors.

[53] *R.* v. *Gill*, 2001 YKTC 46, involved an individual who was convicted of refusing to provide a breath sample and driving while disqualified. He had 11 prior convictions for impaired driving offences, as well as prior convictions for operating a motor vehicle while disqualified. He received a sentence of six months for the refusal, followed by three months consecutive on the driving while disqualified charge. He was disqualified from operating a motor vehicle for five years.

[54] *R.* v. *Fordyce,* 2003 YKTC 88, was a case where Mr. Fordyce was operating a tow truck while having blood alcohol readings of 220 milligram percentile. He had five prior impaired driving convictions, although the most recent was in 1990. Faulkner T.C.J. imposed a sentence of four months custody, which, on appeal to Supreme Court, was replaced by a four-month conditional sentence order, 2004 YKSC 36. On appeal,

the Supreme Court imposed a fairly restrictive three-year probation order also. Mr. Fordyce was disqualified from driving for three years.

[55] *R.* v. *Stone*, 2005 YKCA 11, involved an individual who was being sentenced for his seventh impaired driving offence. His last such offence had been in 1997 and the current offence had occurred in 2000. He had a blood alcohol level of 170 milligram percentile. He was sentenced to nine months on the impaired driving conviction with three months custody on a s. 145(3) charge for breaching his recognizance by driving a vehicle. (It is unclear from a review of the trial and appellant decisions whether this three months was consecutive or concurrent. I note in the trial decision it was stated that it was consecutive.) It is to be noted that a driving while disqualified conviction under s. 259 of the *Code* generally attracts a sentence of 30 days custody for a first offender in the Yukon, also generally served consecutively to a sentence imposed for an impaired driving offence. Mr. Stone was also prohibited from driving for five years, which was upheld on appeal.

[56] *R.* v. *Redies*, 2004 YKTC 88, involved a First Nations individual who was sentenced for s. 253(b) and s. 259(4) offences. He had blood alcohol levels of 190 milligram percentile. He had five prior impaired driving convictions and two prior driving while disqualified offences. On his last two impaired driving offences he was sentenced in 1998 to seven months custody. Mr. Redies advised his Probation Officer that he had attempted to address his alcohol addiction issues but had not been able to find the support that he needs. Faulkner T.C.J. sentenced him to ten months custody on the s. 253(b) offence, to be followed by two months consecutive on the s. 259(4).

[57] *R.* v. *Quadvlieg*, 2009 YKTC 83, involved an individual being sentenced for the offence of driving while impaired and the offence of driving with blood alcohol levels in excess of 80 milligrams percentile. These offences occurred on two separate occasions in 2007. Ms. Quadvlieg's blood alcohol readings were 230 and 210 milligram percentile on the over .08 offence. She had five prior impaired driving convictions commencing in 1984, although there had been a 13 year gap since her last conviction. She also had the facts of one s. 145(3) offence and one s. 733.1 offence read in, pursuant to s. 725 of the *Criminal Code*. These involved breaches of an undertaking to a peace officer not to consume alcohol in 2009 and a breach of a no-contact condition of a probation order. Ms. Quadvlieg had taken significant steps to address her alcohol issues and had originally been attempting to obtain a curative discharge. She was assessed as a medium risk to re-offend in the pre-sentence report. Notice was not filed and Crown counsel proposed a sentence of 45 days on the first offence, to be followed by a six to nine month consecutive conditional sentence on the second offence. I imposed 45 days intermittent and six months to be served consecutively on the second offence, followed by a period of probation. The driving prohibition was three and a half years, which was the range suggested by Crown counsel.

[58] *R.* v. *Stick*, 2009 YKTC 86, involved a First Nations individual who was convicted of driving with blood alcohol readings of 350 and 330 milligrams percentile. He had four prior drinking and driving convictions; two in 1988 and two in 1998. He expressed no interest in quitting drinking and there was little in the way of rehabilitative prospects. He was sentenced to seven months custody. There was no period of probation to follow. He was disqualified from operating a motor vehicle for four years.

[59] *R.* v. *Blanchard*, 2009 YKSC 3, involved a sentencing after trial of an individual for impaired driving following a successful application by Crown counsel to revoke the curative discharge with three years probation, which had been granted in 2006 (2006 YKSC 35). At that original sentencing, Mr. Blanchard also received a conditional sentence of 12 months on a dangerous driving conviction, three months conditional consecutive on a driving while disqualified conviction and three months concurrent conditional for an abstention for an alcohol breach of a probation order.

[60] The impaired driving offence occurred in 2003. The circumstances of the offence are that Mr. Blanchard was operating a work truck in Pelly Crossing when he struck a child riding a bicycle. The child received minor injuries. Four hours after the incident, his blood alcohol level was 270 milligrams percentile. At the time of the 2003 offence Mr. Blanchard had ten prior convictions for drinking and driving offences between 1980 and 2002, and five prior convictions for driving while disqualified from doing so.

[61] Between the 2003 offence date and the 2006 sentencing date, Mr. Blanchard had attended on two occasions for residential treatment. With the exception of one slip in 2004, he had been able to maintain sobriety for approximately one and one half years before being granted the curative discharge and conditional sentence.

[62] The Crown's application for revocation was based upon five convictions arising from breaches of the probation order attached to the curative discharge between October 2007 through to June 2008, for which Mr. Blanchard had been sentenced to four months time served and 30 days consecutive.

[63] Upon his subsequent release from custody, Mr. Blanchard was consuming alcohol heavily in the fall of 2008 until just prior to the revocation hearing on December 17th and subsequent sentencing on the impaired driving offence. Mr. Blanchard's conditional sentence had been terminated in May 2007 as a result of a breach which had occurred on April 18, 2007.

[64] The Crown sought a sentence of between two to two and a half years for the impaired driving offence. Defence counsel stated that since the 2003 offence, Mr. Blanchard had not been drinking and driving for six years, notwithstanding his ongoing struggle with alcohol addiction. In 2009 YKSC 3, Veale J. stated as follows, in sentencing Mr. Blanchard to a period of imprisonment of 90 days to be followed by a two-year probationary period.

> I am not of the view that a long jail sentence will benefit Mr. Blanchard or be in the public interest. His criminal behaviour arises from an addiction to alcohol and he alone must conclude that drinking alcohol is not an option for him. (para. 72)

[65] In dismissing a Crown appeal from sentence at 2009 YKCA 15, the Court of Appeal, after reviewing numerous authorities, stated in paragraphs 39 to 45 as follows:

> I have quoted from these authorities at length because the approach the Territorial Court judges take to a problem they confront on a daily basis is reflected in the approach of the sentencing judge. Their reasons, like those of Veale J., illustrate their understanding of the sentencing provisions in the *Criminal Code*, how they can best be used to accomplish their purpose in the northern territories, and that they are familiar with the observations about their application by the Supreme Court in *R.* v. *Gladue*, [1999] 1 S.C.R. 688 and *R.* v. *Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, as well as this Court's observations in *Donnessey*.

The overarching principle I take from these authorities is that the same sentencing principles are to be applied following revocation of a curative discharge as are applied to sentences following a finding of guilt that results in an immediate conviction. The sentence must serve the purposes of sentencing mandated by s. 718 of the *Criminal Code*. The sentence must also be "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1). Consideration of post-discharge, pre-revocation conduct is required to accomplish these purposes, if proper regard is to be had for the factors set down in s. 718.2.

Like the sentencing judge, I am of the view the purpose of s. 730(4) is permissive. It permits a Court to impose "any sentence that could have been imposed" on the offender at the time of the discharge, just as s. 733.2(5)(d) permits a Court to impose "any sentence that could have been imposed if the passing of sentence had not been suspended."

These are important provisions. They constrain punishment for post-offence conduct, as the trial judge recognized, and recognize s. 11(i) of the *Charter*, which grants the offender the benefit of any lesser punishment effected by a subsequent legislative change. I am not persuaded, however, these provisions preclude consideration of the offender's post-discharge, pre-revocation conduct in assessing his moral responsibility for the offence while in the community under conditions, whether of an undertaking, an order for judicial interim release, or a probation order. In my view, they permit the sentencing judge to take into account conduct and circumstances, favourable to the accused, arising in the interval between the discharge and revocation, to impose a sentence that balances the public interest in deterrence and denunciation demanded by the facts of the offence, with any continuing possibility of rehabilitation for the offender.

Application to Mr. Blanchard:

I approach this appeal with a deference for the trial judge articulated in *R.* v. *Shropshire,* [1995], 4 S.C.R. 227 and *R.* v. *M.*(*C.A.*), [1996], 1 S.C.R. 500.

Its focus is on the alleged failure of the sentencing judge to recognize the overriding importance of deterrence, both specific and general. In Crown counsel's view, the highest provincial

> sentence would fit the offender and his crime and take into proper account the other sentences he received at the time of his discharge since served. Moreover, Crown counsel submits, two years is the sentence the respondent would have received for the impaired driving offence had he been convicted and sentenced at that time.
>
> In my view, the Crown has not established an error that would permit this Court to intervene with a sentence that does not substantially and markedly depart from the sentences customarily imposed for similar offenders committing similar crimes in the Yukon. My reading of his reasons persuades me that Veale J. came to Mr. Blanchard's sentencing with appropriate respect for the sentencing principles, balanced the need for denunciation and deterrence with the longer term interests of the community and arrived at a sentence within a reasonable range supported by the evidence placed before him at the sentencing hearing. I would not interfere with it.

[66] While there is much in the circumstances of Mr. Blanchard and the judicial process prior to his sentencing on the impaired driving offence after revocation of the curative discharge that are unique and different from the case of Mr. Van Bibber, the case is still important in reviewing the considerations that come into play when assessing how to sentence a repeat impaired driving offender in a remote northern community in the Yukon.

[67] 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.

Application to Mr. Van Bibber

[68] The principles of sentencing are set out in s. 718 to s. 718.2 of the *Code* as follows, in part:

> 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 acknowledgement of the harm done to victims and to the community.
>
> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2(a) A sentence should be increased or reduced to account for any relevant, aggravating or mitigating circumstances relating to the offence or the offender…
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (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, with particular attention to the circumstances of aboriginal offenders.

[69] Impaired driving is unique in the devastation and destructive impact it has had within Canada and within the Yukon. No other crime, short of crimes of terrorism, has

the ability to so randomly select unintended victims, and destroy or damage beyond repair their lives and those of their families and their communities. Impaired driving offences are also unique in the circumstances of the individuals who commit the crime of impaired driving and that many of these offenders come from within the general population and are not restricted to a "criminal element or criminally predisposed offender." The victims of the crime of drinking and driving extend not only to the families of the unintended victim but include the offender and his or her families as well.

[70] Quoting from page 7 of the Transport Canada Road Safety Vision 2010 publication filed by the Crown for the sentencing, available at www.tc.gc.ca/roadsafety.

> Canadians make over 7.4 million trips a year - any one of which could result in a crash. In 2007, roughly 1.84 million Canadians reported that they had driven when they felt they were over the legal limit. In fact, about one third of all Canadian drivers killed in car crashes had been drinking. And impaired drivers are not the only ones who suffer. Over 1,000 Canadians - impaired and sober - die each year in alcohol related crashes. In total, these crashes cost Canadians over $10.6 billion a year in lost wages, property damage and health-care costs.

[71] 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.

[72] 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.

[73] There are cases where these principles, while still applicable, give room to rehabilitation, such as the curative discharge process set out in the *Code* and which is in effect in the Yukon, although not in all Canadian jurisdictions. In the curative discharge process, the positive prospects before the Court for the rehabilitation of the offender, usually a repeat offender, allow for the Court to impose a non-custodial disposition in the form of a probation order. Briefly put, the protection of the public in certain cases can best be achieved through the rehabilitation of the offender and not through a further period of incarceration. Mr. Van Bibber has not pursued a curative discharge in this case.

[74] This approach has also been applied in the Yukon through the imposition of conditional sentences for impaired drivers in those cases where the Crown has not filed Notice or where the rehabilitative prospects before the Court are such that the Court is satisfied that the service of the sentence 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 s. 718 to s. 718.2 of the *Code*.

[75] In the present case, the conditional sentence option is not available for the drinking and driving offences, as Crown has filed Notice. The policy for Crown counsel with respect to the prosecution of drinking and driving offences is set out in s. 27 of the Federal Prosecution Service Deskbook, available online at www.ppsc-sppc.gc.ca. An excerpt of the policy is set out in s. 27.2 as follows:

> Crown counsel shall seek greater punishment by proving service of the notice and the relevant criminal record where the accused has one or more previous convictions that have been recorded within five years before the current offence.
>
> However, Crown counsel may exercise discretion *not* to prove service of the notice where:
>
> - the offender has one previous conviction which has been recorded within five years before the current offence, and
> - treatment as a subsequent offender would likely result in an unduly harsh consequence under the circumstances.
>
> Counsel shall nonetheless still prove the relevant criminal record. The intention of permitting this narrow discretion is to recognize that there may be rare instances in which it might be unduly harsh to require a third time offender to serve the mandatory minimum sentence of 90 days imprisonment.

(Which I note is now 120 days.)

> Crown counsel may exercise discretion not to prove service of the notice where the accused has previous conviction(s), all of which have been recorded more than five years before the current offence. Counsel, however, shall still prove the relevant criminal record.

[76] The policy provides some direction or some assistance to Crown prosecutors in deciding how to exercise his or her discretion in a particular case. The policy does not, however, have the status of law.

[77] So I must review the facts and circumstances before me in order to determine how to best arrive at a sentence that gives full effect to the applicable principles of sentencing, and that is just and fair.

[78] The role of the circle sentencing hearing and its participants is a significant factor in this case. Such sentencing circles have not commonly occurred in the Yukon in recent years and have not been conducted in Pelly Crossing for a number of years. There are no strict guidelines governing the manner in which circle sentences are to be conducted in the Yukon. As then sitting Yukon Territorial Court Judge Lilles states in his paper *Circle Sentencing: Part of the Restorative Justice Continuum*, presented when he was Plenary Speaker at the "*Dreaming of a New Reality," the Third International Conference on Conferencing, Circles and other Restorative Practices*, August 8 - 10, 2002 in Minneapolis, Minnesota (available online at www.iirp.org/lib_online_collection.php):

> Circle sentencing has not been authorized by statute but exists solely as a result of judicial discretion. Nevertheless, it is still a sentencing hearing and is part of the court process. It follows that the procedure is not rigid but must conform to the rules of natural justice and other legal requirements imposed by statute or common law. For example, the law requires the following safeguards be present in all circle sentencing hearings.
>
> 1. Any criminal record or any other reports are received and marked as exhibits in the circle hearing process.
> 2. A record is made of the proceedings.

3. A disputed fact is judicially determined in the usual manner through evidence heard under oath.
4. The circle hearing is open to the public.
5. The offender must participate voluntarily.
6. The offender is entitled to representation by counsel and to address the circle.
7. A Crown attorney is present and able to speak to the public interest, ensure victim's issues are fully canvassed and make recommendations with respect to sentence.
8. Media are allowed to attend and to report on the proceedings, although restrictions may be imposed on attributing statements to specific individuals in the circle.
9. Participants in the circle must have access to any documentation filed with the Court, including the pre-sentence report.
10. The judge has the sole responsibility for imposing the sentence, which must be a fit one in accord with the law.
11. The decision is subject to appeal or review in the same manner as any other court decision.

Notwithstanding these common legal requirements there can be substantial differences in how circle sentencing is conducted. These differences arise because community members are directly involved in deciding what the circle process should be and this allows for the inclusion of culture and traditions. Available community resources will influence the kind of cases the community is prepared to undertake.

Judge Stuart makes the argument in favour of diversity:

> This is a good and necessary development. Significant differences in demographic composition, cultural, social, economic and geographic conditions render each community unique. A process for resolving conflict must accommodate the special circumstances, blessing or hindering the specific ability of each community to process conflict. Recognizing the uniqueness of each community, and the uniqueness of each dispute, warrants departing from the audacious presumption of the formal justice system that 'one process fits all forms of disputes' (Stuart 1996).

The procedural variations which result from the community being a full partner in the circle sentencing is at odds with legal culture and the reliance on precedent within the formal justice system. Several Courts of Appeal have been unable to appreciate the need for flexible rules in a community based justice initiative.

In R. v. Johns, Prowse J.A. stated:

> In my view, however, circle sentencing is no longer in its embryonic stages, particularly in the Yukon. … That being so, further heed must be paid to the recommendation of the Yukon Territorial Court of Appeal in R. v. Johnson … that rules, or, alternatively, well-publicized guidelines for circle sentencing, should be established by Territorial Court judges, with the assistance of those with expertise in the process.

> Notwithstanding the urging of the Court of Appeal, Yukon Territorial Courts have resisted dictating procedures for circle sentencing to the communities (McNamara, "Appellant Court Scrutiny of Circle Sentencing, 2000). Rather the communities have been encouraged to develop their own procedures, taking into account their traditions and available human resources. Nevertheless, as circles have similar objectives and must follow due process, the differences are not major.

[79] There is no guaranteed outcome at the conclusion of a sentencing circle hearing. There is no presumption that the sentence will be less restrictive on an offender's liberty than one imposed had the hearing occurred in the more formal courtroom setting. A just sentence must be imposed in accordance with the circumstances of the case and the principles set out in s. 718 to s. 718.2, and such a sentence can include incarceration. What can and generally does occur at a sentencing circle in the Yukon is that the Court is provided more information about the circumstances of the offender, available options and the position of the community with respect to providing ongoing support for and supervision of the offender. Therefore, it is not unusual that this additional information may result in a sentence that is more community based than had the sentence had been imposed without the benefit of this additional information.

[80] Mr. Van Bibber does not come before the Court on his own. His community has rallied to provide him direction and support to assist him on his way. This direction and

support is offered not only by family and friends but by the leadership of the community as demonstrated by the presence and commitment of Chief Isaac and the Elders. This is the community where the two drinking and driving offences for which Mr. Van Bibber is being sentenced occurred and is a community that is all too familiar with the destructive effects of alcohol. This is a community where not that long ago Mr. Blanchard, while driving impaired, struck a young girl riding her bicycle. This community is well situated to understand the crime Mr. Van Bibber has committed and the effects of his crimes on the inhabitants of Pelly Crossing. It is clear to me that the community understands that the consequences of impaired driving extend beyond Pelly Crossing.

[81] The plan put forward by the community is treatment based and has been put together with careful consideration. The plan contemplates a long-term commitment to Mr. Van Bibber and he has indicated, and I accept, that he is prepared to commit himself to following the plan and accepting the direction and support of his family and the community. I was impressed with the quiet conviction that came from those who participated in the sentencing circle, and accept that their commitment to Mr. Van Bibber in his journey is sincere and is made after much thought. Beyond that, I see a community that is prepared to address the issues that many Pelly Crossing residents are struggling with, in particular those of its First Nations inhabitants, and is taking steps to do so. The family and community participants in this circle sentencing, while clearly focused on the circumstances past, present and future of Mr. Van Bibber, are also setting in motion their vision to achieve greater justice and health for the entire community. Participation in this circle sentencing hearing is part of that vision.

[82] I consider the circumstances in this case to be somewhat unique. Mr. Van Bibber has taken some steps, albeit somewhat belatedly, to deal with the alcohol addiction which underlies the crimes for which he is being sentenced. He has reached out and accepted the support of his family and community. His prospects for rehabilitation, while far from being assured, are nonetheless strong. He will have the ongoing support of his family, friends and community from the leadership down to assist him. He has immediate access to specialized treatment and programming to help him deal with his alcohol addiction issues. The safety of the community of Pelly Crossing, or anywhere that Mr. Van Bibber will live in the future, is best assured if he is able to live a life free from the effects of alcohol addiction. The present plan before the Court, and Mr. Van Bibber's indicated commitment to it, offers hope for a successful rehabilitative journey.

[83] I find that, in considering all the principles set out in s. 718 to s. 718.2, and being mindful of the importance of general and specific deterrence and denunciation in impaired driving cases where the driver has a history of drinking and driving offences, that the sentence that best serves the ends of justice in the circumstances of this case does not require any further incarceration of Mr. Van Bibber. I give particular consideration to s. 718.2(d) and (e) in applying the principle of restraint and in consideration of the aboriginal status of Mr. Van Bibber.

[84] The sentence I impose is as follows:

[85] For the s. 253(4) offence, the sentence will be four months time served. This sentence is squarely within the range of sentences imposed for such an offence at the time the offence occurred.

[86] For the s. 253(1)(b) offence, the sentence will be five months time served concurrent. There is a gap of almost exactly eight years between this offence and his last offence in 2001. His readings, while twice the legal limit and therefore high, are not statutorily aggravating within the application of s. 255.1 of the *Code*, as Mr. Van Bibber receives the benefit of the lower reading, 160 milligrams percentile.

[87] This is a sentence that is certainly at the lower end of the range of sentencing for such offences for such an offender, although I do not consider it to be outside of the range. I say this being mindful that this offence occurred after the amendments to the *Code* increased the minimum fines and sentences available for drinking and driving offences, thus reflecting the continuing and increasing seriousness with which Canadian society views such offences.

[88] While the sentences for these two offences could have been imposed consecutively, as requested by the Crown, I find that to do so would not be in accordance with the principles of s. 718 to s. 718.2 of the *Code.* The particular circumstances of this case, and in particular the community involvement in and commitment to the rehabilitation of Mr. Van Bibber, require that the sentences be imposed concurrently and I do so.

[89] For the s. 145(3) offence arising from September 5, 2009, there will be a sentence of 90 days to be served consecutively. I am satisfied, however, that this

sentence can be served conditionally in the community in accordance with the requirements and considerations set out in s. 742.1 of the *Code*.

[90] For the s. 145(3) offence arising from the failure to report to a bail supervisor between November 13, 2009 and February 4, 2010, the sentence will be 30 days consecutive to the 90 day sentence, also to be served conditionally in the community.

[91] Had I imposed consecutive periods of custody for the s. 253(4) and s. 253(1)(b) offences I would, in all likelihood, have made the sentences for the s. 145(3) offences concurrent. However, in the present circumstances, I believe that the plan proposed for Mr. Van Bibber requires a level of supervision and consequential effect that is offered by conditional sentences.

[92] The terms of the first conditional sentence for the September 5 s. 145(3) offence is as follows:

1. You will keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;
3. Report to a Supervisor immediately upon your release from custody and thereafter when required by the Supervisor and in the manner directed by the Supervisor;
4. Remain within the Yukon Territory unless you have written permission from your Supervisor or the Court; notify the Supervisor or the Court in advance of any change of name, address and promptly notify the Court or the Supervisor 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. At all times you are to remain within your place of residence, except with the prior written permission of your Supervisor or if in the direct company of Lois Joe, Jean Van Bibber or any other individual approved in writing by the Conditional Sentence Supervisor after communication with the RCMP and with the treatment team. Until such time as a treatment team is established, Ms. Joe will be the contact person;

7. 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;

8. You are to 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;

9. You are not to attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol;

10. You are to take such alcohol assessment, counselling or programming as directed by your Supervisor and attend and complete a residential treatment program as directed by your Supervisor. In particular, you are to attend the Tatla Mun Cultural Centre between May 16th and May 22nd, or such other dates as may be approved by your Conditional Sentence Supervisor, unless otherwise directed by your Conditional Sentence Supervisor;

11. You are to attend the Tsow --

This is the one that he is attending, Tsow-Tum --

[93] LOIS JOE: Tsow-Tum Le Lum.

[94] THE COURT: Tsow-Tum Le Lum

[95] LOIS JOE: In Nanaimo.

[96] THE COURT:

11. -- Tsow-Tum Le Lum treatment program in Nanaimo, British Columbia from May 24th until July 2nd, 2010, unless otherwise directed by your Conditional Sentence Supervisor, in consultation with the treatment team;

The consultation with the treatment team will be on both of those directions, and, again, that is as represented by Ms. Joe until such time as there may be a treatment team established.

12. You are to take such other assessment, counselling and programming as directed by your Supervisor;
13. You are to have no contact directly or indirectly or communication in any way with such individuals as are identified in writing to you by your Conditional Sentence Supervisor in consultation with the RCMP and the treatment team;
14. You are to perform 30 hours of community service as directed by your Supervisor or such other person as your Supervisor may designate;

15. You are to participate in such educational or life skills programming as directed by your Supervisor;
16. You are to make reasonable efforts to find and maintain suitable employment and provide your Supervisor with all necessary details concerning your efforts;
17. You are to provide your Supervisor with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this conditional sentence order;
18. You are to not drive a motor vehicle at any time;
19. You are to address the annual general assembly of the Northern Tutchone Council at Fort Selkirk in July of 2010 unless otherwise directed by your Conditional Sentence Supervisor in consultation with your treatment team.

[97] Those are all the terms on the first conditional sentence order. The conditional sentence order for the consecutive one month s. 145(3) offence will be identical, with the exception that the references to the Tatla Mun and the Tsow-Tum Le Lum program will be deleted, as will the reference to the July attendance at the general assembly, as those dates will have passed. Otherwise, the terms will remain the same as they are.

[98] This will be followed by a period of probation for two years. The terms of the probation order will be:

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

3. 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;
4. You are to remain within the Yukon Territory unless you obtain written permission from your Probation Officer or the Court;
5. You are to report to a Probation Officer immediately upon completion of your conditional sentence and thereafter when and in the manner directed by the Probation Officer;
6. You are to reside as approved by your Probation Officer and not change that residence without the prior written permission of your Probation Officer;
7. For the first three months of this order you are to abide by a curfew by remaining within your place of residence between the hours of 11:00 p.m. and 6:00 a.m. daily, except with the prior written permission of your Probation Officer or except in the actual presence of such persons as have been approved in advance by your Probation Officer;
8. 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;
9. You are to 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;

10. You are to not attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol;
11. You are to take such alcohol and drug assessment, counselling 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. You are to take such other assessment, counselling and programming as directed by your Probation Officer;
12. You are to 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 treatment team;
13. You are to perform 40 hours of community service as directed by your Probation Officer or such other person as your Probation Officer may designate; this community service is to be completed by 18 months of your probation order;
14. You are to participate in such educational or life skills programming as directed by your Probation Officer;
15. You are to make reasonable efforts to find and maintain suitable employment and provide your Probation Officer with all necessary details concerning your efforts;
16. You are to provide your Probation Officer with consents to release information with regard to your participation in any programming,

counselling, employment or educational activities you have been directed to do pursuant to this probation order.

[99] With respect to the s. 254(3) and s. 253(1)(b) offences, you are prohibited from operating a motor vehicle on any street, road or highway or other public place for a period of four years. These prohibitions commence immediately, so you are clear, and for four years from the date that your sentence concludes. These prohibitions will run concurrent to each other.

[100] Due to comments from some of the participants in the sentencing circle, as well as submissions made by both counsel, I will briefly make some comments on the issue of the appropriateness or the benefit of jail for aboriginal offenders. The following was read out by Elder Bobby Woods:

"Teach Them A Lesson.

We want them to have self worth..
So we destroy their self-worth.

We want them to be responsible..
So we take away all responsibilities.

We want them to be part of our community..
So we isolate them from our community.

We want them to be positive and constructive..
So we degrade them and make them useless.

We want them to be non-violent..
So we put them where there is violence all around them

We want them to be kind and loving people..
So we subject them to hatred and cruelty.

We want them to quit being the tough guy..
So we put them where the tough guy is respected.

We want them to quit hanging around losers..
So we put all the losers under one roof

We want them to quit exploiting us..
So we put them where they exploit each other.

We want them to take control of their own lives,
own their problems and quit being a parasite
So we make them totally dependant on us."[1]

This is from Judge Dennis Challeen of the United States, 1986, from *Making It Right: A Common Sense Approach To Criminal Justice.*

[101] Incarceration in a custodial facility, a jail, is a necessary part of the justice system in Canada and in the Yukon. The principles of sentencing set out in s. 718 to s. 718.2 require that jail be one of the options available for sentencing an offender. This is not only to denounce criminal conduct, to deter others and to protect the public from the offender while he or she is in jail but because incarceration and jail can also have a rehabilitative effect on an offender. This rehabilitative effect can include specific deterrence in that the offender resolves never to commit an offence in the future in order to avoid going back to jail. It can allow offenders a time to "dry out" from addictions and to access rehabilitative programs that they may not have accessed if not in custody.

[102] I have heard on numerous occasions in sentencing submissions the benefits that aboriginal offenders have obtained from the White Bison and Gathering Power programs offered at the Whitehorse Correctional Centre.

[1] This is accurate as to what Elder Bobby Woods read out loud, and a copy is filed as Exhibit 12 on the sentencing hearing. It appears I may have mistakenly referred to an abbreviated version while giving my oral reasons. I have included the full version as filed in the transcript of my Reasons for Sentencing.

[103] Is incarceration and jail ideal? Perhaps not and certainly in many cases, other community-based options would be preferable and of more benefit to the offender and to the community than incarceration. Those options, however, require committed individuals, communities, organizations and governments in order to make them viable as an alternative to incarceration in those cases where incarceration is not necessarily required in order to satisfy the principles of sentencing. In some cases it is necessary.

[104] As a final thought, I quote from a paper entitled *Educational Discipline using the Principles of Restorative Justice*, written by Sam Halstead, April 1999, and reprinted with permission of the Correctional Education Association. This is in the United States.

> The somewhat pessimistic opening quote from Judge Dennis Challeen is a sobering description of the situation in most correctional institutions. It spells out a paradigm that can be shifted. If every second line of his narrative is replaced with a positive restorative statement, a challenging mission for a correctional education can be created:
>
> = We want them to be responsible,
> so we show how they are responsible for the consequences of their choices.
>
> = We want them to be positive and constructive,
> so we model, reinforce and reward positive and constructive attitudes.
>
> = We want them to be non-violent,
> so we help them use practical, non-violent options to solve their problems.
>
> = We want them to be kind and loving people,
> so we encourage their kindness and reinforce the love they already have for family and friends.
>
> = We want them to quit being the tough guy,
> so we show how respect and tolerance are fundamental to society.
>
> = We want them to quit hanging around losers,
> so we help them become winners.

= We want them to quit exploiting us,
so we remain beyond exploitation.

= We want them to take control of their lives,
so we show them how they can."

[105] I am going to waive the victim fine surcharges in this case. The remaining counts?

[106] MS. MACDONALD: Crown enters a stay of proceedings on anything to which a guilty plea was not entered. I would ask the Court to clarify when the driving prohibition commences?

[107] THE COURT: Well, the driving prohibition commences immediately and runs for four years in accordance with the law. As he is on a conditional sentence order -- I am going to make it clear. It commences immediately and runs four years from the conclusion of your conditional sentences. So that is going to be four years plus the extra four months of the conditional sentence order. So the minimum three years on each, there is four years on each, they are concurrent to each other; they start today but they run past four years past the end of your conditional sentences. Which, therefore, should there be breaches, should he be put back into custody on the conditional sentences, the driving prohibition is still going to have four years to run from the time that the conditional sentences are over. Is that clear? You have a driving prohibition that commences immediately and goes for four years from the date that your conditional sentence order on the second s. 145(3) offence for the failure to report is concluded. So it is going to be longer than four years but exactly how long is going to depend. Hopefully it will be four years and four months, which means you will have completed

your conditional sentence without any problems and then you will have four more years of a driving prohibition. That is only the *Criminal Code* driving prohibition because the Motor Vehicles Board in the Yukon may have something to say about whether you will or will not get a licence, in any event.

[108] MS. MACDONALD: Could the Crown, or the Crown seeks an order of forfeiture in that there were mouthpieces that were seized when the impaired driving offences; I think back in 2001, I recall Constable Wallingham bringing them. So I'd ask for an order of forfeiture so the Crown can get rid of --

[109] THE COURT: Whose mouthpieces?

[110] MS. MACDONALD: From the breathalyzer, they were Mr. Van Bibber's. It was part of the refusal trial, because they switched the mouthpieces over and over again, and they brought -- in the good old days, they used to save them to show that there was no obstruction in the mouthpiece.

[111] THE COURT: Okay. So who has the possession of them now?

[112] MS. MACDONALD: The RCMP.

[113] THE COURT: Well, they can do with them as they wish.

[114] MS. MACDONALD: Thank you.

[115] THE COURT: All right. That concludes the decision. I want to thank everyone for their participation and their involvement. I want to thank the

Crown for its willingness to involve itself in the sentencing circle as well and to enable the community to have their voice, and defence counsel for making the efforts, as well, to allow the community to have a voice in what takes place here. Mr. Van Bibber, you have?

[116] THE ACCUSED: I got two questions.

[117] THE COURT: Okay. You have two questions but before you ask your two questions, you have a lot of support in the community, you have a lot of work to do. You said change does not come easy and it does not. As Ms. Joe said, "This plan is not an easy plan." You have to be committed; you cannot run away from this. You owe it to yourself, your family, your daughters, and your community, to take advantage of their help and not run away. You have questions.

[118] THE ACCUSED: You construe heavy equipment as motor vehicles?

[119] THE COURT: It is a motor vehicle.

[120] THE ACCUSED: So I can't --

[121] THE COURT: It depends on -- you know, you should get legal advice as to whether there are certain locations in which the operation of a piece of heavy equipment may not or may be allowed. I am not clear because there are a lot of different places it can be operated in and I am not certain what the law is with respect to any place you may wish to do that. You need to have that clarified. You need to obtain

legal advice. Mr. Christie is listening to this and I am sure that you can have a discussion with Mr. Christie and sort out what you are and are not legally entitled to do.

[122] MR. CHRISTIE: I'll speak with you about that later, George.

[123] THE COURT: All right. That is question one.

[124] THE ACCUSED: This other one, will I still be able to go to Diamond Tooth Gerties? It serves liquor but it is not a primary bar or.

[125] THE COURT: I am not certain that Dawson has ever actually formally resolved that issue as to whether its primary purpose is the sale of alcohol or not. It was a contentious point of issue when I was doing the circuit in Dawson years ago. For now, I am going to make it, the clause that says, "Not attend any bar, tavern, off sales or other commercial premises whose primary purpose is the sale of alcohol." I know there is an argument that the primary purpose of Diamond Tooth Gerties is gambling, so I am not going to resolve that issue today. What is your reason that you would need to go to Diamond Tooth Gerties?

[126] THE ACCUSED: To gamble. I'm a card player.

[127] THE COURT: You are a which?

[128] THE ACCUSED: A card player.

[129] THE COURT: Well, you are going to be -- I doubt that under -- for the conditional sentence order, no. So that is a house arrest order; that is jail in the community.

[130] THE ACCUSED: Yeah, I realize that.

[131] THE COURT: So now let us talk about the probation order.

[132] THE ACCUSED: Also for the entertainment.

[133] THE COURT: Well, you are going to be working on other things for a while, just so you are clear on that. I am not going to allow it right now and I am going to make it clear by saying this: When it says "Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol," I am going to add a clause that says, "Not attend Diamond Tooth Gerties in Dawson City, Yukon without further order of the Court."

[134] So we are going to be reviewing your conditional sentence. Every circuit this is going to be brought back here. Even if you are in treatment, which you are going to be in the June circuit, this matter is going to be brought back and I am going to want to hear from someone as to what is going on. So you are not going to be required because there is going to be an order that the conditional sentence on the first s. 145(3) offence be reviewed on June 22nd at 11:00 a.m., and your presence, if in treatment, because there are always things that can happen, is not going to be required in court, but I will expect some form of report as to how you have been doing on that date. Then it is going to reviewed; I expect on that day it will be set for review the next time; then we will have an idea of how you are doing, and then it will be set for review next circuit and we will see. But right now, that is so far from what is important in the scheme of things that you need to deal with that I am not going to worry about Diamond Tooth Gerties for now as being something that I think you should be allowed to do.

[135] Now, this, you are going to be pretty busy between now and the end of treatment. In speaking with your Conditional Sentence Supervisor, there is the ability to bring an application to Court, to change a term of a conditional sentence. If, for some reason, your Conditional Sentence Supervisor and your treatment team feel that there is some benefit to you in being able to attend at Diamond Tooth Gerties, they are able to bring an application to the Court. Crown gets notice, the Crown will have a position on it, I am sure, and the Court can change that term of a conditional sentence if it feels it is important enough. Right now, it is not happening.

[136] Anything else from anyone? All right. Again, thank you.

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COZENS T.C.J.