Citation: *R.* v. *McClements*, 2012 YKTC 34

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Heard: Teslin
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Ruddy

REGINA

v.

JENNA NICOLE MCCLEMENTS

Appearances:
Kevin MacGillivray — Counsel for the Crown
Malcolm Campbell — Appearing as agent for Ms. Atkinson, counsel for the Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Jenna McClements is before me for sentencing with respect to, I believe, we have 11 counts in total. There are three substantive offences. The most serious of those, of course, is the arson offence, but there is also a s. 129 and a s. 334(b) offence. In addition to those substantive offences, at all material times Ms. McClements was subject to release conditions and finds herself having pled guilty to eight separate counts of having breached those conditions, including a failure to keep

the peace, to abstain, to not attend bars, failure to report, and failure to abide by her curfew.

[2] I am going to go through the facts as quickly as I can for the purposes of the decision. The most serious and first of the offences is the arson which occurred March 26, 2010. The police were contacted by Ms. McClements' mother to indicate that Ms. McClements was intoxicated and had lit bedding on fire following an argument that they had had. The police and fire department responded and located a smouldering blanket in the room where Ms. McClements was asleep. There was oil on the floor, but they determined that there were no other fires burning or concerns at that point in time and the house was cleared. Ms. McClements was visibly intoxicated and not particularly cordial, one might say, in her conversations with the emergency personnel. There was some swearing at them to get out of the house. She did indicate to them that her mother had, at times, expressed a wish that the house be burned down and her mother has actually confirmed that.

[3] The mother was taken from the residence at her own request with emergency personnel and there were subsequent checks made on the home, the second of which came upon the house fully engulfed in flames. Ms. McClements was outside wrapped in a blanket, covered in soot and smelling of oil. There were additional activities that happened, including her uncle arriving, and she appears to have responded negatively, believing that he was in some way going to hurt her, and it took some time for the scene as a whole to be managed. But she was ultimately released on conditions.

[4] On April 10, 2010, Ms. McClements was in Whitehorse and the RCMP in Whitehorse, on patrol, came upon her and two other intoxicated females. Ms. McClements ran when they arrived. She was caught by police, who observed indicia of impairment and, unfortunately, she ran again, but was caught again. She was noted to be uncooperative, including being verbally abusive, spitting and kicking at the officers and kicking at the windows of the police vehicle. She provided a blood sample, which registered at 226 milligrams percent. At the time she was in breach of both the abstain and curfew conditions of her release.

[5] On July 3, 2010, she stole a number of items, including DVDs and a make-up bag from Walmart. It appears she paid for some items, but left without paying for others, was combative when she was stopped, and at that time, she was not residing as directed with respect to her conditions.

[6] On September 25, 2010, she was observed walking down the street in Teslin at a time when she did not have permission to be there.

[7] On December 13, 2010, the police, in responding to a call with respect to an accident, located Ms. McClements in an intoxicated and agitated state. She provided a sample with a blood alcohol reading of 170 milligrams percent.

[8] On March 11, 2011, she admitted to being in breach of her curfew. On March 14, 2011, she failed to report as directed by her Bail Supervisor, and then on March 18, May 6, and June 24, 2011, curfew checks were conducted with respect to Ms. McClements and she was found not to be present and in breach of her curfew condition on all three of those occasions.

[9] On July 16, 2011, she was observed at the Lizards Bar in Whitehorse in breach of her curfew and not attend licensed premises conditions. Finally, on September 15, 2011, she was again found to be in breach of her curfew and not attend bars conditions. So those are the facts.

[10] She comes before the Court with a prior criminal record. It is a limited criminal record. She has one prior conviction for an offence contrary to s. 129, and one contrary to s. 4(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Both convictions occurred in 2007.

[11] Counsel have provided positions with respect to disposition. Essentially, the suggestion is a global sentence in the range of 18 months to two years less a day, to be followed by a probationary term. I will say with respect to the range as suggested, case law has been filed, and as Crown noted, while there are some outliers, the general range for the most serious of the offences before me, which is the arson, certainly falls comfortably within that 18 to 24 month range. So there is no real dispute about the appropriate length. The primary issue in this particular case is the appropriateness of allowing Ms. McClements to serve her sentence conditionally within the community, and that has been the issue that we have been spending all of our time on.

[12] Now, in terms of Ms. McClements' background and circumstances, unless there has been a change in age, she is a 26-year-old member of the Teslin Tlingit Council. There has been significant information provided to me in the form of a Pre-Sentence Report, a *Gladue* Report, a psych assessment, input, as I said earlier, from family, clan leaders, community members, and the wellness counsellor here in Teslin. I want to say

that I am very mindful of the fact that a great deal of the information, particularly the information in the reports that have been provided to me, is of a very personal and sensitive nature, and I want to make it clear for the purposes of the decision, I have read it all, I have considered it all, I have heard it all, but, in my view, it is both unnecessary and, to some extent, inappropriate for me to go into extensive detail in this decision about some of the circumstances, given their nature. So, I do want it to be clear that I have considered all of the information but I am not going to reference everything in the decision.

[13] I do want to make some general comments, though, about some of the key points. Firstly, as is sadly all too common in Yukon First Nation communities, there is a family history here of abuse suffered within the residential school system, and this family, like many that I see, are suffering the ongoing generational impacts of that, which is a factor that is important, particularly when I consider s. 718.2(e) of the *Criminal Code*.

[14] I do also want to say, without going into detail, that there is a very disturbing history here, a distressing history of extensive victimization, beginning with abuse suffered perhaps, not surprisingly, in the very home that was burnt down by Ms. McClements in the offence that is before me. This has led to an ongoing struggle with behavioural issues and significant substance abuse issues, including both alcohol and drugs, for Ms. McClements.

[15] I think it is fair to say that Ms. McClements is an extremely troubled young woman because of her history, who can present at times, I believe the word Ms.

Atkinson used, was as “flippant.” It seems to me more presenting as someone who has developed quite a hard shell and I accept, for the purposes of the decision, that some of those characteristics that might be seen by those dealing with Ms. McClements are in many ways defence mechanisms growing out of her history and background.

[16] I will also say that I am fully aware that she has demonstrated an obvious struggle with compliance on bail conditions, continuing up to September of 2011. Over that period of time, she was given numerous opportunities, as Crown pointed out, by Crown not taking the position she ought to be held in custody, her being released and re-released and re-released by the Court. I know there were a number of efforts by the community to connect her with resources and supports and programs, but during that initial period, up to September of 2011, the pattern of behaviour really was one of failing, to some extent, to follow through with programming. My assessment is that there was alienation of family and community members, to some extent, who were trying to help her following her having abused their trust during this period and earlier. I guess the best way to sum it up is that she blew a number of chances and burnt several bridges in that initial period, and clearly seemed, at that point, destined for a straight custodial term, with the only question being how long.

[17] But, and this is where it became more complicated for me, since September of 2011, since that last offence, there have been a number of indicators of change, beginning with her involvement with the Caring for the Land course that was put on by the Yukon Mine Training Association. She was able not only to successfully complete the course, which was a huge step for her, but also had, again, the support of her classmates, including them providing a letter of support for her to be used in these

proceedings. She has not incurred any additional breaches or substantive offences. She has made efforts, clearly, to repair relationships within her family and within her community. She has been maintaining sobriety now for roughly a six month period; has made efforts to work with community supports to access counselling; has been meeting with the Wellness counsellor, Lyall Herrington, and has made some efforts, with his assistance, to apply for residential programming.

[18] The question for me to answer today, though, is what she has done over the last six months enough? Is it enough to determine that a conditional sentence will firstly meet the principles of sentencing, but, secondly, can be successfully completed by her such that the community is not put at risk?

[19] Now, a conditional sentence is a sentencing option set out in s. 742.1 of the *Criminal Code*, which sets out four pre-conditions, that means four things that I must be satisfied of before I can impose a conditional sentence. The first of those is that the offence cannot be one for which a conditional sentence is precluded by operation of law, which includes any offences which are punishable by a minimum term of imprisonment. The second pre-condition is that the sentence imposed by the Court must be less than two years. The third, that the Court must be satisfied that service of the sentence in the community would not endanger the safety of the community; and the last pre-condition is that a conditional sentence must be consistent with the fundamental purpose and principles of sentencing set out in the *Criminal Code*.

[20] Now, the first two pre-conditions are not an issue in this particular case. The offences upon which I am sentencing are not offences precluded by operation of law;

and, as I have stated earlier, the applicable sentencing range that we were talking about here falls below the two year maximum.

[21] Pre-conditions three and four are the issues. With respect to number three, that being the safety of the community, there are questions in this case raised about the safety of the community, should I grant a conditional sentence. The history of non-compliance with respect to release conditions does raise serious questions for me. I need to be satisfied that Ms. McClements is capable of complying before I can place her on a conditional sentence, and we do have a period of time here where she demonstrated significant struggles, and struggles well beyond the offences to which she has entered pleas of guilty; the behaviour went beyond that. In the initial months, I think it is fair to say, she demonstrated little to no compliance. So that is an issue I have to address. Again, is the period from September to now enough to persuade me that now she will continue to comply, because she has certainly been compliant since September on all of the information that has been provided to me.

[22] Number four, of course, is whether or not a conditional sentence would meet the sentencing principles set out in the *Code*. There are a number of principles set out in the *Code*, this case, like most cases, really engages the principles of denunciation, deterrence and rehabilitation.

[23] The Supreme Court of Canada in a decision called *R.* v. *Proulx,* [2000] 1 S.C.R. 61, did speak at length about conditional sentences, particularly where there were competing principles, because denunciation and deterrence, which are really about punishment, are often most easily and obviously met by a jail term. For rehabilitation,

sometimes it is harder to, if not impossible, to achieve rehabilitative objectives with jail terms. So what do we do in situations where there are blended concerns? In the *Proulx, supra*, decision, the Supreme Court of Canada talks about conditional sentences, obviously, being appropriate, where rehabilitation is the primary focus. On the other hand, where denunciation and deterrence are the primary focus, you are more likely looking at a custodial sentence as being appropriate. But where there are mixed goals, both denunciation and deterrence on the one hand, and rehabilitation on the other, the Supreme Court of Canada has talked about the fact that a conditional sentence can be used to effectively meet all of those principles, provided that the sentence is significantly restrictive to address the issues of denunciation and deterrence. So there has to be a punitive element to it to address those issues. That is what is achieved through house arrest or restrictive curfews.

[24] So, again, the question for me is whether or not the more recent change in the level of Ms. McClements' commitment to address her behaviour is enough to persuade me that the appropriate sentencing principles can effectively be met by a conditional sentence and that the safety of the community will not be put at risk. At the sentencing hearing, I raised two concerns impeding my ability to reach a conclusion on those questions, and they were the fact that in the psychiatric assessment that was completed by Dr. Lohrasbe, he did raise a question about Ms. McClements' treatment readiness; and the second issue for me was the lack of a clear indication of the likelihood of her being able to access appropriate treatment and programming.

[25] The reason these are concerns for me, firstly, is if she is not treatment ready, a conditional sentence, in my mind, is simply not appropriate. Not only would it be a

waste of valuable and very limited treatment resources, but it would not, in my view, be in Ms. McClements' best interests. Similarly, if she cannot access the treatment that is necessary, then I would have concerns with respect to the likelihood of the sentence being able to achieve the rehabilitative objectives. So if one or both of the questions were answered in the negative, then I had a concern that a conditional sentence would essentially be setting her up, which is certainly not in her interests and I do not believe it is in the community's interests either.

[26] So I did adjourn this matter, and prevailed upon everyone to return again today, and, in particular, prevailed upon Mr. Herrington to provide me with a written report to assist me in answering those questions. He has very kindly done so. That report is before me now and we have discussed it at length today, and it has been very helpful. It, in addition to all of the comments that I have heard today, has been very helpful to me in coming to a final resolution as to what I think is appropriate in this case.

[27] So, first and most importantly, Mr. Herrington is able to confirm that Ms. McClements has come a considerable distance and is in fact now treatment ready. She clearly acknowledges that she has a significant substance abuse problem and recognizes that she is in need of significant treatment.

[28] The second question is partially answered, but not completely answered, which is through no fault of Mr. Herrington's; it is unfortunately a result of the practical realities we deal with when trying to access treatment outside of the Territory. What I am advised, through the report, is the Tsow-tun Le lum Program on Vancouver Island, which is one which would appear to suit Ms. McClements' needs, has a six-month wait

list. I believe an application has been made, but there is no guarantee at this point with respect to acceptance into the program. Secondly, Mr. Herrington has taken a step further by doing some additional research and has located another program in Creston, British Columbia, at the Three Voices of Healing Society, which offers a lot of the same benefits in terms of its program. It involves, I understand, a six-week residential treatment component, which is followed by a one to two year after care program, where, it sounds to me, she could potentially continue to reside there and have ongoing access to programming. There is a certain attraction to this. We talked earlier about how a new environment might make it easier for her to move beyond a lot of the entrenched issues that she is currently facing. Now, an application for that program is almost completed, but, similarly, I do not have confirmation of when and if she might be accepted into that program.

[29] I do have confirmation that funding would be available, which is a significant issue, because often that is the biggest barrier to treatment, but I do understand, through Ms. Keenan, that Ms. McClements has the support of the First Nation, from a financial perspective, in terms of accessing programming. It is a question, at this point, of wait and see when she is accepted and to which program she is accepted. I am as satisfied, as I can be in the circumstances, that she will be accepted at some point to an appropriate program.

[30] That raises additional questions, which Mr. Herrington has flagged, in terms of ensuring, if there is going to be a conditional sentence, that Ms. McClements be placed in an environment, while awaiting treatment, that does not jeopardize her ability to maintain her treatment readiness and to be accepted into a program. He has some

concerns specifically about her ability to do so here in Teslin because of the history, which I think is a fair concern and something that concerns me as well.

[31] But I will also point out that I have had rave reviews from Clan Leader, Doug Smarch, with respect to Ms. McClements' performance in a snowshoe-making course that he is conducting here in Teslin. She appears to have been a very enthusiastic participant who has demonstrated a natural ability in this area, once she was through that first pair of snowshoes, that has quite impressed Mr. Smarch. I have also heard from Ms. McClements about some of the benefits that she is experiencing with that program, not just in having the opportunity to learn those traditional skills, but it is also something that she is finding to be very healing for her and she finds herself to feel very peaceful when she is in that program. That program is expected to continue five days a week until the end of April.

[32] So that is the background. As I said, I have three options: one of those would be a straight custodial term, followed by a probationary term, because I am satisfied long-term supervision is necessary and appropriate in this case. So whatever I do, there is going to be a probationary term to follow. The road that Ms. McClements has in front of her is not a short one; she is going to need all the help that she can get and she is going to need all of the support and access to resources that she can get to be successful. I am satisfied she can be successful in the long-term, but as Mr. Herrington said, "This is not a 21-day prospect; this is a long term prospect."

[33] Another option, as I pointed out, would be a blended sentence which would put her in custody at this point in time, for her to be released onto a conditional sentence

somewhat down the road at a time may be closer to when programming might be available. The difficulty with a blended sentence is I do not know when treatment is going to become available. Now, Mr. Campbell did suggest, although I am sure he felt I did not consider it at length, the possibility of putting it over further for some more certainty, but I am satisfied, both by the history of this case and also by Mr. Herrington's comments, that the way that admission often works into these programs, it is unlikely that there is going to be any degree of certainty with respect to her acceptance until roughly a couple of weeks before the start date. So a further adjournment is not necessarily, in fact, not likely, to get us any closer to certainty on that issue. My concern with a blended sentence is if I put her in custody and it overlaps with her being able to get into one of these programs, that opportunity is lost, and that is a real concern to me. So I really think at this point it is either/or; it is actual custody or it is a conditional sentence.

[34] One of the things I want to say is that if Ms. McClements had a more extensive criminal history, I would not even be considering a conditional sentence at all. But when I consider her history and background, the issues she is struggling with as a result of that history and background, her Aboriginal status, the issues that have arisen in her family flowing back to the residential school system and abuse within that system, I am of the view that a conditional sentence is something which seriously has to be considered. Ideally, I would have liked to have observed this behaviour from Ms. McClements from the moment she was released following the arson. We did not have that. We had some clear and evident struggles, significant struggles, but I think it is also fair to say that while it is only six months, we do now have a six-month period of

compliance, sobriety, commitment and a genuine, it seems to me, interest in addressing the issues. I have observed a change in her behaviour even in court, and I think it is fair to say that those who have been working with her much more closely have also satisfied me that there has been a change in her behaviour.

[35] So as I said, while I would like to have seen more than six months, six months is what I have, and I am satisfied that six months is enough in this particular case, recognizing, Ms. McClements, that it has to continue. It has to continue. But following the comments of the Supreme Court of Canada in *Proulx*, *supra*, I am satisfied that a conditional sentence can meet the principles of sentencing, including denunciation and deterrence, as well as the rehabilitative goals.

[36] I am also satisfied that provided the conditional sentence, in terms of placement, for Ms. McClements, has her in a situation that is sufficiently stable, structured, and supervised, that she can comply with the conditions and maintain her treatment readiness until a program is available. Now, how do we do that? It is probably evident from my earlier comments that what I would be envisioning, though I am not going to include it in the conditions expressly, but what I am envisioning though is that she would remain here in Teslin. She and her mother are now in a much more suitable residence, and I am satisfied that the snowshoe course is of benefit to her, not just in terms of the skills and traditions that she is learning, but from a mental health perspective as well. She is going to need those things that make her feel calm and peaceful to help her get through the journey that she has ahead of her. So I am satisfied that should be completed, and it is short-term enough that I think compliance can be managed in Teslin for that period of time, provided that she maintains a connection with Mr.

Herrington, maintains a relationship with her mother, and stays connected within the community and to her Supervisor.

[37] I would then envision her moving to Dawson with her father, because what he is proposing, basically, is to be supervising her directly. So in some ways it might feel like you are going back in time to those days when your parents had a lot more control over your life, but I want you to understand why I think that is appropriate, even if it is not necessarily something that you would want to do. For this to be successful, for you to be successful, you are going to need people to help you, particularly now, to stay clean and to stay on the straight and narrow, and your dad is prepared to do that. Now, if a camp job comes up, I think it would be appropriate for all of these parties that have been working with Ms. McClements, including Mr. King, Mr. Herrington, Ms. McClements' parents, the First Nation, the community, and those individuals who have been directly involved, to sit down and discuss whether or not a particular placement would meet those goals of keeping her in an appropriately supervised and structured environment until we can get her into a residential treatment program.

[38] So that is what I would envision in terms of residency and I think through the group that has been involved working with Ms. McClements, it can be appropriately managed, while not ideal, provided Ms. McClements remains committed. To inspire you to do so, I want you to recognize the amount of effort that all of these people have put into helping you. You do not want to let them down and you do not want to let yourself down.

[39] The other thing that I want to say that has factored into my decision, is that I am quite mindful of s. 718.2(e) which states that I am required to consider the least restrictive sentence, particularly as it relates to Aboriginal offenders. The section has the goal of trying to address systemic problems that have led to an overrepresentation of Aboriginal persons within our jails; and so I am also very mindful of that section as well. In my mind, it is a factor which tips the scales in favour of a conditional sentence being appropriate.

[40] I will say, just again so that you appreciate what everyone has done, that it is persuasive to me, not only the changes that you have made, but also that people are willing to work with you on an ongoing basis to help you get there; that makes a significant difference to me in being able to satisfy myself that the pre-conditions are met.

[41] So here is going to be the breakdown of the sentences. The Crown had suggested a breakdown. I have some minor changes in terms of the breach sentences, just based on the way that I view the different types of breaches; none of it will change the overall sentence. Because this is a conditional sentence and not a custodial sentence, the Supreme Court of Canada says that it is appropriate to consider a somewhat longer term in cases where that is appropriate. If I was going to send Ms. McClements to jail directly, I likely would have done 18 months. For a conditional sentence, I think two years less a day is appropriate because the focus of this is rehabilitative in nature, and this is not a short-term prospect.

[42] I am also satisfied that there should be a three-year probationary term to follow. I know it is a long time period of time. There are possibilities of having the probation terminated if you are doing well, but I want you to have not just the long-term structure, but also long-term access to resources to help you with what you have to do.

[43] So the arson offence, which is the most serious, is going to have a sentence of two years less a day to be followed by a three-year probationary term. All of the other sentences will be concurrent. What that means is they will be served at the same time, because if I go over that two year mark I cannot do a conditional. So they will all be concurrent, but here is the numerical breakdown for them: The s. 129(a), 30 days. I will flag the ones where I am diverging from what the Crown suggested. On the first s. 145 curfew breach, 15 days; on the theft under, 20 days. Now, on the keep the peace breach, Crown had suggested 20 days. I am of the view that 15 days is appropriate. On the abstain breach, Crown had suggested 30 days, and for that one, I think 15 days is appropriate, particularly in light of the fact that she has serious substance abuse problems which make compliance with that type of condition particularly difficult. However, with respect to the breach for failing to report, Crown had suggested 15 days. I think 30 days is appropriate. If you are not reporting, none of this can be managed.

[44] Then we get into the remaining curfew breaches. Crown had suggested 15 days on this next one, I am satisfied that - I believe that is the May 6th one - that 30 days is appropriate, there having been one before that; 30 days on the next curfew breach as Crown suggested; 30 days on the next curfew breach, as suggested, and Crown had suggested 40 on the last. I am satisfied that 45 days is appropriate as there was an

ongoing pattern of breaching curfew and attending bars when she was not supposed to do so.

[45] Now, I do have 21 days spent in remand. I am going to deal with remand simply by saying it is something I have factored into the whole, and it is reflected in some ways by some of the decisions, such as making the other sentences concurrent; and also considering a conditional sentence as well. So I am not going to apply it specifically to anything, but I will state for the record that it is something that I have expressly considered in reaching my ultimate decision.

[46] Now, that brings us to terms and conditions. I am dealing first with the conditional sentence. The statutory terms, which I am required to include, are that you:

1. 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, as Mr. King is here, 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;
5. Notify the Supervisor in advance of any change of name or address; and promptly notify the Supervisor of any change of employment or occupation;

So in addition to those statutory terms I am also going to include the following, that:

6. You are to reside as directed by your Supervisor; you are to abide by the rules of the residence and not change that residence without the prior written permission of the Supervisor;

[47] What that means is Mr. King has the ultimate say in where you live. So it is not, you pick and he approves; he tells you. That is to give him, in consultation with all of these other people that are involved, the ability to manage the sentence around some of the changing factors. So you do not leave the house he has told you to live in unless he tells you you can.

[48] As I have said before, a conditional sentence has to have a punitive element and that is primarily achieved through house arrest or curfew. In this case, it is not in my view, an exceptional case in which I would not do a straight house arrest, which is the starting point. Nor, in my view, would a curfew be appropriate when I consider the seriousness, particularly of the arson offence, that I am sentencing on. But as Crown fairly pointed out, sometimes there is a benefit to a graduated approach in recognizing that it will get easier over time. I am not adverse to that either.

[49] So here is what it is going to be: I am considering - and I am open to input on this - I am considering six months of straight house arrest, and then a graduated curfew. Does anybody have any concerns or submissions as it relates to that?

[50] MR. MACGILLIVRAY: I guess, one of the things is that if there is an issue with any of these kinds of conditions, one of the things that Ms. McClements should know, and with her counsel, Ms. Atkinson, is that she can come back and ask for a change to --

[51] THE COURT: We can do amendments, yes.

[52] MR. MACGILLIVRAY: -- amendments to the CSO. I don't know what the form looks like here, but it's usually a pretty straightforward issue. So if Your Honour is thinking about graduating it, I think six months for house arrest on an arson is probably would be at least -- it would have to be at least six months and then graduate it from there.

[53] THE COURT: So your concern is whether I ought to consider a bit longer. What I would like ideally is, I want it to continue at least until we can get her into a residential treatment program. So there is the possibility that nine might be more appropriate, I guess. Mr. Herrington, do you have a sense of -- I want her to have the stability of having successfully completed one of those programs before it eases off, but what I am also worried about, and mindful of, is that two years less a day is a long sentence, and I want there to be some light at the end of the tunnel such that she does not feel unduly discouraged when she is going through the sentence. I do not want it to feel so overwhelming that I prevent her from being successful, I guess, is what I am saying.

[54] LYALL HERRINGTON: One of the things that, if she does get in or when she does get into a treatment program, they have their own house rules while they're there. Should she get into the one in Creston, for example, then that's a two year after treatment program. They would have their own parameters around that, I would expect.

[55] THE COURT: Yes, about curfews and things like that would probably all be --

[56] LYALL HERRINGTON: Well, one of the things that's required also, along with this application, is the conditions as set out by the Court. So that's one of the reasons why the latest application is not in as we needed to know the standpoint of the Court, because that changes everything.

[57] THE COURT: Okay.

[58] LYALL HERRINGTON: So.

[59] THE COURT: So we are still at that uncertainty of knowing what --

[60] LYALL HERRINGTON: Kind of, yeah.

[61] THE COURT: Okay. Mr. King, any thoughts on that timeframe?

[62] SHAYNE KING: No. Whatever seems to make sense.

[63] THE COURT: Okay. Mr. Campbell.

[64] MR. CAMPBELL: Six months makes sense.

[65] THE COURT: Okay. So we will do it six months.

7. For the first six months, at all times you are to remain within your place of residence, except with the prior written permission of your Supervisor. 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;

[66] The exceptions are determined by Mr. King. You have to get permission in advance. You cannot do something and then ask after if it was okay. If you are in breach, you go to jail. On a conditional sentence breach, the way as I understand the policy as it now stands, conditional sentence supervisors do not have the discretion that they do on a probation order to decide whether you should be breached or not. If you are in breach, you are arrested, and then the argument becomes whether you serve the rest of the sentence in jail, or part of the sentence in jail. So you do risk, if you breach, serving all of the sentence in jail. You could be in jail for the next two years less a day if you do not comply. So you are to be in whatever residence he has directed you to live in; you are to be inside unless you have written permission from him, which you may well want to carry on your person, saying you can be out and what you can be out for, all right? So if you have something coming up that is programming related, you need to get groceries, whatever it is, you have to have the written permission.

8. For the next six months, you are to abide by a curfew by remaining within your place of residence between the hours of, and I am of the view that there should be a few hours out, but it is going to be pretty restrictive, so I am going to say between the hours of 4:00 p.m. and 10:00 a.m.

That gives you a window in between where you can be out a bit for the next six months without having written permission, and then:

9. For the last year, you are to abide by a curfew by remaining within your place of residence between the hours of 7:00 p.m. and 6:00 a.m.

[67] Those will all be "Except with the prior written permission of your Supervisor." So again, he will tell you if you can be out beyond or outside of those times. For those periods of time as well, you will be required to 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, and they will be checking. Well, you know that already.

[68] For this to be successful you have to be clean and sober, so you will be required:

10. 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;
11. You are not to attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;
12. You are to take such alcohol and/or drug assessment, counselling or programming as directed by your Supervisor.

[69] I just want to confirm that you are prepared to consent to residential programming, because I am structuring all of this around --

[70] THE ACCUSED: Mm-hmm.

[71] THE COURT: Okay. I am seeing you nod, so for the record, you are saying yes.

[72] THE ACCUSED: Yeah.

[73] THE COURT: Because I am also going to include that:

13. You attend and complete a residential treatment program as directed by your Supervisor;
14. You are to take such psychological assessment, counselling, and programming as directed by your Supervisor;
15. You are to take such other assessment, counselling, and programming as directed by your Supervisor.

[74] As you go on, they are going to identify other things that might help you, and I want to make sure that it is clear, firstly, that you need to take the programming that they direct you to, but also that you can access programs beyond just substance abuse programs, because I think you are going to need it. All right.

16. You are going to be required 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.

That is so they can track how you are doing to help them decide what else might be of benefit to you.

[75] Now, any comments or concerns with respect to the conditional sentence conditions?

[DISCUSSION BETWEEN MR. MACGILLIVRAY AND THE COURT RE CLARIFICATION OF CURFEW CHECKS CONDITION]

[76] THE COURT: Any concerns Mr. Herrington or Mr. King, in particular, in terms of managing it?

[77] THE COURT: Okay, the probation order. It will be a little more simple; do not worry. The statutory terms, again, that I am required to include:

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 of employment or occupation;

In addition to those, you are to:

4. Report to a Probation Officer immediately upon completion of your conditional sentence, and thereafter, when and in the manner directed by the Probation Officer;
5. I want you to reside, at this point not as directed but as approved by your Probation Officer; abide by the rules of the residence and not change that residence without the prior written permission of your Probation Officer;

That is because where you live is going to affect your chances of being successful. You do not want to be in a house where people are actively abusing substances if you are trying to stay sober. I will require that you continue to:

6. Abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with a prescription given to you by a qualified medical practitioner;

7. Not attend any bar, tavern, off-sales or other commercial premises whose primary purpose is the sale of alcohol;

8. Take such alcohol and drug assessment, 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 the Probation Officer.

[78] That is in the event that residential treatment does not happen during the conditional sentence though, I am sure hoping it does - but out of an abundance of caution, I am going to include it in the Probation Order as well, in case something goes wrong.

10. Take such psychological assessment, counselling and programming as directed by your Probation Officer;

11. Take such other assessment, counselling, and programming as directed by your Probation Officer;

12. Provide your Probation Officer 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 probation order.

[79] Any concerns with respect to the probation order?

[80] SHAYNE KING: I am not sure if you're considering it on a conditional sentence order, but Ms. McClements has any of the -- having the routine and stability of either seeking employment or educational pursuits, you know, if we could get that in there too, just get that point in there.

[81] THE COURT: Okay. Would you like it to be included in the conditional sentence order as well?

[82] SHAYNE KING: Because there's so much other things going on, maybe not, but in the --

[83] THE COURT: But in the probation order?

[84] SHAYNE KING: -- the probation would be --

[85] THE COURT: Okay. I do not have a problem with that. I do recognize from what I have heard from people who have expertise in this area that it is one of those elements that will be beneficial in terms of maintaining long-term sobriety. So I am also going to add that:

> 13. You are to make reasonable efforts to find and maintain suitable employment or education, and that you provide your Probation Officer with all necessary details concerning your efforts.

[86] Anything else?

[87] MR. MACGILLIVRAY: And --

[88] THE COURT: No, there are a few other things I know that. I would waive the victim fine surcharge with respect to all matters because I do not believe you are working at this point in time, are you?

[89] THE ACCUSED: No, I'm not.

[90] THE COURT: Okay.

[91] THE ACCUSED: Just in the course.

[92] THE COURT: Okay. Perfect. So I will waive those, given your financial circumstances. Now, this is a case in which there are, as well, ancillary orders, I believe, are there not?

[93] MR. MACGILLIVRAY: Yes, there's attached is a mandatory weapons prohibition for ten years, and, based on the record, I just had a quick look at her record again, it looks like it's a first conviction and so it's just ten years.

[94] THE COURT: Yes.

[95] MR. MACGILLIVRAY: And there is a -- the DNA order, secondary on this.

[96] THE COURT: Okay. This is a case in which I think a DNA order is appropriate. So I do not need you to argue that point for me.

[97] It is a mandatory order that you be prohibited from having in your possession any firearms, ammunition, or explosive substances for a period of ten years. Okay?

[98] THE ACCUSED: Really.

[99] THE COURT: There is the ability to apply for an exception, particularly for things like subsistence hunting. You can speak to your counsel at some point now or down the road if that is something that is an issue, but I am required by law, to make it. So that order is made.

[100] I am also satisfied that it is appropriate to require that you provide a sample of your blood suitable for DNA testing and banking. I am going to make that order too. So they prick your finger, take a little bit of blood and you go into the DNA data bank, which hopefully will never become an issue for you if you continue over the next several years as you have over the last six months.

[101] Have I missed anything? Remaining counts?

[102] MR. MACGILLIVRAY: No, not that I could tell when I looked at the convictions again. Crown directs a stay of proceedings.

[103] THE COURT: All right. We are done.

RUDDY T.C.J.