COURT OF APPEAL OF YUKON

Citation: *R. v. Joe*,
2017 YKCA 13

Date: 20170804
Docket: 16-YU788

Between:

Regina

Respondent

And

Arthur Frankie Joe

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

On appeal from: An order of the Territorial Court of Yukon, dated April 22, 2016 (*R. v. Joe*, 2016 YKTC 31, Whitehorse Docket 13-00833, 14-00459).

Counsel for the Appellant:	V. Larochelle
Counsel for the Respondent:	L. Lane
Place and Date of Hearing:	Whitehorse, Yukon May 17, 2017
Place and Date of Judgment:	Vancouver, British Columbia August 4, 2017

Written Reasons by:
The Honourable Chief Justice Bauman

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

Summary:

Mr. Joe appeals his sentence of 43 months and five days' imprisonment (before credit for pre-sentence custody) plus three years' probation for one count of refusal to provide a breath sample, one count of impaired driving and breach of an undertaking. He argues that the sentencing judge erred in failing to adequately consider his Aboriginal background, his moral blameworthiness and in his application of the principle of rehabilitation. Held: Appeal allowed. The threshold for appellate intervention is reached if the sentencing judge erred in principle and that error had an impact on sentence; or the sentencing judge imposed a sentence that is demonstrably unfit. Here, the trial judge erred in principle in three ways: failing to give tangible effect to Mr. Joe's Aboriginal background; in effect, requiring Mr. Joe to demonstrate a causal connection between his Aboriginal circumstances and the offence; and failing to give proper or adequate weight to the objective of assisting in Mr. Joe's rehabilitation. These errors significantly impacted the sentence and require that this Court consider the fitness of Mr. Joe's sentence afresh. A global sentence of 23 months and five days' imprisonment (before credit for pre-sentence custody) plus three years' probation is a fit sentence for Mr. Joe.

Reasons for Judgment of the Honourable Chief Justice Bauman:

Introduction

[1] Mr. Joe was before the court below on charges of breach of an undertaking contrary to s. 145(5.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, refusal to provide a breath sample contrary to s. 254(5), and impaired driving contrary to s. 253(1)(b). He was convicted at trial of the s. 253 charge and pled guilty to the ss. 145(5.1) and 254(5) offences. The sentencing judge imposed a global sentence of 43 months and five days' imprisonment, which he then reduced by granting 19.5 months' credit for time spent in pre-sentence custody. He also imposed concurrent 10-year driving prohibitions and 3 years' probation.

[2] Mr. Joe seeks leave to appeal this sentence. He says the sentencing judge erred in considering his Aboriginal background, assessing his moral blameworthiness and applying the principle of rehabilitation. For the reasons that follow, I would grant leave, allow the appeal and substitute a sentence of 23 months and five days' imprisonment less the 19.5 months' credit for pre-sentence custody. I

would not interfere with the other portions of the sentence other than to delete one term in the probation order.

Background

[3] The refusal and breach charges concern events from 31 January 2014 when Mr. Joe was observed by a concerned citizen to be driving erratically and to have caused damage to his driver's side mirror. That individual reported the incident to police and remained with Mr. Joe on the scene. He observed Mr. Joe to have slurred speech and be unsteady on his feet. He also smelled alcohol on his breath. When police arrived they observed Mr. Joe to have bloodshot eyes. They provided him with a number of instructions and warnings to blow into the Alco-sensor FST device. He initially complied and blew on three occasions, but not hard enough for the sensor to obtain a sample. He then refused to blow again and was arrested. At the time, he was on an undertaking to abstain from the possession or consumption of alcohol. Mr. Joe entered guilty pleas to these charges on 28 January 2016.

[4] The impaired driving charge stemmed from an incident on 10 October 2014 when Mr. Joe was found by police next to his stalled truck, which was pulled over at an angle to the curb. He was intoxicated. RCMP took him to the detachment where he blew 150 and 140 milligrams of alcohol per 100 millilitres of blood at 12:51 a.m. and 1:11 a.m., respectively. At the trial, the trial judge examined the issue of care and control, and found that Mr. Joe was the driver.

[5] On both of these occasions, Mr. Joe initially claimed that someone else was driving the vehicle.

[6] Mr. Joe was on remand at the Whitehorse Correctional Centre from March 2015 until his sentencing hearing in April 2016.

[7] Mr. Joe has a lengthy but somewhat dated criminal record of 12 previous convictions for drinking and driving offences, four convictions for driving while prohibited, numerous convictions for failing to comply with court orders, two

convictions for spousal assault, and a number of convictions for property-related offences. The offences occurred from 1970 to 2005. Mr. Joe did not commit any new criminal offences in the eight years leading up to the present charges.

[8] Mr. Joe is 65 years old. He is a citizen of the Champagne and Aishihik First Nation ("CAFN") and the great-grandson of Chief Isaac. He was raised by his maternal grandparents until the age of five years old when he was sent to a residential school. His parents drank frequently so his grandparents were keen to keep him out of harm's way. His mother died when he was nine years old after she froze to death while intoxicated. In his early years, Mr. Joe led a traditional way of life with his grandparents, learning his language and culture, and growing up in the wilderness on his grandparents' trap line. His grandparents were considered leaders in their community.

[9] At age five, Mr. Joe was sent to the Lower Post Residential School in northern BC. The school had a reputation as one of the more repressive and brutal residential schools in Canada. Mr. Joe says he was physically and sexually abused during the ten years he spent at the school — both by staff members and other students. He blames residential school for the suicide of his brother and for causing his sister to abuse alcohol, which ultimately led to her death. There is evidence that while at residential school Mr. Joe looked out for younger students. Mr. Joe's daughter recalls hearing a story from another former student who said Mr. Joe took a beating that was meant for him.

[10] Mr. Joe first used alcohol and cigarettes around the age of five. His use increased over the years and he eventually developed an addiction to alcohol. He has previously worked at laboring-type jobs but says he was often fired because of his drinking. When he received a penitentiary sentence for his 2005 impaired driving offence he says he "smarten[ed] up". He struggled to comply with his parole conditions upon his release from the penitentiary until March 2008, but did not incur any new charges until the present charges from January 2014. He reports being sober during this time although this is inconsistent with the statement of a parole

officer in the *Gladue* report (*R. v. Gladue*, [1999] 1 S.C.R. 688) that his performance on conditional release was "very poor with numerous breaches owing to alcohol". Mr. Joe does not agree with this summary of his time spent on parole. In any event, Mr. Joe's progress stopped when he started drinking again in 2014.

[11] Mr. Joe distrusts the RCMP and the justice system more broadly. One of Mr. Joe's most significant personal relationships was with a woman who died in police cells after being picked up for public intoxication. At the coroner's inquest following her death, Mr. Joe blamed her death on RCMP negligence. In 2003, Mr. Joe alleged that he had been assaulted by two RCMP members. Those members were charged with assault causing bodily harm, but the Crown eventually stayed those charges.

[12] Mr. Joe says he spends a lot of time painting and carving, and has been able to earn "quite a bit of money" from his artwork. He has also used much of his residential school settlement money to buy the lumber and building supplies to build a camp near Haines Junction. His dream is to turn the camp into a tourism venture or a healing centre for people struggling with addictions and residential school trauma. He has hosted a number of people who are trying to stay sober and deal with traumatic experiences.

[13] This camp and the support of CAFN are the subject of Mr. Joe's application to admit new evidence. He applies to adduce new evidence in the form of a letter from the CAFN dated 8 May 2017. It briefly deals with Mr. Joe's progress and developing "29 Mile Bison Hunters Camp". This venture was discussed in the *Gladue* report filed in the sentencing hearing; it updates the information before the Court. In the circumstances, I would admit the evidence on appeal.

Sentencing Decision

[14] At the hearing, the Crown sought a global sentence in the range of four to five years less time served. The defence sought a sentence of two to three years. Both sides agreed 19.5 months' credit for pre-sentence custody was appropriate.

[15] The trial judge began his analysis by stating "[w]ithout any doubt whatsoever the principles of sentencing applicable to cases like this are denunciation, deterrence and separation from society." He said "[r]ehabilitation takes a back seat and is of little concern except insofar as it may piggy-back on specific deterrence" (at para. 10). He cited the fundamental principle of sentencing in s. 718.1 of the *Criminal Code* before outlining Canadian, American and English jurisprudence firmly condemning drinking and driving (at paras. 13-21). He then cited several decisions that set out the concern posed by impaired driving in Yukon, specifically. He observed, as a longstanding deputy judge in the jurisdiction, that "the problem is certainly not getting any better" (at para. 26). He then explained: "[t]he pendulum does not always swing to the left" and that "[m]ost courts have responded responsibly to the carnage so unnecessarily caused by impaired drivers" (at para. 32).

[16] When considering Mr. Joe's circumstances, the judge ruled out prioritizing rehabilitation in this case. He highlighted Mr. Joe's "horrendous record" and found that his culpability and moral blameworthiness were "extremely high" (at para. 40). He noted that Mr. Joe is "not a hopeless alcoholic" but is rather "a well-spoken, highly talented artist" who was able to stay sober for eight and one-half years (at para. 41).

[17] Turning to his determination of the appropriate sentence, the judge reasoned that Mr. Joe should "realistically" be looking at seven to eight years as a "notorious repeat offender" but that mitigating factors and the totality principle prompted a lesser sentence. He relied on *R. v. Hutchings*, 2012 NLCA 2 and *R. v. Li*, 2009 BCCA 85 for the proper approach to applying the totality principle. The judge first determined the appropriate sentence for each offence, noting the five-year maximum applicable to impaired driving, and that Mr. Joe's moral blameworthiness was compounded by falsely claiming someone else was driving. He then set out s. 718.2(e) of the *Criminal Code* and the need to consider Mr. Joe's Aboriginal circumstances. He referred to the detailed *Gladue* report before the court but said, "[t]he fact that Mr. Joe was horribly abused as a child in residential schools does not

relieve him from responsibility for these offences", nor did it reduce his moral culpability (at para. 51). He found that Mr. Joe's moral blameworthiness was extremely high because he is aware of his issues, is well-spoken and was able to remain sober for those eight and one-half years. This was reflected in his criminal record with the gap in offending between 2005 and 2014.

[18] The judge then described Mr. Joe's background, as outlined in the *Gladue* report, and cited the duties of a trial judge from *R. v. Ipeelee*, 2012 SCC 13 at paras. 86-87. He concluded by saying (at para. 62):

> In the rare cases of a notoriously repeat drinking driver, it is my view that he should have almost no particular consideration afforded to him as an aboriginal offender, regardless of how lifelong miseries were forced on him by residential schools and integration. While not totally ignoring *Gladue*, I would rate it as infinitesimal in and of itself.

[19] He further found that in light of the universal acceptance of the serious concerns about impaired driving it could not be said that there is an overreliance on incarceration for such repeat offenders and noted the absence of evidence before him that Aboriginal offenders are over-represented in jail on account of drinking and driving offences (at para. 63).

[20] The judge explained that it was only because of Mr. Joe's age, health, ability to support himself through his art, and desire to help others that he was not sentencing him to a global sentence of seven years. Nevertheless, he held that in light of his age and "unconscionable record":

> …the ends of justice are best served by curtailing the freedoms of Mr. Joe for as long as reasonably and fairly possible in terms of imprisonment, strict probation and a prohibition order which will effectively prevent him from lawfully driving for the rest of his life (at para. 68).

[21] The judge sentenced Mr. Joe to 22 months' imprisonment on the refusal charge, five days consecutive on the breach of undertaking, and 21 months consecutive on the impaired driving offence. He applied the credit for presentence custody to the latter charge. The judge imposed concurrent 10-year driving prohibitions under s. 259(1)(c) of the *Criminal Code*. He also imposed a three-year

probation order. Term 11 of the probation order is relevant on appeal. It prohibits Mr. Joe from being present in any motor vehicle when an occupant of that vehicle has any alcohol in his or her body.

Submissions

[22] Mr. Joe submits that the sentencing judge made a number of errors in principle that impacted the sentence. He highlights paragraphs 10, 51, 52, and 62-64 of the reasons for sentence, and says these paragraphs demonstrate errors in the judge's treatment of the principle of rehabilitation, his approach to sentencing an Aboriginal offender, his determination of Mr. Joe's degree of moral blameworthiness and his consideration of Mr. Joe's circumstances.

[23] With respect to rehabilitation, Mr. Joe submits that the judge failed to give proper weight to his potential for rehabilitation. He highlights the judge's statement that rehabilitation "takes a back seat" to denunciation and deterrence and says this same statement prompted this Court to intervene in *R. v. Menicoche*, 2016 YKCA 7 at paras. 53-55. The judge's reference to rehabilitation being of little concern other than to "piggy-back" on specific deterrence further demonstrates this error. He says the judge used his potential for rehabilitation to instead send him to jail for a longer term.

[24] As it relates to the judge's consideration of the sentencing principles applicable to Aboriginal offenders and his own moral blameworthiness, Mr. Joe argues that he erred in failing to take judicial notice of the over-representation of Aboriginal people in the criminal justice system. The judge also erred in holding that his moral blameworthiness was higher because he is well-spoken and had previously managed to remain sober; and that the abuse he suffered at residential school did not diminish his culpability. The Supreme Court of Canada has repeatedly held that a judge must take into account the offender's personal circumstances along with historical and systemic factors when assessing the moral blameworthiness of an Aboriginal offender. While Mr. Joe does not have to show a causal link between that background and his offending, he says the link in his case

is glaring. He outlines how his criminal offending has coincided with negative experiences tied to his Aboriginal circumstances. More broadly, he asserts that his alcohol addiction is a clear consequence of the abuse he suffered in the residential school system. Borrowing from the language of Justice Grekol in *R. v. Skani*, 2002 ABQB 1097 at para. 60, he says "few mortals could withstand such a childhood and youth without becoming seriously troubled".

[25] Mr. Joe says he is not seeking to avoid responsibility because of his experiences, but rather asks that Canadian society also accept that it had an important role in his fate. This is the first step in advancing the goal of reconciliation.

[26] Mr. Joe highlights, in particular, the judge's findings that he should have no particular consideration afforded to him as an Aboriginal offender "regardless of how lifelong miseries were forced on him by residential schools and integration" and that his personal circumstances are of "infinitesimal" importance to the appropriate sentence. This, he submits, is an error of law and principle that has no place in a 21st century courtroom. He argues the judge gave no genuine effect to his personal and Aboriginal circumstances despite being under a duty to do so.

[27] Mr. Joe says the appropriate range for an individual in his circumstances is 6-12 months. He argues that the appropriate sentence for both offences was in the range of 12-18 months and that the 43-month sentence imposed is demonstrably unfit.

[28] The Crown takes issue with the facts recounted in Mr. Joe's submissions and says they go beyond the facts found by the sentencing judge and those contained in the *Gladue* report. It argues that the judge did not err as alleged and that the sentence imposed is within the range of fit sentences in the circumstances of this offender and these offences.

[29] The Crown says the sentencing judge properly relied on *R. v. Donnessy* (1990), 9 W.C.B. (2d) 542 (Y.T.C.A.) (a case with which Mr. Joe takes issue given that it was decided prior to *Gladue*), which is recognized as a leading case in

establishing the range of sentences for repeat drinking and driving offenders in Yukon. The Crown cites eight other Yukon Territorial Court sentencing decisions and one BC Provincial Court decision involving comparable drinking and driving offences. Many of those decisions involved Aboriginal offenders. The sentences imposed in those cases range from 6 months to two years per offence. The Crown says these cases support the continuing validity of *Donnessy* in establishing a range of sentences of up to two years' imprisonment for each of the alcohol-related driving offences.

[30] The Crown acknowledges that Mr. Joe's recent efforts towards rehabilitation and demonstrated ability to maintain sobriety have a significant impact on sentence. However, the sentencing judge properly took into account the significant and serious issue concerning the prevalence of impaired driving offences in Yukon. The Crown says there is no evidence that drinking and driving is "disproportionately a First Nation issue"; rather, it is a risk that affects all of Yukon society. Accordingly, the judge correctly found Mr. Joe to have a high level of moral culpability.

[31] The Crown submits that when considering the nature of the offences, Mr. Joe's conduct after the first charge in January 2014, his background and his related criminal record, the sentence was fit and within the appropriate range.

Analysis

1. Standard of Review

[32] It is necessary to spend some time on this issue. Here the Crown in its factum (at para. 15) notes Mr. Joe's assertion of errors in principle made by the sentencing judge. Counsel continues:

> Even if there is an error in principle, a failure to consider a relevant factor, or improper weight given to an aggravating or mitigating factor, an appellate court cannot intervene unless the sentence imposed is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code.

[33] Cited in support is the British Columbia Court of Appeal's decision in *R. v. Daigle*, 2017 BCCA 86, and in particular, paragraphs 28 and 29 thereof. There the court (per Bennett J.A.) noted the leading cases on the deference owed to decisions of sentencing judges and in particular *R. v. Lacasse*, 2015 SCC 64 and *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500. The court quoted para. 90 of the latter case:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code*.
>
> [Emphasis in original.]

[34] The *Daigle* court continued (at para. 29) with this critical observation:

> However, even if there is an error in principle, a failure to consider a relevant factor, or improper weight given to an aggravating or mitigating factor, an appellate court cannot intervene unless the sentence imposed is demonstrably unfit. (See *Lacasse* at paras. 44-45; *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 (B.C.C.A.) at para. 37.)

[35] I was on the division that decided *Daigle* and I concurred with the reasons dismissing the appeal there. I was wrong in concurring on this particular aspect of the reasons. The nub of the error lies in the conclusion stated in para. 29 of *Daigle* that even if there is "an error in principle" (etc.) in the disposition by the sentencing judge, appellate intervention is still only permissible if the sentence is demonstrably unfit. This makes conjunctive what *Lacasse* (properly interpreted) and *R. v. M.(C.A.)* make disjunctive.

[36] The threshold for appellate intervention is reached: (i) if the sentencing judge is shown to have erred in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor and that error had an impact on sentence; or (ii) the sentencing judge imposed a sentence that is demonstrably unfit.

[37] That the test for intervention is disjunctive in this regard is made plain by the extract relied upon in *Daigle* from *R. v. M.(C.A.)*, that is to abbreviate:

> … absent an error in principle … a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
>
> [Emphasis added.]

[38] The requirement in the "error in principle" branch of the threshold that the error must have had an impact on the sentence was added by the majority in *Lacasse*, as I will demonstrate. But it is to be stressed that here we are concerned with an impact on sentence, not a sentence that is "demonstrably unfit". I interject to say that of course all appellate review of a sentence imposed under the *Criminal Code* is in the final analysis focused on the "fitness of the sentence appealed against" (s. 687(1) of the *Criminal Code*). However, we are here concerned, not with the final appellate analysis, but rather with the threshold to be met to allow for appellate intervention; to allow the appellate court to approach its review without the traditional deference to the sentencing judge's disposition blocking the way.

[39] As noted, the *Daigle* court relied on *Lacasse* and *Johnson*, another decision of the British Columbia Court of Appeal from 1996. *Johnson* does support the view that even if there is an error in principle in the sentencing judge's disposition, the court must consider whether that error led the judge to impose a demonstrably unfit sentence. (Although arguably there is some confusion even in *Johnson* itself on this point.) But on a proper reading, *Lacasse* does not.

[40] In my view, the majority judgment in *Lacasse* stands for the proposition that appellate intervention is warranted where there was an error in principle, a failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor that had an impact on sentence; or where the sentence is demonstrably unfit. These two grounds are alternative bases on which the deference owing to the sentencing judge falls away. Either is sufficient to justify intervention. To demonstrate this point, I will go through the relevant passages of *Lacasse* (both the majority and the dissent) before turning to a summary of how *Lacasse* has been interpreted by other appellate decisions.

[41] In *Daigle*, Justice Bennett cites the following two paragraphs from *Lacasse* for her stated proposition:

> [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.
>
> [45] For example, in *R. v. Gavin*, 2009 QCCA 1, the Quebec Court of Appeal found, first, that the trial judge had erred in considering a lack of remorse and the manner in which the defence had been conducted as aggravating circumstances (para. 29). However, it then considered the impact of that error on the sentence and stated the following, at para. 35 :
>
> > [TRANSLATION] I find that the lack of remorse was a secondary factor in the trial judge's assessment. This is apparent in the wording of the judgment. The judge referred to and considered all of the relevant sentencing factors, and the issue of lack of remorse was nothing more than incidental. . . . Consequently, unless the Court finds that the sentence imposed was harsher because the judge erroneously determined that the defence's conduct (as in *R. v. Beauchamp*, *supra*) and the lack of remorse were aggravating circumstances, this error in principle had no real effect on the sentence. Essentially, therefore, our task now is to ensure that the sentence is not clearly unreasonable . . . .
>
> Thus, the Court of Appeal, finding that the error in principle made by the trial judge was not determinative and had had no effect on the sentence, rightly concluded that the error in question could not on its own justify the court's intervention. This ultimately led the court to inquire into whether the sentence was clearly unreasonable having regard to the circumstances.
>
> [Emphasis added.]

[42] It will be seen that *Johnson* and *Lacasse* reflect two different appellate standards. In the *Johnson* standard, even if there is an error in principle, the court must nevertheless continue to determine whether that error led the judge to impose a demonstrably unfit sentence. This is the approach adopted by the court in *Daigle*. On the contrary, in *Lacasse*, the error need only have "had an impact on sentence". There is no indication that it must rise to the level of resulting in a demonstrably unfit sentence. That this is so, is confirmed at para. 11 of *Lacasse* where Justice Wagner states:

> [u]ltimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.
>
> [Emphasis added.]

[43] In other words, where there is an error of law or principle that has an impact on sentence, the court need not find that the sentence is also demonstrably unfit.

[44] I said that *Johnson* stood to the contrary but that even within it some confusion arises. In *Johnson* at para. 36, Justice Ryan excerpted the same paragraphs from *R. v. M.(C.A.)* quoted above including this important paragraph, which I again reproduce:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code* [now s. 718.3(1)].
>
> [Emphasis in original.]

[45] As I have said, this statement clearly suggests a two-prong test for appellate intervention. But Justice Ryan then continued (at para. 37 of *Johnson*):

> By these words I understand the court to have meant that without an error in principle the appeal court should only disturb a sentence if it can be said to be unreasonable (demonstrably unfit); that is, clearly outside the range of sentences imposed for the type of offence and the type offender. If the appellant demonstrates an error in principle the question remains whether that error led the trial judge to impose a sentence that was unfit. Although the discretion of a trial judge in sentencing should not be interfered with lightly deference plays a less important role where there is an established error in principle. The question becomes whether the errors in principle led the trial judge to impose a sentence which was demonstrably unfit.

[46] I agree with much of this paragraph. As I said above, absent an error in principle (etc.) that impacts the sentence given, one must still ask whether the sentence is "fit". "Fitness" of the sentence is the ultimate question on appellate review (s. 687(1)). But "fitness" is not to be equated with the threshold for intervention calibrated at "demonstrably unfit" as the Court in *Johnson* appears to do in the last sentence of para. 37. In the end, if this last sentence is correct, why would an appellate court even have a test that looks for an error in principle (etc.) when it would still need to find "demonstrable unfitness"? An unfitness of that magnitude is a higher or more difficult threshold than "error in principle" because we can posit a demonstrably unfit sentence that contains no error in principle: *Lacasse* para. 52.

[47] Justice Wagner's reference to the Quebec Court of Appeal decision in *Gavin* also confirms this interpretation of the standard for intervention. As explained in the *Lacasse* excerpt above (at para. 45), the court in *Gavin* first considered the impact the error had on sentence. Having concluded that the error had no effect on the sentence imposed, only then did the court go on to inquire whether the sentence was "clearly unreasonable" (the language used in *R. v. Shropshire*, [1995] 4 S.C.R. 227).

[48] Justice Wagner later considered the Alberta Court of Appeal decision in *R. v. Stimson*, 2011 ABCA 59, where the court intervened after first identifying at least four errors in principle and explaining there was no doubt that those errors had affected the judge's analysis. Justice Wagner concluded that intervention in that case was "therefore clearly warranted" (at para. 47). In other words, the door to appellate intervention opens upon identifying an error in principle that impacted sentence.

[49] However, Justice Wagner then arguably raises some confusion in the following paragraphs:

> [51] Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.
>
> [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.
>
> [Emphasis added.]

[50] The underlined portion of the paragraph must be read within the context in which it appears in the majority judgment. Justice Wagner was talking about

intervening where the issue is the proper range. Later in his reasons he clarifies that ranges are just one tool that are intended to aid trial judges (at para. 69), and that imposing a sentence outside the range does not in itself constitute an error in principle. If an appellate court is troubled only by the sentencing judge's identification of the proper range then it would be necessary to go on and consider whether the sentence was demonstrably unfit.

[51] Justice Wagner was not saying an appellate court may only intervene where the sentence is demonstrably unfit, as the last sentence of para. 37 in *Johnson* seems to suggest. Instead, he determined that the judge's choice of the applicable range is subject to the high level of deference afforded to sentences not impacted by the errors set out in *Lacasse* at para. 44. This is a point later confirmed in *R. v. Lloyd*, 2016 SCC 13 at para. 52 where Chief Justice McLachlin, writing for the majority, explained that the sentencing judge's choice of a range cannot in and of itself constitute a reviewable error.

[52] This interpretation of para. 51 of *Lacasse* is consistent with the specific issue on appeal in that case, which concerned whether it is open to an appellate court to substitute a sentence primarily on the basis that the trial judge had deviated from the sentencing range established by courts for impaired driving offences (at para. 35).

[53] It is also consistent with Justice Wagner's summary of general principle at para. 67, which he provides after a lengthy consideration of the purpose of sentencing ranges:

> Like the range itself, the categories it comprises are tools whose purpose is in part to promote parity in sentencing. However, a deviation from such a range or category is not an error in principle and cannot in itself automatically justify appellate intervention unless the sentence that is imposed departs significantly and for no reason from the contemplated sentences. Absent an error in principle, an appellate court may not vary a sentence unless the sentence is demonstrably unfit.

[54] If the threshold for intervention in *Daigle* was correct then there would be no need for Justice Wagner to have prefaced the last sentence with "absent an error in principle". A finding that the sentence is demonstrably unfit would always be a

necessary prerequisite to intervention. That this is not correct is amply clear from the review of the majority's reasons provided above and the dissent's reasons to which I now turn.

[55] In his dissenting reasons Justice Gascon (McLachlin C.J.C. concurring) agrees with the standard of review set out in the Supreme Court of Canada's earlier jurisprudence:

> [137] If a party shows that the trial judge made an error in principle, failed to consider a relevant factor or overemphasized appropriate factors, I do not think it can be said that the judge acted within the limits of his or her discretion in sentencing matters. In such cases, the relevant decisions of this Court do not require that the sentence also be shown to be demonstrably unfit before an appellate court can intervene. The effect of such a requirement would be to raise the recognized standard of intervention.
>
> [138] In my opinion, the current approach is neither incongruous nor unfair.
>
> [Emphasis added.]

[56] For the dissent, once the appellant shows an error deference to the sentencing judge's analysis falls away. According to the majority, that deference only falls where the appellant also establishes that the error impacted the sentence.

[57] In my view, the majority and dissent in *Lacasse* differ on the issue of what constitutes an error permitting appellate intervention. Can any error of law or principle justify intervention such that errors are always reviewable (the dissent) or must that error also have impacted the sentence imposed before it is reviewable (the majority)? The two sides are consistent in the view that absent such an error, the only other route to intervention is where the sentence is otherwise demonstrably unfit.

[58] In Justice Wagner's application of the principles to the facts in *Lacasse*, he found that the judge's erroneous consideration of Mr. Lacasse's intoxication as an aggravating factor did not "unduly affect" the sentence and the judge "attached no real weight to this factor in his judgment" (at para. 83). Accordingly, this was not an error justifying appellate intervention because it had no actual impact on the sentence. Similarly, he found that it was not an error for the judge to rely on the

prevalence of impaired driving offences in the local community in emphasizing deterrence provided that it did not result in a demonstrably unfit sentence (at para. 104). This demonstrates that where there is no error in principle impacting the sentence, the demonstrable unfitness standard applies.

[59] On the contrary, Justice Gascon found that the errors concerning the relevant aggravating and mitigating factors were "not non-determinative" and "nor did they amount to a mere failure to properly weigh the aggravating or mitigating factors". Instead, they were reviewable errors that had a "determinative impact on sentencing principles" (at para. 164). Parenthetically, framing the impact of the errors in this manner means that the dissent would have intervened even on the more stringent threshold articulated by the majority.

Review of Other Appellate Authorities

[60] The above interpretation of the majority's judgment is consistent with a number of appellate decisions citing *Lacasse*.

[61] Here are a selection of those cases from Ontario:

- *R. v. S.M.C.*, 2017 ONCA 107 at para. 5: "An appellate court is justified in interfering with a sentence only if the sentencing judge imposed a sentence that is demonstrably unfit or committed an error of principle that had an impact on sentence: *R. v. Lacasse*, [2015] 3 S.C.R. 1089, at paras. 11, 44-46" (emphasis added).

- *R. v. Grant*, 2016 ONCA 639 at para. 162: "An appellate court is justified in interfering with the sentence only if the trial judge imposed a sentence that is demonstrably unfit or committed an error in law or principle that had an impact on the sentence" (emphasis added).

- *R. v. Mathur*, 2017 ONCA 403 at paras. 11-12: The court found that the error did not have any impact on the sentence imposed such that the customary deference owing to trial judges was not displaced.

- *R. v. Wooldridge*, 2016 ONCA 302 at para. 8: “In light of *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, we are permitted to intervene with a sentence imposed at first instance only where the sentencing judge has erred in principle; failed to consider a relevant factor; or erred in his or her consideration of an aggravating or mitigating factor; and that such an error had an impact on the sentence imposed.” The court did not condition this statement on then determining whether the sentence was also demonstrably unfit.

[62] Below are a number of decisions from the British Columbia Court of Appeal that also support the above interpretation and therefore differ from *Daigle*.

[63] In *R. v. J.C.S.*, 2017 BCCA 87, Justice Fitch found that the judge erred in treating the absence of remorse as an aggravating factor. He found that he could not say the error’s impact on sentence was “nothing more than incidental”, and therefore, determined it was “necessary and appropriate to consider the fitness of the sentence unshackled by the full force of the deferential standard of review” (at paras. 91-92). In other words, having concluded that the impact on sentence was more than incidental, Justice Fitch reviewed the fitness of the sentence afresh and did not find it necessary to consider whether the sentence imposed was demonstrably unfit before doing so.

[64] Similarly, in *R. v. Vautour*, 2016 BCCA 497, Justice Kirkpatrick concluded appellate intervention was justified on finding that the sentencing judge’s failure to consider the frequency of abuse as an aggravating factor resulted in a lesser sentence (at para. 49). She later also held that the sentence imposed was demonstrably unfit (at para. 53), but this holding was not framed as a necessary precondition to her earlier conclusion that appellate intervention was warranted.

[65] In *R. v. Karp*, 2016 BCCA 172, Justice Fitch found that the error in principle in relegating rehabilitation to a secondary role had an impact on sentence and proceeded to impose a sentence based on his view of a fit sentence (at paras. 24-28).

[66] In *R. v. Currie*, 2016 BCCA 404, Justice Fitch found that the judge's misapprehension of the *Criminal Code* provisions and the errors that resulted did not have any material impact on sentence. He then explained, "[i]t follows that to succeed on this appeal the Crown must meet the higher threshold for appellate intervention on appeals from sentence where consequential error in principle has not been established": demonstrable unfitness (at para. 45).

[67] In *R. v. Kwan*, 2016 BCCA 208, Justice Fitch (Bennett and Stromberg-Stein JJ.A., concurring), stated (at para. 33):

> At the end of the day, the appellant invites us to approach the matter afresh and conclude, contrary to the determination of the sentencing judge, that a conditional sentence of imprisonment would be consistent with the fundamental purpose and principles of sentencing. We cannot approach the case in this way. In the absence of demonstrated error in principle, doing so would be to abandon the deferential standard of review governing appeals from sentence.
>
> [Emphasis added.]

[68] In short, the deferential "demonstrable unfitness" threshold applies in the absence of a demonstrated error in principle that impacted the sentence imposed.

[69] Justice Stromberg-Stein stated this point directly in *R. v. Eakins*, 2016 BCCA 194, and in doing so provided a concise summary of the standard for intervention on appeal (at paras. 21-22):

> 21 With respect to an error in principle, appellate intervention is only proper where the error has impacted the judge's analysis leading to the sentence: *Chudley* at paras. 18-19.
>
> 22 If the appellant cannot demonstrate an error in principle, an appellate court can still intervene if the sentence is demonstrably unfit.

[70] Justice Stromberg-Stein reasoned to similar effect in *R. v. Al-Isawi*, 2017 BCCA 163 at para. 85:

> Appellate intervention is warranted where the sentencing judge erred in principle, failed to consider a relevant factor, or overemphasized an appropriate factor in a way that had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64 (S.C.C.) at paras. 43-44. Absent such an error, an appellate court may only vary the sentence if it is demonstrably unfit: *Lacasse* at para. 11; *Lloyd* at para. 52.

[71] She repeated this statement of principle again in *R. v. Marks*, 2016 BCCA 480 at para. 7.

[72] *Daigle* is a decision of the British Columbia Court of Appeal. Technically, as we are the Court of Appeal of Yukon, it is not binding on us, although if standing alone, it would certainly challenge comity to not follow it. But it does not stand alone. There are many decisions of that court that support Justice Stromberg-Stein's and Justice Fitch's version of the threshold for appellate intervention in these matters. Having the freedom to choose and believing that it is consistent with the proper reading of *Lacasse*, I respectfully adopt their test for appellate intervention.

[73] Before leaving this discussion I would add some cautions. There remain unanswered questions in the standard of review analysis governing sentence appeals. For example, what degree of impact on sentence must be present to allow for intervention on the ground of error in principle? That issue does not arise in this case because, as I discuss below, I find the errors in principle made by the sentencing judge had a significant impact on Mr. Joe's sentence. Further, what are the implications for a Crown sentence appeal? And in at least the case of an error in principle that impacted the sentence, does deference fall away completely? Or does it simply play a "lesser role" as suggested by Justice Ryan in *Johnson*?

[74] It may be that a five-justice division of the British Columbia Court of Appeal or higher authority will be required to address these questions and fully resolve the apparent conflicts in the jurisprudence.

2. Errors in Principle

[75] Applying this standard of review, in my view, the sentencing judge here made several errors in principle in his approach to sentencing Mr. Joe. These errors significantly impacted the sentence imposed and warrant this Court considering a fit sentence for Mr. Joe afresh.

[76] The most serious error, I conclude, centers on the judge's consideration of Mr. Joe's Aboriginal background.

[77] How that background is to be considered and the mandatory nature of that consideration have been discussed in many cases. The most recent analysis from the British Columbia Court of Appeal is that of Justice Bennett in *R. v. J.L.M.*, 2017 BCCA 258, where my colleague reviewed again *Ipeelee* and *Gladue*. Those cases make clear that for *Gladue* principles to apply, no link or causal connection between the offender's Aboriginal heritage and his offence need be demonstrated as a pre-condition. Indeed, in most cases such a link would be impossible to establish: *J.L.M.* at para. 32.

[78] A sentencing judge must take that Aboriginal heritage into account and give it tangible effect when crafting the sentence (*J.L.M.* at para. 33). As Justice Bennett observed (at paras. 36 and 37):

> [36] The Court in *Ipeelee* affirmed that in sentencing an Aboriginal offender, the Court must consider "the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts", as these factors "may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness" (at paras. 72–73).
>
> [37] In my view, the judge's failure in this case was the same as that described in *Ladue* at paras. 82–83:
>
> > [82] This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*. As the Ontario Court of Appeal states in *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33:
> >
> > > There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence....
> > >
> > > As expressed in *Gladue*, *Wells* and *Kakekagamick*, s. 718.2(e) requires the sentencing judge to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.
> > >
> > > (See also *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245.)

> [83] As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:
>
> > Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.
>
> Furthermore, the operation of s. 718.2(*e*) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[79] In the case of Mr. Joe, the sentencing judge did note the "thorough, detailed and reliable" *Gladue* report (at para. 50). And he accepted (at para. 54) that Mr. Joe's background "is rife with *Gladue* factors as were the backgrounds of Mr. Ipeelee and Mr. Ladue…" But the judge concluded (at para. 62):

> In this rare case of a notoriously repeat drinking driver, it is my view that he should have almost no particular consideration afforded to him as an aboriginal offender, regardless of how lifelong miseries were forced on him by residential schools and integration. While not totally ignoring *Gladue*, I would rate it as infinitesimal in and of itself. It was but one of other factors which kept him away from a federal penitentiary.

[80] Further (at para. 63):

> For a person with now 14 drinking and driving offences, there is really no other option than a lengthy period of imprisonment. Given the universally accepted grave and serious concerns about impaired driving, it cannot be said that with such repeat offenders there is an "overreliance on incarceration". Indeed there is no evidence before me that aboriginal offenders are over-represented in jail on account of drinking and driving offences.

[81] In my view, the sentencing judge made two fundamental errors in principle here.

[82] First, he effectively ignored *Gladue*; while saying that he did not "totally", he rated the *Gladue* factors "infinitesimal in and of [themselves]".

[83] Second, the sentencing judge appears to require evidence that Aboriginal offenders are over-represented in jail on account of drinking and driving offences.

[84] Both of these observations run counter to the cases as *J.L.M.* demonstrates. In respect of the first error, the judge gave no tangible effect to Mr. Joe's Aboriginal background. In respect of the second, he seems to require a demonstration by the offender of a causal connection between his Aboriginal background and the offence. The sentencing judge was required to take judicial notice of systemic and background factors affecting Aboriginal people in Canadian society and have this provide the necessary context for assessing the case-specific information provided by Mr. Joe's counsel: *Ipeelee* at para. 60, and *R. v. Swampy*, 2017 ABCA 134 at para. 31.

[85] By effectively ignoring Mr. Joe's background, it is self-evident in my view that the sentencing judge committed an error in principle that impacted the judge's analysis leading to the sentence. On this ground alone, appellate intervention is warranted.

[86] For the sake of completeness, however, I would identify a further error in principle.

[87] In my view, the judge erred in his consideration of the objective of assisting in the rehabilitation of Mr. Joe (*Criminal Code*, s. 718(d)). The sentencing judge on this aspect of the matter concluded so (at para. 10):

> Without any doubt whatsoever the principles of sentencing applicable to these cases are denunciation, deterrence and separation from society. Rehabilitation takes a back seat and is of little concern except insofar as it may piggy-back on specific deterrence.

[88] "Takes a back seat" in respect of the potential for rehabilitation is the same phrase used by this sentencing judge in *R. v. Menicoche*, 2015 YKTC 34. On appeal (2016 YKCA 7), this Court found that in so concluding, the judge failed to give proper or adequate weight to the sentencing objective of rehabilitation and that this was an error in principle (para. 55). I so conclude in this case as well.

3. A Fit Sentence

[89] In crafting Mr. Joe's sentence, the judge relied heavily on this Court's decision in *Donnessy*, a case "which has offered substantial guidance over the last 25 years or so" (at para. 27).

[90] *Donnessy* involved a 60-year-old chronic offender who had been convicted on six occasions of alcohol-related driving offences. On appeal, a sentence of two years less a day was held to be appropriate. As this Court said in *R. v. Blanchard*, 2009 YKCA 15 (at para. 5):

> The essence of *Donnessey* and those cases upon which it relies is that impaired driving by a chronic recidivist requires a substantial sentence for the protection of the public. General deterrence should be the predominant concern in all cases, even where that drinking and driving conduct has caused little or no harm to others. In *Donnessey*, two years less a day was held to be the appropriate sentence for a 60-year-old employed offender with six previous convictions for impaired driving and four related offences in a period of 14 years.

[91] *Donnessy* was decided in 1990 before the codification of sentencing principles in the *Criminal Code*. In *Blanchard*, this Court cited with approval Finch C.J.B.C.'s observation in *R. v. Bhalru*, 2003 BCCA 645 (at para. 61 of *Bhalru*):

> This is not to say that sentencing decisions which predate the 1996 amendments are of no assistance when determining an appropriate sentence today. However, those older decisions should be regarded cautiously, especially when they are relied on to argue for sentences which may not comply with the principle of restraint that is evident in ss. 718.2(d) and (e).
>
> [Emphasis in *Blanchard*.]

[92] I do not say *Donnessy* is of no assistance, but it must be regarded cautiously especially in the case of Aboriginal offenders in light of s. 718.2(e) of the *Criminal*

Code. In my view, having reviewed the authorities cited by the parties and giving appropriate weight to the applicable principles of sentencing, in particular to the circumstances of Mr. Joe's Aboriginal background and what I take to be his past successful efforts at rehabilitation (for many years) and his future potential in that regard, a fit sentence in this case on a global basis would be 23 months and 5 days broken down as follows:

> 12 months' imprisonment on the s. 254(5) offence;
> 5 days consecutive on the s. 145(5.1) offence; and
> 11 months consecutive on the s. 253(1)(b) offence.

[93] I would credit the 19.5 months of pre-sentence custody as follows: ten months' credit against the sentence imposed on the s. 254(5) offence and 9.5 months' credit against the s. 253(1)(b) offence. This results in a net sentence of 3.5 months plus five days, which Mr. Joe has already served. I would not otherwise alter the sentence save to delete term 11 of the probation order, as discussed in oral argument.

_____
The Honourable Chief Justice Bauman

I agree:

_____
The Honourable Mr. Justice Donald

I agree:

_____
The Honourable Madam Justice Tulloch