COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: *R. v. Blanchard*,
2009 YKCA 15

Date: 20091125
Docket: YU629

Between:

Regina

Appellant

And

Robert Richard Blanchard

Respondent

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of the Yukon Territory, January 23, 2009
(*R. v. Blanchard*, 2009 YKSC 3, Docket No. 04-01532)

Counsel for the (Crown) Appellant: D. McWhinnie

Counsel for the Respondent: J. Van Wart

Place and Date of Hearing: Vancouver, British Columbia
October 16, 2009

Place and Date of Judgment: Vancouver, British Columbia
November 25, 2009

Written Reasons by:
The Honourable Madam Justice Huddart

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Huddart:

[1] This appeal from a sentence for impaired driving imposed following revocation of a curative discharge granted under s. 255(5) of the *Criminal Code* is agreed by counsel to be a matter of first impression. The narrow issue is whether a trial judge, on a sentencing under s. 730(4) of the *Criminal Code* following revocation of that discharge, may take into account an offender's post-discharge conduct and time spent in the community on strict conditions.

[2] Counsel seek guidance for sentencing in the context of the operation of these two provisions, which is not available in the authorities. Such guidelines must permit the balancing of the need for specific and general deterrence of chronic alcoholics — who present a serious risk to others when they drink to excess and then drive — with the rehabilitative purpose that underlies the curative discharge provision of the *Criminal Code*. It aims for a longer term solution to the risk these offenders pose to their communities.

[3] Defence counsel submits the trial judge struck the right balance when he imposed the minimum 90-day custodial sentence for impaired driving alongside a probation order with strict conditions to control the offender in the community for three years while he attempts to maintain sobriety and to continue to refrain from operating motor vehicles.

[4] Crown counsel maintains this sentence is unfit because it does not accord with the principles this Court laid down in *R. v. Donnessey*, [1990] Y.J. No. 138 (C.A.) for chronic drinking and driving offenders.

[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. The respondent in this case had ten previous alcohol-related convictions, as well as five for driving while disqualified, in the 20 years preceding the offence; he was 39 years old at the time of his offence.

[6] The broader issue is how this predominance of the concern for general deterrence is to be reconciled in individual cases with the rehabilitative purpose underlying the curative discharge provision as it is being applied in Yukon Territory in the long-term interest of the communities put at risk by chronic alcoholics in a place where driving is a basic need.

[7] This is not a new issue, although the codification of sentencing principles introduced by Bill C-41 in 1995 gave new emphasis to the restorative justice approach exemplified by the curative discharge provision. In considering a sentence for criminal negligence causing death while street racing in *R. v. Bhalru*, 2003 BCCA 645, Finch C.J.B.C. noted at paras. 46-47 and 61:

> [46] In my opinion, when determining the weight to be given to the objectives of general deterrence and denunciation, it is important to consider the overall tenor of the sentencing amendments Parliament introduced in 1996. Obviously, listed as they are in ss. 718(a) and (b) as objectives of sentencing, general deterrence and denunciation retain a valid role in the process of sentencing. Equally important, however, is the concerted shift towards a restorative justice approach and call for restraint in the use of incarceration represented in the amendments. The Supreme Court of Canada has recognized that the 1996 sentencing amendments were a watershed event in this respect: see *Gladue, supra* ¶29-57; *Proulx, supra* ¶15-20. The punitive objectives of general deterrence and denunciation should not overwhelm the restorative objectives that are also embodied in the new sentencing regime.
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> [47] I do not suggest that there will not be cases where the circumstances of the offence and nature of the offender call for a greater emphasis on the objectives of general deterrence and denunciation. Courts have repeatedly recognized that general deterrence and denunciation will be "paramount objectives" in sentencing for impaired or dangerous driving offences: [citations omitted]. Indeed, in *Proulx, supra* ¶129, the Supreme Court singled out dangerous driving and impaired driving as types of offences where the inference that harsher sentences effect greater general deterrence may hold true. This may be equally true for criminal negligence causing death.
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> [...]

> [61] ... 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).
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> [Emphasis added.]

[8] The judicial debate over how to reconcile individual rehabilitation with protection of the public is longstanding and predates Bill C-41. In *R. v. Wallner* (1988), 44 C.C.C. (3d) 358 (Alta. C.A.), Stevenson J.A. (as he then was), with whom McFadyen J. (then *ad hoc*) agreed, expressed the view that "public protection may well be best served by effective measures to reduce the risk of repetition" even by recidivists. At the same time, Quigley J. (*ad hoc*) took the view that the importance of the rehabilitation principle diminishes where it is a repeat offender and a denunciatory aspect is required. Interestingly, that experienced trial judge would have set aside the curative discharge his colleagues affirmed. In its place, he would have imposed the mandatory minimum of 90 days imprisonment on the offender who had six drinking and driving related convictions in seven years and directed that it be served intermittently without a probation order, a considerably more lenient sentence than the one under appeal.

The Relevant Legislation

[9] Section 255(5) provides:

> Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under s. 253 [impaired driving], after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.

[10] Effectively, this provision permits the use of the conditional discharge provisions in s. 730 of the *Criminal Code* as a tool to encourage chronic alcoholics who drive to obtain treatment in those jurisdictions willing and able to provide the necessary community services. The section was proclaimed in force in the Yukon on

4 December 1985 and is also in effect in New Brunswick, Manitoba, Prince Edward Island, Alberta, Saskatchewan, the Northwest Territories and Nova Scotia.

[11] The relevant provisions of s. 730 are these:

> 730(1) Where an accused ... pleads guilty to or is found guilty of an offence ..., the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged ... on the conditions prescribed in a probation order made under subsection 731(2).
>
> [...]
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> (4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence ..., the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.
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> [Emphasis added.]

[12] Section 732.2(5) permits a court to

> (e) make such changes to the optional conditions as the court deems desirable, or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable.

[13] These provisions were first enacted in 1972 to permit courts to sanction without conviction, following recommendations of the Fauteux Committee in 1956 and the Ouimet Committee in 1969. The idea then was to permit a community disposition of a minor offence by a first offender. The imposition of the discharge did not constitute a "conviction". The offender was subject to the terms of a probation order. Commission of another offence, including breach of a condition, could result in conviction and the imposition of a sanction appropriate to the circumstances of the original offence. With time, the use of the conditional sentence orders has reduced the use of suspended sentences following conviction.

The Authorities

[14] The jurisprudence on sentencing following revocation of a curative discharge seems to be limited to *R. v. Joe*, 2005 YKTC 21 (*Arthur Joe*), *R. v. Demas*, 2006 ABCA 308, and the reasons of Veale J. in this case (*R. v. Blanchard*, 2006 YKSC 35).

[15] *Demas* is of little assistance. The offender in that case had a horrendous record, with over 90 criminal convictions including a dozen for drinking and driving, for the last of which, in August 2002, he had received two years in prison without good effect. Three weeks after receiving a two-year curative discharge in June 2005 following a plea of guilty to impaired driving and driving while prohibited two months earlier, he breached the condition that he not consume alcohol. For that breach he pled guilty and was sentenced to nine months in jail. When his curative discharge was revoked on 21 April 2006, he was sentenced to six months concurrent to the nine months he was serving, plus two years probation. On the Crown's appeal, the Alberta Court of Appeal set aside that sentence and substituted an effective sentence of two and a half years incarceration, holding in brief oral reasons that the sentence failed to give proper effect to principles of deterrence and denunciation, failed to consider the protection of the public, and was "woefully inadequate" and "demonstrably unfit" for the respondent. This case was not provided to the trial judge.

[16] More helpful are *R. v. Joe*, 2008 YKTC 65 [*Larry Joe*], and *R. v. R.S.C.*, 2006 YKTC 19 in which the application of the curative discharge provisions was discussed by experienced Yukon Territory judges with care, albeit in the context of applications for discharge or revocation of discharge. Mr. Blanchard has not appealed the revocation of his curative discharge.

[17] While s. 730(4) also applies to conditional discharges granted under s. 730(1), no authorities were provided that consider revocation of a conditional discharge made under that section.

[18] This paucity of authority may reflect the rarity of revocation or an uncontroversial practice of having recourse to the ordinary principles of sentencing following revocation of a curative or conditional discharge or a suspended sentence.

[19] One author has noted, about revocation as it applies to suspended sentences, "[t]here are very few examples of judicial consideration of the revocation function": Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 244. He cited only *R. v. Tuckey* (1977), 34 C.C.C. (2d) 572 (Ont. C.A.); *R. v. Clermont* (1986), 30 C.C.C. (3d) 571 (Que. C.A.), (aff'd [1988] 2 S.C.R. 171 (S.C.C.)); and *R. v. Oakes* (1977), 37 C.C.C. (2d) 84 (Ont. C.A.). None of these are helpful in this case. *Tuckey* concerned process issues. *Oakes* and *Clermont* stand for the proposition that a custodial sentence cannot be made consecutive to a sentence imposed after the date of the passage of the sentence originally suspended.

[20] No more helpful are the few comments about similar provisions in s. 8(7) of the *Powers of Criminal Courts Act 1973* (U.K.). That provision allowed a court to revoke a conditional discharge and authorized the court to "deal with [the offender], for the offence for which the order was made, in any manner in which it could deal with him if he had just been convicted by or before that court of that offence." It is substantially reproduced in the current *Powers of Criminal Courts (Sentencing) Act 2000*, s. 13 (U.K.). The provision appears to have been considered judicially only in *R. v. Slatter*, [1975] 3 All E.R. 215 (Crown Ct.) where the question was which court had jurisdiction to deal with sentencing following revocation. That question was fairly resolved in *R. v. Graham* (1975), 27 C.C.C. (2d) 475 (Ont. C.A.).

[21] More apposite is this Court's decision in *R. v. Linklater* (1983), 9 C.C.C. (3d) 217 (Y.T.C.A.) where this Court addressed revocation under the comparable provision governing revocation of a suspended sentence (precursor to s. 732.2(5)(d) of the *Criminal Code*). Taggart J.A. wrote for the Court that the imposition on the offender of a three-year sentence for manslaughter following revocation of a suspended sentence did not offend s. 11(h) of the *Canadian Charter of Rights and Freedoms* when the probation order was without any punitive effect, and if it did, that

breach was subject to the reasonable limit prescribed by the suspended sentence provisions of the *Criminal Code*. He stated clearly, however, that this conclusion applied only to a probation order the sentencing judge viewed as smacking "more of rehabilitation than it did of punishment" (at 220). The order contained the statutory terms, a reporting condition, abstention from the consumption of alcohol, and notification of a change of address. At 221, he concluded:

> For these reasons, as well as for the reasons of the trial judge relating to the effect to be given to the suspension of sentence and the imposition of a probation order of this kind, I think it is not open to the appellant to raise the provisions of Section 11(h) because she has not been punished again, never having been punished in the first place.

[22] The Court's attention does not appear to have been drawn to *R. v. Johnson* (1972), 6 C.C.C. (2d) 380 (B.C.C.A.) where Bull J.A. wrote (at 382):

> When a sentence is suspended and a person is ordered to be released on conditions, I am satisfied that that would not come into the ambit of being "punishment" because it is a suspension of punishment.

[23] To similar effect are the reasons of Hinds Co. Ct. J. (as he then was) in *R. v. Gladstone* (1978), 40 C.C.C. (2d) 42 (B.C.Co.Ct). He held a condition that the offender surrender his permit to fish for one month was the imposition of punishment. Because it was not for the rehabilitation of the offender, he deleted it from a probation order made following suspension of a sentence by a Provincial Court judge. Mr. Justice Martin expressed a similar opinion in *R. v. Ziatas* (1973), 13 C.C.C (2d) 287 at 288 (Ont. C.A.): The only power on suspension of a sentence is "to impose such reasonable conditions as (the sentencing judge) considered desirable for securing the good conduct of the accused and for preventing the repetition by him of the same offence or the commission of other offences."

[24] In subsequent decisions, other courts have found in the exclusively rehabilitative purpose of probation orders reason to find they are not considered punitive in effect and thus do not violate s. 11(h) of the *Charter*: *R. v. T.R.* (No. 2) (1984), 11 C.C.C. (3d) 49 at 54 (Alta. Q.B.); and *R. v. Marquardt,* 1985 O.J. No. 2436 (Prov. Ct.).

[25] By analogy, these authorities support the Crown's proposition that the offender's conduct following a curative discharge is irrelevant to sentencing for an offence after revocation of that discharge. The respondent (and all other offenders in like circumstances) are to be given the sentence appropriate to the offence and the offender "as if he had been convicted at the time of the discharge."

[26] This proposition differs somewhat from the practice of Yukon trial courts, as it was explained by Ruddy T.C.J. (as she then was) at paras. 16-20 in *Arthur Joe*:

> [16] However, I note in looking at these two prior offences, while I am, in effect, sentencing Mr. Joe as if he had not been granted that discharge, I am not doing so in a vacuum. I agree with the proposition in both of these cases that the curative discharge cannot be viewed as previous punishment and I am not treating it as such. However, I do distinguish the two previous offences from the *Donnessey, supra*, situation from the perspective that Mr. Joe made substantial and considerable efforts towards rehabilitation at the time that he was granted that discharge.
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> [17] The common practice in the Yukon is that individuals do a great deal of work before they get to the point of even making the application, and I accept that he made significant efforts before the discharge was granted, as well as significant efforts after, including a one-month residential treatment program. While I do not view any of that as being punitive in nature, I do take the view that Mr. Joe is entitled to receive credit, as he would if I were sentencing him at that time. If it was determined at the time that a curative discharge was not appropriate, he would nonetheless be given credit for the efforts he had made up to that point in time.
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> [18] So I do take the position that he should receive credit with respect to the efforts that he made, both before and after. It is my determination that an appropriate sentence with respect to those initial matters, bearing in mind the work that he has done, as well as the five year gap in his record between 1996 and 2002, which does change matters somewhat in terms of the appropriateness of any sentence that he should be given for the offences for which he was previously discharged in 2002.
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> [19] Bearing all of that in mind, with respect to the first offence, arising in May of 2000, Mr. Joe is sentenced to a period of six months in custody. ...
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> [20] With respect to the second offence arising on August 31, 2000, Mr. Joe is hereby sentenced to nine months consecutive.
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> [Emphasis added.]

[27] The "period of work" to which Judge Ruddy refers may occur while on judicial interim release under the supervision of a probation officer awaiting trial; between a

guilty plea or finding of guilt and the hearing of the application for a curative discharge; or between the discharge and the revocation. In this case, neither counsel challenged the practice of granting lengthy adjournments before sentencing and, as we do not have the benefit of full argument on the issue, this is not an appropriate case on which to opine on it.

[28] Even where the length of time between conviction and sentence is lengthy because the offender absconded, the principles of sentencing permit post-offence, pre-sentencing conduct to be considered as a mitigating or aggravating factor, as is evident from both the trial and appellate decisions in *R. v. Jansons*, 2008 YKTC 25 and 2008 YKCA 15. At issue was the appropriate sentence for an impaired driving offender who absconded for almost 10 years following the adjournment of his sentencing for five months to allow him to attempt to qualify for a curative discharge. Chief Judge Faulkner explained his view at paras. 9-12:

> [9] This case presents a most interesting dilemma. Mr. Jansons is a serial drunk driver, now with nine prior convictions. *R. v. Donnessey*, [1995] Y.J. No. 5 from our Court of Appeal, makes it clear that such persons are to receive substantial sentences. It is beyond argument that had the matter proceeded to disposition in 1998, and had Mr. Jansons not succeeded in receiving yet another discharge, (more than a remote possibility) he would have received a sentence of imprisonment in the range of two years.
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> [10] The Crown argues with impeccable logic that Mr. Jansons should not be rewarded for absconding: doing so would encourage those facing incarceration to flee, and thus be inimical to the due administration of justice. On the other hand is this: prior to 1998, Mr. Jansons was racking up driving while intoxicated convictions at an alarming rate, virtually on an annual basis. Since then, he has had only one rather minor brush with the law, an uttering threats conviction that netted him a $500 fine. He has not, rather miraculously, in my view, been again found driving while drunk.
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> [11] It further appears that since he left the Yukon, he has been steadily employed as an electrician, having worked at the Kemess Mine in British Columbia, since 1998, and has continued to support his wife and two children. He claims to have been entirely abstinent since 2006.
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> [12] Consequently, the Court's dilemma. *Donnessey* is clear, but it is also clear that the situation now is not what it was in 1998. Just as *Donnessey* is clear, the case law is also clear that the accused's post offence conduct is a relevant consideration in sentencing. If the Court imposes a sentence it would have imposed in 1998, general deterrence will certainly be served, as will the principle that the absconder should not benefit. On the other hand, if

> Mr. Jansons receives that sentence, he will undoubtedly lose his employment, and it is virtually certain that all of the progress that Mr. Jansons has made since that time will be lost and he will return to his old and dangerous ways. This is hardly in the public interest. [Emphasis added.]

[29] The sentence of 90 days to be followed by a probation order for two years and combined with a three year driving prohibition Chief Judge Faulkner then imposed was varied by this Court as unfit. Kirkpatrick J.A. spoke for the Court at para. 12:

> [12] ...The inescapable message that is conveyed by the imposition of a virtual minimum sentence in circumstances in which, but for the rehabilitation made possible by the abscondment, a two year sentence would have been imposed, is one which encourages flouting of the law. While there can be no doubt that Mr. Jansons' efforts at rehabilitation are to be commended, general deterrence is not served by the imposition of the sentence in the circumstances of this case.

[30] The period of incarceration was increased to one year to take proper account of the aggravating abscondment. Nothing was said about the sentencing judge's balancing of the rehabilitation and deterrence factors. The balance of the sentence was not changed.

[31] As I mentioned earlier in these reasons, *Larry Joe* provides some useful insights into the operation of curative discharges in the Yukon. In that case, the Crown sought revocation of a curative discharge granted on 30 March 2007 with respect to a December 2005 impaired driving offence as a result of new charges in January 2008. The curative discharge had been accompanied by a five-year driving prohibition. For the new offences of driving while disqualified and with blood alcohol over the legal limit, the Crown sought a sentence in the range of two years less a day. Mr. Joe had 20 convictions for impaired driving and related offences between 1968 and 1999 before the event giving rise to the curative discharge. Defence counsel sought a second curative discharge, noting that Mr. Joe's long struggle with alcohol abuse resulted from sexual abuse from two supervisors in the residential schools he was required to attend between the ages of eight and 16, for the sequelae of which he had only begun to seek help in 2006.

[32] Chief Judge Ruddy determined that a second curative discharge would be contrary to the public interest, because the new offence called into question both the likelihood of his driving a vehicle while under the influence as well as his ability to deal effectively with his addiction. Finally, she noted, "the operation of these factors is such that the need for a denunciatory sentence overrides the suitability of a curative discharge." Nevertheless, she found that Mr. Joe's rehabilitation plan combined with s. 718.2(e) remained considerations in his sentencing, before concluding that the "most effective balance of the competing sentencing principles would be to place Mr. Joe on a conditional sentence for which he had met all the pre-requisites." The Crown had not given notice of intention to seek greater punishment, so the statutory minimum did not apply. She then imposed a sentence for the new offences of 18 months to be served conditionally within his community of Pelly.

[33] She responded to Crown counsel's concerns that a conditional sentence would not take proper account of the public interest with this explanation of her thinking, at paras. 84, 89-91 and 93:

> [84] In my view, these positions do not fairly recognize that a conditional sentence is a very different sentence than a curative discharge. A conditional sentence offers additional tools to protect the public that a curative discharge simply does not. As a conditional sentence is a jail sentence served within the community, the nature of the attached conditions and the supervision are much more intensive, and the response to any breach is much more immediate and severe, including the potential of serving the remainder of the sentence in actual jail. Thus, the nature of the conditional sentence itself goes some considerable distance in addressing public safety concerns.
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> [...]
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> [89] Using a straight jail term to meet the principles of denunciation and deterrence is counter to the competing principle of rehabilitation. When one considers Mr. Joe's background and the issues he faces, as set out in the psychological assessment, it must be recognized that he has come some considerable distance in addressing his addiction. A lengthy jail term would undermine, in my view, the rehabilitative progress he has made to date, and would hamper his continued rehabilitation. While jail might provide the benefit of enforced sobriety, and may allow access to some alcohol programming, it would not allow access to the specialized counselling he would receive from Mr. Stewart to address both addiction and trauma related issues.

> [90] Furthermore, the case is clear that any offence meeting the prerequisites set out in s. 742.1 is eligible for a conditional sentence and that such a sentence can provide significant deterrence and denunciation if sufficiently punitive conditions are imposed.
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> [91] Lastly, I am mindful of the provision of s. 718.2(e). While it may be unusual to address deterrence and denunciation through a conditional sentence in impaired driving cases, I am satisfied that there is more than enough information before me with respect to Mr. Joe's personal background to warrant treating him differently from the average offender.
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> [...]
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> [93] Mr. Joe's addiction problem which has brought him into conflict with the law is directly attributable to circumstances imposed on him by this society by virtue of his aboriginal heritage. I am hard-pressed to think of a situation more deserving of a restorative approach. Not only do I conclude that a conditional sentence meets the principles of sentencing, I conclude that it is the only available sentence which appropriately meets and balances the principles of sentencing on the circumstances of this case.
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> [Emphasis added.]

[34] In setting strict conditions for the community sentence, she noted (at para. 113) that the "curfew" is "considered the punitive aspect of a conditional sentence that provides the deterrent and denunciatory effect of the sentence" and (at para. 114) that "the norm certainly ought to be house arrest on these types of cases, and that we should only differ from that in exceptional circumstances." Treating Mr. Joe as an exceptional case, she directed a 6:00 p.m. to 7:00 a.m. daily curfew, with exceptions for going to and from employment and others with the prior written permission of his supervisor.

[35] Finally, she explained that she was not revoking the curative discharge for the 2005 charges because Mr. Joe had been compliant with its conditions, made progress toward his rehabilitation, remained motivated and had a better plan in place to address the isolation and unemployment issues that had hampered his progress.

[36] Two other decisions provide helpful guidance in considering what still appears, after almost 24 years, to be an innovative approach to the problem of chronic alcoholics who drive. Both sentences followed a sentencing circle.

[37] In *R. v. Johns,* [1996] 1 C.N.L.R. 172 (Y.T.C.A.), this Court affirmed that an appeal court should not lightly interfere in circumstances "where the judge is satisfied that there is a real possibility the accused can be rehabilitated without a term of imprisonment, or, as in this case, by the minimum custodial sentence required by law". In *R.S.C.* (2006 YKTC 19), Chief Judge Lilles granted a curative discharge under conditions in a probation order for three years for the offence of driving with blood alcohol exceeding the legal limit. He did so to recognize the offender's efforts in seeking treatment, maintaining sobriety and working with his community's Justice Committee, while refusing a similar disposition for an earlier offence of impaired driving causing bodily harm. For that offence, he imposed a 14-month conditional sentence, after noting at para. 53:

> [53] The principles of general deterrence and denunciation are of high importance in impaired driving cases, particularly when personal injury or death results. I am prepared to take judicial notice of the large number of motor vehicle accidents in the Yukon resulting in injury or death where alcohol is a contributing factor. It is a fact that the per capita alcohol consumption in the Yukon is one of the highest among all Canadian jurisdictions. As a result, in sentencing for these types of crimes, there is a need to deter similar behaviour in others and to overcome the reckless attitudes that spawn it. The public interest and the safety of the public require both that individual accuseds and the public in general understand that the courts view drinking and driving as a serious criminal offence.

[38] Following a brief review of three cases where sentences of nine to 15 months were imposed for a similar offence in similar circumstances, Chief Judge Lilles continued at paras. 59-61:

> [59] I also took into account what the victims, members of their families and members of the community stated in the Circle. There was a consensus that Mr. R.S.C. should not actually go to jail, but that he should be closely supervised for a lengthy period of time to ensure that he will not drink and drive in the future. That supervision should involve the continued participation of his support group, the Kwanlin Dun Justice Committee and community and the court. I note that the pre-sentence report concluded that Mr. R.S.C. would be suitable for a community disposition.
>
> [60] The sentence I impose must also take into account the restricted recognizance Mr. R.S.C. has abided by for approximately one year. In addition to a curfew and abstain clause, Mr. R.S.C. was required to reside at the Yukon Adult Resource Centre for a period of time. As indicated earlier, during this time Mr. R.S.C. participated in a number of treatment programs.

> The recognizance was not dissimilar to a conditional sentence of imprisonment and in my opinion, should serve to reduce the sentence I impose today.
>
> [61] I do not disagree with Crown counsel's submission that a sentence of two years imprisonment could be imposed in a case such as this. Considering all of the circumstances, including the mitigating ones previously identified and the restrictive terms Mr. R.S.C. has fully complied with for a year, a community disposition in the form of a conditional sentence of imprisonment of 14 months is appropriate for the February 9, 2005 conviction for impaired driving causing bodily harm. This will be followed by a period of probation of three years. The terms will be identical to that of the curative discharge. [Emphasis added.]

Discussion

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

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

[41] Like the sentencing judge, I am of the view the purpose of s. 730(4) is permissive. It permits a court to impose "any sentence that could have been imposed" on the offender at the time of the discharge, just as s. 733.2(5)(d) permits

a court to impose "any sentence that could have been imposed if the passing of sentence had not been suspended."

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

Application to Mr. Blanchard

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

[44] Its focus is on the alleged failure of the sentencing judge to recognize the overriding importance of deterrence, both specific and general. In Crown counsel's view, the highest provincial sentence would fit the offender and his crime, and take into proper account the other sentences he received at the time of his discharge since served. Moreover, Crown counsel submits, two years is the sentence the respondent would have received for the impaired driving offence had he been convicted and sentenced at that time.

[45] In my view, the Crown has not established an error that would permit this Court to intervene with a sentence that does not substantially and markedly depart from the sentences customarily imposed for similar offenders committing similar crimes in the Yukon. My reading of his reasons persuades me that Veale J. came to Mr. Blanchard's sentencing with appropriate respect for the sentencing principles,

balanced the need for denunciation and deterrence with the longer term interests of the community and arrived at a sentence within a reasonable range supported by the evidence placed before him at the sentencing hearing. I would not interfere with it.

[46] I begin by noting that a conditional sentence was not available to Mr. Blanchard because the Crown gave him notice that it intended to seek a greater penalty. The second point is that the trial judge did not err when he applied the ordinary principles of sentencing set down in ss. 718, 718.1, 718.2, and 718.3 of the *Criminal Code*. Thirdly, while the trial judge's explanation for the sentence is brief, it must be read in conjunction with his reasons for revoking the curative discharge and with the reasons he gave in dealing with the impaired driving charge commencing in April 2005. I propose to review somewhat summarily that history in an attempt to show the trial judge's application of the sentencing provisions of the *Criminal Code* to Mr. Blanchard in the context of the process the Yukon courts have developed to deal with the problems driving by chronic alcoholics creates in their small isolated communities as well as in Whitehorse. These communities are not well-served by public transportation.

[47] At the time of the offence in September 2003, the respondent was a 39-year-old chronic alcoholic with 10 alcohol-related driving offences between 1980 and 2002 as well as five for driving while prohibited between 1992 and 2002. On the morning of 29 September 2003, while under a five-year driving prohibition imposed in December 1999, having drunk too much vodka, he got keys to a pickup at the equipment yard in Pelly Crossing, picked up two fellow workers and drove to work. When, around noon, he got the pickup stuck in a chain link fence, the manager of the capital works department for the Selkirk First Nation responsible for the truck took the keys from him. Undeterred, the respondent returned to the yard, entered a 3/4 ton truck with a flatbed also owned by the Selkirk First Nation, and drove it erratically back to the worksite. As he was crossing the Pelly River bridge, again with passengers, the truck's passenger-side mirror struck a young cyclist, knocking her into the bridge's guardrail. Her injuries were minor. Four hours after the accident, his

breathalyzer reading was 270 mg of alcohol per 100 mL of blood. As a result, he was arrested when he returned to the worksite and charged with dangerous driving, driving while impaired, and driving while disqualified.

[48] Since that day, the respondent's life has been subject to strict control by provincial authorities, either in custody or in the community. While on bail awaiting trial, the respondent took a treatment programme, remained sober for seven months, relapsed, and then took a 28-day programme in January 2005 at the direction of his bail supervisor.

[49] On 16 February 2005, he was found guilty of dangerous driving and impaired driving following a trial, and convicted on two charges he did not contest: driving while prohibited and consuming alcohol contrary to a probation order made 19 June 2002. The trial judge remanded him in custody to await sentence: 2005 YKSC 10. On 15 April 2005, the trial judge found the respondent's need for curative treatment was great and released him on bail so he might prepare an application and be assessed in the community for a curative discharge: 2005 YKSC 22. Crown counsel expressed some concerns, but did not oppose the application. The trial judge's reasons (at paras. 8-12) are instructive:

> [8] His proposed release is not without risk. According to the LSI - R risk assessment tool, he has a moderate risk of reoffending. He has a poor record of complying with court orders. However, he has taken responsibility for his actions and offered some remorse. He has yet to grasp that his alcoholism is his responsibility and that it can result in injuring or killing people if he gets behind the wheel of an automobile.
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> [9] He has been sober since November 24, 2004, under a structured environment. He has met with Dr. de la Mare, who has a great deal of experience with assessing suitability for curative discharges. Dr. de la Mare described Mr. Blanchard as having no evidence of recent alcohol use. He states that it is necessary to assess Mr. Blanchard's ability to function at a job and in society before he can provide the Court with an assessment of Mr. Blanchard's suitability for a curative discharge. He also indicated that having a spouse who drinks makes recovery difficult, as it requires major lifestyle changes. He described Mr. Blanchard as being totally out of control when he drinks. Dr. de la Mare will be able to provide an opinion on Mr. Blanchard's suitability by November 2005.

> [10] Mr. Blanchard has potential employment doing siding for residential houses. The employment could last until the Fall.
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> [11] The curative discharge provision of the *Criminal Code* is not restricted to those with less extensive criminal records. In fact, the repeat offender may be a suitable candidate because of his chronic alcoholism. The underlying assumption is that curative treatment may offer more hope for rehabilitation than a long period of incarceration which does not address the underlying causes of alcoholism nor provide for a plan on release from prison. Curative treatment does offer the hope of Mr. Blanchard taking control of his life and ending his cycle of alcoholism and incarceration.
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> [12] I have no concern about Mr. Blanchard's attendance in court. The issue is the protection and safety of the public while he is awaiting sentence. That can only be addressed by release conditions that are strict and enforced. The potential for rehabilitation must be given a chance but the public understandably has no tolerance for releasing alcoholics without strict terms and conditions. It is important that Mr. Blanchard have a support system that includes Dr. de la Mare, an alcohol counsellor, an Alcoholic Anonymous sponsor, and his employer as well as his Bail Supervisor. I order the Bail Supervisor to deliver a copy of these release terms to Dr. de la Mare, Tracy Korotash, J.R. Ray, Gilbert Trudeau and his sponsor at Alcoholics Anonymous. It is also a condition of this release order that the Bail Supervisor, Shayne King, approve the residence or any change of residence by Mr. Blanchard.
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> [Emphasis added.]

[50] The release conditions included abstention from alcohol consumption, submission to tests as ordered, attendance for treatment as directed, attendance at Alcoholics Anonymous twice a week, not to drive a motor vehicle, a curfew from 9:00 p.m. to 7:00 a.m., stay away from Pelly Crossing, and report to his doctor as required. The sentencing was adjourned to 4 October 2005 to fix a date for the sentencing hearing.

[51] That hearing occurred on 6 February 2006. At the sentencing hearing, Crown counsel did not oppose a curative discharge on the impaired driving charge in addition to a three-year probation order with conditions much like those contained in the earlier release orders. The Crown sought an 18-month conditional sentence for the remaining offences (12 months for dangerous driving; six months for driving while prohibited) and 90 days concurrent for consuming alcohol contrary to the probation order, for an effective sentence of four to four-and-one-half years. The

respondent sought a conditional discharge on the dangerous driving charge and time served on the other two offences.

[52] The trial judge imposed a global conditional sentence of 15 months (12 months for dangerous driving and three months for driving while prohibited and three months concurrent for consuming alcohol while prohibited), after crediting the respondent with three months for the two months he had spent in pre-sentence custody, and granted a curative discharge on the impaired driving conviction with a three-year probation order on much the same conditions as in the earlier release orders. The conditional sentence was to be followed by a probation order in the same terms: 2006 YKSC 35.

[53] Three months later, the respondent was found outside his residence just after 11:00 p.m. in breach of his curfew. (He had gone nearby to the home of his boss to get some moose meat and talk about employment matters and was observed returning to his house by probation officers who had just been to his house to do a curfew check.) In compliance with an agreement he reached with his sentence supervisor that evening, he made arrangements for the care of his daughter who lived with him and turned himself in on April 27. On 4 May 2006, Gower J. acceded to both counsels' submission that no further action be taken. He found the seven days in custody sufficient punishment. Mr. Blanchard had accepted full responsibility for this minor breach: 2006 YKSC 34. He was released.

[54] Further breaches resulted in the suspension of the conditional sentence on 16 February 2007 for 21 days and its termination on 8 May 2007 under s. 742.6(9)(d) of the *Criminal Code*. The respondent served the remaining 14 days of that conditional sentence intermittently on weekends. A ten-year driving prohibition followed that termination.

[55] Between 23 October 2007 and 9 June 2008, more breaches of conditions occurred (abstention, curfew, reporting, treatment, blood testing, appear in court). Mr. Blanchard was last employed in December 2007. He was taken into custody on 11 June 2008 and on 22 August 2008 sentenced globally by Gower J. on five counts

of breaching his probation order to four months time served concurrent and 30 days time served consecutive. Those offences (under s. 733.1(1) of the *Criminal Code*) formed the basis of the Crown's revocation application that was heard on 18 December 2008. After hearing from the respondent's doctor and probation supervisor, the trial judge concluded that the "conditions that led to the granting of the curative discharge have been substantially non-existent for the past year" and "his early success ... has been substantially eroded." On 23 January 2009, eight days before its expiry, he granted the revocation (2009 YKSC 3), explaining, at paras. 66-68:

> [66] To be fair to Mr. Blanchard, he has recommitted to sobriety recently and he has not committed a new substantive drinking and driving offence. But a curative discharge must, to be in the public interest, be complied with, excepting some isolated slips. While Mr. Blanchard's non-compliance cannot be compared to Arthur Joe's disappearance in *R. v. Arthur Frank Joe*, the effect of his breaches has been a breakdown of the essential conditions of reporting and being treated as ordered. These conditions are essential to protect the public interest. In my view, the curative discharge has not been a success.
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> [67] The fact that Mr. Blanchard's curative discharge would expire in the normal course on February 6, 2009, would arguably support the natural expiry without revocation. But the reality is that the curative discharge has not been functioning since December 2007, and has been subject to repeated breaches culminating with serious drinking episodes in the Fall of 2008. In addition, his employment, which was crucial to the original curative discharge, no longer exists. No evidence was led to explain the lack of employment and I infer that his drinking was certainly a factor. He did not present any employment prospects except for possible employment in Pelly Crossing with no evidence of a plan, community support or treatment. This prospect was not considered viable by his probation officer.
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> [68] I conclude that Mr. Blanchard's curative discharge should be revoked, as it has not been complied with for the better part of a year and is no longer in the public interest.

[56] He then sentenced the respondent to the statutory minimum in the circumstances: imprisonment for three months to be followed by three years under a strict condition probation order. He explained the sentence at paras. 69-73:

> [69] I interpret the revocation section as being discretionary both as to whether revocation is required and to the sentence that is appropriate. Mr. Blanchard has been under a recognizance or probation order for a period

> of approximately five years. His breaches have occurred in the latter half of the probation order. He has been sentenced to 18 months served in the community from offences arising out of the same original incident.
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> [70] His long record of drinking and driving offences is an aggravating factor. The fact that he caused minor injury to a child is also aggravating.
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> [71] He should not be punished for his failure to live up to the conditions of his curative discharge as he has already been sentenced for those breaches.
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> [72] I am not of the view that a long jail sentence will benefit Mr. Blanchard or be in the public interest. His criminal behaviour arises from an addiction to alcohol and he alone must conclude that drinking alcohol is not an option for him.
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> [73] The appropriate sentence, in all circumstances, is to incarcerate Mr. Blanchard for 90 days in jail to be followed by probation for a period of two years. This period of probation is required to supervise and assist Mr. Blanchard when released from jail. ...

[57] Important to the trial judge's reasoning would have been the fact the respondent had not been found in control of a motor vehicle since September 2003 as well as the evidence of Dr. de La Mare he had summarized earlier in his reasons at paras. 30-31:

> [30] Dr. de La Mare testified that in his experience, jail terms of three months can be useful to detoxify alcoholics, but longer jail terms are destructive because they take the offender out of the community and contribute to family breakdown and financial problems. He gives this opinion from a perspective of ten years as a physician at the Whitehorse Correction Centre, specializing in alcohol addiction.
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> [31] Dr. de La Mare does not believe that Mr. Blanchard has been drinking and driving, but he acknowledges that it is a serious concern for the safety of the public and for that reason, he favours the imposition of short, three month jail terms to control Mr. Blanchard when he relapses. Dr. de La Mare is still optimistic that Mr. Blanchard has an 80% chance of succeeding to become alcohol-free. He testified that continued employment is still critical for that successful outcome, as a job provides confidence and improved self-esteem.
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> [Emphasis added.]

[58] The trial judge noted that the respondent's probation supervisor, while pessimistic about the respondent's ability to remain sober, was prepared to continue working with him. The respondent had recently taken the White Bison program, embraced the Alcoholics Anonymous philosophy and sponsorship previously

resisted, and apparently not driven a vehicle during his curative discharge. He had been sober since his last detoxification ended on November 5 or 6, 2008.

Disposition

[59] It follows from these reasons and my conclusion at para. 45 that I would dismiss the appeal.

The Honourable Madam Justice Huddart

I Agree:

The Honourable Mr. Justice Donald

I Agree:

The Honourable Mr. Justice Groberman