Citation: *R.* v. *Charlie*, 2012 YKTC 5

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Docket: 10-10007
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Registry: Watson Lake
Heard: Whitehorse

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

REGINA

v.

FRANKLIN CHARLIE (Jr)

Appearances:

Terri Nguyen — Counsel for the Crown
Malcolm Campbell — Counsel for the Defence

REASONS FOR SENTENCING

[1] LILLES T.C.J. (Oral): This is the matter of Franklin Charlie Jr. Franklin Charlie Jr. is a 26 year-old Aboriginal man from the Yukon community of Ross River. He has pled guilty to the following charges:

1. On May 12, 2010, in Whitehorse, robbery, an offence contrary to s. 344(b) of the *Criminal Code*: armed with a stick, he stole some money, beer and car keys from Mr. John Lewis McPhee;
2. On August 30, 2010, he failed to attend Territorial Court in Whitehorse, as required by his recognizance, an offence contrary to s. 145(2) of the

Criminal Code; and

3. On September 18, 2010, in Ross River, he failed to abstain from the consumption of alcohol as required by his recognizance, contrary to s. 145(2) of the *Criminal Code*.

[2] The circumstances of the two s. 145(2) charges are self-explanatory. I am grateful to counsel for filing an Agreed Statement of Facts regarding the charge contrary to s. 344(b). That statement reads as follows:

1. On or about May 12, 2010 the Accused was at a party with Harley DICK ("Dick") and Donevan DICKSON ("Dickson") among others. The three ran out of alcohol. The Accused came up with a plan to "hold up" John Lewis McPHEE ("McPhee").

2. The three drove near McPhee's residence on Dickson's ATV. Once there, the Accused pick up a dry tree limb and went to the door of the residence, where he knocked on the door.

3. McPhee, thinking that it was a friend who had arrived, opened the door. The Accused entered the residence carrying the tree limb. McPhee and the Accused wrestled for the tree limb and the Accused overcame McPhee's efforts. During the struggle, the Accused yelled to a second male for help but that male did not assist or enter the residence. McPhee was struck twice with the tree limb, scratching his face and arm.

4. The Accused threatened to kill McPhee, demanding money and alcohol from him.

5. McPhee gave the Accused $30 and pointed out where his alcohol was kept. The Accused then told McPhee to go to his bedroom and followed McPhee to the bedroom. Once there, the accused demanded the keys to McPhee's vehicle.

6. McPhee told the Accused that the keys were in the kitchen of the residence. The Accused then ordered McPhee to retrieve the keys and return to his room. Once back in the bedroom, the Accused told McPhee to stay in the room and that if McPhee called police the Accused would return to kill him.

7. McPhee stayed in his bedroom until he could no longer hear anyone in the house, then called RCMP.
8. A search by RCMP did not immediately discover the Accused or McPhee's missing vehicle. The vehicle was located later in the evening of May 12, 2010 near Albert Creek, not far from Watson Lake.
9. The robbery complete, the Accused gave Dick several cans of beer and sped off in McPhee's vehicle, leaving Dick and Dickson to leave on the ATV. The three met later that day, driving the car as far as Albert Creek. The Accused had stated he intended to go to Vancouver but the car had a flat and skidded into the ditch where it was later located.
10. The Accused was arrested in the early morning hours of May 13, 2010.

[3] Mr. McPhee's victim impact statement indicated that he was not seriously injured in the altercation with Mr. Charlie, just some "nicks and bruises." However, the attack clearly had a significant emotional and psychological impact, as he has had trouble sleeping and it has affected his personality. His car, which was taken by Mr. Charlie, was damaged so severely that Mr. McPhee could not afford to repair it, so he sold it for $500. He now has to rely on taxis and family members to take him to doctor's appointments in Whitehorse.

[4] This attack on a 50-year-old frail man in his home can be properly described as a "home invasion." It appears to be "premeditated." Mr. Charlie expected Mr. McPhee to be at home and entered the house carrying a stick, a weapon, in order to rob him. Based on previous court decisions and Mr. Charlie's criminal record, a sentence of five years incarceration in a penitentiary would not be out of line.

[5] Mr. Charlie's personal circumstances require the Court to reconsider the appropriateness of the sentencing precedents filed by the Crown. To that end, I have had the benefit of a detailed "*Gladue* Report" prepared by Ms. Caroline Buckshot, a

comprehensive FAS evaluation by MediGene Services Inc., and an updated pre-sentence report from Mr. Duane Esler.

Information from the *Gladue* Report:

[6] Mr. Charlie is a status member of the Kaska Nation. He is from Ross River, Yukon, a remote village with a summer population of 450, of which 90 percent are of aboriginal descent. Mr. Charlie's parents were six years old when they were taken by the Indian Agents, along with other children in the community, to residential school. The parents of these children had little choice in the matter, as they were threatened with the loss of their rations if they did not cooperate. At the same time, they were offered $6 for each child that was taken to the residential school. Mr. Charlie's parents' recollections are recorded in the *Gladue* Report, beginning at page 6 as follows:

> Mr. Charlie Jr.'s parents were children who were taken by the Indian Agents to residential school. Mr. Franklin Sr. remembered being just a very young child and feeling very scared because he did not want to leave his family and get on the big canvas-covered truck. He was forced to get in the back of the canvas-covered truck with other little children like cattle. When they arrived (to) [sic] at the school it was night time and he wanted to stay with his sister. He was pushed in a different direction and he did not understand. He was punished for speaking in his own Kaska language, and if he was caught talking to others from his village he was strapped. He recalled being strapped three to four times a day and he did not understand why. It was some time before he learned the English language.
>
> Mr. Charlie Sr., father of Franklin Charlie Jr., was in Selkirk Residential School a Baptist Mission School from age six until he was fifteen years old. He recalled having to live with very stringent rules, he could not talk to others from his village, he was forced to pray "like hell", and he was sexually and physically abused. He remembered the older kids taking all the food that was provided and the younger kids "went hungry". In 1960 he went to Yukon Hall for two years; however, he was very angry at the world as a result of his experience in residential school. When he returned to Ross River, he went to trade school for a year and became a journeyman carpenter. He started to drink alcohol at age fifteen and quit

> drinking in February 9, 1986 almost a year after his son Franklin Jr. was born. He drank to forget the experience he had at residential school. He participated in Cross Roads Treatment Centre to address his alcoholism and issues of residential school. He needed to utilize the services of a psychiatrist two or three times before he was successful in walking the red road of sobriety. He has been alcohol free for twenty-five years.

[7] Franklin Charlie's mother, Nora Ladue, was also taken to residential school.

> Ms. Nora Ladue is the mother of Franklin Charlie Jr. Ms. Ladue shared her experience in residential school was filled with unpleasant memories. She was in Lower Post Residential School from age six until she was fourteen years. Her first memories were being very frightened, lonely and she cried for her parents. During those years in school, she was physically and sexually abused. She was allowed to go home to Watson Lake in the summers. Sadly, her parents separated while she was at school and when she returned home she lived with her mother and four brothers. She was fourteen years old when she started to drink alcohol and rebelled at anything and everything. She was sixteen years old when she moved to Ross River to live with her father who was a violent alcoholic. She met and lived common-law with Franklin Charlie Sr. and they had three children, Franklin Jr. (26), Maureen (38) and Celine (29). Ms. Ladue drank alcohol while pregnant with her children; as a result, Maureen and Franklin were most impacted with Fetal Alcohol Syndrome, (FAS).

[8] Ms. Ladue attended several residential treatment programs before she managed to maintain sobriety. She has now been alcohol free for 25 years. Prior to obtaining sobriety, her children were apprehended by the Ministry of Children and Family Services. Ms. Ladue offered the opinion that 90 percent of the second generation of residential school survivors in Ross River have been impacted with FAS. Although this is a subjective opinion on her part, the Territorial Court's experience sitting in Ross River suggests that the rate of FASD in that community is very high.

[9] This history of Franklin Charlie's family is important because it identifies a direct link between the colonization of the Yukon and the government's residential school

policies to the removal of children from their families into abusive environments for extended periods of time, the absence of parenting skills as a result of the residential school functioning as an inadequate parent, and their subsequent reliance on alcohol when returned to the communities. Franklin Charlie's FASD is the direct result of these policies of the Federal Government, as implemented by the local Federal Indian Agent. Ironically, it is the Federal Government who, today, is prosecuting Mr. Franklin Charlie for the offences he has committed as a victim of maternal alcohol consumption.

[10] This connection between the residential school system and the social problems in aboriginal communities today was recognized in Prime Minister Harper's apology on behalf of the Canadian Government on June 11, 2008. While it was directed to the former residents of the residential school system, it stated:

> … the consequences of the Indian residential schools policy were profoundly negative and that this policy has had a lasting and damaging impact on aboriginal culture, heritage and language. … The legacy of Indian residential schools has contributed to social problems that continue to exist in many communities today.

What is FASD?

[11] FASD is an acronym for Fetal Alcohol Spectrum Disorder. Alcohol abuse, including maternal alcohol consumption, was a significant social problem experienced by the Indian residential school students who returned to their village of Ross River. A severe form of mental retardation, now referred to as FASD, was a direct result of this maternal alcohol consumption. Franklin Charlie is only one of many children of that generation who now suffer from this disability.

[12] In an earlier decision, *R.* v. *Harper*, 2009 YKTC 18, this Court summarized

information reported in the National Conference: Access to Justice for Individuals with FASD held in Whitehorse, Yukon, in September, 2008. The following information is taken from that report and is worthwhile highlighting again today in order to understand what FASD is.

1. FASD is one of the leading causes of mental retardation, developmental and cognitive disabilities in Canada. It is entirely preventable. Approximately 0.9/100 people from the general population have FASD. Rates of FASD are higher in areas where alcohol abuse and poverty are widespread.

2. The person with FASD is entirely blameless - an innocent victim of maternal alcohol use during pregnancy. FASD can affect every part of the developing brain. This can result in problems with learning, memory, storage and retrieval of information, adaptive behaviour, attention, impulse control, speech and language abilities, motor development, reasoning, and problem solving. Approximately half of individuals with FASD meet standard criteria for mental retardation (IQ less than 70). The brain abnormalities associated with FASD are different for every person with this disability.

3. Improving access to justice for individuals with FASD requires a better understanding of this disability and a concerted effort to keep FASD individuals out of the justice system. The justice system should not be used as a substitute for social services and supports for these most vulnerable citizens.

4. FASD-affected individuals can appear in the justice system as victims, witnesses and offenders. Most are involved in the child welfare system at an early age and for prolonged periods.

5. FASD-affected individuals do not do well in school or in society generally. By the time they reach adulthood they have often exhausted and alienated their family members. Out on their own, a multitude of factors combine to result in social isolation, poor job performance, poverty, mental and physical health problems, homelessness, victimization and involvement in the criminal justice system.

6. Given the stringent criteria associated with defences of “Not Criminally Responsible due to Mental Disorder” and “Unfit to Stand Trial” in the *Criminal Code*, most individuals with FASD do not meet the thresholds. Instead, they are processed as fully responsible individuals with handicaps that are sometimes viewed by sentencing judges as mitigating, on other

occasions as aggravating.

Mr. Franklin Charlie's FASD:

[13] The report from MediGene is 25 pages long and includes a detailed Psycho-Educational Assessment. In order to fully appreciate the breadth and depth of Mr. Charlie's limitations, the report must be considered in its entirety. For the purposes of this sentencing hearing, I have set out some of the more important observations and conclusions set out in the report.

- Although he has some mild evidence of FAS facial features, Mr. Charlie exhibits no evidence of growth failure. His normal appearance deceives people into assuming that his cognitive functioning is better than it actually is.
- His formal diagnosis is "static encephalopathy, alcohol exposed," which means he suffers from FASD.
- He has exhibited severe behavioural and learning issues since he was a child, which has resulted in unstable living placements, educational opportunities, social difficulties and ongoing problems with the law. His cognitive deficiencies are exacerbated by his significant addiction issues.
- Mr. Charlie was diagnosed with ADHD as a child, and it is likely that this condition is secondary to his brain dysfunction and thus will not respond to typical ADHD protocols.
- Mr. Charlie has "pockets of skills" within his underlying brain dysfunction. It is important to identify and build on his strengths in a concrete way in order to overcome his areas of needs.

- Mr. Charlie's general Full Scale Intelligence Quotient (FSIQ) is 61, indicating "Extremely Low" range of intellectual functioning.
- Mr. Charlie is a concrete thinker with limited reasoning skills. He can only deal with the exact literal information provided to him and he struggles to read into a situation or idea. He can only process a small amount of information at a time and does not understand abstract or complex concepts. His answers and decisions tend to be very egocentric and based on what is immediately in front of him or his immediate needs. He has limited understanding of the big picture or the impact of his answers or behaviours and gives little to no thought to the link between concepts, ideas or outcomes. Mr. Charlie often misinterprets dialogues and situations, which leads to significant confusion and frustration, which results in excessive emotional and behavioural reactions.
- As indicated in many reports in his file, he needs increased structure, routine and direction.
- Expectations and interactions must be very concrete in nature. He cannot transfer generalized skills, infer meaning, reason through abstract scenarios or use deductive or inductive reasoning for problem solving.
- Keep concepts or tasks as simple as possible. This is also relevant to any orders the Court may make.
- Mr. Charlie demonstrates severe deficits in all areas of memory: short term, rote memory, working memory, visual memory and long term memory. He will require external cues and prompts to deal with new

information and to retrieve what information he may have stored in memory.

- Do not be fooled by Mr. Charlie's ability to simply repeat what he has heard. Parroting back information does not require thinking.
- Mr. Charlie demonstrated significant deficits in information processing and it takes him significantly longer to figure out what has been said and to come up with an appropriate response.
- Mr. Charlie is essentially illiterate. His reading and writing skills are at a Grade 2 level. He does not have the skills to manage any of the reading requirements of daily living.
- His math skills are slightly stronger than the Grade 3 level. He has not memorized any of the basic facts but understands the basic concepts of addition and subtraction. He can tell time to the half hour.
- Mr. Charlie does not mind being in prison as he feels safe, the rules are simple and he knows what he has to do every day. This provides a clear indication of the direction, structure and supervision he will need when he is released if he is to come close to meeting society's expectations.
- Franklin Charlie is a young man with a severe disability. He does not have the capacity to successfully live as an independent adult. He requires placement in a living situation equipped to manage complex developmentally delayed adults.
- He does not have capacity to manage his personal needs. His parents and his First Nation should explore options related to the *Public Guardian*

and Trustee Act, SY 2003, c. 21, Schedule C, and the *Adult Protection and Decision Making Act,* SY 2003, c. 21, Schedule A. He would benefit from continued involvement with the Fetal Alcohol Syndrome Society of the Yukon (FASSY).

- In general, Franklin presents as a person aged ten to 12 years, much younger than his 26 years. To build future success and reduce behaviours, language, expectations, responsibilities, accountability, and supervision should be altered to the level of a ten to 12-year-old.
- Mr. Charlie does not have the cognitive ability to respond to traditional therapy. He will respond better to concrete supports in his own environment.
- He is a follower and can be easily led. He is at very high risk of being victimized by others. His social interactions need to be monitored to prevent others from using him as a pawn or taking advantage of him.
- Franklin has significant problems with substance abuse. Any limited cognitive skills that he has when sober become non-existent when he is drinking. Managing his substance abuse when he is released will be critical. Addictions counselling based on cognitive principles will not work for him. He should simply be made to understand that he cannot drink.
- He will do well in a structured and supervised treatment program (including prison), but once he is released, he will quickly return to his past habits and friends, unless there is a dramatic change in his day-to-day situation.

- FASD is not an excuse for antisocial behaviour. Franklin should be held accountable for his behaviours, utilizing relevant and meaningful consequences.

Sentencing:

Seriousness of Offence

[14] The predicate offence, that of robbery, occurred on August 30, 2010, and is a serious offence for which the *Criminal Code* provides a maximum penalty of life imprisonment. Where a “home invasion” is involved, penitentiary terms in the range of four to eight years are not uncommon. In this case, a tree branch was used as a “weapon.” The victim was known to the accused as an older, frail and vulnerable individual who lived alone. A small amount of money, some beer and the victim’s car keys were stolen. The major financial loss entailed damage to the car, which was recovered. The trauma to the victim was significant and will be ongoing.

[15] The Agreed Statement of Facts indicates that three individuals, including Mr. Charlie, were partying and ran out of alcohol. It is stated that Mr. Charlie came up with the plan to rob Mr. McPhee. I was not advised of the personal circumstances of the other two individuals, who were clever enough to remain outside Mr. McPhee’s residence when Mr. Charlie entered. I note that the FAS assessment of Mr. Charlie stated that he was a follower, not a leader, and that he is easily influenced by others due to his limited cognitive abilities.

[16] While I consider myself bound by the Agreed Statement of Facts, I place less weight on Mr. Charlie’s leadership role for the purpose of sentencing.

[17] Mr. Charlie has also pled guilty to two charges of breaching court orders: August 30, 2010, failing to attend court, s. 145(2) of the *Criminal Code*, and September 18, 2010, breach of recognizance by consuming alcohol, contrary to s. 145(3) of the *Criminal Code*.

Criminal Record

[18] Mr. Charlie has both a youth and adult criminal record consisting of 26 convictions. There are nine breaches of court orders, four break and enters, and three possession of stolen property offences. In 2008, he disposed of 14 charges at one sentencing hearing, and received a penitentiary sentence of two years plus one day. He was 23 years old at the time.

[19] In light of the FAS assessment currently before the Court, it does not surprise me to hear that his parole was revoked five times.

[20] Mr. Charlie was released from his federal sentence on April 9, 2010. The robbery which occurred on May 12, 2010, was less than five weeks later.

[21] His criminal record is consistent with his FAS assessment. The home invasion/robbery of Mr. McPhee was Mr. Charlie's first violent offence.

Sentencing Principles

The *Criminal Code* provides general guidance for sentencing of offenders.

> PURPOSE.
>
> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one

or more of the following objectives:

(a) to denounce unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

OTHER SENTENCING PRINCIPLES.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or
(v) evidence that the offence was a terrorism offence,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[22] The principles and purposes set out in the *Criminal Code* presume that accused individuals are fully competent. Individuals with extreme mental disorders are dealt with pursuant to the provisions of s. 672 of the *Code*. It is only relatively recently that courts have begun to “struggle” with the application of these sentencing principles to FASD affected individuals who have severe cognitive impairments that fall short of the requirements of “Not Criminally Responsible” or “Not Fit to Stand Trial” as defined in s. 672 of the *Code*.

[23] A number of recent Yukon cases have considered the application of the sentencing principles found in s. 718 of the *Criminal Code* to individuals with significant cognitive impairments due to FASD: See *R.* v. *Harper*, 2009 YKTC 18; *R.* v. *Quash*, 2009 YKTC 54; *R.* v. *Elias*, 2009 YKTC 59; *R.* v. *D.J.M.*, [2005] Y.J. 18. These were all serious offences. In all of these cases, the Court concluded that the cognitive impairment of the accused reduced “moral blameworthiness” and resulted in a reduction of the sentence that would have otherwise been imposed.

<u>Principle of Proportionality</u>

[24] The fundamental principle of sentencing is set out in s. 718.1 of the *Code*. It requires that a sentence “be proportionate to the gravity of the offence and the degree of responsibility of the offender”. This two-pronged proportionality consideration is critical to the Canadian understanding of fundamental justice and has a recognized constitutional dimension (*R.* v. *C.A.M.*, [1996] 1 S.C.R. 500).

[25] The proportionality principle sets an internal limitation on sentences, in that:

> … the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. (*R.* v. *Nasogaluak*, 2010 SCC 6, para. 42).

[26] Accordingly, a just sentence is one that speaks out against the offence but, at the same time, punishes the offender no more than is necessary. (*Nasogaluak*, para. 42).

[27] In *Harper*, *supra*, this court noted the difficulty courts can have in reconciling the two aspects of the proportionality principle. This is nowhere more true than in the case of offenders with significant intellectual deficits. While, taken alone, Mr. Charlie's offence is serious enough to warrant a significant time in jail, even penitentiary time, this assessment must be tempered by the fact that he is unable to process and understand the world in the way that most of us do.

[28] Given the severe nature of his disability, Mr. Charlie effectively comprehends the world as a ten to 12-year-old child would. In order to function, he needs significant structure and direction. He is easily overwhelmed and, additionally, he has difficulty tempering or regulating his behaviour. This is not his fault, but a direct result of alcohol-related brain dysfunction. Mr. Charlie's "moral blameworthiness" is therefore significantly less due to his cognitive limitations.

[29] In *Harper*, *supra*, the Court considered the difficulty of applying the sentencing principles of specific deterrence and denunciation to accused persons suffering from FASD.

[43] There are additional sentencing principles that call for a reduction of Mr. Harper's sentence. The role of specific deterrence in sentencing FASD-affected offenders decreases in proportion to the severity of the offender's cognitive deficits. Specific deterrence presupposes that an offender can make the connection between the sanction imposed by the court and the wrongful act, remember that connection, and then generalize the probability of punishment to other unlawful acts. The assessment report by Medigene Services suggests that Mr. Harper's cognitive deficits are severe enough to limit or even preclude the brain functions inherent in the operation of specific deterrence.

[44] When we make decisions, we use strategies derived from previous experience and apply that experience in a flexible way to different situations. Our past experiences guide our thinking and provide a basis for our choices. Decision making is governed by the ability to generalize. Mr. Harper, by way of contrast, cannot generalize or read into a situation or idea.

[45] Memory is the ability to store information for later use and the capacity to retain and recall that past experience as required. A functional memory is essential for critical thinking in all areas of life: understanding truth, making decisions, motivating oneself to make changes, delaying gratification, and problem solving. Mr. Harper's memory is so impaired that he is unable to retain information in his short term memory long enough to encode it into long term memory. As a result, he has significant problems with cause and effect relationships. He is a person who may repeatedly touch a hot stove because he does not remember that it burned him when he touched it the last time.

[46] I have concluded that specific deterrence should not be a factor in sentencing Mr. Harper.

[47] Denunciation is an important factor in sentencing serious cases. It sends a message that certain kinds of conduct are considered by society to be abhorrent. Sexual contact with a 13-year old girl by a 35-year old man constitutes abhorrent conduct. General deterrence is also a part of s. 718, and it generally indicates to other would-be offenders that committing the same offence will lead to serious consequences. Should denunciation and general deterrence be a major factor in sentencing an individual with the cognitive disabilities exhibited by Mr. Harper? In this case should we use Mr. Harper as a whipping boy by imposing a gaol sentence of greater length on him in order to deter others who should and are capable of knowing better? I think not. Mr. Harper is an innocent victim of the FASD visited on him by maternal alcohol consumption during pregnancy. As stated in *R.* v. *Abou*, [1995] B.C.J. No. 1096 (Prov. Ct.), "it is simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person".

> To do so would invite a Charter remedy pursuant to s. 12 of the *Canadian Charter of Rights and Freedoms* that forbids cruel and unusual punishment.

[30] It is worth mentioning that Mr. Harper's FASD assessment is very similar to that of Mr. Charlie, in many respects. As an example, Mr. Harper's FSIQ score is 59, while Mr. Charlie's is 61.

Aboriginal Considerations

[31] Mr. Charlie is Kaska. He is Aboriginal, and s. 718.2(e) of the *Criminal Code* requires that the Court pay particular attention to his circumstances when considering an appropriate sentence.

[32] It is well-known that s. 718.2(e) was enacted in 1996 as a response to the high overrepresentation of Aboriginal people in Canadian prisons. Although the provision was meant to be remedial, there is no indication that, in the 15 years since its introduction, it has had any effect on the disproportionately high numbers of Aboriginal people in our jails. If anything, the situation is worsening. In the Yukon, for example, roughly 75 percent of the inmates are Aboriginal, despite the fact that Aboriginal people make up less than 25 percent of the Yukon population (see Landry L. and Sinha M. (2008), Adult Correctional Services in Canada, 2005/6, Juristat, 28(6) (Cat. No. 85-002-XIE), Ottawa, ON: Statistics Canada; Facts 2011.

[33] A similar situation persists in the federal system. In its *Backgrounder on Aboriginal Inmates* created as part of the 2005-2006 Annual Report, the Office of the Correctional Investigator notes that despite a 12.5 percent decline in the overall number of federally incarcerated inmates between 1996 and 2004, the number of First Nations

people increased by 21.7 percent. The sobering conclusion reached was that, unchecked, "the Aboriginal population in Canada's correctional institutions could reach the 25 percent mark in less than 10 years" (see Backgrounder: Aboriginal Inmates). This seems to be borne out in the Investigator's 2009-2010 Annual Report, which indicates that 20 percent of the federal prison population was Aboriginal in that year. The statistics are more than sobering, and I note parenthetically that the government's tough on crime legislation with its increased emphasis on jail sentences will do nothing to improve the situation.

[34] *R.* v. *Gladue*, [1999] 1 S.C.R. 688, says that, when faced with a First Nations offender such as Mr. Charlie, a sentencing judge must endeavour to remedy the drastic overrepresentation of Aboriginal people in the prison population to the extent that the sentencing process allows the Court to do so (para. 64). In the words of the British Columbia Court of Appeal in *R.* v. *Ladue*, 2011 BCCA 101, para. 52:

> … we have been directed by both Parliament and the Supreme Court to consider the unique circumstances of Aboriginal people and to implement community-based sentences whenever appropriate.

In circumstances where the gravity of the offence requires a custodial sentence, that sentence may nonetheless be reduced so that the more restorative objectives of sentencing can be addressed in the community (*Gladue*, para. 79, *Ladue*, para. 53).

[35] In finding a just and appropriate sentence for Mr. Charlie, I must consider the circumstances that have brought him before the Court, both individual and systemic. In the course of my consideration of an appropriate sentence, I must ask the following questions:

> For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systematic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances? (*Gladue*, *supra*, para. 80)

[36] While not couched in terms of proportionality, these questions highlight the centrality of an individual's experience as an Aboriginal person to a determination of a fit and just proportionate sentence and again relate back to s. 718.1 of the *Criminal Code* (*R.* v. *Jacko*, 2010 ONCA 452, at para. 91).

[37] As demonstrated by the *Gladue* Report filed in this matter and as discussed earlier in this decision, Mr. Charlie's FASD is a direct result of the residential school policies of the Federal Government. There is an indisputable link between his Aboriginal status and his disability.

Conclusion:

[38] As stated in the MediGene FAS Evaluation:

> FASD is not an excuse for antisocial behaviour. Franklin should be held accountable for his behaviours and salient consequences must be provided.

This means that the consequences should be meaningful, proportionate to the seriousness of the offence and his moral blameworthiness, and reflect his experience

as an Aboriginal person. Except in those few instances where concerns relating to protection of the public overwhelm these considerations, the punitive aspect of the sentence imposed will be reduced for offenders like Mr. Charlie.

[39] I have already discussed the impact of Mr. Charlie's FASD diagnosis has on the relevant sentencing objectives. Denunciation and general deterrence are not apt, as, given Mr. Charlie's limitations, they can have little application to other members of the community. Similarly, because of his limited understanding of the big picture or the impact of his behaviours, specific deterrence will not be met by punitive sanctions.

[40] Mr. Charlie is not affected by prison as others might be. As pointed out in the FAS Assessment, he finds it a safe place with clear rules and expectations. He functions well in that setting. But it is not a rehabilitative environment for him, because the programs do not recognize and build on his strengths. As a result, after spending two years in a penitentiary, he reoffends again, almost immediately. As stated in the MediGene assessment, prison and cognitive-based programming do not contribute to specific deterrence or rehabilitation of most FASD offenders like Mr. Charlie. When he is released from prison again, he will reoffend again, unless he is provided with the supervision, structure and programming identified in his FAS Evaluation.

[41] In all of the circumstances, I sentence Mr. Charlie to a further six months in prison on the s. 344(b) charge. On the two remaining s. 145 charges, I sentence him to 30 days custody, to run concurrently. This sentence takes into account a credit of 27 months pre-trial custody calculated at the rate of 1.5, as agreed by counsel. The effective total sentence is therefore two years and nine months incarceration.

[42] It is my expectation that during the remaining time of his custodial sentence, his Probation Officer, Health and Social Services, his parents, his First Nation, FASSY, and other supporting agencies will work together to develop a treatment, supervision and support plan to take effect upon his release. It is imperative that a transition plan be put in place before he is released, and that there are responsible individuals present on his release to receive him. I am respectfully requesting that Mr. Charlie be brought back to court on March 16 at 9:00 a.m. for a review of that transition plan. It would be helpful if those individuals and agencies working with Mr. Charlie, including his parents, could be present at that time.

[43] In *R.* v. *Harper*, *supra*, this Court was advised that Mr. Harper was sexually assaulted while in the Correctional Centre. Mr. Charlie, along with all other FASD affected prisoners, require special protection and consideration when exposed to the general population in prison. They are followers and are easily manipulated and taken advantage of. The Correctional System has a legal obligation to protect vulnerable individuals like Mr. Charlie.

[44] I am also placing Mr. Charlie on probation for a period of three years. The terms of that probation order are as follows:

1. You must keep the peace and be of good behaviour. Do not do anything that will get you in trouble with the police;
2. You must come to court when the judge or your Probation Officer tells you to;

3. You must live where your Probation Officer tells you. You must tell your Probation Officer if you go to live somewhere else, change your name or change jobs;

4. You must meet with your Probation Officer in person or by telephone when he tells you. If you are going to be late or cannot make a meeting, you must telephone your Probation Officer and ask for another meeting time;

5. You will do the best you can to:

   (a) stay away from people who are drinking;

   (b) not drink any alcohol, meaning, beer, wine or liquor;

   (c) stay away from the liquor store, off-sales, and bars;

   (d) meet with counsellors when your Probation Officer tells you to;

   (e) find work or go to school;

   (f) not talk to or hang out with people your Probation Officer says that you should stay away from;

   (g) stay away from and not talk to Mr. John McPhee;

6. It is important for your Probation Officer to talk to your doctor and your counsellors. You will sign a paper that will allow your doctor and counsellors to tell your Probation Officer how you are doing;

[45] I am open to any other suggestions with respect to the probation order, so long as we are able to translate it into meaningful language. I want to hear as well whether there is anything that needs to be done by way of firearms order or DNA order.

[46] MS. NGUYEN: Yes, both, and they’re both mandatory in the circumstances.

[47] THE COURT: No issue with that?

[48] MR. CAMPBELL: They’re mandatory.

[49] THE COURT: Those orders will go as requested by Madam Crown.

[50] MS. NGUYEN: This is my concern with the probation order, and with speaking what little I was able with Maureen Charlie earlier today, Franklin seems to get into trouble when he is not with his family, not out on the land, and I think given how he found himself in trouble for the most part, as all this came about, telling him he can’t go to Watson Lake without a sober adult with him would also be useful. There are -- it’s a bigger community --

[51] THE COURT: Something about Watson Lake that it is a bigger community, closer, and lots of places to get into trouble; is that right?

[52] MS. NGUYEN: Certainly, lots of people who could influence him there as well, when he’s not around better influences.

[53] MR. CAMPBELL: That’s where Mr. McPhee is as well.

[54] THE COURT: Is it?

[55] MR. CAMPBELL: Yeah, these are Watson Lake charges.

[56] MS. NGUYEN: Yes.

[57] THE COURT: So just give me that wording again that you are proposing.

[58] MS. NGUYEN: Well, I'm not sure how to word it, but I would --

[59] THE COURT: Well, just give me the outline and then we will all work on it.

[60] MS. NGUYEN: I would suggest that you can't go to Watson Lake unless you're with a sober adult, for a visit.

[61] THE COURT: This is a little more complicated --

[62] MS. NGUYEN: Yes, and perhaps just --

[63] THE COURT: -- but let us -- no, no, what I have got here, so I am going to read it to you. Yours was fine, but I was trying to --

> 7. You must not go to Watson Lake unless you are with one of your parents or another sober adult approved by your parents or a Probation Officer.

[64] MS. NGUYEN: I think that's fine, if we can find wording that will make it clear to Franklin Charlie, and perhaps we need to just break that up into several -- you cannot go to Watson Lake unless you are with your parents or you also cannot go to Watson Lake without permission from your Bail Supervisor. If we break it up a little bit, I think it will be easier to understand for Franklin, but my concern being, right after he gets out of jail, he heads for Watson Lake, hooks up with some influences that certainly weren't positive. I know this happens.

[65] THE COURT: I think the two, listening to you:

7. You must not go to Watson Lake unless you are with one of your parents;
8. You must not go to Watson Lake unless you have permission from your Probation Officer.

[66] I assume that the Probation Officer, Duane Esler, will sit down with him and explain, "Okay, if you are going to go, you have to go with this person. This person, who you are saying is a sober person, may be sober now, but he has a reputation of getting drunk when he gets to Watson." So I think maybe just two things, and then the details can be sorted out verbally, which is probably better for him.

[67] MS. NGUYEN: Yeah, and he'll remember by the time he gets out of custody and gets on probation, so.

[68] THE COURT: Right. Anything else? I am glad you pointed that out, because now a lot of the information in the reports makes more sense to me. Watson Lake clearly is the trouble spot for him.

[69] MR. CAMPBELL: Was the keep the peace and don't do anything that will get you in trouble, was that all one condition or were those two separate conditions?

[70] THE COURT: Yes, "You must keep the peace and be of good behaviour. Do not do anything that will get you in trouble with the police."

[71] MR. CAMPBELL: That's one condition, okay. Because in other orders, it's been two, and they get two breaches for --

[72] THE COURT: No, it is one.

[73] MS. NGUYEN: I would think that if there were two breaches, they'd be *Kienapple*'d for my friend's benefit, but that's my opinion on the matter.

[74] THE COURT: So the DNA and the firearms orders will go as requested. Anything else?

[75] MS. NGUYEN: Yes, thank you.

[76] MR. CAMPBELL: Victim fine surcharge?

[77] THE COURT: I do want to emphasize one thing again, and I am looking for both counsel here to play a lead role. I have requested that there be a review towards the end of his time in custody. I am going to be here on the date that I gave. I recognize that I do not have any jurisdiction to compel that to happen. I have made those requests in the past and they have been fulfilled, and they have actually turned out to be a good benchmark; everyone comes to the review with some planning done. So to the extent that counsel can encourage the various authorities to make that happen, I would be very appreciative.

[78] MS. NGUYEN: Certainly, sir, I believe I am available at that point anyway, and continuity being the best thing for all concerned in this matter. There is the matter of the victim fine surcharges, and quite frankly, the Crown is --

[79] THE COURT: They will be waived in this particular case.

[80] MS. NGUYEN: Thank you.

[81] THE COURT: The firearms order is a ten year mandatory.

[82] MS. NGUYEN: It is a ten year mandatory, yes, and a lifetime for the additional elements.

[83] MR. CAMPBELL: What is being discussed is Mr. Charlie, because he spends a lot of time out on the land and that's a good place for him to be, he's often out pursuing traditional activities such as hunting and trapping, so a firearms prohibition is problematic, but that is mandatory and there is --

[84] THE COURT: It is mandatory; I do not have a choice. What it does mean, however, is --

[85] MR. CAMPBELL: An application.

[86] THE COURT: -- that if he is in a situation where his safety might be at risk due to being in the wilderness, he needs to be with someone who does have a firearm, but I do not have any discretion in this particular case, and in light of all the information I have heard, I am not likely to make an exception, not at this point. I have no doubt that when Franklin is sober, there is no problem at all with firearms. He has not demonstrated any problem with firearms in his record. But when he is drinking, quite frankly, as this incident clearly indicates, anything can happen, and I just do not want him to have access to a firearm, either to hurt himself or to hurt someone else. But the bottom line is, as counsel have said, I actually do not have the discretion to

make an exception because of the nature of this offence. Parliament has said, “No firearms.” This is one of those offences.

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LILLES T.C.J.