Citation: *R.* v. *Joe*, 2008 YKTC 65

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05-00550
Registry: Whitehorse

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

REGINA

v.

LARRY JOHNNIE JOE

Appearances:
Jennifer Grandy — Counsel for Crown
Edward Horembala, Q.C. — Counsel for Defence

REASONS FOR SENTENCING

[1] RUDDY T.C.J. (Oral): Larry Joe, a 59-year-old member of the Kwanlin Dun First Nation, has struggled with substance abuse for the majority of his adolescence and adult life. This is clearly reflected in his lengthy history of impaired driving offences.

[2] In December of 2005, Mr. Joe was charged with an offence for driving while impaired. This triggered a decision to enter into the ADS treatment program in April of 2006, followed by one-to-one counselling with ADS and liver testing under his doctor's supervision.

[3] As Mr. Joe was successful in maintaining sobriety and showed promise in his potential to continue addressing his addiction issues, I granted his application for a curative discharge with respect to the December 2005 offence on March 30, 2007, placing him on strict probationary conditions for a period of three years, and prohibiting him from driving for a period of five years.

[4] Unfortunately, on January 17, 2008, Mr. Joe was again charged with offences relating to an incident of driving while under the influence of alcohol. He subsequently entered early guilty pleas to one offence of driving while the concentration of alcohol in his blood exceeded the legal limit, contrary to s. 253(b), and one offence of driving while disqualified, contrary to s. 259(4) of the *Criminal Code*.

[5] Mr. Joe's sentencing hearing was set to June 5, 2008, to enable him to make preliminary efforts towards pursuing another curative discharge application.

[6] On June 4, 2008, the Crown formalized their stated intention of pursuing an application to revoke the March 2007 curative discharge by filing the requisite notice of application.

[7] The sentencing hearing, together with the hearing of Mr. Joe's curative discharge application and the Crown's revocation application, proceeded on June 5, 2008, and included the filing of a pre-sentence report, a psychological assessment, and the *viva voce* evidence of five witnesses. I reserved decision to allow time to appropriately consider the complex issues and diverse positions put before me.

[8] It should be noted that Mr. Joe voluntarily surrendered himself into custody on February 27, 2007, in anticipation of his sentencing hearing, as his surety was required to leave town for medical reasons. Upon completion of his sentencing hearing, he consented through his counsel to remain in custody pending completion of this decision.

[9] The facts with respect to the new offences are relatively unremarkable. On January 17, 2008, Mr. Joe was driving in the Kookatsoon Lake area towards the Carcross corner. An RCMP member following his vehicle noted Mr. Joe to weave into the other lane and onto the shoulder. Upon stopping Mr. Joe, the officer noted indicia of consumption and impairment, including open alcohol in the vehicle and slurred speech.

[10] Mr. Joe was given the breath demand, and ultimately provided two samples, both registering 160 milligrams per cent.

[11] At the time Mr. Joe was subject to a driving prohibition, as well as a probation order requiring him to abstain from the possession or consumption of alcohol.

[12] As noted, Mr. Joe has an extensive and related criminal record. Of the 20 entries on his record, there are 12 convictions for offences of either impaired driving, driving over the legal limit, or refusal, between 1968 and 1999. Also included within that time period are four offences for driving while disqualified, with the last occurring in 1980. There is an eight-year gap in Mr. Joe's record, followed by the curative discharge he received in March of 2007 for an additional offence of impaired driving.

[13] Clearly, Mr. Joe's criminal record is indicative of a longstanding struggle with alcohol abuse. The pre-sentence report and the psychological assessment provide a great deal of additional insight into Mr. Joe's background and current circumstances.

[14] Mr. Joe, the youngest of nine children, was raised in a functional family which enjoyed a traditional lifestyle with a livelihood based on hunting and trapping. As the youngest, Mr. Joe enjoyed the protection of his parents and older siblings. Unfortunately, at the age of eight, Mr. Joe was removed from this protective environment and placed in the residential school system. Between the ages of eight and 16 Mr. Joe attended two different residential schools, suffering prolonged sexual abuse in both schools, at the hands of two separate supervisors. Not surprisingly, the extensive sexual abuse has had a profound and lasting impact on every aspect of Mr. Joe's life.

[15] In her detailed psychological assessment, Dr. Natalie Polvi notes:

> Residential school sexual abuse has contributed to Mr. Joe's past and ongoing dysfunction. Distinct and prominent psychological sequelae of these abusive experiences include personality disorder, disturbances in interpersonal relationships, alcohol abuse, anger and aggression, significant levels of self-blame, shame, and lack of trust, depression, dissociation, intrusive memories and flashbacks, suicidal thoughts, sleep disturbance, and, finally, idiosyncratic disturbances in functioning.

[16] Each of these impacts is discussed in detail in the psychological assessment. For the purposes of this decision, the passage in which Dr. Polvi draws a direct link between Mr. Joe's alcohol abuse and the abuse he suffered in the residential school system is of particular relevance, and bears repeating.

> Mr. Joe's alcohol abuse is attributable to his residential school sexual abuse experiences. He was not exposed to alcohol in his family home prior to being sent to residential school. Although his post-residential school social context has often supported the abuse of alcohol (e.g. among his friends, within his community, and/or within common-law relationships), the origins and impetus for Mr. Joe's alcohol abuse, and the continuing major psychological factors in sustaining his alcohol abuse, are primarily the sequelae of sexual abuse. In particular, throughout his life alcohol has provided a means of blocking out the knowledge, thoughts, and feelings associated with the sexual abuse. In addition, alcohol has served as an escape from himself and provided a means to depart from his fears of rejection and criticism, social withdrawal, and shyness. Mr. Joe described himself as a different person when drinking alcohol: sociable, loud, and telling jokes. More generally, clearly Mr. Joe has used alcohol as a coping mechanism in his life. In summary, alcohol abuse has been a long term maladaptive coping mechanism by which Mr. Joe has 1) blocked out knowledge, feelings, and memories related to the residential sexual abuse and 2) released his inhibitions and preoccupations related to fears of criticism, rejection, and embarrassment as well as feelings of inadequacy and inferiority. …
>
> Overall, Mr. Joe experienced significant alcohol abuse and dependence attributable to residential school sexual abuse.

[17] It was not until November of 2006 that Mr. Joe disclosed the abuse he suffered. Since that time he has participated in the Indian residential school adjudication and compensation process. He has made efforts to address his addiction issues, and begun to recognize the connection between the sexual abuse and his abuse of alcohol. The curative discharge granted to Mr. Joe in March of 2007 was intended to support him in his ongoing efforts to address his addiction.

[18] On a more positive note, Mr. Joe has acquired a solid employment history as a truck driver in the construction industry, and he is described as a highly-qualified worker. Unfortunately, his inability to drive, and thus to work, as a result of his driving prohibition has been a source of significant stress and frustration.

[19] My task now becomes determining an appropriate sentence for the new offences before the Court, particularly in light of the fact they arose while Mr. Joe was still subject to the provisions of his curative discharge. The parties have presented widely divergent positions as to their views on an appropriate disposition of the matters before me.

[20] The Crown takes the position that the curative discharge has effectively failed and that Mr. Joe has, by virtue of his own behaviour and his prior record, disentitled himself to another chance to address his addiction within the context of a community-based disposition. Based on the case law, Crown has suggested a sentence in the range of two years less a day on the new offences. In addition, they are seeking revocation of the curative discharge and suggesting that Mr. Joe be re-sentenced on the December 2005 impaired, again within the suggested range of two years less a day.

[21] The defence not only opposes revocation of the curative discharge but asks that I grant Mr. Joe an additional curative discharge with respect to the new offence of driving while the concentration of alcohol in his blood exceeded the legal limit. With respect to the drive while disqualified, defence suggests that Mr. Joe ought to receive a custodial term reflecting the aggravating factors of Mr. Joe driving while prohibited and while subject to a curative discharge.

[22] In considering these positions, I must also consider the evidence of the five witnesses called during the sentencing hearing.

[23] Dr. Ayman Tadros has been a general practitioner since 1999, in the Yukon since June of 2005. He has been Mr. Joe's treating physician since April of 2006.

[24] Dr. Tadros provided a letter to Mr. Joe's previous counsel, dated February 23, 2007. In that letter, he confirmed Mr. Joe's sobriety since March of 2006. He indicated his support for a curative discharge, citing Mr. Joe's motivation and support system. Dr. Tadros also provided evidence at the hearing with respect to Mr. Joe's application for a curative discharge, reiterating his support.

[25] Dr. Tadros provided an additional letter, dated May 25, 2008, in which he indicates that Mr. Joe participated in liver testing on 26 occasions between March of 2006 and January 14, 2008, with 11 of those tests occurring after the granting of the curative discharge. Dr. Tadros' letter indicates that each of those tests were normal, though there was some suggestion in his *viva voce* evidence that one test in March of 2006, which he did not administer, was abnormal. Given the date, I am of the view that any abnormality in March of 2006 is of little to no relevance to the proceedings before me at present. The May 25th letter goes on to indicate that at no time did Dr. Tadros observe any indicia of consumption or impairment during any of his visits with Mr. Joe.

[26] Of concern, Dr. Tadros' letter suggests that the liver testing undergone by Mr. Joe is of limited utility in identifying isolated instances of consumption, and is really only good in detecting chronic usage. This issue was explored in greater detail during Dr. Tadros' testimony at the sentencing hearing. He confirmed that the tests provide good evidence of recent or chronic use but are of limited use in detecting isolated consumption not proximate in time. He agreed that he made no mention of the limited use of the tests at the original hearing of Mr. Joe's curative discharge application, and went on to suggest that testing should be every two weeks again.

[27] Dr. Tadros was asked his opinion on Mr. Joe's current prognosis. He noted the difficulty in assessing prognosis without current information about Mr. Joe's supports and activities, but on the information he did have he felt the prognosis was still good. He went on to agree that the prognosis would be better if Mr. Joe was able to secure employment and if he was engaged in counselling with psychologist Bill Stewart.

[28] Dr. Tadros indicated that he had three visits with Mr. Joe in February of 2008, and that Mr. Joe participated in one liver test on February 9th, which was normal. Mr. Joe did not at any time advise Dr. Tadros of his new charges. Dr. Tadros could not say for certain if he had asked Mr. Joe in any of those three visits if he had been drinking, though he indicated that it is his practice to do so. He went on to say that he does not think he did ask, as he made no notation of having done so.

[29] Dr. Tadros initially took the position that Mr. Joe's failure to disclose his drinking and consequent offence was a breach of the relationship of trust required for Dr. Tadros to continue treating Mr. Joe, and he was not prepared to continue supporting him in his curative discharge.

[30] It appears that Dr. Tadros was previously unaware of the sexual abuse suffered by Mr. Joe, his use of alcohol as a coping mechanism, and of the information contained in Mr. Joe's psychological assessment, specifically the indication that Mr. Joe suffers from Avoidant Personality Disorder, which is characterized by a preoccupation with fear of criticism, disapproval or rejection; a disorder which provides some basis for understanding Mr. Joe's failure to disclose.

[31] When Dr. Tadros was provided with this information, and asked if it changed his position with respect to continuing to treat Mr. Joe, he indicated that he would be prepared to keep Mr. Joe as a patient indefinitely, but would only continue to assist him with the requirements of the curative discharge on a short-term basis, until such time as Mr. Joe could locate an alternate physician to assist.

[32] I find this a somewhat curious position to take, particularly given Dr. Tadros' view that Mr. Joe's prognosis remains good; however, whether or not I agree with his position is of little consequence, as I am not in a position to order his continued involvement in the curative discharge.

[33] Elizabeth Janus is Mr. Joe's assigned probation officer, and thus responsible for supervising his progress on his curative discharge. She was called as a witness in these proceedings as a result of several comments included in her pre-sentence report.

[34] Overall, Ms. Janus' report and her evidence suggest that, at least up until the January 17th offence, Mr. Joe's performance on his curative discharge was positive. He attended all required appointments and complied with all requests.

[35] Notwithstanding this apparent positive progress, Ms. Janus makes several somewhat incongruous negative statements about Mr. Joe's motivation and prognosis in her pre-sentence report.

[36] Firstly, she notes that Mr. Joe advised her that the January 17th offences were the first time he had consumed alcohol since the ADS program in April of 2006. Even though Ms. Janus notes Mr. Joe to have been honest in readily admitting his culpability

for the January 17th offences, she nonetheless takes the position that it is doubtful Mr. Joe is being truthful about this being his first slip. Her apparent basis for this conclusion was the high readings, Mr. Joe's lengthy related record, and her experience that her clientele often lie about usage even when they are being tested. In her evidence, she agreed that her reasons were entirely speculative and could point to no factual basis to believe that Mr. Joe had been otherwise consuming alcohol.

[37] Ms. Janus also characterizes Mr. Joe's motivation as having waned over time. She bases this on the fact that he appeared not to be doing more than he was directed to do, and the fact that he did not increase his access to supports immediately following the January 17th offences. However, she concedes that she could have, but did not, direct him to do more. Ms. Janus also agreed that Mr. Joe's concern about the funding running out with respect to his sessions with Mr. Stewart was indicative of motivation.

[38] In my view, Mr. Joe's failure to demonstrate initiative by pursuing more than he was directed to do is entirely consist with the psychological profile provided by Dr. Polvi, and thus not necessarily indicative of a lack of motivation. I would also note that Mr. Joe has been in custody since February 27th. Given his isolated living circumstances, and lack of a driver's licence, it is not difficult to understand why he only met with his ADS counsellor, Ms. Mohamed, on two occasions between January 18th and February 27th.

[39] Ms. Janus opines that Mr. Joe is entrenched in criminal thinking, such that drinking and driving have become normalized behaviour for him. This belies the recent eight-year gap in Mr. Joe's record and is in direct contradiction to Dr. Polvi's opinion,

which I prefer, that Mr. Joe is not currently entrenched in criminally-oriented attitudes, values, or lifestyle.

[40] There was also some concern about Ms. Janus' opinion that while Mr. Joe's residential school experiences may have been the initial cause of his problems with alcohol, they do not explain his current decisions regarding drinking and driving. Dr. Polvi makes a direct correlation between Mr. Joe's residential school abuse and both his past and his ongoing problems with alcohol. When this was put to Ms. Janus, she clarified that her statement was not meant to suggest that his experiences at residential school do not explain his ongoing problems with alcohol, just that they do not explain his decisions to drive while under the influence of alcohol.

[41] Overall, Ms. Janus does not support a curative discharge or any other form of community-based disposition. She cites Mr. Joe's record, his sober decision to drive, his high risk to re-offend, and the fact he was already on a curative discharge, in support of her position. She feels the enforced sobriety of a jail term would be a more appropriate disposition. However, she did agree that the proposed placement in Pelly with Ms. Edwards, employment, and counselling with Mr. Stewart, would alleviate some of her concerns.

[42] Bill Stewart is a private psychologist who is well-known to the Yukon courts. He has been a registered psychologist since 1983, practising in the Yukon since 1993. In his current practice he works primarily with the First Nation population, addressing concurrent addiction and trauma issues. This includes addressing sexual abuse and

residential school abuse issues, and the alcohol-related problems resulting from that abuse.

[43] Mr. Stewart is familiar with Mr. Joe, having counselled him for six sessions over an eight-month period in preparation for the hearing of Mr. Joe's residential school claim. The sessions were discontinued once funding was exhausted. Mr. Joe contacted him in the fall of 2007 seeking further assistance. Unfortunately, there was no additional funding to pursue this counselling.

[44] Given Mr. Joe's current circumstances, however, the Northern Tutchone Council has indicated its willingness to support Mr. Joe, and has offered to cover the fee for Mr. Stewart's services for Mr. Joe.

[45] Mr. Stewart advised that he attends Pelly every other week to provide services, including counselling. He would, therefore, be able to meet with Mr. Joe bi-monthly for counselling, and could provide Mr. Joe with additional services should Mr. Joe come into Whitehorse.

[46] Mr. Stewart further noted the possibility of Mr. Joe participating in land-based treatment, and that the Northern Tutchone Council is supporting a work-placement for Mr. Joe. This is confirmed by the council in their letter, filed as Exhibit 2 in these proceedings.

[47] Dorothy Edwards is the language coordinator for her First Nation. She describes herself as being Mr. Joe's common-law spouse since 1998, though she resides in Pelly Crossing and he in the Marsh Lake area. Whether or not the

relationship meets the technical definition of common-law, they are nonetheless involved in a relationship of longstanding.

[48] She testified that over the period of 2006, up to the date of the January 2008 offences, she saw Mr. Joe for two to three days every other weekend, most holidays, including Christmas, and for two to three weeks in the summer. At no time did she ever see or suspect that Mr. Joe was, or had been, drinking.

[49] In addition, Ms. Edwards offers an alternate residential placement for Mr. Joe to counter the concerns raised by his isolated circumstances in Marsh Lake, which do not allow for sufficient supervision or support.

[50] The pre-sentence report alludes to two potential concerns with Mr. Joe residing with Ms. Edwards. Firstly, it notes that Ms. Edwards recently attended for alcohol treatment in Alberta; and secondly, several of Ms. Edwards' family members are involved in the justice system and regularly move into and out of her home.

[51] Ms. Edwards answered both of these concerns in her testimony. With respect to her attendance at treatment, she indicates she attended a six-week program in B.C. primarily to address grieving issues, having lost three family members in the last three years, though issues relating to alcohol did form part of the treatment.

[52] When questioned about her use of alcohol, she indicated that alcohol was a problem for her in the past, but she gained control of it a long time ago. Subsequently, she would consume an occasional drink, but she made it a point not to consume alcohol

in front of Mr. Joe. She has consumed no alcohol since attending for treatment in November of 2007.

[53] With respect to her family and her residence, Ms. Edwards noted that she now has a new residence, and her family members no longer reside with her as they now have their own residences, though she does occasionally care for her grandchildren.

[54] Lloyd Vallevand is married to Mr. Joe's older sister, Virginia, and has known Mr. Joe for between 40 and 50 years. As noted in the pre-sentence report, Mr. Joe is particularly close to his sister and Mr. Vallevand, and it was evident through Mr. Vallevand's evidence that he and his wife are supportive of Mr. Joe.

[55] Mr. Vallevand testified that since 2006 he has seen Mr. Joe approximately six to ten times per month. This included visits of a couple of hours up to a full day at Mr Joe's home at Marsh Lake. In addition, Mr. Vallevand would frequently drive Mr. Joe to Whitehorse for appointments and groceries.

[56] Mr. Vallevand noted that during 2006 and 2007, he never observed Mr. Joe to take a drink or to be under the influence of alcohol.

[57] Additional evidence was provided to the Court by way of exhibits, confirming Mr. Joe's counselling relationship with his ADS counsellor, Ms. Mohamed, who notes that he is, in her experience, "able to maintain abstinence for long periods of time when he is working, and follows through on his after-care plans."

[58] In addition, his completion of the ADS treatment program in April and May of 2006 is confirmed by letter from Ms. Harbord of ADS. Mr. Joe has provided his CV,

setting out his extensive work experience, and the support of the Northern Tutchone Council with respect to employment and counselling is also confirmed by letter.

[59] Based on all of the evidence before me, I am satisfied that the offences of January 17th represented an isolated occurrence of consumption and that Mr. Joe is otherwise performing well and managing his sobriety on his curative discharge.

[60] In determining the appropriate disposition on the circumstances of this offence and this offender, I have considered the sentencing principles set out in s. 718, 718.1, and 718.2. I do not propose to reiterate each of those principles for the purposes of this decision. Instead, I will refer to those highlighted, quite properly in my view, by counsel in these proceedings.

[61] The Crown submits that deterrence and denunciation ought to be the dominant sentencing principles. Certainly, these are the principles most often referenced in impaired driving cases, in recognition of the very real danger impaired drivers pose to society as a whole. Given Mr. Joe's erratic driving pattern, he is extremely lucky that he is not before me having caused serious injury or death as a result of his actions. When one considers this very real potential for disaster, it is essential that a message be sent to the public at large, as well as specific offenders, through the sentencing process, that impaired driving will not be tolerated.

[62] Conversely, the defence asks that I give priority to rehabilitation and to the provisions of s. 718.2(e). Indeed, s. 718.2(e) is at the core of defence submissions. It reads:

> 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.

[63] In a nutshell, the defence points to Dr. Polvi's conclusion that Mr. Joe's substance abuse problem, both in its origin and its continuation, is directly attributable to the abuse he suffered in the residential school system. Mr. Horembala contends that the underlying cause of Mr. Joe's addiction must be considered a mitigating factor in sentencing, and is a reasonable basis upon which to treat Mr. Joe differently, pursuant to s. 718.2(e).

[64] I cannot take issue of with the submissions of either side with respect to the relevant sentencing principles. The question for me is determining the sentence which most appropriately balances the competing interests.

[65] It is most easy to do so with respect to the offence of driving while disqualified. Mr. Joe's own counsel concedes that the abuse Mr. Joe suffered in residential school in no way mitigates his decision to drive in contravention of his driving prohibition. There are a number of aggravating factors with respect to this offence. These include the fact that Mr. Joe made a sober decision to drive, then compounded this significant error in judgement by consuming alcohol and getting back behind the wheel. Furthermore, I consider Mr. Joe's erratic driving, his prior related record, and the fact that he was bound by the conditions of a curative discharge, all to be aggravating factors.

[66] The only mitigating factor of any substance is Mr. Joe's early guilty plea.

[67] In such circumstances, the only appropriate sentence is a jail term of sufficient length to reflect the extremely aggravated nature of the offence on the circumstances of

this case. However, I am also mindful of the fact that Mr. Joe is entitled to credit for the approximately six months he has spent in remand. There is no information before me to suggest an entitlement to anything other than the usual credit of one and a half to one, for a total credit of nine months. However, I am satisfied that a sentence of six months adequately reflects the gravity of this offence.

[68] Accordingly, with respect to the offence of driving while disqualified, I sentence Mr. Joe to one day deemed served by his attendance in court today, but ask that his record reflect that in doing so I am crediting him for six months spent in remand. The remaining credit he is entitled to has been factored into my decision with respect to the remaining count.

[69] The appropriate disposition for the remaining count of driving while the concentration of alcohol in his blood exceeded the legal limit is a significantly more difficult balancing exercise.

[70] In doing so, the first question to address is Mr. Joe's application for another curative discharge, pursuant to s. 255(5) of the *Criminal Code*. To be eligible for a curative discharge, an offender must satisfy the Court that he or she is in need of curative treatment for an alcohol addiction and that a discharge would not be contrary to the public interest.

[71] As in most cases, the first of these requirements is not a significant hurdle for Mr. Joe. The evidence before me, in particular the psychological assessment, clearly establishes that Mr. Joe continues to be in need of curative treatment for substance abuse.

[72] The issue of the public interest is another story. The defence argues that the superior plan advanced, which includes residency in Pelly with Ms. Edwards, the support of the Northern Tutchone Council, employment and counselling with Bill Stewart, plus the operation of s. 718.2(e), are sufficient to address any public interest concerns. In *R.* v. *R.S.C.*, [2006] Y.J. No. 30, His Honour Judge Lilles provided a summary of factors to be considered in determining the public interest in a curative discharge application. They are as follows:

- length of record for drinking and driving offences;
- whether the accused is motivated to deal with his alcoholism;
- whether there was an accident, whether someone was hurt, and if so, how badly;
- whether the accused has demonstrated an ability to deal effectively with his addictions;
- that it is unlikely that the accused will ever drive a vehicle under the influence of alcohol again;
- whether the need for a denunciatory sentence overrides the suitability of a discharge on the facts of the case;
- the mode of life, character and personality of the offender;
- the attitude of the offender after the commission of the offence;
- whether the accused was under a driving prohibition at the time of the offence; and
- whether the accused has received the benefit of a prior curative discharge, and his performance pursuant to that order.

[73] Reviewing this list, there are several factors which in my view militate against granting Mr. Joe an additional curative discharge.

[74] The first and most obvious concern is the fact that Mr. Joe not only had the benefit of a prior curative discharge but he was still subject to the conditions of that discharge when he re-offended. The likelihood of his driving a vehicle while under the influence of alcohol in future is also called into question by his actions of reoffending while under the conditions of a curative discharge, and while subject to a driving prohibition.

[75] Similarly, the new offence raises a question about Mr. Joe's ability to deal effectively with his addiction.

[76] Finally, the operation of these factors is such that the need for a denunciatory sentence overrides the suitability of a curative discharge.

[77] The enhanced plan put forward by Mr. Joe does go some distance towards alleviating some of the foregoing concerns, but it is insufficient to address the need for both specific and general deterrence, and for denunciation, on these facts.

[78] Nor does the operation of s. 718.2(e) tip the balance in Mr. Joe's favour. While s. 718.2(e) requires the sentencing judge to consider the unique circumstances of an aboriginal offender, it does not automatically override other sentencing principles, such as deterrence and denunciation, which are of such critical importance in impaired driving cases.

[79] On balance, I am satisfied that a second curative discharge would be contrary to the public interest. However, while I have determined that a curative discharge would not meet the principles of sentencing in this case, I am equally of the view that rehabilitation and s. 718.2(e) remain very real considerations in determining an appropriate disposition with respect to the s. 253(b) offence.

[80] After careful consideration, I have decided that the most effective balance of the competing sentencing principles would be to place Mr. Joe on a conditional sentence, pursuant to s. 742.1 of the *Criminal Code*. A conditional sentence has the following pre-requisites: (1) there must be no minimum term of imprisonment; (2) the sentence must be less than two years less a day; (3) it must not endanger the safety of the community; and (4) it must be consistent with the principles of sentencing set out in s. 718 to 718.2.

[81] With respect to the first requirement, the Crown has opted not to file notice of intention to seek greater punishment; therefore, there is no mandatory minimum term of imprisonment.

[82] With respect to the second requirement, I would note that the Crown is not seeking a sentence of more than two years less a day. Furthermore, the Crown has filed the *R.* v. *Donnessey*, [1990] Y.J. No. 138 (Y.T.C.A.), and *R.* v. *Leatherbarrow*, 2004 YKTC 95, decisions, both Yukon cases, which in my view fairly set out the appropriate sentencing range as being 14 months to two years less a day.

[83] The third requirement, public safety, is clearly one which has caused concern for both the Crown and the probation officer. The Crown asserts that the public interest concerns with respect to a curative discharge are equally applicable to a conditional

sentence. The probation officer notes that Mr. Joe was already doing what he would be ordered to do on a conditional sentence when he was arrested for virtually the same offence.

[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.

[85] In addition to this I have also considered the implications of the enhanced plan put forward by Mr. Joe. The proposed placement of Mr. Joe in Pelly would see him in a small community under the close scrutiny of the resident RCMP members. He would have more immediate access to personal supports, access to transportation options with those supports, and access to employment. These go some considerable distance in addressing the isolation and unemployment concerns which have clearly hampered Mr. Joe's progress.

[86] Furthermore, and perhaps most importantly, he would have access to counselling with Bill Stewart designed to address not just his addiction problems but also the underlying trauma which has caused his addiction. This is clearly in line with the recommendations of Dr. Polvi in her psychological assessment.

[87] These combined factors persuade me that any public safety issues can be met through the stringent conditions of a conditional sentence.

[88] With respect to the final requirement that the sentence be consistent with the principles of sentencing, I am equally satisfied that those principles previously identified as relevant to this disposition can all be met through a conditional sentence.

[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.

[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.

[92] In the *R.* v. *Gladue* decision, [1999] 1 S.C.J. No.19, the Supreme Court of Canada made it clear that:

> Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

[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.

[94] Accordingly, with respect to the offence of driving while the concentration of alcohol in his blood exceeded the legal limit, I sentence Mr. Joe to a period of 18 months to be served conditionally within the community.

[95] I will return to the issue of conditions at the end, as I have some questions for counsel with respect to those.

[96] This leaves the remaining issue of the Crown's revocation application. It should come as no surprise that I have decided not to revoke Mr. Joe's pre-existing curative discharge.

[97] In making the application, Crown referenced a decision of mine in Haines Junction wherein I granted the Crown's application to revoke a curative discharge. I think it bears repeating that that case involved an individual who was virtually non-compliant on his curative discharge, having disappeared not long after the granting of the curative discharge, only to surface significantly later facing new impaired driving charges. Given the complete and utter lack of compliance, failure to revoke would have resulted in virtually no repercussions for the initial offence.

[98] The same cannot be said of Mr. Joe. With the exception of the January 18th offences, he has been compliant with the conditions of his curative discharge, and he has made progress towards this rehabilitation. He remains motivated, and he has a better plan in place which will address the isolation and unemployment issues which hampered his progress.

[99] In such circumstances, I am not satisfied that it is in the public interest to revoke Mr. Joe's curative discharge, and I decline to do so. The application is denied.

[100] That leaves the outstanding issues of conditions on the conditional sentence, the victim fine surcharge, the driving prohibition, and the interlock program.

[101] I will deal first with the issue of conditions. I will cover the conditions that I think are appropriate, but there are two areas which I would like some input from counsel.

[102] Mr. Joe, the conditions of your conditional sentence will be as follows:

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

3. That you report to a supervisor immediately upon your release from custody and thereafter when required by the supervisor and in the manner directed by the supervisor;
4. That you remain within the Yukon Territory unless you have written permission from your supervisor, notify the supervisor in advance of any change of name, address, and promptly notify the supervisor of any change of employment or occupation;
5. You are to reside as approved by your supervisor, and not change that residence without the prior written permission of your supervisor.

I will state for the record my expectation and understanding is that you will be residing in Pelly. Was there any suggestion that that was problematic?

[103] MR. HOREMBALA: No.

[104] THE COURT: I note the supervisor is not here.

[105] MR. HOREMBALA: With Dorothy Edwards?

[106] THE COURT: Yes. Okay, so I just want it made clear for the record that that is my expectation of where he would be staying and that much of this decision is based on that placement.

[107] I would also require:

6. That he not attend any bar, tavern, off-sales, or other commercial premises whose primary purpose is the sale of alcohol;

7. That he take such alcohol assessment, counselling, or programming, as directed by the supervisor;
8. That he take such psychological assessment, counselling and programming as directed by the supervisor, and that he take such other assessment, counselling, and programming as directed by the supervisor;
9. That he make reasonable efforts to find and maintain suitable employment and provide the supervisor with all necessary details concerning his efforts;
10. That he provide his supervisor with consent to release information with regard to his participation in any programming, counselling, employment, or educational activities that he has been directed to do pursuant to his conditional sentence order.

[108] That leaves two areas, those being the abstain and the curfew. There will be an abstain condition. The question that I had, which is probably primarily for you, Mr. Horembala, is that there was a reference to the lack of utility of the liver testing that he had been doing. The information was certainly before me that if that is the type of testing he is going to be undergoing, it needs to be more frequent. I don't at this time propose to go back in any way and change the pre-existing provisions of his curative discharge and increase testing in that way. What I am wondering is, given his placement in Pelly, and the difficulty of him having to find rides to come in and out of Whitehorse, which would make liver testing every couple of weeks probably somewhat problematic for him, whether he would prefer to provide his consent to providing samples of his breath or urine to a peace officer in the event that they have reasonable

grounds, which would allow them to do the testing in that way, so that there is an alternate option.

(Submissions by counsel)

[109] THE COURT: So before we go any further, I will go back to the curative discharge and I am going to amend condition 12 to read "submit to medical testing", and then take out "directed by Dr. Ayman Tadros".

[110] THE ACCUSED: What's that?

[111] THE COURT: I am just removing Dr. Tadros' name. So that way if he continues to maintain his position that he does not want to work further with you on the curative discharge, then he is not part of the order.

(Discussions re details)

[112] THE COURT: As liver testing is available in Pelly, there is going to be a condition requiring that you abstain absolutely from the possession or consumption of alcohol and controlled drugs or substances, except in accordance with -- sorry, there is not any information with respect to the issue of drugs is there, solely alcohol?

11. So you are to abstain absolutely from the possession or consumption of alcohol;
12. There will also be a condition that you are to submit to medical testing every two weeks for the duration of your conditional sentence order, as directed by your supervisor;

[113] That leaves us with the issue of the curfew. In my mind it is an element -- sorry, I am just reacting to Ms. Edwards' reaction -- to explain, it is an element of a conditional sentence. It is considered the punitive aspect of a conditional sentence that provides the deterrent and denunciatory effect of the sentence. So there will be one. As this was not something that either counsel had presented, and I think it was a possibility I raised, I wanted to give both counsel an opportunity to make your submissions as it relates to the issue of how we best handle the curfew in this particular circumstance.

(Submissions by counsel)

[114] THE COURT: Having heard the submissions of both, I will say that I am in agreement with Mr. Justice Veale 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. I conclude, however, in this case that we do have exceptional circumstances. I am not going to at this stage reiterate all of those factors that led me to believe this is the appropriate disposition in the first place; suffice it to say those same factors, in my mind, make this case a fairly exceptional one, and I have already made the conclusion that by virtue of s. 718.2(e), and by virtue of his past circumstances, Mr. Joe ought to be treated differently. So I do conclude it is an exceptional case.

[115] The curfew is going to be as follows:

> 13. To abide by a curfew by remaining within his place of residence between the hours of 6:00 p.m. and 7:00 a.m. daily, except for the purposes of employment, including going directly to his place of work, and then

> returning directly to his place of residence after working, and except with the prior written permission of the supervisor;

So that allows both for employment, but also additional exceptions should the supervisor allow them. He is also to present himself at the door or answer the telephone during reasonable hours for curfew checks. Failure to do so would be a presumptive breach of this condition.

[116] Okay, any further issues or concerns as they relate to the conditions of the conditional sentence?

[117] MR. HOREMBALA: So in clause 12, not in the conditional sentence, but clause 12 of the original probation order, the only thing that is deleted is "directed by Dr. Tadros".

[118] THE COURT: "By Ayman Tadros", yes. So because the time frames are already set out in there, I did not feel the need to include "as directed by the probation officer" as I did in the conditional sentence order. It is simply removing him from the order, because the suggestion is he has no interest in continuing to be involved.

[119] Now the only outstanding issues are the victim fine surcharge, the driving prohibition, and the interlock program if he wishes to make any submissions as it relates to that.

[120] My preliminary view is if he is looking at employment supported by the Northern Tutchone Council, and he has also received his settlement, unless you have something else, Mr. Horembala, my view is that he is in a position to pay a victim fine surcharge.

[121] MR. HOREMBALA: He is? He's been in jail for six months.

[122] THE COURT: I am more than happy to give him time to pay, but the information I have been provided is that he is about to start employment, so -- I am not asking he pay it today, I am asking that he pay it in the near future.

[123] MR. HOREMBALA: Three months?

[124] THE COURT: Yes. I believe it is an indictable election so that is $100 on each count, three months time to pay.

[125] So that leaves us with the driving prohibition. When I checked my notes, I did not have a record of any submissions made as to the driving prohibition when we did the original hearing. So either I neglected to write it down or we did not turn our minds to it.

[126] MR. HOREMBALA: No, we did not talk in terms of time period [indiscernible]. At least I didn't.

[127] THE COURT: No, and I could not find any.

[128] MS. GRANDY: No.

[129] THE COURT: So before making a determination on that, I wanted to give both parties an opportunity to make submissions.

(Submissions by counsel)

[130] THE COURT: Okay. I think you both have valid points. In this particular case, I think I am going to lean towards slightly less, primarily because the majority of his employment history is related to his ability to drive. So there is going to be a driving prohibition of four years, which would slightly extend what you still have, Mr. Joe.

[131] THE ACCUSED: I'll be retired by then.

[132] THE COURT: Well, you understand, sir, that part of the reason that you are here is that you got behind the wheel of your vehicle when you should not have, when you legally could not, and when you were too impaired to drive. There are consequences for that. That is the reason there is a driving prohibition.

[133] THE ACCUSED: Yeah.

[134] THE COURT: I appreciate that that causes difficulty in your life because of your personal background. You need to sit down and start to look at other ways that you can do what you need to do without the need to drive. Okay? The driving prohibition reflects the decisions that you made and it reflects your record, and in my view it is necessary for the protection of the public. So there will be a four-year driving prohibition.

[135] Do you wish to make any submissions as they relate to the interlock?

[136] THE ACCUSED: [Indiscernible]

[137] MS. GRANDY: I can ask for the remaining counts to be marked as withdrawn, if we are finished.

[138] THE COURT: Thank you. Okay. Anything further? No? Thank you to Mr. Vallevand and Ms. Edwards for taking the time to be here again today. There will be an order that will take a little bit of time for the Clerk to prepare for Mr. Joe to sign. He is then going to need to go from there to report, okay?

[139] MR. HOREMBALA: Okay.

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RUDDY T.C.J.