Citation: *R.* v. *Maxwell-Smith*, 2012 YKTC 107

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Docket: 10-00258
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10-00258B
10-00258C
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Deputy Judge Orr

REGINA

v.

CHRISTOPHER JOHN MAXWELL-SMITH

Appearances:

Eric Marcoux — Counsel for the Crown
Gordon Coffin — Counsel for the Defence

REASONS FOR SENTENCING

[1] ORR T.C.J. (Oral): Christopher John Maxwell-Smith was found guilty following a trial, of two charges, namely that:

> Count 1: On the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, while his ability to operate a motor vehicle was impaired by alcohol, that he did operate a motor vehicle and thereby caused the death of Valentino Vella, contrary to Section 255(3) of the Criminal Code; and
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> Count 2: On the 8th day of July, 2010, at or near Pelly Crossing, Yukon Territory, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did, while operating a motor vehicle, cause an accident resulting in death to Valentino Vella, contrary to Section 255(3.1) of the Criminal Code.

Pursuant to the principles set out in *R.* v. *Kienapple,* [1975] 1 S.C.R. 729, the Crown directed a stay of proceedings in respect of Count 2, the charge contrary to s. 255(3.1) of the *Criminal Code*, and I entered a conditional stay in respect of that matter.

[2] On the 18th day of February, 2011, Mr. Maxwell-Smith elected to be tried by a Territorial Court judge and pleaded not guilty to all charges. After a number of proceedings, the trial on these matters was held the week of July 16th to the 20th, 2012. On August 10, 2012, I found Mr. Maxwell-Smith guilty of the above noted two charges.

[3] At the request of defence counsel, the matter was then adjourned for the preparation of a Pre-Sentence Report, which has now been filed with the Court. No victim impact statement was filed in this matter. Crown and defence counsel each filed a book of authorities for my consideration, and both made lengthy oral submissions.

[4] The issue remaining in this case is what is the appropriate sentence for Mr. Maxwell-Smith. It is noted on today's date, prior to the proceedings, Mr. Maxwell-Smith entered two further guilty pleas, one to a charge of breaching the terms of his release, s. 145 (3), and the second in respect of failing to attend court, s. 145(2)(b).

[5] In my decision, dated August 10, 2012, which has since been typed and distributed to counsel, I set out at length the facts and the law which form the basis upon which Mr. Maxwell-Smith was found guilty of the charges. That decision forms the basis for the sentence to be imposed in this matter.

[6] A Pre-sentence Report was prepared in this matter. It indicates that Mr. Maxwell-Smith is now 27 years of age and has no prior criminal record. He is a citizen

of the United Kingdom. He maintains frequent contact with his family members, particularly with his mother, brother, and sister, who continue to live in the United Kingdom, and with whom he has a close relationship. His mother travelled to the Yukon to support him during his trial. His relationship is described as more formal with his father, with whom he has less contact, as he lives on an island in Greece. He indicated that his father suffered from depression and kept himself isolated, being violent towards his mother. Despite those difficulties, Mr. Maxwell-Smith indicated that his childhood was similar to others in his peer group, and that his parents were good parents.

[7] Mr. Maxwell-Smith did well in school and left in 2003 at age 18 with an arts diploma from the Language College. Due to a downturn in the family's finances, Mr. Maxwell-Smith then focused on working, so he could assist his mother. It appears from the Pre-Sentence Report that Mr. Maxwell-Smith has always had a strong work ethic, holding various jobs, starting when he was 13 and still in school. He obtained training in scaffolding through the National Construction College and worked with Scaffolding Group London until he moved to Canada in 2007. From 2007 to 2011, Mr. Maxwell-Smith worked with Matakana Scaffolding B.C. at projects all over Canada and the United States. In October 2011, he left B.C. to work with Wold Scaffold Inc., based out of Toronto, and he remained with that company as a supervisor until January, 2012. That employer spoke highly of Mr. Maxwell-Smith, indicating that he can return to the job at any time, and indicated they have had a hard time filling his position.

[8] Mr. Maxwell-Smith has been in a relationship with Christine Bryant for four years. They moved to Toronto in October, 2011 to help out her family with health issues. The accident and subsequent charges have added stress to their relationship but it seems

she continues to be supportive of Mr. Maxwell-Smith.

[9] The Pre-Sentence Report notes the struggles that Mr. Maxwell-Smith has had with depression and with drinking. In February, 2010, Mr. Maxwell-Smith was prescribed anti-depressants by his doctor, as he was not dealing well with issues regarding work and his father. Following the accident which gave rise to these charges, Mr. Maxwell-Smith had great difficulty coming to terms with the death of Mr. Vella, whom he considered a friend as well as a co-worker. It seems he turned to alcohol on occasion to help him forget. He became so withdrawn and depressed that his partner would call into his work saying he was sick, due to her fear that he would jump off the building at work. He did see a grief counsellor a few times before he moved to Ontario. According to the Pre-Sentence Report, since he has been in custody, he has seen Dr. Heredia, as well as other counsellors, and is now off all medication, and is feeling much better from a mental health point of view. The Pre-Sentence Report, in general terms, can be described as a relatively positive report.

[10] Crown counsel submits that the appropriate sentence in this case would be a period of incarceration in the range of four and a half years. Defence counsel submits that in the circumstances the Court should consider a sentence in the range of two years less a day that would, perhaps, not put him at immediate risk of deportation in respect of these matters.

[11] Sections to 718 to 718.2 of the *Criminal Code* set out the purpose and principles of sentencing for the Court to consider. A review of those sections as they apply to this case follows. Section 718 of the *Code* provides that:

> 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;

[12] In the case of *R.* v*. Johnson,* [1996] B.C.J. No. 2508, Madam Justice Ryan of the British Columbia Court of Appeal stated at paragraphs 29 to 30:

> The principle of deterrence as a goal of sentencing is embedded in our law. The Supreme Court of Canada said so in *C.A.M*., the amendments to the *Criminal Code* specifically refer to it as a sentencing objective (see s. 718(b)). We must assume that deterrent sentences have some effect. It is futile to ask whether a particular sentence will deter others. That question can never be answered. Deterrence operates in a general way. Those that would break the law must know, and law-abiding citizens must be assured, that law breakers will receive sentences which reflect the seriousness of their crimes. This will deter some potential offenders, it will not deter others.
>
> Drinking driving causing death or bodily harm offences are senseless crimes because they are so easily avoided and at the same time they are so easily committed by ordinary citizens. They are unlike any other crimes in the sense that nothing much can be offered to justify driving drunk. Crimes of theft may be motivated by poverty, crimes of assault may be motivated by fear, but what excuse can be offered for driving drunk, except that alcohol allowed the offender to lose all sense of judgment? It is for this reason that communities rightfully express outrage when victims are killed or injured as a result of such conduct. It is for this reason that both deterrence and denunciation are legitimate objectives to pursue for this type of offence.

The above noted passage was quoted with approval by Saunders J.A. in the case of *R.* v*. Charles,* 2011 BCCA 68, and in dismissing the appeal from sentence, indicated that the trial judge had not been wrong to say that denunciation, deterrence, and promotion

of a sense of responsibility were the primary considerations in a case of impaired driving causing death.

[13] In *R. v. Junkert,* 2010 ONCA 549, O'Connor, A.C.J.O., in dismissing the appeal against conviction and sentence, stated at paragraphs 46 to 47:

> In recent years there has been an upward trend in the length of sentences imposed for drinking and driving offences. The reasons for this trend can be attributed to society's abhorrence for the often tragic circumstances that result when individuals choose to drink and drive, thereby putting the lives and safety of others at risk.
>
> The imposition of substantial penalties for drinking and driving offences sends an important message to individuals who are considering driving while their ability is impaired.

[14] In the case of *R.* v. *Ruizfuentes,* 2010 MBCA 90, Chartier J.A. of the Manitoba Court of Appeal stated at paragraph 33:

> In cases of impaired driving causing death, the paramount objectives of sentencing are denunciation and deterrence. The punishment must express society's condemnation of the accused's ways and serve to dissuade others from engaging in similar conduct. In such cases, an accused is "punished more severely, not because he or she deserves it, but because the Court decides to send a message to others who may be inclined to engage in similar criminal activity" (see *Vancouver (City) v. Ward,* 2010 SCC 27, at para. 29).

[15] In the case of *R.* v. *Cromwell*, [2005] NSCA 137, at paragraph 29, Bateman J. stated:

> The sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgment. Those who would maim or kill by driving their vehicles while impaired are as harmful to public safety as are other violent offenders. The proliferation of this crime and the risk that it will be seen by society as less socially

> abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features.

[16] It is clear from the cases referenced above and from the authorities relied upon by both counsel in this case that deterrence and denunciation are significant principles to be considered in determining the appropriate and fit sentence to be imposed in this matter.

Section 718(c) to separate offenders from society, where necessary :

[17] As noted in many of the authorities that have been filed by counsel in this matter, there is no need in and of itself to separate Mr. Maxwell-Smith from society. Other than the circumstances which gave rise to this offence, he has been a valued and contributing member of society, gainfully employed and exhibiting pro-social values.

Section 718(d) to assist in rehabilitating offenders:

[18] It appears from the Pre-Sentence Report that Mr. Maxwell-Smith's mental health has improved considerably in recent months, despite his current status as a remand inmate. Through the documents that have been filed here today, there is an indication that he has also taken advantage of the time while he has been in custody to avail himself of some programming with respect to alcohol issues, and he has also taken advantage of the opportunity while he was out of custody to avail himself of some much-needed counselling with respect to this matter and the mental health issues that he was dealing with.

Section 718(e) to provide reparation for harm done to victims or to the community:

[19] No sentence that I can impose will undo the harm done in this matter. A life has been lost and nothing can be done to alter that situation now. It is because the consequences are so grave that deterrence and denunciation play such a significant role in sentencing on a charge of this nature.

[20] As noted by Judge Lilles in the case of *R.* v. *Jones*, [1995] Y.J. 118 at paragraph 7:

> The value of human life cannot and should not be measured by a term of imprisonment. To attempt to do so demeans the memory of the person who has been lost, and will always create frustration and anger for those left behind. So whether the Court imposes two, five or ten years imprisonment, relatives and friends will say, it is not enough, her life was worth more. And they would be right. This tragedy cannot be undone. It is not possible for this Court to impose a sentence which will repair the harm that has been done. The sentence in this kind of a case does not attempt to evaluate, assess or determine the goodness, quality or usefulness of a human life. It does not reflect the worth of a particular human being.

Section 718(f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community:

[21] Each accused person is entitled to have a trial and to have the Crown establish the charges against him beyond a reasonable doubt. It is not an aggravating factor that an accused person exercised that right. No accused gets a higher sentence than would otherwise be imposed because they had a trial and were convicted after that trial. However, the case law is clear that a court can, and usually should, consider it to be a mitigating factor, and one which could reduce the sentence otherwise appropriate, if the person accepted responsibility for the offences, pleaded guilty, and thus saved the time and expense of a trial. The expense of a trial refers not only to the actual costs of providing a facility, staff and other resources, but the cost to witnesses, both in terms of

the time and expense they may experience by attending court, as well as the human toll on actually having to testify in court and be subjected to cross-examination, which, for some, can be a difficult experience.

[22] The comments of Taylor J. of the P.E.I. Supreme Court in the recent case of *R.* v. *Burton*, 2012 PESC 2, reflect that approach and indicate that it is appropriate, when considering the various precedents relied upon by counsel, to look at whether those sentences were imposed, in part, in consideration of the significant mitigating factor of a guilty plea, or whether a trial was held. In this case, Mr. Maxwell-Smith exercised his right to have a trial. He had some measure of success in that regard as he was found not guilty on two of the four charges he originally faced. The arguments he raised at trial were not frivolous, but, unfortunately for him, they were not successful. Mr. Maxwell-Smith should understand that the sentence that will be imposed in this matter has not been increased because he exercised his right to have a trial. The sentence that will be imposed is a sentence that otherwise would be appropriate for this offence. It simply has not been reduced from what otherwise would be appropriate to account for the mitigating factor if there had been a guilty plea.

[23] According to the Pre-Sentence Report, Mr. Maxwell-Smith well recognizes the harm that has been done in this matter. Since the preparation of the Pre-Sentence Report, where it indicated he was having difficulty in facing the family of Mr. Vella, he has now been able to send a letter to Mrs. Vella, expressing his concern and remorse for the loss of Mr. Vella, and he has received a response from Mrs. Vella that has been filed with the court. From the comments in the Pre-Sentence Report it appears that this is a positive step that should assist him in addressing the grief that he has been

experiencing and be able to start to move forward in that regard.

[24] He has indicated in the Pre-Sentence Report that he would like to write a letter of thanks and apology to the Selkirk First Nation as he felt that they treated them with kindness while working in the community and he would like to apologize for the disrespect the accident brought to the community.

[25] Mr. Maxwell-Smith also recognizes that the outcome of this charge and the resulting sentence may have an impact on his ability to continue to live and work in this country, which will further impact on his girlfriend, her work and family.

[26] With respect to the issue of whether or not Mr. Maxwell-Smith has expressed remorse in respect of this matter, it is always a difficult situation after an individual has exercised their right to have a trial to then, in sentencing, find that they would change anything in the position that they advanced during the course of the trial as to their perception of their actions and whether or not there was responsibility attached to those for the criminal action in respect of this matter. The comments in the Pre-Sentence Report certainly are consistent with the evidence that Mr. Maxwell-Smith gave during the course of the trial. Whether or not that is considered to be full acceptance of his responsibility for the actions which resulted in the death of Mr. Vella, there is no question that he certainly is most concerned by and is most troubled by the fact that as a result of this matter, he lost a friend and a co-worker and certainly that that is not something that he is in a position to be able to undo.

[27] Section 718.1 of the *Code* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 255(3) of

the *Code* provides that everyone who commits an offence under section 255(1)(a) and causes the death of another person as a result is guilty of an indictable offence and liable to imprisonment for life. As can be seen from the maximum penalty provided for this offence by Parliament, it is one of the most serious offences that a person can commit. It is Mr. Maxwell-Smith alone who is responsible for this offence. It is he who operated the motor vehicle in the manner indicated in the findings that I made during the course of the trial, and it was his driving while impaired that resulted in the accident which caused the death of Mr. Vella.

[28] Section 718.2 provides that a court that imposes a sentence shall also take into consideration the following principles. None of the aggravating circumstances as set out in sub-section (a) are applicable in this matter. Other principles to be taken into consideration as set out in s. 718.2 are as follows:

> 718.2(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances:

I have reviewed the cases filed by both counsel. No two cases are the same, and it is true in this case as well. I am not going to go through the details of each of these cases as both counsel have made extensive submissions on the details and the rationale in those cases, but the following is a short summary of those authorities.

[29] In the case of *R.* v. *Junkert, supra,* the accused struck and killed a woman who was jogging in a residential neighbourhood. The accused was convicted following trial and sentenced to five years in jail on the impaired driving causing death charge and to three years concurrent on the dangerous driving causing death. Those sentences were

upheld on appeal. The Court of Appeal indicated that while the sentence was on the high end of sentences for such offences, it was not unfit. The accused's blood alcohol level at the time of the accident was between 130 and 170 milligrams percent. The accused had no prior record.

[30] In *R.* v. *Ramage*, 2010 ONCA 488, the accused was convicted following a jury trial on charges of impaired causing death, dangerous driving causing death, impaired driving causing bodily harm and dangerous driving causing bodily harm. He had no prior record and was considered to be a valued and contributing member of society. The person killed was a passenger in the accused's vehicle and a long-time friend. The family of the deceased made an impassioned plea to the sentencing judge to not impose any jail time. The person injured was the driver of one of the other vehicles hit when the accused's vehicle crossed four lanes of traffic on a busy road, striking two oncoming vehicles. The accused's blood alcohol level at the time of the driving would have been between 229 and 292 milligrams percent.

[31] In *R.* v. *Ruizfuentes, supra,* the accused was sentenced to six years in prison for one count of impaired driving causing death. He had a limited and unrelated record, but had what was described as an unenviable driving abstract under the *Highway Traffic Act*, which was directly related. The accused had been speeding, tailgating and driving through intersections against red lights. When he went through the third red light he hit another vehicle, killing the driver. His blood alcohol at the time of the driving was between 131 and 183 milligrams percent. He pleaded guilty to the charge. In allowing the appeal against sentence, the Manitoba Court of Appeal conducted a helpful review of decisions from across the country and concluded that the appropriate range of

sentencing for a first offender was from two to five years in prison. The Court of Appeal then sentenced that accused to four and a half years in prison.

[32] In *R.* v. *Charles, supra*, the accused was sentenced to three years in prison for two charges of impaired driving causing death, and two years in prison for two charges of dangerous driving causing death, all concurrent. The accused, of First Nations ancestry, aged 21, did not have a driver's licence, drove an unregistered vehicle, failed to negotiate a turn in the road, hit a telephone pole, and his girlfriend and cousin, who were in the vehicle with him, were fatally injured. He had no criminal record. His blood alcohol readings were between 196 to 214 milligrams percent. The sentence was upheld on appeal, with the Court of Appeal determining that it was not unfit.

[33] In *R.* v. *Morine*, 2011 NSSC 46, the accused pled guilty to refusing the breathalyzer, impaired driving causing death, impaired driving causing bodily harm, and assaulting a peace officer. A preliminary inquiry had been held and his guilty plea was characterized as being a late one. He had no prior record. The sentencing judge concluded from his review of the case law that the appropriate range of sentence for impaired driving causing death was between three and five years in Nova Scotia. He imposed a sentence of five years for the charge of impaired driving causing death.

[34] In *R.* v. *Homer*, 2003 BCCA 15, the accused was sentenced to three years following a guilty plea to a charge of impaired driving causing death. A 17-year-old was hit by the accused's van as she was walking home from work. Road conditions were poor, with rain and hail, leaving the road slippery, but other drivers at the scene did not have any problem keeping their vehicles under control. The accused's blood alcohol

readings were 230 and 224 milligrams percent about two hours after the accident. She had no prior record and consumed a quantity of beer and Tylenol 3s prior to driving. A conditional sentence, still available as a sentencing option at that time, was rejected. The sentence was upheld on appeal.

[35] In *R.* v. *Johnson*, 2012 YKTC 47, the accused pled guilty to impaired causing death, driving while disqualified, and two breaches of his bail terms, one for abstaining from alcohol and one regarding curfew. The matter had been set for a two-week trial and an Agreed Statement of Facts was filed. He lost control of his vehicle on a turn, rolled, and hit a tree. The accused and passenger left the scene. Another passenger was still in the vehicle and that passenger was dead. The accused was found in the bushes with a bottle of liquor. He denied being the driver of the vehicle for several days. His blood alcohol was 170 and 160 milligrams percent. He had a lengthy and related record with six prior convictions for drinking and driving offences. The Court imposed a sentence of three and a half years on the impaired driving causing death charge, which was the sentence suggested by the Crown.

[36] In *R.* v. *Mitchell*, [1990] Y.J. No. 24, (T.C.), the accused pleaded guilty to impaired driving causing death, leaving the scene of an accident and breach of a recognizance. In sentencing the accused to two years in jail for the impaired driving causing death and six months consecutive for leaving the scene of an accident, the Court indicated that without the guilty plea the sentence imposed would have been much higher. No facts of the offences were indicated in the case.

[37] In *R.* v *Jones, supra,* the accused pled guilty to impaired driving causing death.

He pulled out to pass a truck in a bend on the road and collided head-on with another vehicle. He was 31 years old, had no prior record, and was remorseful, having sought counselling since the accident. His blood alcohol level was 217 milligrams percent. Rehabilitation prospects were considered to be high. He was sentenced to three years in prison.

[38] In *R.* v. *Caprarie-Melville*, [1998] Y.J. No. 182 (S.C.), the accused was sentenced to 27 months imprisonment for criminal negligence causing death and fined $500 for refusing to provide a breath sample. He was convicted by a jury. In an apparent attempt to rescue his friend from a violent mob, the accused drove his truck and loaded trailer into a crowd, running over and killing the victim. The accused had no criminal record and the driving record was not considered serious. His ability to drive was only marginally impaired by alcohol. That sentence was upheld on appeal, but the driving prohibition was varied to three years.

[39] In *R.* v. *Sam*, 2003 YKTC 67, the accused pleaded guilty to impaired driving causing death and, on a separate and subsequent occasion, to failing the breathalyzer. His blood alcohol level at the time was determined to be 188 milligrams percent. He failed to heed the weather or road conditions or listen to his passengers who told him to slow down, and he lost control of the vehicle, which left the road and rolled, killing one of the passengers. The subsequent offence occurred in respect of a snowmobile he was operating and his readings then were 200 milligrams percent. He had an extensive criminal record and with a prior, but dated, record for drinking and driving. He had a long-standing problem with alcohol. He was sentenced to serve two years less a day on a charge of impaired driving causing death, and a conditional sentence in respect of

the charge of failing the breathalyzer.

[40] In *R.* v. *Naedzo*, 2007 NWTSC 68, the accused pleaded guilty to a charge of impaired driving causing death. He had a prior record which included a drinking and driving offence. He was apparently drinking while he was driving, lost control of the vehicle, left the road, through a ditch and into a pond. His grandmother, who was one of the passengers of the vehicle, died as a result of the accident. He was sentenced to 12 months in jail.

[41] In *R.* v. *Matheson*, 2011 BCSC 308, the accused was found guilty by a jury of dangerous driving causing death, dangerous driving causing bodily harm to another, impaired driving causing death, impaired driving causing bodily harm, an over 80 causing death, and over 80 causing bodily harm. The accused's blood alcohol reading was 130 to 165 milligrams percent. Her father was killed as a result of the accident and his friend was hurt in it. She received two years in jail on the impaired causing death and 18 months concurrent on the impaired causing bodily harm.

[42] None of the cases I have referred to have the same facts as in this case, but they are helpful to illustrate the principles of sentencing that the courts have applied and the factors that have been considered in imposing the various sentences. Comments have been made by counsel as to the fact that in some of those cases, there have been multiple charges. While that is a factor that has to be looked at, that usually relates to how many people were in the vehicle and whether there was more than one person who was killed or injured in respect of the matter, and in some cases, there were also charges of dangerous driving, either causing death or bodily harm. The actions of the

accused, however, in respect of all of those matters, was the single action, as to the manner in which the vehicle was being operated. There were not separate or distinct accidents.

[43] The challenge for this Court is to draw the appropriate parallels and distinctions from those cases and then use them as guidelines when determining the appropriate sentence in the present case.

[44] Section 718.2(c):

> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

In this case, we have three matters for sentencing.

[45] Section 718.2(d) and (e):

> (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.

[46] There is no indication that Mr. Maxwell-Smith is an Aboriginal person. Jail is considered to be a sanction that is to be avoided if at all possible. All sanctions that are reasonable in the circumstances must be considered. This is clear from the sentencing amendments passed in 1996 and the case law that has considered those provisions. However, as noted in the cases that have been filed in this matter, in recent years the *Criminal Code* has again been amended and, whereas at one time conditional sentences were a sentencing option, that is no longer the case for this type of offence,

since it is considered to be one involving serious personal injury. In this matter both counsel have recognized that the appropriate sentence in this matter is one of imprisonment and that this is not an appropriate case, as noted by defence counsel, for the Court to consider a suspended sentence.

[47] What then is an appropriate sentenced in this matter? The facts in this case and the findings that I made in the decision of August 10th, 2012, indicated the level of impairment that Mr. Maxwell-Smith was found to be under at the time he operated the vehicle, with the readings extrapolated back to the time of the accident, to be between 134 to 158 milligrams percent. Parliament has indicated that anything above 160 milligrams percent is an aggravating factor. He certainly is just below that in respect of the range. As noted by defence counsel, the *Criminal Code* provides that if there are two readings obtained in respect of readings on the breathalyser, the Court is required to consider the lower of those two, and so certainly the same should operate in respect of the range of readings that have been provided in this particular matter. In any event, the range is below the aggravating point.

[48] Weather conditions were not a factor in this matter. There were not any indications of any mechanical problems with the vehicle. The road construction was clearly and well marked, with eight warnings signs which were posted a sufficient distance in advance of the construction to give the motoring public ample time to heed them and to adjust the manner of driving accordingly. Mr. Maxwell-Smith, while acknowledging that he knew the signs were there, could not recall if he saw them the night of the accident. He certainly did not heed them as reflected by the speed that he was doing when the van left the road. The re-constructionist in respect of this matter

determined that he was doing approximately 101 kilometres at that point. That speed would have been reduced somewhat at that point by the van's movements on the road just prior to leaving it. He had been warned by Mr. Baggott about the gravel on the road and in his testimony, he had acknowledged that. He should not have been operating the van in the first place, given the restrictions on his learner's licence which restricted the number of passengers he could have in a vehicle he was driving, and which prohibited him from having any alcohol at all in his body, much less the amount that he claimed that he had consumed or the amount that gave rise to the readings that were provided in evidence by Ms. Mendes.

[49] Mr. Maxwell-Smith acknowledged that he was responsible for the scaffolding crew and getting the project completed, but yet he ignored restrictions on his licence and decided he would be the one who would drive the vehicle for a journey he indicated he did not want to make. Clearly, his judgment was affected and impaired by the alcohol that he had consumed. As noted in the Pre-Sentence Report, as well as the evidence at the trial, his actions on that night were certainly contrary to the general indications that he gives, i.e. that he is not a person to take risks or be casual about the responsibilities that he has with his work. Unfortunately, he did get behind the wheel of the vehicle, he did drive, and we have the results that we have, in the loss of Mr. Vella as a result of the accident which occurred a short distance, some 17 kilometres past Pelly Crossing. The excessive speeds to all of the limits that were posted in the area and the disregard of the eight warning signs as he approached the construction area, certainly are all factors for the Court to consider.

[50] Most of the cases that have been filed in respect of this matter have discussed

the difficult task for a court to sentence an individual in a situation of this nature, and that is no different in the case of Mr. Maxwell-Smith. Mr. Maxwell-Smith, from all reports and indications, is not a bad person. It is his actions on July 8, 2010, that are. He has been, and when this matter is concluded, he should continue to be, a contributing, positive member of society. He is hard working, smart; and he is considered to be a good person by those who know him, as attested to by the numerous letters of support from his family and friends that have been filed with the court today. The challenge for the Court is to consider those positive attributes while following the direction that courts across this country have provided in imposing the proper sentence, which is to reflect deterrence and denunciation as its principal purposes. As is noted, the deterrence is general deterrence. There is no indication from anything that is before the Court or any submissions of counsel, that specific deterrence for Mr. Maxwell-Smith is necessary.

[51] Counsel have raised the issue of the potential challenges that Mr. Maxwell-Smith may face as a result of his conviction, depending on the nature and length of the sentence that is imposed, with respect to whether or not he may face deportation since he is not a Canadian citizen at this stage. According to the Pre-Sentence Report, it was his hope to become one. As noted in *Ramage*, *supra*, the Ontario Court of Appeal made reference to the difficulties that Mr. Ramage may well have in gaining re-entry into the United States, where he had lived, his family had lived, and where he had worked for a number of years. Mr. Ramage was a Canadian citizen, and the Court, although it referred to it, did not make any reference to what impact the Court of Appeal felt that that would have on the sentence to be imposed in respect of the matter. The situation is somewhat different in this case. Certainly, Mr. Ramage was not going to be facing

deportation from Canada as a result of the sentence that was being imposed. In contrast, it appears that Mr. Maxwell-Smith could face deportation depending on how the authorities view his conviction in respect of this matter, and the nature and length of the sentence that is imposed.

[52] Mr. Maxwell-Smith made a very serious mistake on July 8, 2010, by getting in the vehicle and driving. He then made several further mistakes in not complying with the terms of his release and not attending court as required for his trial. As a result of that, he faces additional charges to which he has entered the guilty pleas here today. Because of those actions, warrants were issued for him.

[53] He did turn himself into the authorities in Ontario on the 23rd of January, 2012. The RCMP then proceeded to Ontario in order to bring him back to the Yukon, and since the 23rd of January, 2012, he has been in custody. On the 3rd of February, 2012, pursuant to s. 524 of the *Criminal Code,* his release was revoked. Counsel did not refer to it, but when I went back to check the record today, I noted that following my decision and finding of guilt on the two counts on the 10th of August, 2012, I then remanded Mr. Maxwell-Smith in custody until today's date, at the request of the Crown, pending sentence. My understanding is that, at that stage, that would end the s. 524 provisions. It then becomes the Court remanding him, pending sentence, so that we are no longer under s. 524.

[54] With respect to the issue of the time that he has served on remand, Mr. Maxwell-Smith has been in jail continuously from January 23 to November 6, 2012. The period from August 10th to today's date may well be a period of time to which he would be

entitled to credit on the basis of up to 1.5 to one, from my reading of the provisions of the *Criminal Code*, as amended by the *Truth in Sentencing Act*, S.C. 2009, c. 29. From the decision in R. v. Vittrekwa, 2011 YKTC 64 that has been provided to me, Chief Judge Cozens, with respect to a similar issue, indicated that evidence of behaviour during the period of remand would normally be provided for the calculation of appropriate pre-sentence credit. Certainly the Pre-Sentence Report, and the report of the programs and counselling sessions that Mr. Maxwell-Smith has availed himself of while he has been in custody, would appear to support that there have not been any issues with respect to him, while he has been on remand, that would have affected his ability to earn the remission time that would ordinarily be provided to an individual serving a sentence.

[55] The time in custody, by my rough calculations from the numbers that were provided to me, would indicate that Mr. Maxwell-Smith has served approximately nine and a half months on remand or, if credit from the time that I remanded him on the 10th of August to the present time is considered to be appropriate to be credited at one and a half to one, it would be closer to 11 months of total time of credit. I consider that the time that he has been on remand in respect of this matter, whether calculated at straight one for one, or at one and a half to one credit, is a relevant factor in respect of the appropriate sentence in this matter.

[56] Mr. Maxwell-Smith, would you stand, please, sir? In regard to the principles of sentencing that I have set out, the evidence that I heard in this case, and the findings contained in the decision following the trial on August 10, 2012, the submissions of both counsel, and the contents of the Pre-Sentence Report, I have determined that the

appropriate sentence in this matter, on the charge under s. 255(3), impaired driving causing death, is a sentence, commencing today, of two years less a day. On the charge under s. 145(3) as amended, breach of the conditions of your bail, I impose a period of one month in jail concurrent. On the charge under s. 145(2)(b), failing to attend court as required, I impose a period of one month in jail concurrent.

[57] The victim fine surcharge in respect of all matters is hereby waived, given the nature and length of the sentence that is being imposed.

[58] On the charge under s. 145(2)(b), failing to attend court, I agree with the defence submission in respect of this matter, that the significant cost of Mr. Maxwell-Smith's non-attendance at court for his trial should be dealt with through a restitution order under s. 738, as suggested. The figure that was provided was $5,000 reflecting the cost of the officers having to travel to Ontario, obtain Mr. Maxwell-Smith and return, and addresses both cost of travel and time from the detachment. Pursuant to s. 738(1) of the *Criminal Code* I hereby order that Mr. Maxwell-Smith make restitution to the Pelly Detachment of the RCMP in the amount of $5,000, payable forthwith. This will entitle the detachment to register that as a civil judgment and to take appropriate action in order to collect that amount. And certainly, if Mr. Maxwell-Smith is in a position to make that payment without it having to go through civil process, then that certainly, I am sure, will be to his advantage. He will avoid all those other consequences.

[59] On the charge of impaired driving causing death, because the sentence that is to be served in respect of this matter is two years less a day, that gives me the ability to add a probation order to it. Upon his release from custody, Mr. Maxwell-Smith, on that

charge, will be placed on probation for a period of 18 months. The terms of the probation are that:

1. You are to keep the peace and be of good behaviour;
2. Appear before the Court when and if required to do so;
3. Immediately notify the Probation Officer if there is any change of your address, place of employment, education or training;
4. You are to report to a Probation Officer immediately upon your release from custody and thereafter when required by the Probation Officer and in the manner as directed by the Probation Officer;
5. You are to reside as approved by your Probation Officer and abide by the rules of the residence and not change that residence without the prior written permission of your Probation Officer;
6. You are to take such alcohol and/or drug assessment, counselling or programming as directed by your Probation Officer;
7. You are to take such psychological assessment, counselling and programming as directed by your Probation Officer;
8. You are to take such other assessment, counselling and programming as directed by your Probation Officer, and you are to provide your Probation Officer with consents to release information with regard to your participation in any programming, counselling, employment or educational activities that you have been directed to do pursuant to this probation order.

I have taken the wording for those conditions out of the Pre-sentence Report, in the

hope that this is the standard wording that is used in respect of these matters.

[60] The purpose of the probation, certainly, Mr. Maxwell-Smith, is to ensure that you follow up on the efforts that you have already made with respect to your mental health issues and alcohol use issues. I am not making an order that you abstain from consuming. From the reports and from the information that is before the Court, that does not seem to have been a factor on other occasions other than, sadly, this particular night that gave rise to these offences. So I do not see any necessity of adding that.

[61] Finally, there will be an order prohibiting you from operating a motor vehicle on any street, road, highway or other public place for a period of ten years from today's date. It is an offence under s. 259(4) of the *Criminal Code* to operate a motor vehicle now that you have been prohibited from doing so. That is on the s. 255(3) charge.

[62] Whether or not the sentence that is imposed is one that will enable you to continue to be a productive member of this country and this society will, of course, have to be determined by someone else, sir. But in all the circumstances, I believe that this is a reasonable and fair sentence to be imposed in respect of this matter, given all the factors that I have referred to. As I say, this is a sentence that commences as of today's date. I am not making any specific reference to the specific time that you spent on remand, only to acknowledge that you have been in jail and I have considered that. You have been in jail since the 23rd of January as a result of these matters, and I have considered that as one of the factors in determining the appropriate length of the sentence to be imposed on these charges here today.

[63] Are there any questions, or anything I have missed, counsel?

[64] MR. COFFIN: No, Your Honour.

[65] THE COURT: And, Mr. Coffin, would you explain to your client the terms of the probation, the consequences of breach of probation, commission of another offence while he is on probation, as well as the provisions to review the additional terms, if there is any change in circumstances?

[66] MR. COFFIN: I will do.

[67] THE COURT: And, certainly, given the fact that his work is likely to take him outside of the Territory upon his release, it will certainly be essential and important for him to make those appropriate arrangements before he leaves the Territory, to ensure that there are not any further difficulties that he has experienced in the past with respect to that reporting. I believe that is everything on this matter.

[68] MR. MARCOUX: I have a question, Your Honour.

[69] THE COURT: All right.

[70] MR. MARCOUX: For clarity purposes, what is the global sentence that has been handed out today?

[71] THE COURT: Global sentence that has been –

[72] MR. MARCOUX: Because I heard Your Honour mention credit for 11 months of --

[73] THE COURT: No. I am not giving him any credit for any time that he has served on remand. I have considered the fact that he has been on remand for approximately 11 months. I have considered that, and I believe that the appropriate sentence to be imposed in respect of this matter here today is for him to serve a sentence, commencing today, of two years less a day.

[74] MR. MARCOUX: Okay. Thank you.

[75] THE CLERK: Your Honour, the issues of a DNA order and firearms orders were not addressed.

[76] THE COURT: There was no request for --

[77] MR. MARCOUX: I did not make any submissions; the Crown's not seeking any of those.

[78] THE COURT: No, there was no request for any of those orders.

[79] THE CLERK: And the outstanding charges were addressed?

[80] THE COURT: Yes, and all of the charges have now had pleas entered on them.

[81] MR. MARCOUX: Yes

[82] THE COURT: You may adjourn then.

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ORR T.C.J.