In the Court of Appeal of for the Northwest Territories

**Citation: *R v Zoe*, 2020 NWTCA 1**

**Date:** 2020 01 31

**Docket:** A-1-AP-2017-000 016

**Registry:** Yellowknife

**Between:**

**Her Majesty the Queen**

Respondent

- and -

**Bobby Zoe**

Appellant

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| **Restriction on Publication**  **Identification Ban** – See the *Criminal Code*, section 486.4.  By Court Order, information that may identify the victims must not be published, broadcast, or transmitted in any way.  **NOTE:** This judgment is intended to comply with the identification ban. |

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**The Court:**

**The Honourable Mr. Justice Paul Bychok**

**The Honourable Madam Justice Ritu Khullar**

**The Honourable Madam Justice Dawn Pentelechuk**

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**Memorandum of Judgment**

Appeal from the Conviction by

The Honourable Deputy Judge J.R. McIntosh

Convicted on the 24th day of February, 2016

Appeal from the Sentence by

The Honourable Deputy Judge J.R. McIntosh

Sentenced on the 8th day of December, 2017

(Docket: T-2-CR-2015-000134)

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**Memorandum of Judgment**

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**The Court:**

# Introduction

1. What does society do with an offender with low cognitive functioning and an alcohol use disorder who has committed multiple random sexual assaults? The offender has been in denial about his conduct and alcohol problems and often fails to cooperate in treatment and counselling. He is a difficult inmate to manage. For most of his adult life he has been in custody, and when not in custody, he lives a transient lifestyle of shelters or couch surfing, sustained by social assistance and occasional support from an adoptive sister, the only pro-social relationship in his life. He is at high risk to reoffend. At what point does he fall into the category of the “small group of persistent criminals with a propensity for committing violent crimes against the person”, a dangerous offender designation and warranting indeterminate preventative detention: ***R v Boutilier***, 2017 SCC 64 at para 3. Did the Crown discharge its burden in this case, to justify such an order?
2. Mr Zoe appeals his conviction for three offences: breaking and entering into a dwelling and committing sexual assault inside, breaking and entering into a dwelling and committing theft inside, and breach of probation order (failure to keep the peace and be of good behaviour). He also appeals his designation as a dangerous offender and the indeterminate sentence in a penitentiary. These appeals were heard together. Mr Zoe was self-represented for his conviction appeal. While he did not file any written submissions on the conviction appeal, he did make oral submissions and was able to answer questions from the bench. He was represented on his sentence appeal and written submissions and oral submissions were received on this issue.
3. For the reasons below, the conviction appeal is dismissed and the sentence appeal is allowed.

# Background Facts to the Offences

1. In the early morning hours of February 15, 2015, while on probation, Mr Zoe entered the apartment of HS and JF. HS had gone to bed around midnight on the evening of February 14 and her partner, JF, returned from his job as a bartender around 2:00 or 3:00 am. He had $285 in cash in his wallet. He went to bed at approximately 4:00 am. HS woke up to someone rubbing her vagina over her clothes and blanket. When she opened her eyes she saw a man standing next to the bed with a finger over his lips saying “Ssssh”. She screamed and JF woke up. HS could not see the intruder’s face but described him as wearing a “reddish” winter jacket, a backpack, a dark toque and possibly a blue scarf.
2. JF jumped out of bed in his underwear, chased the man into the stairwell, at which point a struggle ensued during which he pulled the man’s backpack off. As the man was exiting the building, he looked back at JF. JF saw his face and he recalled the swishing sound of the jacket or snowpants. He said the jacket was red. He described the man as having the same build as himself and saw enough of his face to identify him as Aboriginal.
3. JF opened the backpack and noticed some beer which had been removed from their fridge as well as some clothing and documentation with Mr Zoe’s name. A glove was also found that tested positive for Mr Zoe’s DNA and the DNA of an unidentified individual. JF checked his wallet and noticed his cash was missing.
4. While JF chased the intruder, HS called the police. She noted the time to be 5:30 a.m.
5. Two RCMP constables responded to the call to the police. Upon interviewing the victims, they realized they had seen someone matching the description of the assailant on their way to the apartment, approximately fifty meters from the victims’ apartment, walking away from downtown. He was the only person they had observed on their patrols. Another constable was dispatched to pick up the man who identified himself as Mr Zoe. This all happened within fifteen minutes of the initial call to the police. Upon confirming the backpack contained Mr Zoe’s documentation, Mr Zoe was arrested and then transported back to the victim’s apartment. After some discussion, JF was brought down where he identified the appellant through the rear window of the police car. Mr Zoe was found with $460 cash.
6. Mr Zoe had been with his childhood friend, Mr Lawrence Tailbone, earlier during the day on February 14, 2015 and they had been at Mr Tailbone’s brother’s trailer drinking beer. At one point, they left to go to the liquor store and then returned to the trailer with a large bottle of rum and divided it into four mickeys, two of which Mr Zoe put into his backpack. Mr Tailbone testified that he was told by his brother not to let Mr Zoe stay the night. At approximately 2:00 am, Mr Tailbone let Mr Zoe out of the trailer; he recalled the time because he noticed it on the clock and it was almost “bar closing time”.
7. Mr Zoe testified. He confirmed that he had been at the trailer with Mr Tailbone earlier on February 14. He confirmed going to the liquor store. He claimed that he left the trailer at about midnight, went to the Winks gas station and purchased some food. Approximately twenty minutes later, he was walking and left his backpack in the local ball park under the stands and then proceeded to walk towards some bars. He did that because he was not allowed to take alcohol into the bars. His gloves were also in the backpack. He had noticed a group of people who he believed to be homeless in the lobby of an apartment building close to the ball park and noticed that one of them was wearing a red jacket. He claims he continued to walk towards the Northern Lights Hotel, where he shared cigarettes with an individual he knew and with another individual who unexpectedly struck him in the eye.
8. He testified that when he made his way back to the ball park, he found that his backpack had been stolen so he decided to walk towards downtown to see if he could find someone wearing it. He was wearing a balaclava around his neck but not wearing gloves. After looking for his backpack for approximately half an hour, he started walking back towards the trailer sometime between and 1:00 and 2:30 am. Then he was arrested.
9. Mr Zoe denied entering the victim’s apartment, committing a sexual assault or taking the money. At trial, he filed an alibi notice. He also confirmed at trial that he owned the backpack and glove found in the victim’s apartment, but denied being in the apartment.
10. In addition, Mr David Pin, Mr Zoe’s case manager at the North Slave Correctional Centre from where he had been released in January 2015, testified that when inmates are released from custody in the winter months, they are provided a free jacket and gloves. He identified that the jacket Mr Zoe was wearing when he was arrested as being one of the models of jackets issued to inmates on release though the gloves were not.

# Conviction Appeal

1. Mr Zoe’s appeal centers on two issues: his alibi defence which the trial judge rejected; and the related issue of whether the Crown had met its burden to prove the identity of the perpetrator of the offences. Both of those issues engage with findings of fact made by the trial judge which largely turned on assessments of credibility. Trial judges are entitled to great deference in this area and their findings should only be interfered with on appeal if there is a palpable and overriding error: ***R v Bourgeois***, 2017 ABCA 32 at para 12, aff’d 2017 SCC 49. This standard also applies to any eyewitness identification notwithstanding that a court’s review of eyewitness identification evidence should be “penetrating and robust”: ***R v Letendre***, 2019 ABCA 179 at para 7.
2. The trial judge rejected Mr Zoe’s alibi evidence. This conclusion turned on findings of credibility with respect to Mr Zoe and other witnesses, in particular Lawrence Tailbone. The trial judge found Mr Tailbone to be a credible witness and accepted his evidence that Mr Zoe left the trailer around 2:00 a.m. and was told he could not return. He rejected Mr Zoe’s evidence, pointing to problems, including that: Mr Zoe could not say if he left the trailer at 2:00 am when the bars closed; his claim to have left his backpack at the ballpark so he could go to the bar made no sense; the approximately three-hour time gap from 2:00 am when he said he left downtown to his arrest just after 5:30 am; he was found walking northbound in the opposite direction of the trailer to which he said he was returning; and that he did not wear his gloves when it was -30 Celsius or colder in Yellowknife when he was outside walking.
3. We see no basis for interfering with the trial judge’s conclusions in this regard.
4. With respect to the identification evidence, we also see no reviewable errors made by the trial judge. First, while the trial judge admitted JF’s identification of Mr Zoe in the police car as an exception to the hearsay rule only, he was right to accord it very little weight because of the unreliable circumstances. It was appropriate to receive the evidence of HS and JF regarding their contemporaneous descriptions of the person in their apartment. Ultimately, the identification was established by relying on a constellation of circumstantial evidence including: the rejection of the alibi evidence; the fact that Mr Zoe’s backpack and glove were found in the victim’s apartment; the victims’ description matched Mr Zoe and his clothing, even before JF was asked to identify him in the police vehicle; he was arrested within 100 meters of the victim’s residence; he was the only person seen by police at approximately 5:30 am in -30 degree Celsius weather; and the complete rejection of Mr Zoe’s evidence. Relying on these factors, the trial judge reasonably concluded that Mr Zoe was the assailant.
5. Mr Zoe also argues that the police service dog was not able to track him outside of the victim’s apartment and this proves he was innocent. In our view, this does not detract from the evidence which supported his identification.
6. In all of the circumstances, the appeal from the conviction is dismissed.

# Sentence appeal

1. Sentencing someone as a dangerous offender is a two-step process. In the first step, the sentencing judge must determine whether an offender should be designated as a dangerous offender under s 753(1) of the *Criminal Code*. If so, the next step is to determine the appropriate sentence under ss 753(4) and (4.1).
2. These provisions of the *Criminal Code* were amended in 2008, and their constitutionality challenged. The Supreme Court of Canada issued its reasons in ***Boutilier*** just two weeks after sentencing occurred in this case. The test for dangerous offender designation and the appropriateness of an indeterminate sentence applied by the sentencing judge in this case contained legal errors in light of the reasons in ***Boutilier***.
3. The appellant argues, among other things, that because of these errors, the sentencing judge did not do the required analysis so the appeal should be granted and the matter be remitted for a new sentencing hearing.
4. In addition, Mr Zoe applies to submit fresh evidence in the form of a ***Gladue*** report in relation to an alleged error of the sentencing judge failing to consider ***Gladue*** factors.
5. The Crown concedes one legal error by the sentencing judge in light of ***Boutilier***, but submits that the curative provisions of the *Code* be applied to dismiss the appeal. The Crown argues that given the extensive record, when the proper legal analysis is done, the same conclusions on sentence will flow. It also opposes the admission of fresh evidence.

## *Boutilier* and the Legal Test

1. **Designation Stage**
2. Prior to ***Boutilier***, there had been some uncertainty about whether an offender’s future treatment prospects were relevant to the designation stage of the dangerous offender scheme. The Supreme Court of Canada clarified that there are two aspects to the designation stage. First, the sentencing judge must look at the *past* behaviour of the accused and consider whether it comes within ss 753(1)(a)(i) to 753(1)(a)(iii) or, 753(1)(b) of the *Criminal Code*. The statutory elements are:

753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence ... and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender’s behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

(b)  that the offence for which the offender has been convicted is a serious personal injury offence ... and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

1. In short, the underlying offence must be a serious personal injury offence and the offender must be a threat on the basis of evidence:

* of a pattern of repetitive behaviour and likelihood of death or injury to others if not restrained (s 753(i)(a)(i));
* of a pattern of aggressive behaviour and an attitude of indifference to the reasonably foreseeable consequences of such behaviour (s 753(1)(a)(ii));
* any brutal behaviour which indicates that the offender is unlikely to be inhibited in the future (s 753(1)(a)(iii));
* a pattern of sexual offences that demonstrate a failure to control sexual impulses in the past and the likelihood to fail to control the sexual impulses in the future (s 753(1)(b)).

1. Second, the sentencing judge must look to the future and the threat or risk that an offender poses, as the point is to prevent violent behaviour in the future. Thus, there must be a prospective assessment of risk. Specifically, a court must be satisfied that an offender

... poses a high likelihood of harmful recidivism and that his or her conduct is intractable. I understand “intractable” conduct as meaning behaviour that the offender is unable to surmount.

***Boutilier*** at para 27

1. In assessing whether someone is intractable, a court must consider the future treatment prospects of the offender and whether he or she might be responsive to future treatment.
2. At all times, the onus remains on the Crown to prove beyond a reasonable doubt that an offender’s condition is untreatable or intractable and the offender has a high likelihood of harmful recidivism: ***Boutilier*** at para 45.
3. **Sentence Stage**
4. The second stage, the sentencing stage, is governed by ss 753(4) and (4.1). Section 753(4) sets out the mandatory options, once an offender has been declared dangerous. He or she “shall” receive one of the following sentences:

* A sentence of indeterminate detention in a penitentiary;
* The appropriate sentence for the underlying offence (minimum 2 years in a penitentiary) plus a long-term supervision order for a maximum of 10 years; or
* A sentence applying standard sentencing principles for the offence for which the offender has been convicted.

1. Section 753(4.1) mandates an indeterminate penitentiary sentence:

... unless [a Court] is satisfied by the evidence adduced during the hearing … that there is a reasonable expectation that a lesser measure … will adequately protect the public.

1. The combined effect of these two provisions is as follows:

* There is no presumption of an indeterminate sentence; rather a sentencing judge has to conduct a thorough inquiry into the possibility of control in the community and consider all of the evidence to determine the fittest sentence: ***Boutilier*** at paras 64-69;
* The full range of sentencing options summarized in s 753(4) are available to a sentencing judge: ***Boutilier*** at paras 58-59;
* The sentencing judge must apply sentencing principles outlined in ss 718 to 718.2: ***Boutilier*** at paras 53, 61-62;
* The sentencing judge must consider an offender’s moral culpability, seriousness of the offence, mitigating factors, and ***Gladue*** factors: ***Boutilier*** at para 63;
* The sentencing judge should start with the least restrictive option and consider whether the public will be adequately protected, before considering more restrictive conditions: ***Boutilier*** at paras 70;
* The sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the scheme, protection of the public: ***Boutilier*** at paras 60-61.

## The Reasons for Sentence

1. At the designation stage, the Crown initially sought the designation based on ss 753(1)(a)(i) (pattern of repetitive behaviour likely to cause death or injury) and 753(1)(b) (failure to control sexual impulses). However, Mr Zoe conceded that he met the statutory requirement of s 753(1)(b) for a dangerous offender designation. He had previously been found guilty of the following sexual offences as summarized in Mr Zoe’s factum:

* Sexual assault (s 271 CC): On August 7, 2004, in the middle of the afternoon, the appellant approached a woman whom he did not know from behind, and grabbed her on the buttocks. He was convicted of sexual assault, and on February 4, 2005, he was given a suspended sentence of six months.
* Sexual Interference (s 151 CC): On June 24-25, 2008, the appellant was drinking with the 13-year old female victim and two other people. The victim passed out, and awoke to the find the appellant touching her breasts, waist, buttocks and vagina over her clothing. He was found guilty on June 11, 2009 and sentenced to 15 months’ imprisonment.
* Sexual Assault (s 271 CC): On January 2, 2011, while intoxicated, the appellant approached the victim from behind, placed one arm around her neck and covered her mouth with his other hand. He demanded money and placed one hand down her pants, penetrating her vagina with his fingers for approximately 30 seconds. She told him she could not breathe and when he loosened his grip, she yelled for help. Two men in the area came to her assistance. The appellant entered a guilty plea on December 16, 2011 and was sentenced to 39 months’ imprisonment.

1. In light of the concession that Mr Zoe satisfied the requirements for a dangerous offender designation, the sentencing judge conducted no analysis at the designation stage. There was no consideration of Mr Zoe’s intractability or future treatment prospects.
2. At the second stage, the sentencing judge interpreted s 753(4.1) as creating a presumption of an indeterminate sentence which was not rebutted by the evidence. He rejected Mr Zoe’s suggestion of an eight-year penitentiary sentence followed by a 10-year long-term supervision order. He found that the phrase ‘reasonable expectation that a lesser measure … will adequately protect the public’ in s 753(4.1) meant more than ‘reasonable possibility’ which is what the evidence established. Because he relied on the rebuttable presumption, he did not consider, as ***Boutilier*** requires, whether an indeterminate sentence was the least restrictive sentence that would adequately protect the public.

## Issues

1. If the sentencing judge committed an error of law in failing to consider an offender’s treatment prospects (for the purpose of designation) and in applying a rebuttable presumption of an indeterminate sentence, whether a new hearing is required depends on the application of the curative proviso in s 686(1)(b)(iii) of the *Criminal Code*: see ***Boutilier*** at para 82. In this case, neither of the alleged errors are “harmless”. If errors are made out, a new sentencing hearing must be ordered unless “there is no reasonable possibility that [the outcome] would have been any different if the error of law had not been made”: ***R v Johnson***, 2003 SCC 46 at para 49; ***Boutilier*** at para 82.
2. There is no doubt that in light of ***Boutilier*** legal errors were made in the analysis at both stages of the dangerous offender analysis. The question is whether on this record, that made any difference to the result.
3. The Crown argues first of all that no error was made at the designation stage because the sentencing judge relied on a concession from Mr Zoe from which he cannot now resile. Second, incorrectly applying a presumption at the sentencing stage is saved under the curative proviso because an indeterminate sentence was the only option available based on the evidence in the record. Lastly, the Crown submits there was no error in the consideration of ***Gladue*** factors, and the fresh evidence should not be admitted.

## Concession

1. The Crown argues that Mr Zoe cannot resile from his concession at trial that he met the criteria of a dangerous offender.
2. The concession made at the court below with respect to designation was made within a particular legal context that arguably did not require the Court to consider future treatment. ***Boutilier*** clarified the law on this topic. We see no reason to hold Mr Zoe to that concession in light of the change in the law: see ***R v Napope***, 2019 SKCA 124 at para 3.

## Treatment Prospects

1. In light of ***Boutilier*** and the requirement to consider treatment prospects at the first stage, we find that the sentencing judge committed an error of law in not doing so.
2. The Crown argues that the sentencing judge turned his mind to the prospect of future treatment at the second stage and, in any event, that analysis would apply at the first stage. Therefore, the failure of the sentencing judge to consider treatability at the designation stage had no effect on the outcome.
3. The evidentiary record establishes that both the experts (Dr Klassen for the Crown and Dr Nesca for the defence) agreed that Mr Zoe:

* Had a traditional stable upbringing until age 16;
* Has low cognitive functioning;
* Is a high risk to reoffend;
* Needs treatment for both his alcohol abuse and sexual offences; and
* Has generally not been cooperative with treatment.

1. Dr Nesca identified that Correction Services Canada is rolling out a new generation of treatment programs for federal inmates known as the Integrated Correctional Program Model (ICPM) that would include motivational modules and modules for cognitively impaired inmates. Also specialized services for Aboriginal offenders were in the works. Dr Nesca thought Mr Zoe would benefit from access to some of this programming. Dr Nesca was realistic about treatment options, saying that it would be challenging and that there would likely be several setbacks.
2. Both Dr Klassen and Dr Nesca felt that indigenous-specific treatment options best suited Mr Zoe and that suitable programming was becoming available.
3. While both experts agreed Mr Zoe was a high risk to reoffend, the sentencing judge never specifically considered whether his conduct was intractable. There is no doubt he would be difficult to treat, but we cannot say that the outcome at the designation stage would have necessarily have been the same if the sentencing judge had considered the availability of appropriate treatment.

## iii) Presumption of Indeterminate Sentence

1. The foregoing analysis applies equally to the second sentencing stage of the dangerous offender analysis.
2. The sentencing judge applied a presumption of an indeterminate sentence and evaluated the evidence only to see if the presumption was rebutted. We do not have the benefit of any consideration or probing of whether any other disposition, such as a period of penitentiary time, and/or a long-term supervision order would have adequately addressed the risk posed by Mr Zoe to the public. Both experts observed that Mr Zoe would benefit from structure and supervision in the community, something he has never had.
3. In this case, there is a reasonable possibility that the sentencing judge would have reached a different conclusion about (1) whether Mr Zoe is a dangerous offender and (2) whether an indeterminate penitentiary sentence is appropriate if the proper legal analysis had been applied. Therefore, the curative proviso does not displace the need for a new hearing.

## iv) Fresh Evidence of *Gladue* Factors

1. The presentence report addressed Mr Zoe’s aboriginal background. But the proposed fresh evidence, a comprehensive ***Gladue*** report dated October 15, 2019, reveals a much more nuanced and complex history.
2. The information before the sentencing judge was that Mr Zoe was adopted as a baby into a stable loving family. He was raised in the remote and stable community of Gamètì, living a traditional life moving between camps and traplines. When he was 16, he left the community to attend school in Behchokǫ̀, formerly known as Rae-Edzo. There he became exposed to alcohol and cannabis. He dropped out of school and began the transient life with no real employment or education prospects, supported by social assistance and odd jobs. His substance use, gambling and lack of supportive social network has resulted in him amassing a criminal record which has kept him in custody for the majority of his adult life.
3. His only prosocial relationship is with his sister from his adoptive family. He often stays with her when not in jail, and she emotionally and financially supports him when she can.
4. On noting no history of residential schools in his adoptive family, the sentencing judge held that there was nothing in his background that should lower his “blameworthiness with respect to the predicate offence”. Both parties urged the Court to consider the broader colonial and systematic context, but the sentencing judge declined to do so.
5. Even based on the evidence in the presentence report, this was an impoverished approach to understanding and applying ***Gladue*** factors. The mandate for sentencing judges to give a robust consideration to ***Gladue*** factors in sentencing could not be clearer: ***R v Ipeelee***, 2012 SCC 13; ***R v Laboucane***, 2016 ABCA 176 at para 5; ***Boutilier*** at para 63.
6. The fresh evidence of the ***Gladue*** report provides much more context to the predicate offences and Mr Zoe’s past offences. Mr Zoe’s birth parents were young and unmarried and both had residential school experience. He connected with them at age 16 in Rae Edzo when he started attending school. Unfortunately, while he never developed a meaningful relationship with his biological mother, he did develop a relationship with his biological father. He was exposed to drinking and cannabis with his biological father and uncle.
7. We admit the ***Gladue*** report as fresh evidence under the relaxed ***Palmer*** test. This evidence gives this Court a more complete picture of Mr Zoe’s aboriginal upbringing and the factors that may impact on his moral blameworthiness and prospects for future treatment. The sentencing judge did not have the benefit of a complete record on this important issue, and a complete record is necessary for a fair hearing: ***R v Wolfleg***, 2018 ABCA 222 at para 81; ***Kritik v R***, 2019 QCCA 1336.
8. We note that in some cases ***Gladue*** factors may have a limited role in a dangerous offender situation where protection of the public is a primary factor: ***R v Bonnetrouge***, 2017 NWTCA 1 at para 22. Significant ***Gladue*** factors may not be enough on their own to avoid a dangerous offender designation or sentence.
9. However, ***Gladue*** factors may be more relevant to determining whether culturally sensitive programming might enhance the offender’s prospects of rehabilitation and treatability: ***R v Moise***, 2015 SKCA 39 at para 24; ***Bonnetrouge*** at para 23. This is especially relevant to this case. There is some evidence that Mr Zoe had been meeting with a traditional counsellor for a certain time period and this had been positive. Analyzing future prospects for treatment, intractability, and appropriate sentence cannot be accomplished on the current record.
10. A full ***Gladue*** report on these issues may have an impact on either or both parts of the dangerous offender analysis.
11. We caution however, that this decision does not endorse litigation by installment of providing “better” ***Gladue*** reports on appeal. Parties are expected to put their best case forward at the sentencing hearing. Part of the difficulty in the presentence report was Mr Zoe’s failure to cooperate in the writing of the report. Some of that resistance was due to his substance abuse illness and limited cognitive ability. Having reviewed the “better” ***Gladue*** report and having had the benefit of significantly more information than the sentencing judge, combined with the effect of the legal errors, we have determined that, in the unusual circumstances of this case, it is appropriate to grant the sentence appeal.

# Conclusion

1. In this case, the sentencing judge committed two errors of law: failing to consider Mr Zoe’s treatment prospects before designating him a dangerous offender, and applying a presumption of an indeterminate sentence at the second stage of the analysis. A court of appeal can dismiss an appeal against a declaration that an offender is dangerous if the error of law has resulted in no substantial wrong or miscarriage of justice.
2. However, that power should only be exercised in the rarest of circumstances: ***Boutilier*** at para 82. This is not one of those rare cases. The decision below is quashed and sentencing is remitted to the Territorial Court for a new sentencing hearing.

# Disposition

1. The conviction appeal is dismissed. The sentence appeal is granted.

Appeal heard on October 22, 2019

Memorandum filed at Yellowknife, NWT

this 31st day of January, 2020

Authorized to sign for Bychok J.A.

Khullar J.A.

Pentelechuk J.A.

**Appearances:**

B. Green

for the Respondent

J. Cunningham

for the Appellant (on the Sentence Appeal only)

Appellant, In Person (on Conviction appeal only)

A-1-AP-2017-000 016

IN THE COURT OF APPEAL

FOR THE NORTHWEST TERRITORIES

**Between:**

**Her Majesty the Queen**

Respondent

- and -

**Bobby Zoe**

Appellant

|  |
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| **Restriction on Publication**  **Identification Ban** – See the *Criminal Code*, section 486.4.  By Court Order, information that may identify the victims must not be published, broadcast, or transmitted in any way.  **NOTE:** This judgment is intended to comply with the identification ban. |

MEMORANDUM OF JUDGMENT

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