

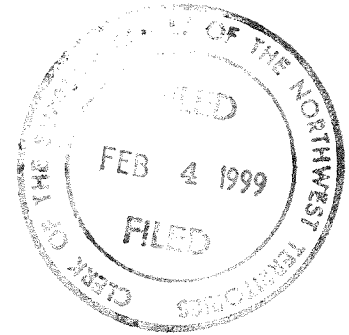
CR 03517

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -



RONALD NUYAKIK TOLOGANAK

Transcript of the Oral Reasons for Sentence by The Honourable Justice V.A. Schuler, at Yellowknife in the Northwest Territories, on Thursday, January 28th A.D., 1999.

APPEARANCES:

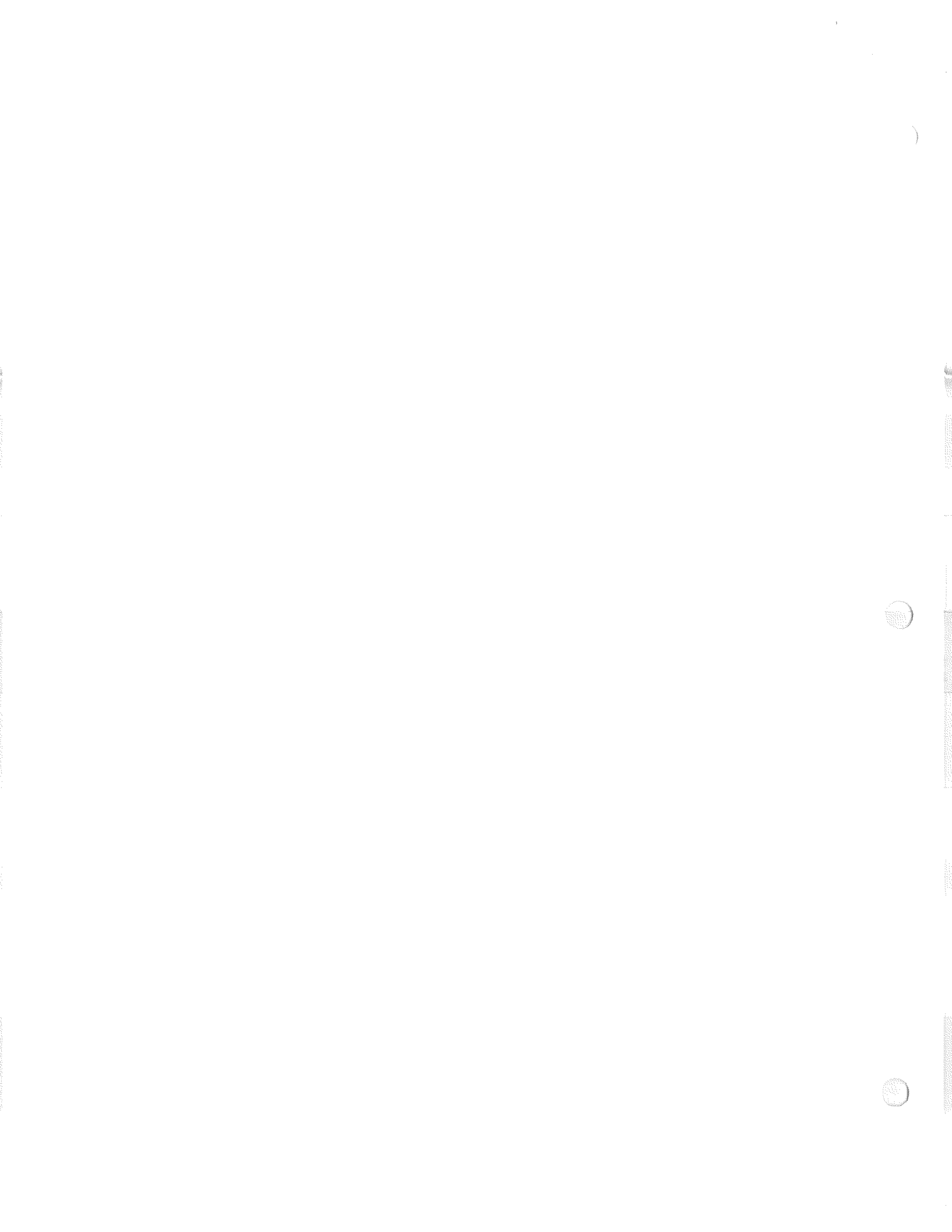
Ms. B. Schmaltz:

Counsel for the Crown

Mr. G. Boyd:

Counsel for the Accused

Charge under s. 334(a) Criminal Code of Canada



1 THE COURT: Mr. Tologanak has pleaded guilty to
2 a charge of theft over \$5,000. It is a breach of trust
3 situation, and the facts are set out in the Agreed
4 Statement of Facts which has been filed. It will
5 suffice if I simply say that while Mr. Tologanak was
6 the executive director for the Kitikmeot Hunters and
7 Trappers Association for approximately a year and a
8 half over 1995 - 1996, he stole \$40,005.20 from the
9 association. He did this by charging personal expenses
10 to the association, overpaying himself, and charging
11 personal expenses to the association's credit card.
12 This was noted by another employee, who saw that
13 Mr. Tologanak was charging personal expenses, and an
14 investigation ensued and Mr. Tologanak was eventually
15 suspended from his position as executive director. He
16 later approached the association in an attempt to
17 arrange restitution. He admitted what he had done when
18 he was interviewed by the police.

19 I have been told that Mr. Tologanak, who is now 35
20 years old, was in a difficult personal situation at the
21 time in question, that his wife had left him and had
22 gone to Hay River with their three children and that he
23 was trying to support two households in effect. He
24 apparently panicked and started charging expenses to
25 the association all the time meaning or hoping to pay
26 them back.

27 As I said, this is a breach of trust situation,

1 and it is therefore more serious than the normal
2 theft.

3 I have reviewed the cases that counsel have
4 filed. I won't mention all of them but as Mr. Justice
5 Richard pointed out in the case of Joellie Veevee,
6 people or organizations who wish to guard their
7 property from theft can put their money in a bank
8 account or lock their doors or put things in a safe and
9 that's how they protect themselves from dishonest
10 people. But when they hire employees who are often
11 people with good work records, as I have been told
12 Mr. Tologanak had, they trust those employees and they
13 let them have access to the safes or the books or the
14 money or the credit card; they let them have access to
15 their property precisely because they trust them
16 because they seem to be good people. Organizations
17 like the Kitikmeot Hunters and Trappers Association
18 can't really protect themselves from such people
19 because they don't expect them to steal. This is why
20 the Courts have always treated breach of trust theft
21 cases in a special way and there have been many cases,
22 going back over many years, in which this Court has
23 said that a jail sentence will normally be imposed
24 unless there are special circumstances.

25 As to his personal circumstances, Mr. Tologanak is
26 35 years old, and he is from Kugluktuk. He has a Grade
27 12 education with some college. It is said that he has

1 an exemplary work record and that he has virtually
2 always been employed and has contributed to his
3 community. He is currently living in Edmonton while
4 his spouse attends school there. He has been unable
5 thus far to obtain employment. The family plans to
6 return to Yellowknife when Mr. Tologanak's spouse
7 finishes the course. And I am told as well that
8 Mr. Tologanak recently paid \$100 towards restitution of
9 the amount involved in the theft.

10 Mr. Tologanak does have a record which is
11 unrelated save for a theft conviction in 1982 which is
12 sufficiently long ago as to make that conviction really
13 irrelevant for purposes of the sentencing today.

14 Now, as I indicated, normally a jail sentence is
15 imposed in a breach of trust situation, and the most
16 important factors in these types of cases are
17 considered to be general deterrence, in other words,
18 discouraging other people from doing this sort of thing
19 to their employers and also denunciation, in other
20 words, indicating how seriously the public views this
21 type of activity and condemns it.

22 In this case, Crown and defence have made a joint
23 submission for a sentence of two years less one day to
24 be served in the community with probation to follow
25 essentially for purposes of restitution. That means
26 really that in this case Crown and defence are saying
27 that a jail sentence is appropriate but it should be

1 one that is served in the community instead of in an
2 institution.

3 In the case of The Queen and Brady, the Alberta
4 Court of Appeal has said that where general deterrence
5 and denunciation are paramount, a conditional sentence
6 will not be appropriate in the usual case. Therefore,
7 accepting the general principle that the Court should
8 not depart from a joint submission unless the sentence
9 recommended is clearly inadequate, I should, it seems
10 to me, review the circumstances to see whether there
11 are factors in this case that do take it out of the
12 ordinary.

13 So dealing first of all with the aggravating
14 factors, the circumstance that this is a breach of
15 trust is in itself aggravating. And I would note as
16 well that the amount of money involved was
17 substantial. However, it does seem to me that those
18 are the only aggravating factors.

19 In terms of mitigating factors, Mr. Tologanak
20 waived his right to a preliminary hearing early on and
21 he has pleaded guilty. I am told that he has always
22 intended to plead guilty to the charge but that
23 logistics got in the way. I will just comment that it
24 does seem to me that this case has taken an inordinate
25 amount of time to finally be dealt with considering
26 that the preliminary hearing was waived in November of
27 1997, but I do accept that that is not due to any fault

1 on Mr. Tologanak's part or any wish on his part to drag
2 the matter out.

3 The guilty plea means two things really, one is
4 that Mr. Tologanak has waived his right to a trial and
5 he has saved the court system the time and expense of
6 the trial. And the same applies with respect to the
7 preliminary hearing.

8 The second consideration is that the plea of
9 guilty is an indication of remorse and it's an
10 indication that Mr. Tologanak is taking responsibility
11 for what he did.

12 Also a mitigating factor to consider is that
13 Mr. Tologanak did make an attempt to arrange
14 restitution, apparently thinking that he would be able
15 to pay it if he was kept on with the association, which
16 of course did not happen.

17 I also consider that he did admit what he had done
18 to the police and that he expressed remorse to them and
19 that he has also expressed remorse in his words to the
20 Court today.

21 Another, and in my view quite substantial,
22 mitigating factor is that Mr. Tologanak did not make
23 any attempt to cover up or to conceal what he was doing
24 or to doctor the books in any way. And to some extent
25 that does take this case out of the ordinary.
26 Notwithstanding the fact that he didn't make any
27 attempt to cover up, as Crown counsel said in her

1 submissions these cases can be difficult to prove so I
2 don't think that the guilty plea is in any way
3 diminished because he didn't try to cover things up.

4 Turning then to the requirements of Section 742.1,
5 which is the conditional sentence section, first of all
6 I am satisfied that a conditional sentence is
7 available; in other words, I am satisfied that this is
8 a case where a jail sentence of less than two years is
9 appropriate. There is no evidence that serving the
10 sentence in the community would endanger the community
11 so I am satisfied on that aspect as well. The only
12 real question, it seems to me, is would a conditional
13 sentence be consistent with the fundamental purposes
14 and principles of sentencing as set out in the Criminal
15 Code and which of course include deterrence and
16 denunciation and recognizing breach of trust as an
17 aggravating factor.

18 Now, I will say in light of what is said by the
19 majority, I believe in the Brady case, that I have
20 considered that Mr. Tologanak's record does include a
21 conviction for breach of probation in 1993, and in
22 Brady the Court indicated that that's something that
23 should be considered on the issue whether an accused is
24 likely to comply with conditions in a conditional
25 sentence order.

26 I have considered that there is the only one
27 instance of a conviction of that nature on

1 Mr. Tologanak's record, and the fact that he was in
2 1993 convicted of breach of probation, in my view ought
3 not to stand in the way of his being considered for a
4 conditional sentence.

5 In all of the circumstances and having considered
6 all of the factors and that this is a joint submission,
7 I have concluded that I can accept the recommendation
8 of counsel. In my view the combination of the waiver
9 of the preliminary hearing, the guilty plea, the
10 circumstance that Mr. Tologanak did not try to cover up
11 what he was doing, the combination of those factors
12 persuade me that a conditional sentence is
13 appropriate.

14 I should say as well that I accept the
15 recommendation of counsel that there also be a
16 probation order and considering that the combined
17 sentence then would be a conditional sentence order,
18 probation order, and restitution, it seems to me that
19 this is a fairly heavy sentence and that it will serve
20 the purposes of denunciation and deterrence.

21 Now, just before I continue then, counsel, I want
22 to just canvass with you how to deal with the
23 restitution, and I will tell you exactly what my
24 concern is.

25 I am thinking that if I impose a conditional
26 sentence of two less a day and then probation of two
27 years, that it may be best to divide the amount for

1 restitution so that effectively there would be \$20,000
2 payable under the conditional sentence order and then
3 \$20,000 payable under the probation order. That is a
4 lot of money; Mr. Tologanak is not working. I would
5 like to include a condition that he make regular
6 payments of not less than a certain amount. Whether
7 those should be monthly payments or quarterly payments
8 and how much they should be is what I would like to
9 hear from you on.

10 Ms. Schmaltz, if you want to go first.

11 MS. SCHMALTZ: Yes, My Lady. I did hear Mr. Boyd
12 say that he hadn't been able to find work in Edmonton.
13 I'm not sure if he had work up to that point or expects
14 to get it. I agree with Your Ladyship that in any
15 event the Crown certainly doesn't want to set him up
16 for a breach, that whatever payments have to be
17 realistic and I am not sure what his entire financial
18 situation is, and I don't believe that we heard that in
19 submissions, whether his wife expects to be working,
20 whether he expects to be working, but I think that has
21 to be canvassed before the amounts can be determined
22 otherwise I think that he would be set up for a breach
23 and would have a defence to it in essence. But I agree
24 that it should be split up probably over -- and I would
25 suggest -- I would suggest monthly payments with --
26 because he always has the option to amend the
27 conditional sentence order as well.

1 THE COURT: I guess one of the difficulties is
2 that by the end of this conditional sentence order he
3 could be in breach of that order if he isn't able to
4 pay the 20,000. Now of course there are the various
5 sections dealing with breach. But perhaps I should
6 hear then from Mr. Boyd on the financial aspect.

7 MR. BOYD: Yes, My Lady. My concerns
8 specifically would be again setting Mr. Tologanak up
9 for a breach. He tells me since this has been hanging
10 over his head, and as it may be, he hasn't been able to
11 find any permanent employment. As indicated in my
12 submissions, basically the types of jobs that he has
13 been able to get are the temporary labor jobs at the
14 Sally Ann. Now, as I said, before this happened he did
15 have an exemplary work record and obviously his
16 reputation has been severely tarnished by this. He
17 will be remaining in Edmonton until his spouse
18 completes school and until the end of that time, his --
19 although he tells me that he has applied in numerous
20 businesses, realistically his prospect continues to be
21 labor jobs at the temps which are generally minimum
22 wage jobs for a limited number of hours. Now when he
23 returns to Yellowknife, he hopes, certainly intends, to
24 be seeking full-term employment. Again, he is in the
25 position that because of this he has certainly gone
26 from a relatively -- you know, jobs of a certain
27 importance and now he certainly will be at the lower

1 end of the pay scale once again, probably relegated to
2 labor jobs and that type of situation. I understand
3 the Court's concern with having some sort of schedule
4 for repayment, it is just my concern that the \$20,000
5 within the first two years may be unrealistic given
6 that Mr. Tologanak is going to have to start working at
7 building up his resume again and establishing
8 credibility with any employer that he finds and it
9 certainly will take some time for him to start
10 productively paying this back. I am essentially in the
11 Court's hands with respect to how the Court wishes to
12 structure it, but I am very concerned with respect to
13 the issue of the potential breach.

14 THE COURT: I wonder if a restitution order
15 would be preferable in the circumstances.

16 MS SCHMALTZ: And it may be, My Lady, that it
17 could be dealt with in both ways, that a certain amount
18 as compensation and then just on behalf of the
19 complainant, that they still have the restitution order
20 to fall back on should they ever wish to enforce that
21 civilly.

22 THE COURT: Well, I don't -- oh, I see what you
23 mean. The problem is how to structure it. I don't
24 know of any bar to my making a conditional sentence
25 order and a probation order and a restitution order.

26 MS. SCHMALTZ: I think that's possible, all three
27 of those orders are possible. As I understand it, a

1 restitution order under the Code simply gives a
2 complainant or a victim of a crime a means to collect
3 that debt without going through the civil process once
4 the offence is amended in criminal court.

5 THE COURT: Perhaps then and, counsel, I want
6 to run this by you because if you foresee any
7 difficulty with this I want to know, it may be the best
8 way to deal with this is to make one of the conditions
9 of the conditional sentence order, payment of let's say
10 \$10,000. And then a further 10,000 would be payable
11 under the probation order, a minimum. These would be
12 minimum amounts. There would be a restitution order
13 for the entire amount with the condition that anything
14 that has already been paid obviously is credited
15 towards it. Do either of you see any difficulty with
16 that?

17 MS. SCHMALTZ: Not from the Crown, no, My Lady.

18 MR. BOYD: Not from defence, My Lady.

19 THE COURT: All right. Mr. Tologanak, would
20 you stand up, please.

21 On this charge of theft, Mr. Tologanak, I am
22 sentencing you to a term of imprisonment of two years
23 less one day however that is to be served in the
24 community. That order will include the statutory
25 conditions that you keep the peace and be of good
26 behaviour, that you appear before the Court when
27 required to do so by the Court, that you report to a

1 supervisor within three working days of today, here in
2 Yellowknife, and thereafter when required by the
3 supervisor and in the manner directed by the
4 supervisor. You are to remain within the jurisdiction
5 of the Northwest Territories or the province of Alberta
6 unless written permission to go outside those
7 jurisdictions is obtained from the Court or the
8 supervisor. You are to notify the Court or the
9 supervisor in advance of any change of name, or
10 address, and promptly notify the Court or the
11 supervisor of any change of employment or occupation.
12 Do you understand those conditions so far?

13 THE ACCUSED: Yes, Your Honour.

14 THE COURT: As additional conditions, you will
15 seek and maintain employment. You will provide for the
16 support and care of your family. You will perform 240
17 hours of community service work as approved by your
18 supervisor within the first year of the conditional
19 sentence. You will make restitution in the amount of
20 at least \$10,000 which is to be paid to the Clerk of
21 the Court for payment to the Kitikmeot Hunters and
22 Trappers Association. And that is to be made within
23 the term of the conditional sentence order.

24 At the conclusion of the conditional sentence, you
25 will be on probation for a period of two years. The
26 conditions of the probation will be that you keep the
27 peace and be of good behaviour, that you appear before

1 the Court as and when required to do so, and that you
2 make restitution of at least \$10,000, again payable to
3 the Clerk of the Court for payment to the Kitikmeot
4 Hunters and Trappers Association.

5 There will also be a restitution order and,
6 counsel, I will just indicate that this amount takes
7 into account the \$100 paid. It will be in the amount
8 of \$39,905.20, and any amounts paid under the
9 conditional sentence order and the probation order are
10 to be credited to that.

11 Now, you will have to remain here after court
12 closes, Mr. Tologanak. The clerk will provide you with
13 a copy of the conditional sentence order and explain to
14 you the consequences of breaching that order and also
15 explain to you how you or the supervisor or the
16 prosecutor may apply to change the optional conditions
17 in that order. And similarly, with respect to the
18 probation order, the clerk will explain to you the
19 consequences of a breach of that order and how it may
20 be changed, how the conditions may be changed.

21 Mr. Tologanak, there is really no doubt in my mind
22 that before the Court was given the ability to make a
23 conditional sentence order, in other words, an order
24 that you serve the sentence in the community, before
25 the Court was given that power by the legislature, you
26 would have got a jail sentence on this and, in other
27 words, you would be serving a lengthy term of

1 imprisonment. I don't think there is really any doubt
2 about that. The conditional sentence order is really a
3 term of imprisonment but you serve it in the
4 community.

5 Now, if you breach the conditions of the order,
6 you can then be ordered to serve the remainder in
7 jail. So you must appreciate and keep in mind how
8 important it is to comply with the conditions because
9 otherwise you may very well be looking at serving the
10 remainder of the sentence in jail, and I want to make
11 sure that you understand that and that you will abide
12 by the conditions that I have imposed.

13 Now, in the circumstances, counsel, I am not going
14 to order any Victims of Crime surcharge -- or I am
15 going to order that there won't be one.

16 Is there anything else at all that I should be
17 dealing with?

18 You can sit down, Mr. Tologanak.

19 MS. SCHMALTZ: If I might just suggest, My Lady,
20 the restitution part of the conditional sentence order,
21 being \$10,000 having been paid within the term of the
22 conditional sentence order, might I suggest that that
23 be within say the first 18 months of the conditional
24 sentence order, being that if he has to the end of the
25 conditional sentence order, there would be no --
26 nothing could be done if it wasn't paid because the
27 conditional sentence would be up and there's no offence

1 for breach of a conditional sentence order.

2 THE COURT: After the fact?

3 MS. SCHMALTZ: Just with it going right to the end
4 of the order that we could take no steps and even if --
5 and I don't mean to make it more onerous, or even if
6 that 7500 of that could be paid within the first 18
7 months and perhaps 2500 in the last six months. At
8 least that would give him motivation to make regular
9 payments and I realize that regular payments are not
10 the best way to go given his employment situation right
11 now but if it just was in the 18 months, if some of it
12 at least had to be paid.

13 THE COURT: I understand what you are saying.

14 Do you have any submissions?

15 MR. BOYD: I would simply indicate that that's
16 a fair request assuming that the amount that should be
17 paid by the 18 months, perhaps \$7,500 or \$7,000 would
18 be appropriate, just in that he starts at square zero
19 with his earning potential now. If his record holds
20 through as it has in the past, I am confident that once
21 he returns to Yellowknife he will get himself back on
22 his feet but it is going to take him some time before
23 he starts earning money and starts being able to pay
24 this back and hopefully it will be an increasing curve
25 that he is on with respect to his earning potential.
26 So this first 12 months will probably be the most
27 difficult to make any payment so that factor should be

1 reflected in the amount requested by the 18-month
2 period.

3 THE COURT: I understand what you are saying.
4 I think what I will do is structure the restitution
5 portion of the conditional sentence order such that it
6 will remain that he is to pay a minimum of \$10,000 and
7 that will be payable in the amount of \$7,000 within the
8 first 18 months of the order and \$3,000 thereafter.
9 Now again, those are minimum amounts. But I think that
10 covers it.

11 Mr. Tologanak, that is a lot of money and
12 obviously there's quite a burden on you now to try to
13 obtain employment which, in your circumstances, I am
14 sure isn't going to be easy but what you have to
15 consider is that if you don't make arrangements to make
16 these payments, you may very well be looking at serving
17 the sentence in jail instead of in the community. So I
18 am sure that you will make every effort considering
19 your circumstances.

20 Thank you very much, counsel, for your help in
21 this case. We will close court.

22 **(AT WHICH TIME THE ORAL REASONS FOR SENTENCE CONCLUDED)**

23 Certified pursuant to Practice
24 Direction #20 dated December 28, 1987.

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Lois Hewitt,
Court Reporter