***R v Tobac*, 2018 NWTSC 20 S-1-CR-2017-000101**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**TONY LYNETTE MARIE TOBAC**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Transcript of the Reasons for Sentence held before The Honourable Justice S. H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 16th day of March, 2018.

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**APPEARANCES:**

Ms. M. Zimmer: Counsel for the Crown

Mr. P. Harte: Counsel for the Accused

(Charges under s. 5(1) of the *Criminal Code*)

1. THE COURT: Good afternoon.
2. MS. ZIMMER: Good afternoon, Your Honour.
3. MR. HARTE: I'll have my client join me,
4. if I may, Your Honour.
5. THE COURT: Yes, that's fine.
6. Tony Tobac has pleaded guilty
7. to trafficking in cocaine contrary to Section
8. 5(1) of the *Controlled Drugs and Substances Act*.
9. She entered her plea on August 21, 2017, and a
10. presentence report was ordered. The matter was
11. subsequently scheduled for January 22, 2018, and
12. I heard sentencing submissions at that time. It
13. was adjourned to February 5, 2018, when it was
14. again adjourned to March 2, 2018, for further
15. submissions following the release of the reasons
16. and the decision of the Court of Appeal in *R v*
17. *Joe*, 2018 NWTCA 1. It is now my task to sentence
18. Ms. Tobac for this offense.
19. The facts of the offense are
20. that between March 9 and 17, 2017, the RCMP in
21. Yellowknife were conducting a drug trafficking
22. investigation called Project Glacier. The
23. project focused primarily on investigating
24. suspected dial a dope phone numbers. On March
25. 13th, 2017, at approximately 4:05, an undercover
26. officer called the suspected dial a dope number
27. to purchase cocaine. The officer spoke briefly
28. to a male and a female who said that they would
29. call back. About a minute later the officer
30. received a call and he was advised to go to the
31. side door of an apartment building in
32. Yellowknife.
33. At approximately 4:27 p.m. the
34. officer arrived at the apartment building and
35. called the number. A male answered and said that
36. he would be right down, and shortly after
37. Ms. Tobac opened the side door of the apartment
38. building and walked with the officer to the base
39. of the stairwell. She told the officer that her
40. name was "Tony" and that "he sent me down".
41. Ms. Tobac then sold the officer one piece of
42. crack cocaine weighing 0.4 grams for $80. After
43. the transaction Ms. Tobac ran up the stairs and
44. met a male at the next landing.
45. On March 16th the RCMP
46. executed a search warrant at a unit in the
47. apartment building, which was the apartment that
48. Ms. Tobac shared with Russel Hamilton. A number
49. of items were seized, including cell phones,
50. score sheets, and a scale with white residue.
51. The Crown is seeking a
52. sentence of 10 months imprisonment and the
53. defence is urging the Court to consider a
54. sentence of 90 days incarceration to be served
55. intermittently, followed by a period of
56. probation.
57. There have been many cases in
58. this jurisdiction in which offenders have been
59. sentenced for trafficking in cocaine or crack
60. cocaine. There are a range of sentences that can
61. be imposed, and for the most part they're now
62. sentences of imprisonment based on the appellate
63. case law applicable in this jurisdiction. The
64. cases provide some guidance for an appropriate
65. range of sentence and demonstrate the consistent
66. approach of the Courts in sentencing those who
67. traffic in cocaine.
68. Courts in this jurisdiction
69. have consistently imposed sentences meant to
70. denounce and to deter offenders who are
71. trafficking cocaine. And it has been said in
72. many of those cases that the drug trade
73. trafficking in cocaine and crack cocaine has had
74. a devastating effect on the people in Yellowknife
75. and elsewhere in the Northwest Territories.
76. Cocaine destroys lives and families. People who
77. are addicted to this drug commit other offenses
78. to get money to purchase cocaine. They traffic
79. in cocaine to fund their own addictions. And
80. nowhere is this more evident than in this case.
81. Ms. Tobac sold cocaine because she is an addict
82. who needed money to buy cocaine and alcohol and
83. needed money to get by.
84. Ms. Tobac is of Slavey descent
85. from the Sahtu community in Fort Good Hope.
86. Section 718.2(e) requires me to consider
87. available sanctions other than imprisonment that
88. are reasonable in the circumstances paying
89. particular attention to the circumstances of
90. aboriginal offenders.
91. The Supreme Court of Canada in
92. the cases of *Gladue* and *Ipeelee* have considered
93. the application of Section 718.2(e) in the
94. context of sentencing aboriginal offenders. One
95. of the impetuses behind Section 718.2(e) was the
96. overrepresentation of aboriginal people in
97. Canadian penitentiaries. The Supreme Court of
98. Canada in *Gladue* noted that in 1997 aboriginal
99. people constituted close to 3 percent of the
100. population of Canada, but amounted to 12 percent
101. of all federal inmates. In *Gladue* the Court
102. noted at paragraph 64 and 65:
103. It is reasonable to assume that
104. Parliament in singling out aboriginal
105. offenders for distinct sentencing
106. treatment in Section 718.2(e)
107. intended to attempt to address the
108. social problem to some degree. The
109. provision may properly be seen as
110. Parliament's direction to members of
111. the judiciary to inquire into the
112. causes of the problem and to endeavor
113. to remedy it to the extent that a
114. remedy is possible through the
115. sentencing process.
116. It is clear that sentencing
117. innovation by itself can not remove
118. the causes of aboriginal offending
119. and the greater problem of aboriginal
120. alienation from the criminal justice
121. system. The unbalanced ratio of
122. imprisonment for aboriginal offenders
123. flows from a number of sources,
124. including poverty, substance abuse,
125. lack of education, and the lack of
126. employment opportunities for
127. aboriginal people.
128. The Supreme Court of Canada
129. emphasized that sentencing Courts have a role to
130. play in addressing this problem, but acknowledged
131. that this is not something that can be dealt with
132. by the Courts alone. Crimes by aboriginal
133. offenders will not end simply because Courts
134. consider alternatives to incarceration for them.
135. Indeed, the statistics
     1. provided by counsel for Ms. Tobac and the
     2. submissions reveal that the problem of aboriginal
     3. overrepresentation in prisons has not gotten any
     4. better. In fact, it's gotten much worse.
     5. Aboriginal people represent approximately 3
     6. percent of the population, but in 2015/2016
     7. aboriginal adults accounted for 28 percent of
     8. admissions to federal corrections services and 27
     9. percent of provincial and territorial custodial
     10. admissions. For aboriginal women, the
     11. overrepresentation was even more pronounced.
     12. Aboriginal females accounted for 38 percent of
     13. female admissions to provincial and territorial
     14. sentence custody in comparison to 26 percent of
     15. aboriginal males.
     16. What is required is an attempt
     17. to deal with the root causes of crime by
     18. aboriginal offenders. Factors like poverty,
     19. substance abuse, unemployment, poor housing, lack
     20. of education, et cetera. Most of these factors
     21. are outside of the Court's control and require
     22. steps by Government and society to address these
     23. problems. The Courts cannot build houses, give
     24. someone a job, educate someone. While there are
     25. some limited tools at the Court's disposal, many
     26. times they are not enough. But we continue to
     27. see aboriginal offenders before this Court on a
136. daily basis and we have to impose sentences
137. taking into account Section 718.2(e) and do what
138. we can to give effect to the principle and
139. guidance referred to in *Gladue* and *Ipeelee*.
140. As stated in *Gladue*, what I am
141. required to do is:
142. Give attention to the unique
143. background and systemic factors which

9 may have played a part in bringing

1. the particular offender before the
2. Courts. In cases where such factors
3. have played a significant role it is
4. incumbent upon the sentencing judge
5. to consider these factors in
6. evaluating whether imprisonment would
7. actually serve to deter or to
8. denounce crime in a sense that would
9. be meaningful to the community of
10. which the offender is a member.
11. In this case I have the
12. benefit of a presentence report, which provides
13. information about Ms. Tobac's background and
14. circumstances, as well as I've heard from counsel
15. for Ms. Tobac in his submissions. And what I've
16. heard reflects many of the factors referred to in
17. *Gladue* and *Ipeelee*. Ms. Tobac has had a
18. difficult upbringing and has had a difficult
19. life. She was raised by her mother after her
20. parents separated. Her mother abused alcohol.
21. And Ms. Tobac moved between her mother's home and
22. her grandparents' home in Fort Good Hope where
23. she grew up. Her grandparents drank as well and
24. Social Services were often involved in
25. Ms. Tobac's life. She was in foster homes while
26. growing up. She was exposed to violence and was
27. physically abused by her mother. And when living
28. with her mother there was often no food in the
29. house.
30. Ms. Tobac began using alcohol
31. at 13 or 14 years old and when the presentence
32. report was prepared she stated that she used
33. alcohol regularly and often drank to the point
34. that she blacked out. Ms. Tobac said to the
35. writer of the presentence report that she had
36. drunk alcohol on a daily basis and did so up
37. until she was four months pregnant with her
38. second child. She has two children, she was
39. unable to care for her oldest child, who was
40. adopted by her mother. However, her mother
41. continues to struggle with alcohol abuse and that
42. child was in foster care at the time of the
43. preparation of the report.
44. Ms. Tobac is now 27 years old.
45. She moved to Yellowknife when she was 22 and her
46. time in Yellowknife has been marked with
47. drinking, drugs, homelessness, and fighting.
48. She's often been homeless while living in
49. Yellowknife, although that situation has recently
50. changed. Ms. Tobac began using crack cocaine a
51. few years ago and used it initially twice a week
52. while drinking alcohol daily. Eventually she
53. used crack cocaine daily and did so throughout
54. her pregnancy. She's been in several
55. relationships, which have been marked by the
56. abuse of alcohol and violence. She was in a
57. relationship for several years, where there was
58. the abuse of alcohol and in which she was abused.
59. When that relationship ended Ms. Tobac was in
60. another relationship which also involved
61. violence. And she's now in another relationship
62. which both she and her partner have abused
63. alcohol and drugs. She has a child as a result
64. of this relationship. At the time of the offense
65. she was pregnant with her son. Ms. Tobac
66. acknowledged using alcohol and crack cocaine
67. throughout her pregnancy and said to the preparer
68. of the presentence report that she engaged in
69. trafficking to support her addiction and to get
70. by. Social Services has been involved with
71. Ms. Tobac since the birth of her son and they
72. continue to monitor her situation.
    1. Ms. Tobac has been unemployed
    2. and lives on income support. With the money that
    3. she receives it is difficult to pay her monthly
    4. expenses. And I'm sure the added cost of buying
    5. alcohol and drugs only adds to that burden.
    6. Money spent on crack cocaine or alcohol is money
    7. that is not being used to buy food or pay for
    8. other necessities.
    9. Ms. Tobac learned traditional
    10. skills from her grandmother and attended cultural
    11. events in Fort Good Hope. Since she's moved to
    12. Yellowknife she has not kept up with those
    13. activities.
    14. One thing that was noted in
    15. the presentence report was that Ms. Tobac does
    16. not display any insight as to how her actions
    17. have affected others in the community. And
    18. counsel for Ms. Tobac addressed this in his
    19. submissions saying that this was not surprising
    20. because Ms. Tobac is herself an addict and is not
    21. looking at this from the perspective of the
    22. effect on the community or society, but looking
    23. at it in the context of herself as an addict.
    24. And I think that approach does explain it to an
    25. extent.
    26. Life has not been easy for
    27. Ms. Tobac and it will not become easier just like
73. that. Without some positive changes, your life
74. will continue as it has, marked by violence,
75. alcohol, and drug abuse, having your child taken
76. from your care. It is a difficult cycle to break
77. when that is how you have been raised and that is
78. what you know. But for your child's sake, and
79. for yours, Ms. Tobac, I hope that you take the
80. opportunity that's given to you by this sentence
81. to make some changes. Particularly as you have
82. another child along the way. Don't make your
83. child go through the same stuff that you did
84. while growing up. You didn't deserve it, and
85. your children do not deserve it.
86. Counsel have provided cases
87. which deal with sentencing offenders for
88. trafficking in cocaine, and I don't intend to
89. review all of them, but I have read them and I
90. have read quite a few other sentencing decisions
91. of this Court dealing with trafficking in
92. cocaine. And I've observed that there is a
93. considerable range in sentence depending on, for
94. example, the offender, their personal
95. circumstances, their criminal record, whether
96. there was a guilty plea, whether there was a
97. trial, the number of transactions involved, the
98. amount of drugs involved, the nature of the drugs
99. involved, the role of the offender in a criminal
100. organization, if any, and their motivation for
101. trafficking in drugs.
102. A recent case by the Northwest
103. Territories Court of Appeal in *R v Joe* dealt with
104. sentencing for an aboriginal female offender who
105. was found guilty of possession of cocaine for the
106. purpose of trafficking and possession of
107. marijuana for the purpose of trafficking. The
108. amount of marijuana in that was 236 and a half
109. grams and 8 grams of crack cocaine. As well
110. there were a number of marijuana joints that were
111. seized and over $5,000 in cash. In that case the
112. offender had entered a guilty plea, although it
113. was noted that it was not at an early
114. opportunity. There had been a pretrial
115. application with respect to the search prior to
116. the guilty plea. The offender in that case had
117. no criminal record and was 37 years of age.
118. There was a presentence report before the Court
119. which indicated that the offender was a user of
120. cocaine and the report was overall considered
121. somewhat positive. The sentencing judge in that
122. case imposed a sentence of probation but did not
123. include any other sentencing disposition with it
124. and the matter was appealed on this basis. Both
125. Crown and defence agreed that imprisonment should
126. have been imposed, however, defence sought that
127. the sentence be stayed. The Court of Appeal
128. noted that the sentencing objectives are
129. deterrence and denunciation and that they should
130. not be undermined. In discussing the *Gladue*
131. factors applicable to the offender, the Court did
132. not refer to them extensively but stated:
133. In relation to *Gladue* and *Ipeelee*
134. considerations, we accept that the
135. respondent's upbringing in a home
136. marked by violence and alcohol abuse
137. leading to her being raised in foster
138. care for a period of time impacts
139. moral culpability for these offenses
140. as an aboriginal offender. However,
141. these considerations support the
142. imposition of a minimal sentence of
143. 12 months. They do not justify the
144. imposition of a stay of what is
145. otherwise a fit and proper sentence.
146. The situation in *Joe* is
147. distinguishable from this case. In that case
148. both the Crown and defence agreed on appeal that
149. a sentence of one year imprisonment was
150. appropriate. As well, the amount of drugs
151. involved in that case were significantly more
152. than in this case. This case involved one
153. transaction of 0.4 grams of crack cocaine.
     1. As stated by Justice
     2. Charbonneau in *R v Grandjambe*, 2018 NWTSC 3 at
     3. page 7:
     4. For any given offense there is never
     5. just one appropriate sentence. There
     6. is always a range. Usually in this
     7. jurisdiction people who traffic in
     8. cocaine can expect even on a guilty
     9. plea to receive sentences that are
     10. close to the two year mark.
     11. In saying this, this is not a
     12. starting point sentence or a guideline, but an
     13. observation by Justice Charbonneau of the
     14. sentencing practices in this jurisdiction. A
     15. review of the case law demonstrates that
     16. sentencing for cases involving trafficking in
     17. cocaine can involve penitentiary sentences and
     18. can also involve sentences as low as in the 7 to
     19. 10 month range. So the sentence of 10 months
     20. proposed by the Crown is certainly reasonable.
     21. Looking to the factors that
     22. are applicable in this case. In mitigation,
     23. Ms. Tobac has entered a guilty plea and she did
     24. so at an early opportunity. There was no
     25. preliminary inquiry in this matter. The case was
     26. not overly complicated and would not likely have
     27. been a difficult case for the Crown to prove.
154. But the guilty plea avoided the need for a trial
155. and reflects Ms. Tobac's acceptance of
156. responsibility for her actions, so she should
157. receive full credit for the guilty plea.
158. Ms. Tobac does have a criminal
159. record. She has 11 convictions from 2005 in
160. youth court through to 2011. There are
161. convictions for property offenses, but the bulk
162. of her criminal record consists of convictions
163. for offenses against the administration of
164. justice.
165. Looking at the circumstances
166. of the offense, while trafficking in cocaine is a
167. serious offense, and as I've said, the Courts
168. treat this type of offense seriously, this
169. offense is not the most serious of offenses that
170. have come before this Court. It involved one
171. transaction of selling 0.4 grams of crack cocaine
172. to an undercover officer. Ms. Tobac's
173. involvement is at the lower end of culpability.
174. Certainly her situation is different from many of
175. the offenders this Court has seen recently who
176. were involved in Project Green Manalishi.
177. There's no evidence that she is involved in a
178. criminal organization. And her role can be
179. described as someone who assists and participates
180. in a dial a dope operation. She was motivated by
181. money to the extent that selling drugs allowed
182. her to be able to buy her own cocaine and it
183. allowed her to get by to buy things for her child
184. and to pay bills.
185. Dealing first with the
186. ancillary orders that were requested by the
187. Crown, Section 5(1) of the *Controlled Drugs and*
188. *Substances Act* is a secondary designated offense
189. pursuant to Section 487.04. And there will be an
190. order pursuant to Section 487.051 for the taking
191. of Ms. Tobac's DNA for the DNA data bank.
192. Pursuant to Section 109 of the *Criminal Code*, a
193. firearms prohibition order is mandatory and
194. Ms. Tobac will be prohibited from possessing
195. firearms for a period of 10 years following her
196. release from imprisonment. There will also be
197. the victim of crime surcharge of $200 payable in
198. accordance with the regulations.
199. I have considered what an
200. appropriate sentence might be given the
201. circumstances of the offense, the applicable
202. sentencing principles, and Ms. Tobac's personal
203. circumstances. As I said, the sentence that the
204. Crown is proposing is reasonable and in another
205. similar case I would have no hesitation in
206. imposing that sentence. I believe that Ms.
207. Tobac's personal circumstances fall within what
208. is referred to in *Gladue* and *Ipeelee*. There are
209. significant factors in Ms. Tobac's life which
210. justify the use of restraint in sentencing and in
211. the circumstances I'm going to exercise even more
212. restraint than I might otherwise. I cannot
213. impose a sentence as low as what is being sought
214. by defence counsel because I cannot ignore the
215. sentencing principles of deterrence and
216. denunciation.
217. But I am taking a chance,
218. Ms. Tobac, that things in your life have begun to
219. change and the prospects of rehabilitation need
220. to be emphasized. So I am considering that in
221. sentencing you. Please stand up.
222. For the offense of trafficking
223. in cocaine I sentence you to a period of
224. imprisonment of 6 months. This will be followed
225. by a period of probation of 18 months which will
226. include the statutory conditions and additional
227. conditions. So you'll be required to keep the
228. peace and be of good behaviour, to appear when
229. required do to so by the Court, to notify the
230. Court or the probation officer in advance of any
231. change of name or address, notify the Court or
232. the probation officer of any change of employment
233. or occupation. You will also have to report to
234. the probation officer within two days of your
235. release and thereafter as directed, and if you
236. agree and subject to the programs available and
237. your acceptance in that program, take and
238. participate actively in a treatment program. You
239. will take any counselling as directed by your
240. probation officer, including any programs that
241. are deemed by your probation officer to be
242. suitable, including programs addressing alcohol
243. and drug abuse, violence and trauma, parenting
244. and pre or postnatal programs.
245. Do you understand those
246. conditions?
247. THE ACCUSED: Yeah.
248. THE COURT: Okay, thank you. You may sit
249. down.
250. I have considered imposing
251. conditions with respect to the abstention from
252. alcohol or non-prescription drugs, but I have
253. decided not to impose those conditions as I think
254. it ignores the reality of how difficult it is to
255. overcome these addictions and it may set Ms.
256. Tobac up to fail.
257. All right, counsel, is there
258. anything else we need to address?
259. MR. HARTE: I think I'm missing something,
260. Your Honour, but at this point not that I can --
261. not that I can think of.
     1. THE COURT: Okay.
     2. MR. HARTE: Thank you.
     3. MS. ZIMMER: Sorry, Your Honour, I was just
     4. checking and I don't think there's anything else
     5. from the Crown's perspective.
     6. THE COURT: Okay. All right, thank you,
     7. counsel, for your submissions and your
     8. cooperation when I requested to have additional
     9. submissions following the release of the Court of
     10. Appeal decision. Thank you. It's been very
     11. helpful.
     12. MR. HARTE: Thank you for the opportunity
     13. to make further submissions, Your Honour.

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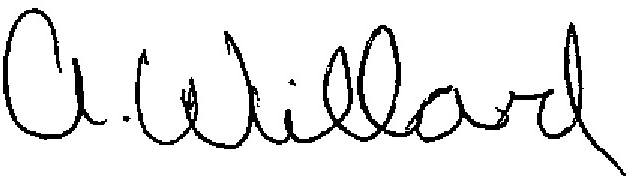
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# 1 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. foregoing pages are a complete and accurate
3. transcript of the proceedings taken down by me in
4. shorthand and transcribed from my shorthand notes
5. to the best of my skill and ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 20th day of March, 2018. 10
8. Certified Pursuant to Rule 723
9. Of the Rules of Court 13

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1. Allison Willard
2. Court Reporter

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