AMENDED ORIGINAL

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- v -

JOSHUA RYAN CLIFFORD MOORE

Original amended as of October 26, 2018, to:

Cover page: Publication ban removed

Transcript of the Reasons for Sentence held before The Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 17th day of January, 2018.

APPEARANCES:

Mr. A. Godfrey:	Counsel for the Crown
Mr. R. Clements:	Counsel for the Accused

(Charges under s. 255(3), s.255(2) of the *Criminal Code*)

THIS DECISION IS NOT SUBJECT TO A PUBLICATION BAN

THE COURT: Joshua Moore has pleaded guilty to charges of impaired driving causing death and impaired driving causing bodily harm, and I must now sentence him for that offence.

Crown and defence have presented the Court with a joint submission. They are jointly suggesting that the sentence that should be imposed is two-and-a-half years' imprisonment together with a driving prohibition for a period of five years. They are also jointly taking the position that a DNA order and a firearms prohibition order should be made.

At the time of the sentencing hearing on December 19th, I expressed concern about the joint submission. Counsel said at the hearing that the sentence being jointly proposed was at the low end of the range. And when I questioned counsel about the appropriateness of that joint position, they maintained that it was a fit sentence having regard to the circumstances of the case, and in particular the mitigating factors that are present.

Having now taken some time to think about those submissions and having reviewed carefully the cases that were filed, as well as all the other materials that were filed at the hearing, I am going to say at the outset that although I

continue to think that this is a very lenient sentence, overly lenient in my view, I have also concluded that because of the law that now governs joint submissions, it is not open to me to depart from what is being proposed as far as the duration of the jail term.

There are aspects of the ancillary orders that are being proposed that I am unable to agree with, and I will explain why, but as far as the jail term of two and a half years, I do not think that it is open to me to depart from it.

I understand that from the perspective of the public, it may seem contradictory to have a judge say that she disagrees with a proposed sentence and yet still impose that sentence, so I am going to take quite a bit time this afternoon to try to explain this decision.

As is always the case in imposing sentence, a judge must take into account the circumstances of the offence, the circumstances of the person who committed the offence, and the legal principles that govern sentencing.

Dealing first with the circumstances of the offence. On the day of these tragic events, just before 9 a.m., Mr. Moore was driving in the area of Sissons Court in Yellowknife, and he came upon four people he knew. He offered them a ride, and

they accepted. At first Mr. Moore drove around and in Yellowknife. He was driving very fast. One witness thought at one point he was going as fast as 180 kilometers per hour. Whatever the exact speed was, which is something we will never know, it was scaring the passengers, and they asked him to slow down.

Eventually Mr. Moore drove outside of Yellowknife down the Ingraham Trail Highway. He stopped at the recreational area at the Yellowknife River Bridge. He and his passengers consumed alcohol there. They got going again and Mr. Moore continued driving down the Ingraham Trail further east. At that point he was going 100 kilometers per hour. The posted speed limit for that portion of the road is 70 kilometers per hour. Quite apart from the posted speed limit, it is an agreed fact that 100 kilometers per hour is an excessive speed to be driving on that portion of the road.

At one point Mr. Moore went over the centre line and came upon another vehicle going in the opposite direction. He swerved back into his lane, narrowly missing the other vehicle. 300 or 400 meters further, Mr. Moore came upon a sharp turn on the road just before the Prosperous Lake pullout area. There is a sign on the road ahead

of this turn that warns that it is a sharp turn.

Mr. Moore was not able to negotiate this turn. He hit the shoulder and lost control of the vehicle. The vehicle ran off the shoulder, was in the air for a few meters, then hit the ditch where it rolled and came to a stop in nearby water. There was water up to halfway up the doors of the vehicle. Mr. Moore admits that at the time of the crash, he was driving between 100 and 130 kilometers per hour.

Other motorists came upon the crash site and called for help. Emergency personnel arrived on the scene shortly thereafter. The police officer who spoke to Mr. Moore at the scene did not initially detect any signs of impairment, but when she asked him to blow his breath in her face, she noted an odor of liquor. She demanded that he provide a sample of his breath in a screening device, and the result was a "fail." Mr. Moore was arrested, advised of his rights, and a Breathalyzer demand was read to him. He later provided samples of his breath.

The results of the Breathalyzer testing were that there was 100 milligrams of alcohol in 100 milliliters of blood on the first sample, and 90 milligrams of alcohol in 100 milliliters of blood on the second sample. The legal limit is

80 milligrams of alcohol in 100 milliliters of blood. Mr. Moore admits that his ability to operate the motor vehicle was impaired by alcohol at the time of this crash, and that the alcohol concentration in his blood was a significant contributing cause to the crash.

One of the passengers miraculously was not injured, but others were not so lucky. In fact, the consequence of this crash were disastrous. Karen Lafferty died as a result of the injuries that she sustained in this crash. Another passenger, April Goulet was seriously injured. She suffered a broken shoulder, broken pelvis, fractured ribs, and a fractured sternum, as well as a contusion on her left lung. She was medivaced to the Alberta Hospital in Edmonton, and remained there until May 30th. She was transferred back to the hospital in Yellowknife and received further treatment and was discharged on June 14th.

Another passenger suffered a broken arm as a result of the crash, and had surgery. Mr. Moore was injured as well. He broke his arm and required several surgeries and has still not fully healed.

Mr. Moore has been in custody since his arrest, which now adds up to 242 days. Credited

at a rate of one and a half days of credit for each day in remand, which is what the law says is open to me to grant him, this adds up to 363 days, which is just a few days short of one year.

Mr. Moore pleaded guilty to these charges on November 6th, 2017. The sentencing hearing was adjourned so that a presentence report could be prepared. I heard on December 19th that early on Mr. Moore expressed an intention to plead guilty on this matter, and that, in fact, the resolution discussions between Mr. Moore's counsel and the Crown started even before the disclosure process was complete. There was no preliminary hearing in this case, which means that none of the passengers nor any other witnesses ever had to give evidence on this case.

After I heard sentencing submissions on December 19th, the matter was adjourned to last week for my decision. At the time of the sentencing hearing, I had been told that Ms. Lafferty's family and the other victims had been made aware of their right to prepare victim impact statements, but they had chosen not to prepare any. This was, I was told, because they were too overwhelmed by these events to do so, and they were still consumed with their grief.

There were comments to a similar effect on the presentence report, because the author had attempted to contact the victims as well.

On the day scheduled for my decision last week, counsel advised that members of Ms. Lafferty's family had approached the Crown and did want to provide victim impact statements. So last week, instead of me giving my decision, I heard these victim impact statements.

Ms. Lafferty's grandmother, who raised her, read her victim impact statement to me herself. Two others, from Ms. Lafferty's mother and her sister-in-law were read by the Crown. Three more, two from her sisters and one from her 12-year-old niece, were not read out loud, but I have read them. They were all very sad. They speak volumes about the immense tragedy that these events have brought to the lives of Karen Lafferty's family.

As I said last week to family members that were here, I know that nothing this Court does on sentencing can bring her back and undo the terrible harm that was done. I can only hope that the conclusion of the criminal proceedings might be one step towards healing and closure.

I was struck by the last words of the victim impact statement of Ms. Lafferty's grandmother.

Those words are: (As read)

> My husband and I talk about missing Karen a lot, but we also know that we have to find a way to go ahead.

Those words are very true, very wise, and very brave, and I do hope that those affected by these tragic events will find a way to go ahead and keep going, as she said.

Earlier this afternoon we heard another victim impact statement. It was sent to the Court just yesterday, and it was written by Ms. Goulet. It, too, describes the impact that these events had on her, both from a physical point of view and from a psychological point of view. Her physical injuries were significant, and I do not doubt that there is a long road ahead for her, even longer perhaps to heal from the emotional scars that these events have left on her.

She expresses her sadness about Ms. Lafferty's death, and the impact that it has had on her family. She expresses anger towards Mr. Moore, and that anger is entirely understandable under the circumstances.

The timing of the presentation of these victim impact statements was unusual in the sense that ordinarily I would have heard them all back in December. These victim impact statements, the

ones that were read last week and the one that was read this afternoon, certainly have assisted me in understanding even more the impact that this crime had. But they are not, in law, a basis for changing my decision in this case.

The second factor that needs to be considered at any sentencing, as I said already, are the circumstances of the person who has committed the offence. So I turn now to Mr. Moore's personal circumstances. I have the benefit of a detailed presentence report that talks about that; about his circumstances, his family's circumstances, and information about specific factors that relate to his aboriginal heritage. His mother has also written a letter, which was filed as an exhibit, and I have read it carefully.

The report was marked as an exhibit, and it is part of the record. I am not going to refer to all its details here. It is very difficult to do justice to a detailed report like that simply by trying to summarize it, but I will say a few things about it. I have considered all of it, whether I mention a specific aspect or not today.

Mr. Moore is now 29. He is Gwich'in. He was born in Inuvik and spent the first years of his life there. He has never met his biological

father. Until he was six, he lived with his mother, his grandmother, and Jackie Storr, who was his grandmother's partner at the time, as well as an aunt and uncle. When he was six his mother relocated to Yellowknife. For a time he stayed behind in Inuvik with his grandmother and Mr. Storr. Once his mother was able to get a house and get settled in Yellowknife, she brought him to Yellowknife. And that is where he has lived since.

According to the author of the report, Mr. Moore views himself as having had a happy childhood. Mr. Moore told the author of the presentence report that he had always felt loved, supported, and provided for, that he had a positive upbringing, free of violence, and that although as a youth he saw some substance abuse within the home, this stopped when he was older. He described himself as having been spoiled as a child, and that he often got to do as he pleased. This is confirmed by his mother and others who were interviewed by the author of the presentence report.

There are indications that there was little to no structure in the home. Mr. Moore was not required to participate in chores, did not have a curfew, and did whatever he wanted. The report

also says that Mr. Moore had difficulties adjusting after his move to Yellowknife. He associated with a group of peers who did not follow the rules of their homes and did not attend school. At that point his mother tried to establish some rules, but in the words of the presentence report, Mr. Moore was so accustomed to not having any structure that nothing seemed to work.

Mr. Moore eventually got into trouble with the law. His criminal record dates back to when he was a youth. It includes a variety of convictions including several convictions for drug offences, property offences, failures to comply with court orders, and one conviction for aggravated assault, for which he was sentenced to 23 months imprisonment in 2012. There are no drinking and driving offences on his record, however.

It seems clear to me that Mr. Moore has substance abuse issues. He started consuming alcohol when he was 10 and first experimented with drugs when he was 11. For a period of time he was using cocaine on a regular basis. He has on several occasions consumed alcohol to excess, to the point of being held in the drunk tank. Many of the offences that he has been convicted

for were committed when he was under the influence of alcohol or drugs.

Mr. Moore sustained a head injury as a result of being beaten up some 13 years ago when he was around 16. He was seriously injured and was in a coma for two weeks after this assault. He says, and this is confirmed by his mother, that to this day he has issues with his memory, and he thinks that is a consequence of this head injury that he suffered.

Mr. Moore has the continued support of his mother, as he does the support of Mr. Storr. Mr. Storr's relationship with Mr. Moore's grandmother ended a long time ago, but Mr. Moore and Mr. Storr have remained close. Mr. Moore is very fortunate to have this support, more fortunate than many offenders who come before the Court.

The presentence report notes that attempts were made over the years to set Mr. Moore up to take counselling to address his issues. There are indications in the report that some of these efforts may have failed through no fault of Mr. Moore's, but there are also indications that, in other respects, there was a lack of motivation and engagement on his part. For example, the report says that in 2013, while in custody, he

completed the National Substance Abuse Program, but he, "required a lot of assistance to do the work" and "often lacked motivation."

Bearing in mind he was serving a sentence for aggravated assault, a very serious offence, this lack of motivation is troubling, to say the least. More recently while on remand he has attended AA meetings. This for sure is a step in the right direction. On the other hand, the report also says that the jail psychologist met with him once, and when other attempts were made to set up other meetings, Mr. Moore did not take the psychologist up on that opportunity. The psychologist is of the view that Mr. Moore could benefit from more sessions, but, of course, unless Mr. Moore himself is motivated to help himself, nothing will come of this. Counselling cannot be forced on a person who does not want to receive it.

I recognize that the evidence shows that Mr. Moore, as an aboriginal person, was affected by the systemic and background factors that have had an impact on the lives of aboriginal people in this country. I also recognize that he was exposed to alcohol abuse in the home for part of when he was growing up. He also, no doubt, was affected by not having ever known his father.

None of that can be overlooked in deciding what his sentence should be. Mr. Moore's aboriginal heritage and some of the struggles he has faced must be taken into account and do mitigate his blameworthiness to a point.

That being said, his background is far more positive than many aboriginal offenders who come before the Court. As has been noted in several cases, the application of the principles set out in the Supreme Court of Canada decisions of *R v Gladue* and *R v Ipeelee* should not be interpreted as operating an automatic reduction in the sentence that should otherwise be imposed for an offence, particularly for a serious offence. And this is a very serious offence.

No one must lose sight of the fact that Ms. Lafferty was also an aboriginal woman. She and her family were also affected by the systemic issues, disadvantages, and unfairness that *Gladue* and *Ipeelee* talk about. And now on top of that, they also have to deal with the added burden of this terrible loss as a direct consequence of Mr. Moore's actions. They have to live with this pain every single day.

As I already noted, it appears Mr. Moore was a very spoiled young man. He was not forced to comply with rules, and he spent a lot of his life

as a teenager and young adult not following rules. It also seems that Mr. Moore, at least up until the time of these events was continuing to be spoiled, at 29 years old, still living with his mother, still dependent on her and others financially. I realize he has had difficulties in school, but a lot of people who do not have extensive education still work to support themselves. There is no reason Mr. Moore cannot work to support himself, or at least help his mother financially contribute to the expenses of her home if he is going to continue living with her.

Mr. Moore's behaviour on the day of these events shows that his problems with the law, his exposure to whatever programs were available to him in custody, the added supervision he had when he was on probation have not worked. They have not made him more inclined to follow the rules of society. He was driving without a licence. He was driving faster, much, much faster, than the speed limit, and he drank before driving and while he was driving.

Mr. Moore is not a child anymore, and he has to stop acting like one. Whatever struggles he may have had, those cannot become permanent excuses to do whatever he wants and act

recklessly. One can only hope that the disastrous consequence of his actions on May 21st, 2017, will have brought home to him that he needs to make some significant changes. Only time will tell. Although I accept that he is sorry for the harm he has caused, and although I do agree with his counsel that his attendance in AA is a positive step, a step in the right direction, I have to say I find it extremely worrisome and disturbing that he has not shown more interest in taking up the jail psychologist on his offer for more sessions, considering the seriousness of the offence he has committed and its consequences.

Based on everything I have heard and read about Mr. Moore, I fear that unless he engages in a meaningful, long-term process to address his substance abuse issues, and whatever else is at the root of his behaviour, he will continue to present a threat to public safety. I am not a psychologist, and I do not know what processes, counselling, or treatment may be needed to help him make progress in this regard, but something has to happen, otherwise he will be back before the Court before long, possibly after having caused great harm again.

I turn now to the legal framework. It has

been recognized by the Courts for many years that drinking and driving causes a veritable carnage on the roads of this country. Every year innocent people are killed by drunk drivers. It has long been a serious problem, and it continues to be. There have been countless education campaigns, and significant effort has gone into trying to get the message through about the devastation that this totally preventable crime causes. Still, people drink and drive.

People from all walks of life, all backgrounds, do this. Notably, people who are normally law-abiding, responsible citizens commit this crime sometimes, and many, many do not get caught. Many do get caught but do not have accidents and do not end up hurting anyone. But sometimes what happened in this case happens. Someone gets seriously hurt or killed.

The Courts cannot single-handedly solve this problem, not any more than Courts can single-handedly solve any other social problem. Courts have a limited number of tools, mostly very blunt instruments, to respond to these crimes. Parliament decides what sentence are available and sometimes are mandatory for offences. Parliament has responded to the persistent problem of drinking and driving by

increasing the penalties for these offences, and Courts have imposed sentence of increased severity.

It's relatively rare that the Supreme Court of Canada has occasion to deal with sentence appeals, but it did a few years ago in *R v Lacasse,* 2015 SCC 64, a case of impaired driving causing death. That gave the Court a opportunity to make some comments about sentencing in these types of cases. Ultimately, the Supreme Court of Canada restored a significant jail term that had been imposed by the sentencing judge and had been overturned by the Court of Appeal.

The case engaged a number of issues, but I want to refer here primarily to the general comments that the Court made, and this is the top court in the country, about the sentencing principles that are paramount in drunk driving cases. First the Court said that deterrence and denunciation are the sentencing objectives that must be emphasized in these cases to convey society's condemnation of drinking and driving. The Court then said: (As read)

> While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases, in the instant case, as in all cases in which general or specific deterrence and denunciation must be emphasized, the Courts have very few options other than imprisonment for meeting

> these objectives, which are essential to the maintenance of a just, peaceful, and law-abiding society.
>
> The increase in the minimum and maximum sentences for impaired driving offences shows that Parliament wanted such offences to be punished more harshly. Despite countless awareness campaigns conducted over the years, impaired driving offences still cause more deaths than any other offences in Canada.
>
> This sad situation, which unfortunately continues to prevail today, was denounced by Justice Cory more than 20 years ago.

And the Court here quotes what Justice Cory had said, which was: (As read)

> Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country.

The Supreme Court noted as well, as I did a moment ago, that this type of offence is often committed by law-abiding citizens, and that those people may be more sensitive to harsh sentences than other types of offenders. Then after speaking of ranges of sentences for these types of offences across the country, the Supreme Court noted at paragraph 65 of the decision that in

most jurisdictions, for impaired driving causing death:

> Sentences vary from 18 months to two years in the least serious situations and from seven to eight years in the most serious.

These are the general legal principles that emerge from that Supreme Court of Canada case. Aside from that case, counsel filed a number of cases at the sentencing hearing. I am not going to refer to each of them in detail, but I do want to make some comments about those cases. No two cases are ever alike, and because of this, looking at the outcome in other cases to identify what the sentence should be in this case is always difficult. Looking to other cases usually is more helpful to identify governing principles than it is in assisting in the determination of what the bottom line decision should be. At the same time, one of the principles of sentencing is parity; the idea that similar offences committed by similar offenders should result in similar sentence. And because of that, it is quite proper, as counsel have done, to refer to other cases and their outcomes and note similarities and differences between those cases and the case at bar.

The cases provided by counsel are useful,

but I disagree with some aspects of counsels' comparative analysis between those cases and this one. I am not convinced that those cases support a two-and-a-half year jail term that is being put forward for this offence committed in these circumstances. My view is that the cases filed, in particular, the ones that have most persuasive weight, support the proposition that a much more severe sentence ought to be imposed in the circumstances of this case. I find that this is so, in particular, based on the cases from the Alberta Court of Appeal, those cases being particularly persuasive in this jurisdiction given the composition of our own Court of Appeal.

For example, in *R v Gibson*, 2015 ABCA 41, the sentencing judge imposed a sentence of two years and eight months, which was challenged on appeal. At the sentencing hearing, there had been a joint submission for a sentence of two years. Not only did the Court of Appeal not reduce the sentence imposed at trial, but it said that a sentence of four to five years could have easily been justified. The Court of Appeal also referred to cases from other jurisdictions where sentences of four-and-a-half years were imposed in less egregious circumstances than the ones in that case.

I certainly agree with counsel that the circumstances in the *Gibson* case were more aggravating than the circumstances in this case. In particular, the accused had passed a vehicle and then stayed in the wrong lane long enough to drive two other vehicles off the road before crashing into a third, killing its occupant. And the accused blood alcohol level in *Gibson* was higher than was the case here.

Still, that was a case where the accused was only 22, pleaded guilty, and had no criminal record. So there were mitigating factors. So I question whether the additional aggravating features in the *Gibson* case justify a gap of some one-and-a-half to two-and-a-half years between what the Court of Appeal said in that case could easily be justified and what is been proposed here.

The case of *R v York*, 2015 ABCA 129, is another Alberta Court of Appeal decision. The accused in that case crossed the centre line and struck a motorcyclist who was going in the opposite direction, killing him. The accused's blood alcohol contents in that case were very, very high at 240 milligrams of alcohol in 100 milliliters of blood. In addition, the accused had two prior convictions for drinking

and driving and two prior convictions for driving while disqualified. And a further aggravating factor was that he walked away from the scene when the victim, who eventually died, was in distress. So there were aggravating factors in that case that are not present in this one. There was an early guilty plea, and the Court found there was genuine remorse, and the principles that I talked about emerging from the cases of *Gladue* and *Ipeelee* were not engaged in that case.

The sentence imposed at trial in *York* was six years with the driving prohibition of 10 years. Mr. York appealed and the Court of Appeal upheld the sentence. One of the things the Court of Appeal noted, which can be said of Mr. Moore as well, is that the accused would have been aware of his alcohol problem for several years before these events. In its decision the majority quoted from another case, this one from the Manitoba Court of Appeal, *R v Ruizfuentes*, 2010 MBCA 90, which identified the proper range for these offences as being one to four years for offenders who have no prior convictions for drinking and driving or serious personal injury offence. And that for those who do have a prior record for driving and driving or a serious

personal injury offence, the range is five to six years. This is in line with my view that Mr. Moore's criminal record, although unrelated to drinking and driving, is aggravating because it does include a conviction for aggravated assault, which should be taken into account in deciding what a fit sentence is.

There was a dissenting judge in *York*, but it is noteworthy that although that judge would have allowed the appeal, he would have reduced the sentence but still imposed a sentence of five years. So, again, as with the *Gibson* case, *York* has some aggravating factors that are not present in this case, most significantly, the higher readings, the related criminal record, and the fact that the offender walked away from the accident scene, but that case did not involve a prolonged dangerous driving pattern as is the case here. And, again, comparing the features of that case with this one, I find the gap between the sentence upheld by the Court of Appeal in that case, even the one that would have been imposed by the dissenting judge, and the sentence proposed here, difficult to reconcile.

Counsel appear to have placed great reliance on *R v Schwarz*, 2017 ABQB 224, a decision from the Alberta Court of Queen's Bench. It's a

recent decision rendered after the Supreme Court of Canada decision in *Lacasse.* The sentencing judge in that case imposed a sentence of two-and-a-half years in jail in the case of impaired driving causing death.

That case, as all these cases are, was tragic. The accused had been drinking, he had been having a heated conversation on the phone, and had thrown the phone on the floor of his vehicle in frustration. He then bent over to pick up the phone while driving, went through an intersection at a red light, and crashed into another vehicle, killing a young child who was in that other vehicle.

In submissions I understood counsel to say that those circumstances are more aggravating than what Mr. Moore did, and with respect, I disagree with that assessment. Yes, the behaviour in *Schwarz* was very dangerous. Yes, the evidence was that his blood alcohol level was higher than Mr. Moore's. Still, the crash in that case was the result of decisions made over a short period of time and at the worst possible moment.

Unlike here, there was no evidence of a prolonged pattern of fast and risky driving, despite passengers being scared and asking the

driver to slow down, and despite an accident having nearly happened just before the fatal crash. Here we have Mr. Moore picking up people just before 9 a.m. and crashing the car somewhere around 9:15 and 9:30, and a lot of driving in between, even taking into account the stop at the Yellowknife River. So that is much, much more than a brief lapse in attention or a very short-lived loss of control of the vehicle. It suggests reckless and risky behaviour for a long period of time, all things relative.

When comparing the circumstances of this case to those in *Schwarz*, another significant factor is that in that case, the Crown put before the Court evidence showing that the credibility of one of the investigators, who have been a critical witness for the Crown, was very much an issue. That officer had falsified notes in an unrelated investigation and had committed various policy violations. His credibility would have been challenged had the matter gone to trial. That is a very unusual and very problematic situation that the Crown in that case would have faced if it had gone to trial. I cannot think of a case that I ever heard in my experience as a judge, or as a lawyer, where that particular fact was put before a sentencing Court; that is, that

a key police witness presented with that serious a credibility problem right from the start.

The Crown in *Schwarz* obviously recognized this, because the Reasons For Sentence state that the Crown said that a sentence of four years would have been fit but for that weakness in the Crown's case. That is mentioned at paragraph 33 of the decision.

Here, I accept that there were triable issues. There usually are triable issues in these types of cases. A number of technical defences can be raised in impaired driving cases. The admissibility of Breathalyzer results can be challenged through a number of means. But still there were passengers in the vehicle who could have provided direct evidence about Mr. Moore's drinking and his erratic driving pattern.

I am not dismissing the fact that Mr. Moore did give up his right to put the Crown to the proof of its case. I simply note that the difficulties that the Crown was facing in the *Schwarz* case were far more significant and far from routine. It seems to me that the issues that the Crown might have faced in this case, had it gone to trial, were, as Chief Justice Fraser put it in *Gibson*, "problems of a general nature that would be often engaged in these types of

cases."

For that reason, I find the *Schwarz* decision entirely distinguishable. And as well, although it is a decision from a very experienced judge, it remains a trial decision and carries less persuasive weight than do decisions from the Court of Appeal or from the Supreme Court of Canada in *Lacasse*.

Other cases referred to, such as *R v Stimson*, 2011 ABCA 59, and *R v Cameron*, 2016 SKQB 83, also did not involve an extended pattern of risky driving. The Court of Appeal made it clear in *Gibson* that the *Stimson* decision did not stand for the proposition that the range for impaired driving causing death cases was two to four years in Alberta. It commented that the circumstances in that case involved a momentary loss of control by the accused on an unfamiliar road after she had been asked to take the wheel from the driver who had become tired. Those circumstances bear no resemblance to what Mr. Moore did.

Finally, I want to say a few words about *R v Kayotuk*, 2016 NWTSC 59, because it is a recent decision of this Court. The sentence in that case was three-and-a-half years. The accused had past convictions for drinking and driving, and his blood alcohol level was much higher than

Mr. Moore's was. But as was the case in *Schwarz*, there is no indication that his pattern of erratic and dangerous driving was as prolonged as was the case here. And very significantly, *Kayotuk* was a case where the judge was presented with a joint submission as to range. The sentencing judge followed it, but said at paragraph 15 of the decision, that he was following it "somewhat reluctantly."

One of the consequences of the current state of the law about joint submissions, which I will get to in a moment, is that the precedential value of a case where a judge has followed a joint submission is very limited, unless of course the judge says that he or she agrees that the joint submission is a fit sentence. And this often happens. We have had numerous cases before this Court in the recent past, including a number of sentencings on major drug cases, where joint submissions were presented to the Court, and the Court accepted them without question.

But when a joint submission is followed reluctantly, it does not represent an endorsement by the Court of the fitness of what is being proposed. For those reasons, I do not find that the outcome in the *Kayotuk* case is of any assistance in supporting the joint submission

that is being presented here.

I generally agree with counsel in their identification of the aggravating and mitigating factors that are present in this case, but I do not share their view as to the weight that ought to be attached to those factors. Where I agree completely with counsel is that the most mitigating factor is by far the guilty plea. It has provided certainty of outcome. It has avoided the need for witnesses to relive these terrible events and have to testify about what happened. It has saved the time and resources needed to run a preliminary hearing and a trial. And avoiding that is important because both levels of court are under pressure, and the ability to use resources for other cases is an important factor. And, finally, the guilty plea is an indication of remorse. And I want to make clear that I accept Mr. Moore is sorry for what happened.

Mr. Moore's personal circumstances as an aboriginal offender must also be taken into account, and I accept that they reduce his blameworthiness to a point, but only to a point. As I have said, Mr. Moore's circumstances compare favourably to those of many aboriginal offenders who come before the Court.

As far as aggravating factors, the most significant one is something I have already alluded to, the persistent pattern of reckless driving, despite the protests of the passengers, and despite the near collision with the oncoming vehicle before the fatal crash. Defence counsel argued during submissions that what happened after the passengers asked Mr. Moore to slow down was that he stopped at the Yellowknife River. With the greatest of respect, that is not what the agreed facts say. There is no link in the agreed facts between the passengers asking Mr. Moore to slow down and the vehicle stopping at the Yellowknife River. And even if there was, the fact is that after that stop, when they got going again after consuming more liquor, Mr. Moore again drove way too fast, and he continued to drive too fast, even after having gone over the centre line and nearly having a collision with another vehicle. I find that highly aggravating, because it shows persistent recklessness and disregard for the safety of the others.

It's also aggravating in my view that there were several passengers in the vehicle whose safety he endangered. These were all potential victims. It is not because of anything Mr. Moore

did that Ms. Lafferty was the only one who died. The reality is that Mr. Moore could have killed them all.

The record is aggravating to a far lesser degree than if it was a drinking and driving record, but it is not neutral, because it shows that Mr. Moore, despite being exposed to various sentencing options, supervision, despite the significant sentence he received for the aggravating assault, has not addressed his underlying issues. He cannot be treated as though he is a youthful first offender. Far from it. In that respect, he is different from the offenders in some of the cases that I was referred to.

To summarize, my main disagreement with the positions advanced by counsel about how all of these factors interplay boils down to this: Number 1, I view Mr. Moore's driving pattern as an aggravating factor of enormous significance given the persistence of his conduct and despite things that should have shaken some sense into it; Number 2, I do not attach as much weight as counsel seem to have to the fact that his blood alcohol readings were at the low end of what is illegal.

Higher readings are an aggravating factor.

Low readings are not mitigating. Our Court of Appeal has stressed the importance of not confusing the absence of an aggravating factor with the presence of a mitigating factor in *R v A.J.P.J.*, 2011 NWTCA 2, at paragraph 14.

Drinking and driving is dangerous because alcohol impairs motor skills but also because it impairs judgment. When they reach a certain level, high blood alcohol readings become statutorily aggravating, but as this case demonstrates, impairment caused by alcohol concentration in the blood that falls short of that threshold can still lead to disastrous consequences. A case involving a lower level of impairment does not necessarily put a case at the low end of the scale in seriousness, and it does not necessarily justify a less severe sentence if other aggravating factors are present.

Number 3, while I agree that aspects of Mr. Moore's circumstances as an aboriginal offender reduce his blameworthiness to a point, I would not have attached as much weight to that as counsel seem to have.

I have already talked about the ranges that the Supreme Court of Canada referred is to in *Lacasse*. I would have placed this case neither in the least serious category nor in the most

serious category. I would have characterized it as falling in the middle of the range, and considering this, I would have thought that a sentence in the range of three-and-a-half to four years would have been fit under the circumstances. To be sure, that would not be a lenient sentence by any stretch of the mind. But in my view, such a sentence would have adequately reflected the seriousness of the offence and been in line with the stern comments of the Supreme Court of Canada in *Lacasse*.

But I am not free in this case to simply impose a sentence that I think is fit, and this takes me to the law dealing with joint submissions.

When a joint submission is presented at a sentencing hearing, it alters, in a profound way, the legal framework that governs the task of the sentencing judge. It has long been the law that joint submissions are to be given serious consideration by sentencing judges, but since the Supreme Court of Canada decision in *R v Anthony-Cook*, 2016 SCR 204, the threshold that must be met before a judge can decline to follow a joint submission has been raised considerably.

Lawyers and judges know this. I want to make sure that others be clear on this as well.

By "others" I mean Ms. Lafferty's family, Ms. Goulet's family, and Ms. Goulet herself, other passengers who were injured in this crash and the public in general.

Sentencing is a highly individualized process. It is anything but an exact science. For any crime committed by any offender, there is never only one appropriate sentence. Typically there's a range of sentences that can be said to achieve the various sentencing objectives and conform with the principles of sentencing, primarily the fundamental principle that a sentence should always be proportionate to the degree of gravity of the offence and the degree of blameworthiness of the offender.

There is much to consider, and ordinarily the sentencing judge considers all of those principles and the positions put forward by Crown and defence, and ultimately makes the call as to what a fit sentence is in that particular case. And in law, great deference is afforded to that determination. Even the Court of Appeal is not permitted to vary a sentence simply because the Court of Appeal judges would have imposed a different one.

But when a joint submission is presented, that legal framework is significantly altered.

The framework that the Supreme Court has prescribed is that a sentencing judge must follow a joint submission unless to do so "would bring the administration of justice into disrepute or is otherwise not in the public interest." That is at paragraph 29 of *Anthony-Cook*.

This is a higher threshold than a simple fitness test, and it is a higher threshold than a "demonstrable unfitness test." Both these tests were considered by the Court and rejected in *Anthony-Cook* at paragraphs 27, 28, and 46 to 48. As a result, a sentencing judge's discretion not to follow a joint submission is very, very limited.

To illustrate in explaining just how high a threshold the test entails, the Supreme Court adopted language such as: (As read)

> A joint submission will be...contrary to the public interest if...it is so "markedly out of the line with the expectations of reasonable persons aware of the circumstances of the case that this would view it as a break down in the proper functioning of the criminal justice system."

Or in deciding whether to follow a joint submission: (As read)

> Trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the Courts."

At paragraph 34 of the decision the Court said: (As read)

> Rejection denotes a submission so unhinged from the circumstances of the offence and the offender, that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system has broken down.

So in summary, the question today is not what sentence I would have imposed absent the joint submission. The question I must answer is whether sentencing Mr. Moore to two-and-a-half years' imprisonment for this offence would bring the administration of justice into disrepute or otherwise not be in the public interest, whether it would be so unhinged from the circumstances of the case that it would make that reasonable and informed persons, aware of all the relevant circumstances and aware of the importance of promoting certainty in resolution discussions, believe that the proper functioning of the justice system has broken down.

After having given the matter careful and very anxious consideration, I cannot say that this high threshold is met as far as the duration of the jail term. As I've said, were my discretion not limited by this framework, I would

have imposed a higher sentence than what is being proposed. I would have done so because I think that for this type of offence, stern sentences are needed to send a consistent, firm message and reflect the devastating consequence and tragedy that result from drinking and driving across this country.

The sentence being proposed places far more emphasis than I would on the mitigating factors in this case, and far less emphasis than I would have on the aggravating features of this case. But in the final analysis, I cannot say that what is being proposed is so lenient that I would be justified in not following it. Because in law, my disagreement is not a sufficient reason to reject a joint submission.

But as I am sure will be clear from everything I have said, I accept this joint submission with extreme reluctance. The sentence imposed in this case should not be treated as having any precedential value whatsoever, and it should not be regarded as a reflection of what this Court sees as a fit sentence in circumstances when drinking and driving results in serious injury or death following actions such as the one described in this case. In following this joint submission, I am simply following the

binding direction of the Supreme Court of Canada and applying the extremely strict test that I am duty-bound to apply when considering a joint submission.

However, with respect to the proposed length of the driving prohibition, I cannot impose a driving prohibition of only five years. I do think that doing so would be contrary to the public interest.

I do think that reasonable and informed members of the public, even knowing of the importance of resolution discussions and promoting certainty in outcome, would lose faith in the justice system if Mr. Moore was not prohibited from driving for a much longer period of time than what is being proposed. I base this assessment on the length of driving prohibitions imposed in some of the cases that were filed, on the extent of risky driving that he engaged in, and on the fact that he did not even have a licence at the time of these events.

The information about the lack of license, and, in fact, a lot of information about Mr. Moore's circumstances, comes from the presentence report. I do not know if the Crown had the benefit of that information when it negotiated the joint submission, both from the

point of view of the length of the jail term and from the point of view of the length of the driving prohibition. But with the evidence available to me at this stage, I think that the length of driving prohibition that is being proposed is wholly inadequate and would cause reasonable, informed members of the public to lose confidence in the Courts, especially considering the extreme leniency of the jail term being proposed.

I'm going to deal first with the ancillary orders that were included in the joint submission. For the reasons that I have just given, I am going to depart from the joint submission as far as the driving prohibition is concerned, and it will be for a period of ten years in addition to the jail term that will be imposed today. Driving is a licenced activity. It's a privilege, not a right. I find the circumstance of Mr. Moore's driving egregious and that to prohibit him from driving for only five years would bring the administration of justice into disrepute.

The second issue that arose during submissions was the possibility of probation. Given the credit that Mr. Moore will receive for his remand time, the further jail term that will

be imposed today will be in a range that would allow probation to be made part of the sentence. That may well have been helpful to him. It would have permitted including a no-contact condition with the members of Ms. Lafferty's family, and I was told they wanted that. But probation was not part of the joint submission. It was raised by the Crown at the sentencing hearing, and it is not being agreed to by defence.

The time for the Crown to think about this and ask for it, or discuss this possibility, would have been while the terms of the joint submissions were being discussed with defence. The Supreme Court has made it clear that joint submissions have to be approached on an as-is basis and specifically guarded against the idea, for example, of adding a probation order when it is not part of what is being proposed. So, again, following those directions from the Supreme Court, I do not think it is open to me to include a probationary period as part of his sentence.

The next ancillary order that is being sought is the DNA order. This is a secondary designated offence, so the DNA order will issue.

The next ancillary order that is being sought is a firearms prohibition order. Counsel

jointly suggest that it is mandatory pursuant to Section 109 of the *Criminal Code*. That section says that a firearms prohibition order is mandatory for an offence when the offender is liable to ten years' imprisonment or more, which is the case here, for an offence in the commission of which violence against a person was used, threatened, or attempted.

At the time of the hearing I asked counsel if they had any authority to support the proposition that this offence fits within that definition. They were unable to refer me to any. Reviewing the cases that were filed at the hearing and other cases, I do see that in some, the Section 109 order was made. It was, for example, made in *Kayotuk*. In other cases, there is no mention of a Section 109 order being made. In the cases where the order was made, there was no analysis on this topic. It does not appear that this was ever raised before.

I have looked into this issue, and I have been unable to find any cases that have examined this issue in the context of drinking and driving where bodily harm or death it caused. There are a few cases that have examined the issue in the context of sexual offences. There are cases going both ways, but the bulk of the authorities

seem to have concluded that sexual assault is an inherently violent offence, and I agree with that analysis. But it is not helpful in resolving the issue in the context of drinking and driving.

I note that the *Youth Criminal Justice Act* defines the term "violent offence," in a very broad way. It includes, among other things, an offence that has as one of its elements causing bodily harm. It also includes offences where the safety of others is endangered. So in that context, impaired causing death would clearly be included. But the *Criminal Code* does not include any such definition.

The *Code* does define "serious personal injury offence," and it defines it as including offences involving the use or attempted use of violence or conduct endangering or likely to endanger the life and safety of others. The fact that in that context "conduct that endangers" is included specifically, in addition to the word "violence," seems to confirm that the concept of violence, on its own, does not include conduct that merely endangers safety.

In the absence of a definition in the *Criminal Code*, whether in general or specifically applicable to Section 109, I am left with the ordinary meaning of the word. The Oxford

Dictionary defines "violence" as:

> Behaviour involving physical force intended to hurt, damage, or kill someone or something.
>
> The unlawful exercise of physical force or intimidation by the exhibition of such force.

Violence implies an element of deliberateness of intention. One of the features of drinking and driving offences that results in injury or death is, in a large majority of cases, that the driver never intended for anyone to get hurt or to be killed. It is a crime of recklessness, of gross negligence, and we can attach many adjectives to it, but I do not think that it fits within the concept of use of violence referred to in Section 109 of the *Code*.

As I have explained at length, the joint submission curtails my discretion considerably, but not to the point of going along with a position that I think is wrong in law. I decline to make a firearms prohibition order because, in my view, Section 109 is not engaged in this case.

The victim of crime surcharge is mandatory, so there will be one in the amount of $200 for each of the two counts. The default time and the time to pay are statutorily provided for. I will also credit Mr. Moore for the time that he has

spent on remand on a ratio of roughly one-and-a-half days of credit for each he has spent on remand. Again, there is clear direction from the Supreme Court of Canada that that should be the norm.

Stand up, please, Mr. Moore. Mr. Moore, I am going to follow the joint submission on Count 1. But for the time that you spent on remand, the sentence would have been two-and-a-half years' imprisonment. For the 242 days you have spent on remand, I give you credit for 11-and-a-half months, so the time remaining to be served will be 18-and-a-half months.

On Count 2, the sentence will be two years' imprisonment. The one-and-a-half month credit for the remand time applies to that as well, so the time remaining to be served on that count 12-and-a-half months, and that will be concurrent, which means served at the same time. You may sit down.

There will also be, as I said, a driving prohibition of ten years plus 18-and-a-half months in accordance with Section 259(2)(a.1). Is there anything that I have overlooked from the Crown's point of view?

MR. GODFREY: I don't believe so, Your

Honour. Thank you.

THE COURT: Thank you. Anything from the defence that I have overlooked?

MR. CLEMENTS: No.

THE COURT: Okay. Thank you. Mr. Moore, before we close court, there are a few things I want to tell you. I hope you understand you are getting a huge break, huge, huge break today. I believe you when you say you are sorry, but being sorry is not good enough. It has to come with action. You are 29 years old, and it is time you grew up. You need to seriously work on your issues. Keep going to AA while you are in jail, and keep going to AA when you get out of jail. While you are in jail, spend some time with the psychologist and make the most use possible of the resources that are there.

You are very lucky. You have the support of your mother, of Mr. Storr, and of others. You cannot bring Karen Lafferty back. You cannot undo what you have done. But the least you can do is to work on yourself in a very serious long-term way.

You can talk to other people about what you have done. You can talk to other people about what happened. How it has made you feel. How it has hurt others. The kind of harm that can never

be undone. That is something that you actually can do. That is one way you might be able to start making amends. Maybe you can prevent other people from doing what you did. No one ever gets behind the wheel of a car thinking this is going to happen. No one. So if you are able to, you might want to try to be part of the solution and talk about this, even if it is very hard, and even if it does not put you in a very nice light.

But you cannot just be sorry. Sorry is not good enough this time. So I hope you think carefully about that, and I hope although you are getting a lenient sentence today, I hope you do not look at it as having gotten away with something. I hope you look at it as a chance to make real changes, because I hope to never have to see you in court again as an accused person. I hope no Court ever sees you in court again as an accused person. But that is not up to me. It is completely up to you.

So I hope you were listening. I hope you were listening when those victim impact statements were read last week and today, because that is the reality of what is happening because of what you have done. So I hope that you do something about your issues.

Close court.

CERTIFICATE OF TRANSCRIPT

I, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings taken down by me in shorthand and transcribed from my shorthand notes to the best of my skill and ability.

Dated at the City of Edmonton, Province of Alberta, this 31st day of January, 2018.

Certified Pursuant to Rule 723
Of the Rules of Court

Karilee Mankow
Court Reporter