

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**– and –**

**WILBERT MENACHO**

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**WRITTEN REASONS FOR DECISION**  
**of the**  
**HONOURABLE JUDGE ROBERT GORIN**

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Heard at: Tulita, Northwest Territories  
Date of Sentence: September 24, 2019  
Date of Written Judgment: October 30, 2019  
Counsel for the Crown: Andreas Kuntz  
Defence Counsel: Robin Parker

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**INTRODUCTION**

[1] On September 24th of this year I imposed sentence on Mr. Menacho for two offences. The first offence was failing or refusing to provide a breath sample contrary to what was the now repealed s. 254(5) of the Criminal Code. The second offence was operating a conveyance while his blood alcohol concentration was equal to or over 80 milligrams in 100 millilitres of blood contrary to s. 320.14(1)(b) of the Criminal Code. Mr. Menacho had a criminal record consisting of over 50 prior convictions. Eight of those prior convictions were for offences contrary to the then in force s. 253, i.e., operating a motor vehicle while impaired or while “over 80”. He also had 5 prior convictions for driving while disqualified contrary to the now repealed s. 259(4).

[2] Mr. Menacho, who was 60 years old at the time of his sentencing, had a gap of 4 years since his most recent unrelated conviction and a gap of over 6 years since his most recent set of convictions contrary to ss. 253 and 259.

[3] At Mr. Menacho's sentencing, the Crown provided proof of notice of its intention to seek greater punishment. Pursuant to s. 320.23(1), sentencing had previously been adjourned in order to allow Mr. Menacho to attend an approved alcohol treatment program. As required by the subsection, the Crown had consented to the adjournment. By the date of his sentencing Mr. Menacho had successfully completed the program and pursuant to s. 320.23(2), I was therefore not required to impose the minimum punishments and prohibition orders that would otherwise have applied.

[4] The Crown requested that I impose a global sentence of 10 months imprisonment to be served in a correctional facility and a 6-year driving prohibition. Defence counsel suggested that fines be imposed rather than imprisonment. She also suggested a "lengthy" period of probation as well as a "lengthier" driving prohibition.

[5] The sentence I imposed was a conditional sentence of 3 months on each of the convictions to be served consecutively for a total conditional sentence of 6 months. On both convictions I imposed one 3-year probation order with terms of alcohol abstinence and counselling and further treatment if deemed appropriate. Finally on each of the convictions I ordered a 10-year driving prohibition, which pursuant to ss. 719(1) and 320.23(9), were required to be concurrent.

[6] I provided very brief reasons for my sentence and advised that written reasons would follow. My reasons follow.

## **ANALYSIS**

[7] After pleading guilty Mr. Menacho was convicted of the following offences:

1. "That WILBERT MENACHO on or about the 21st day of July in the year 2018 at the Hamlet of Tulita of the said Region, did without reasonable

excuse refuse to comply with a demand made to him by Cpl. Huff, a peace officer to accompany the said Officer for the purpose of enabling samples of the breath to be taken pursuant to section 254(3) of the Criminal Code contrary to Section 254(5) of the Criminal Code.”

2. “Wilbert Menacho [...] On or about, the 19th day of January, 2019, at or near the Town of Norman Wells in the Northwest Territories did within two hours after ceasing to operate a conveyance, have a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 mL of blood, contrary to Section 320.14 of the Criminal Code”;

[8] Because the former “curative discharge” provisions contained in 255(5) were available at the time of the first offence and the present “Exception to minimum punishment” provisions contained in s. 320.23 now exist, s. 11(i) of the Charter is applicable to that offence. The subsection states:

11. Any person charged with an offence has the right [...] (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of the commission and the time of sentencing, to the benefit of the lesser punishment.

[9] In *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 41, the Supreme Court stated that a measure will constitute punishment under s. 11(i) when:

(1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender’s liberty or security interests.

[10] I also note that since the date I imposed sentence the principles set out in the foregoing paragraph of *K.R.J.* were confirmed by the majority of the Supreme Court in *R. v. Poulin*, 2019 SCC 47, at paras. 37 & 38.

[11] The two offences committed by the accused straddle the December 18, 2018 date on which the comprehensive amendments to the Criminal Code relating to driving offences came into force. In relation to the first count, the elements of the offence set out in what was s. 254(5) of the Code are virtually identical to those set

out in the section now in force, s. 320.15(1). The offence itself appears to have been unchanged.

[12] So to do the applicable punishments for second and third or subsequent offences for the offences of failing to provide a breath sample and driving while “over 80”. Both the former s.255 (1) and the present 320.19 require at least 120 days imprisonment and both the former s. 259(1) and the present s. 320.24(1) required a driving prohibition of at least 3 years with no maximum.

[13] However, there are significant differences between the repealed “curative discharge” provisions of s. 255(5) and the now in force s. 320.23.

[14] S. 255(5) provided:

(5) Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person’s attendance for curative treatment in relation to that consumption of alcohol or drugs.

I note that the Northwest Territories was among the 9 provinces and territories where s. 255(5) had been in effect.

[15] S. 320.23 of the Code now states:

320.23 (1) The court may, with the consent of the prosecutor and the offender, and after considering the interests of justice, delay sentencing of an offender who has been found guilty of an offence under subsection 320.14(1) or 320.15(1) to allow the offender to attend a treatment program approved by the province in which the offender resides. If the court delays sentencing, it shall make an order prohibiting the offender from operating, before sentencing, the type of conveyance in question, in which case subsections 320.24(6) to (9) apply.

(2) If the offender successfully completes the treatment program, the court is not required to impose the minimum punishment under section 320.19 or to make a prohibition order under section 320.24, but it shall not direct a discharge under section 730.

[16] The new section allows for a lesser punishment in that it creates an exception to not only the mandatory minimum fines and jail terms set out in s. 320.19, but also the mandatory minimum driving prohibitions set out in s. 320.24. The repealed curative discharge provisions on the other hand only allowed for the court to depart from the applicable mandatory minimum fines and jail terms.

[17] On the other hand, the former curative discharge provisions arguably allowed for a lesser punishment, in that if the curative discharge were granted, the accused would ultimately not have a conviction entered on their criminal record. However, I conclude that for the vast majority of accused, the mandatory minimum driving prohibition constitutes the most onerous penalty imposed by the court. Typically they are first time offenders who in addition to the driving prohibition are subject to a mandatory minimum fine rather than a mandatory minimum term of imprisonment. Additionally the positive impact of a discharge is far less in the case of an accused who is being sentenced for a second or third or subsequent offence. In such a case the discharge will not erase the fact that the accused already has a criminal record. I find that notwithstanding, the unavailability of a discharge, the present provisions of s. 320.23 allow for a lesser penalty than those that were available in s. 255(5).

[18] Furthermore, as a practical matter applying the former curative discharge provisions to Mr. Menacho's first offence and the provisions of s. 320.23 to his second offence would have been a convoluted process.

[19] I note as well that both Crown and defence were in agreement that s. 320.23 was the applicable section for both offences. They also agreed that its prerequisites had been met.

[20] Crown and defence also agreed that since the Crown had proven it had provided the accused with notice of its intention to seek greater punishments and that given the accused's prior related convictions, this court, although not bound to

impose any mandatory minimum penalty, also possessed the statutory power to impose a driving prohibition of up to the maximum available in the case of third and subsequent offenders, i.e., a life-time driving prohibition. I agree with the position of counsel as I find that it accords with the literal meaning of the engaged sections of the Code.

[21] As stated, although the Crown conceded that s. 320.23 was applicable, it requested that this court impose a global jail term of 10 months and a 6-year driving prohibition. In support of its position, the Crown submitted that Mr. Menacho's criminal record was highly aggravating since it contained more than 50 criminal offences including 8 prior criminal convictions for impaired operation of a motor vehicle and the 5 prior convictions for operating a motor vehicle while prohibited from doing so. The Crown conceded that the guilty pleas were mitigating as were the profound Gladue factors set out in the presentence report. The Crown pointed out that the second incident involved blood alcohol readings the lesser of which at 210 milligrams percent was statutorily aggravating. Furthermore, the Crown submitted Mr. Menacho was using his employer's vehicle at the time and that therefore a breach of trust was involved. Finally, the Crown referred to the fact that the incident took place at approximately midday and in the commercial area of the community entailing a heightened risk to the public.

[22] The Crown also pointed out that Mr. Menacho had committed the second offence while at large on process for the first. It noted as well that the presentence report before the court indicated that Mr. Menacho had attended the same residential treatment program that he had just finished, 19 years ago in 2000. Finally, the Crown submitted that although the last related conviction was committed over 6 years before the first offence, he had been placed under a lengthy driving prohibition that had just expired before he committed the first of the two offences before the court.

[23] The defence submitted that the Gladue factors set out in the materials before the court were such that denunciation and deterrence could be met through fines combined with the maximum 3- year period of probation or in the absence of a fine, a conditional sentence in the range of four months. Defence counsel submitted that a lengthier driving prohibition was also appropriate.

[24] She pointed to Mr. Menacho's background factors. Mr. Menacho had a very positive background growing up in Tulita until he began attending residential school at Inuvik's notorious Grollier Hall for a semester. He was 15 when he decided to attend the school in order to pursue his studies. It began as a positive experience because he had access to sports that he wanted to play such as hockey, volleyball and basketball. He also enjoyed studying and completing his daily chores. However, he began to receive detentions during which he was sexually abused by an authority figure at the school. He initially thought that if he behaved well the detentions would stop. However, since the purpose behind them was not to correct his behaviour they continued, as did the sexual abuse.

[25] Defence counsel advised that due to the extreme abuse he experienced while at residential school, Mr. Menacho began to self-harm and also began drinking at the age of 17 in order to erase the memories of the trauma he suffered while at residential school. He also began to get in trouble with the law - sometimes very seriously, although from his record it seems that all of his jail terms were all for periods of less changes. Other than a gap between 1993 and 1998, his criminal convictions continued unabatedly. The presentence report indicates that in 2000, after the accused finished his first round of residential treatment, he remained sober for 4 years. However, this is contradicted by his criminal record which indicates a 2001 conviction for impaired driving. Nonetheless, other than accumulating another conviction for driving while disqualified, in 2002, he appeared to stay out of trouble between 2002 and 2009. Unfortunately in the interim Mr. Menacho's father, who had been a very positive figure in his life, died and he began to drink again. As a result he separated from his wife, who had also been a positive figure. In 2009, 2011, 2012 he was convicted of 3 counts of driving while impaired or "over 80" contrary to s. 253 and 4 counts of driving while disqualified. In 2015 his most recent convictions for failing to attend court and resisting arrest were entered.

[26] Today he is 60 years old. He has in the past been able to both remain sober and stay out of trouble for extended periods of time. As pointed out by defence counsel the road to sobriety is not always a straight line. The materials filed on his behalf indicate that he is a valued member of the community and valued employee. It is noted that he is a conscientious and ethical worker who is respected by his co-workers and clients alike. He is typically employed as a supervisor and as his



operations manager puts it, “effectively bridges the gap between that of his culture and heritage with that of the corporate culture/world. In doing so he greatly assists [his employer] in creating a ‘win win win’ scenario that has allowed us to be successful”. A fellow participant at Mr. Menacho’s most recent session of residential treatment who spent every day with him while in his counselling stated among other things:

“What struck me about Wilbert is his spirituality and kindness. This is a man who is very serious about his recover. He was always ready to help someone, talk to someone and offer whatever support that he could. He was often asked to assist with the ceremonial duties such as the weekly “sweats”, which is again a testament of high regard that he was held in. Wilbert talked often of his love for his mother, his family and the Elders in his community and how much he was grateful for receiving a second chance to change his life and give back some of what he was learning. He was looking forward to going “on the land” and continuing to grow in his spirituality and recovery.”

[27] Notwithstanding Mr. Menacho’s previous residential alcohol treatment in 2000, the fact that he has undergone 42 days of the same treatment since being charged with the present offences sentenced is a mitigating factor that cannot be ignored. The guilty pleas are also mitigating as are the Gladue factors I have reviewed. It is difficult to imagine experiencing what Mr. Menacho experienced in his youth without becoming seriously troubled. It is not at all uncommon for someone who experienced what he did to consume alcohol in order to block the resulting emotional pain. While the criminal record is certainly aggravating, the 4-year gap between the most recent convictions on his record and the 6-year gap in his record since his last convictions for impaired driving and driving while impaired, “over 80” and while disqualified are at least somewhat attenuating. It is also significant that Mr. Menacho continues to take counselling and is described by an individual who attended the residential alcohol treatment with him as someone who is very serious about his recovery.

[28] The fundamental purpose of sentencing is set out in s. 718 of the *Criminal Code*. The section states:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[29] Additionally, s 718.1 states:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

## **CONCLUSION**

[30] The gravity of the offences before the court were certainly serious as was Mr. Menacho's degree of moral blameworthiness given his criminal record. He had been sentenced numerous times in the past and yet continued to reoffend. However, the Gladue factors before the court render his degree of moral blameworthiness to be lower from what would otherwise be the case. Those Gladue factors appear to have been directly related to his consumption of alcohol. Furthermore his important rehabilitative endeavors must be recognized.

[31] In order to adequately reflect the gravity of the offence and Mr. Menacho's blameworthiness, imprisonment was necessary. However my view was also that a community based disposition was appropriate and that Mr. Menacho's imprisonment could take the form of a conditional sentence.

[32] Crown counsel correctly pointed out that on past occasions when Mr. Menacho has not been able to refrain from consuming alcohol, it resulted in him getting behind the wheel of a motor vehicle and putting the public at risk. However, I noted that on the two occasions before the court for sentencing, the

driving prohibition he had previously been under had expired. Given the gap in his record for related offences, I concluded that Mr. Menacho obeyed the last driving prohibition that was imposed on him and that protection of the public can be addressed through a driving prohibition of 10 years for both offences. In both cases the driving prohibition imposed was 10 years. As stated previously, pursuant to s. 320.23(9), they could not be ordered to run consecutively and were therefore concurrent.

[33] The total driving prohibition is of a longer duration than that suggested by the Crown. However it is certainly part of the entire sentence that was imposed by the court and in itself has a denunciatory and deterrent effect. Under all of the circumstances I found that the lengthier driving prohibition coupled with the shorter global term of imprisonment of 6 months to be served in the community was appropriate. I also imposed a term of probation of 3 years which will follow the conditional sentence in order to assist Mr. Menacho in his continued rehabilitation. The entire sentence imposed by the court with the exception of the two concurrent 10-year prohibitions from operating a motor vehicle are set out in appendix “A” to this judgment.

[34] I thank both counsel for their assistance.

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Robert Gorin  
Chief Judge of the  
Territorial Court

Dated at Yellowknife, Northwest  
Territories, this 30th day of October, 2019.

## Appendix “A”

### Conditional Sentence

- July 21, 2018 Tulita, NT 254(5) CC (3 months)
- January 19, 2019 Norman Wells, NT 320.14(1)(b) CC (3 months Consec)

TOTAL TERM – 6 months

The offender shall:

- a) Keep the peace and be of good behaviour;
- b) Appear before the court when required to do so by the court;
- c) Report to a supervisor within two working days of the date of this order and thereafter, when required by the supervisor and in the manner directed by the supervisor
- d) Remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and
- e) Notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

In addition, the offender shall comply with the optional conditions;

- f) Not consume any alcohol;
- g) Participate in any counselling or treatment as directed by your supervisor, including residential treatment if deemed appropriate by your supervisor;
- h) For the first four months of this conditional sentence, you are to be inside your residence subject to the following exceptions:
  - 1) In the case of a genuine medical emergency;
  - 2) If you have the written permission from your supervisor to be outside your residence and you are carrying such written approval;
  - 3) To attend any treatment or counselling directed by your supervisory;
  - 4) Every day between 12:00 p.m. and 1:00 p.m.;
  - 5) Between the hours of 6:30 a.m. and 7:30 p.m. while working in order to go to and from and attend your place of employment. You are to provide

your work schedule to your supervisor and to the RCMP detachment in Tulita, NT; and

- i) Present yourself at the door of your residence if the RCMP checks compliance with this conditional sentence.

### **Probation Order**

- July 21, 2018 Tulita NT s. 254(5) CC
- January 19, 2019 Norman Wells, NT s.320.14(b)CC

Following the expiration of the offender's conditional sentence order for a term of 6 months related to this or another offence the offender shall for a period of **3 years:**

- a) Keep the peace and be of good behaviour;
- b) Appear before the court when required to do so by the court;
- c) Notify the court or probation officer in advance of any change of name, or address and promptly notify the court or probation officer of any change of employment or occupation; and
- d) Not possess or consume any alcohol.

*R. v. Menacho*, 2019 NWTTC 15

*Date: 2019 10 30*  
*Files: T-1-CR-2018001470*  
*T-1-CR-2019000504*

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[Sections: 11(i) *Charter*; 254(5); 320.14(1)(b);  
255(5); & 320.23 *Criminal Code*]