SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Denny*, 2017 NSSC 127

Date: 2017-05-16
Docket: CRP No. 451625
Registry: Pictou

Between:

Her Majesty the Queen

Appellant

v.

Leroy David Denny

Respondent

Judge: The Honourable Justice James L. Chipman

Heard: May 15, 2017, in Pictou, Nova Scotia

Counsel: Edward J. (Jody) McNeill, for the Appellant
Stephen Robertson, for the Respondent

By the Court:

Overview

[1] This is a summary conviction appeal by the Crown involving a Respondent aboriginal offender. The Respondent pled guilty to two counts of refusing the breathalyzer as follows:

> 1. That he, on or about the 1st day of August, 2015, at or near Pictou, Nova Scotia did without reasonable excuse refuse to comply with a demand made to him by Cst. Joshua Penton, a peace officer, to provide then or as soon thereafter as is practicable, samples of his breath in the opinion of a qualified technician are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the *Criminal Code*; and
> 2. The he, on about the 24th day of October, 2015, at or near New Glasgow, in the County of Pictou and Province of Nova Scotia, did without reasonable excuse refuse to comply with a demand made to him by a Peace Officer to provide samples of his breath suitable to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood, contrary to Section 254(5) of the *Criminal Code*.

[2] On April 28, 2016, both matters proceeded to sentencing in Provincial Court. Judge Del W. Atwood received oral submissions and had the benefit of an April 22, 2016 pre-sentence report (PSR) and attached Justice Enterprise Information Network (JEIN) offender summary. The judge rendered an oral decision and subsequently issued a written decision, *R. v. Denny*, 2016 NSPC 25. Under the heading "Other mitigating factors", the judge concluded his decision with these paragraphs:

> [16] I do not believe that a lengthy period of incarceration would be warranted in this case. Yes, Mr. Denny has a significant record; nonetheless, the court must be mindful of the gap principle that was restated authoritatively by the Nova Scotia Court of Appeal in *R. v. Boudreau*, which informs me that a prior record recedes in significance as it recedes in time. The rationale behind the principle is clear: the greater the gap in time between offences, the stronger the circumstantial evidence that the person to be sentenced was rehabilitated effectively by the earlier sentence and can be trusted as being committed to pro-social values.

[17] The presentence report is extremely positive. Mr. Denny has a concrete employment plan. Further, he has been able to maintain sobriety for many years and there is no doubt in my mind that he will be able to do so in the years to come.

[18] There is a minimum penalty that is applicable in relation to both of the charges before the court. Sub-para. 255(1)(a)(i) of the *Code* states that for a first offence, there is a minimum fine to be imposed of not less than $1,000.00.

[19] As was decided by the Newfoundland and Labrador Court of Appeal in *R. v. Hatcher*, [2000 NFCA 38] a period of imprisonment, however brief, would fulfil the requirements of a mandatory-minimum fine. Although that decision is not binding on this court, the logic and legal merit of it is compelling, and I intend to follow it.

[20] What the court intends to do here is impose one day of imprisonment served by Mr. Denny's appearance in court in relation to each of the counts before the court, to be served concurrently to each other.

[21] I recognize that these offences occurred on separate dates; however, in my view, they arise out of connected circumstances and particularly arise out of a brief period of time during which Mr. Denny, due to personal circumstances which include the oppressive circumstances of his First-Nations' history, experienced a lapse in his success in dealing with an alcohol-use disorder; therefore, I find that concurrency is appropriate.

[22] So it will be one day time served concurrently in relation to each of the counts before the court. In my view, that fulfills the mandatory punishment requirement.

[23] The court is going to impose $10.00 fines in relation to each of the counts before the court, along with the mandatory minimum $3.00 victim surcharge amounts and Mr. Denny will have one year to pay those combined amounts.

> [24] As these are Mr. Denny's first convictions for offences punishable under s. 255, the period of prohibition that would be applicable is described in para. 259(1)(a) of the *Code*: for a first offence, for a period of not more than three years plus any period to which the offender is sentenced to imprisonment and not less than one year. The Court imposes, in relation to each of the charges, a one-year period of prohibition.
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> [25] The court will not extend the waiting period for Mr. Denny's eligibility for the interlock program and given the fact that the court has imposed a period of imprisonment as well as fines, it would not be permissible for the court to impose a period of probation, given the provisions of para. 731(1)(b) of the *Code*; therefore I decline to do so.
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> [26] I am grateful to counsel for the thorough sentencing submissions made in this case.

Grounds of Appeal

[3] By Notice of Summary Conviction Appeal filed May 24, 2016, the Crown set out five grounds of appeal. In their factum filed April 3, 2017, they reduced their list of issues to the following:

1. Did the Learned Trial Judge err in law by failing to impose the minimum sentence as set out in s. 255 of the *Criminal Code*?
2. Did the Learned Trial Judge impose a sentence that was demonstrably unfit?
3. Did the Learned Trial Judge err in law by taking judicial notice of facts not in evidence?

[4] In his factum filed April 27, 2017, the Respondent submitted that a further ground of appeal should be considered by the Court, namely:

> Did the learned trial judge properly consider and apply s. 718.2(e) of the *Criminal Code* and properly consider and apply the principles of sentencing for aboriginal offenders, as instructed by the Supreme Court of Canada in *R. v. Gladue* (1999), 1 S.C.R. 688 and *R. v. Ipeelee* (2012), 1 S.C.R. 433?

[5] Given that the Respondent is not appealing the decision, I will not consider the above as a ground of appeal. Nevertheless, I will consider grounds 1 and 2 in the context of s. 718.2(e), *Gladue* and *Ipeelee*.

Standard of Review

[6] Since this is a summary conviction appeal, I have reviewed the record, written submissions and oral argument sitting as a summary conviction appeal court (SCAC). In *R. v. MacGregor*, 2012 NSCA 18, Justice Bryson confirmed the appropriate review standard as follows:

> [20] This is an appeal under s. 839 of the *Criminal Code*. In *R. v. R.H.L.*, 2008 NSCA 100, Justice Saunders described the appropriate standard:
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> > [20] Not only are appeals under s. 839 restricted to questions of law "but the error of law required to ground jurisdiction in this court is that of the summary conviction appeal judge" per Oland, J.A. in *R. v. Travers (R.H.)*, 2001 NSCA 71 at ¶ 21, also making reference to *R. v. Shrubsall*, [2000] N.S. J. No. 26 (NSCA) at ¶ 7. Accordingly, for this appeal to succeed an error in law must be identified in the decision of Justice LeBlanc, sitting as the SCAC.
> >
> > [21] The standard of review that applied at the SCAC during its review of the trial judge's decision was explained by this court in *R. v. Nickerson*, [1999] N.S.J. No. 210 at ¶ 6:
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> > > . . . Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in **R. v. Burns (R.H.)**, [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript…

[7] *Nickerson* was penned by Cromwell, JA (as he then was) and his words are the guidepost for SCAC judges to follow. Furthermore, as this appeal concerns the

fitness of the sentence imposed, I am mindful of the standard of review applicable to an appeal of sentence. This was recently reviewed by Justice Scanlan in *R. v. Garnett*, 2017 NSCA 33, at para. 3:

> [3] The standard of review applicable to appeal of sentence was recently discussed in *R. v. Skinner*, 2016 NSCA 54, and in *R. v. B.M.S.*, 2016 NSCA 35. In *B.M.S.* the Court stated:
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> > [11] Trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law: *R. v. Shropshire*, [1995] 4 S.C.R. 227 at para. 46, *R. v. Nasogaluak*, 2010 SCC 6 at para. 43-46. Absent an error in principle, failure to consider a relevant factor, overemphasis of the appropriate facts, or a sentence that is demonstrably unfit, a Court of Appeal should not intervene: *R. v. Proulx*, 2000 SCC 5 at para. 123. Any error that may be identified by an appellate Court will only justify intervention if that error had an impact on the sentence ordered: *R. v. Lacasse*, 2015 SCC 64 at paras. 41, 43-44.

Positions of the Parties

The Appellant

[8] The Crown takes the position that the sentence is demonstrably unfit. They argue that the judge erroneously took judicial notice of traffic volumes as justification for arriving at what they say is a light sentence. The Crown adds that, in the circumstances, the imposition of a fine less than the $1,000 minimum for each offence was an error of law.

[9] The Crown asks this SCAC to intervene and impose a fit and proper sentence consistent with what they submitted during the original sentencing. In this respect, the Crown commends a sentence in the range from a six-to-nine month conditional sentence on the low end to a 30 to 60 day period of custody on the high end followed by a twelve month period of probation. The Crown also recommends a driving prohibition of between two and three years.

The Respondent

[10] The Respondent says that the original sentence is appropriate. They argue that the judge took proper judicial notice that the later into the evening one goes, the less traffic there is on the roads. As for the $10 fines, the Respondent submits that the Provincial Court judge's interpretation of *Hatcher* was reasonable, that

even if the SCAC disagrees with his interpretation, "… that does not raise it to the standard of review required to overturn the sentencing judge's decision."

[11] The Respondent adds that the sentence is not demonstrably unfit, taking into consideration s. 718.2(e) of the *Criminal Code*, *Gladue* and *Ipeelee*. While acknowledging it is a rarity to have an impaired driving fine as low as $10, the Respondent says the judge did this only after considering, "… as he should have according to s. 718.2(e) the broad systemic and background factors affecting aboriginal people generally, but also the factors that were unique to Mr. Denny himself".

[12] The Respondent says the judge properly paid particular attention to the circumstances of the Respondent in order to craft a fit and proper sentence. While acknowledging the sentence to be "unique and novel", the Respondent submits it is not an illegal or demonstrably unfit sentence.

[13] Alternatively, the Respondent says that if the SCAC feels that the imposition of a $10 fine does amount to an illegal or demonstrably unfit sentence (and that the sentencing judge misunderstood *Hatcher*), "… then it could simply cancel the fine and rule this is a case where a fine is not necessary and that the sentence of two days' incarceration served by his appearance in court and a license suspension is, by itself, a fit and proper sentence."

Did the Learned Trial Judge err in law by taking judicial notice of facts not in evidence?

[14] At para. 5 of his decision, the sentencing judge stated:

> However, as with any offence, there are degrees of seriousness. In Mr. Denny's case, both stops occurred during times of the day when traffic volumes would have been quite light, making the risk to the public reduced substantially. Although Mr. Denny refused to provide breath samples as he was required by law to do, there is no evidence before the court Mr. Denny was disruptive or combative with police.

[15] At the sentencing hearing, the Crown read in a statement of facts which confirmed the first offence occurred on August 1, 2015, at approximately 11:05 in the evening, and that the second offence occurred at approximately 2:30 in the morning on October 24, 2015. With respect to traffic volumes for these times and dates, the Court did not receive any evidence, agreed statement of facts or argument.

[16] Given the above, the Crown submits that the judge relied on his own personal knowledge, without advising counsel or seeking their input concerning traffic volumes or risk to the public. The Crown therefore argues that the judge erred in law by taking judicial notice in the manner described.

[17] By way of rebuttal, the Respondent states that what the judge was explaining when he made these comments was simply that later into the evening one goes, the less traffic there is on the roads. He adds that saying traffic volumes are lighter the later into the evening one gets is, "no more controversial than saying it is brighter outside during daylight hours than at night."

[18] Under s. 723(1) of the *Criminal Code*, "a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any fact relevant to the sentence to be imposed", before determining the sentence.

[19] Judicial notice amounts to, "an 'exception' to the general rule of evidence that parties are required to prove all facts in a criminal trial by relevant and admissible evidence", since it "is another form of proof substituting for evidence and the requirement of formal proof" (Hon. S. Casey Hill, D. Tanovich, L. Strezos (eds.) *McWilliams' Canadian Criminal Evidence*, 5th ed. (Aurora, Ont.: Canada Law Book Inc., 2014) Vol. 3 at para. 26:10).

[20] A court may properly take judicial notice of facts that are either (a) so notorious or generally accepted as not to be the subject of debate among reasonable persons, or (b) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy (*R. v. Find*, 2001 SCC 32 at para. 48, *R. v. MacDonald*, 1988 Carswell NS 10 (C.A.) at para. 58).

[21] The permissible scope of judicial notice varies according to the nature of the issue under consideration. The more important the fact is to a sentencing proceeding, the more a court ought to insist on compliance with a stricter criteria for judicial notice (*R. v. Spence*, 2005 SCC 71, at paras. 60-61).

[22] With respect to the specific context of a motor vehicle offence, judicial notice was addressed in *R. v. Synkiw*, 2012 SKQB 337. The accused approached a check-stop but made a "u-turn" and drove in the other direction. Police pulled him over and noted indicia of impairment. The accused was ultimately charged with impaired driving and "over 80".

[23] The trial judge acquitted the accused after finding the stop violated the accused's section 9 Charter rights, on the basis that there existed a broken yellow line on the roadway where the accused was stopped, rendering a "u-turn" permissible. In so finding, the trial judge considered matters not in evidence, specifically the roadway markings, relying on his own personal knowledge. There was nothing in the transcript to suggest the trial judge advised counsel of or sought their input concerning his knowledge of the road in question.

[24] On appeal by the Crown, the Saskatchewan Court of Queen's Bench agreed that the facts found by the trial judge concerning the broken line on the roadway were not indisputable and accordingly were not the proper subject of judicial notice, regardless whether the trial judge was actually correct or not. As such, it was an error of law. Justice Gabrielson noted at para. 18:

> …the trial judge also states that he travelled the road in question "before". I cannot ascertain from his judgment whether the term "before" means before the date that his decision was released or before the date of the trial. In any event, the only relevant date would be July 10, 2009, as that is the date of the alleged offences. Without evidence from a witness who could then be subject to cross-examination, the true state of the roadway on the night in question cannot be determined.

[25] Furthermore, there would appear to be support for the proposition that to take judicial notice of certain facts, without affording the Crown or the accused an opportunity to make submissions, constitutes an error in principle (*R. v. Mallory*, 2004 NBCA 72 at para. 24, *R. v. Trachsel*, 2010 SKQB 288 at para. 22).

[26] In the result, I find that the sentencing judge erred in law by taking judicial notice in the manner that he did at para. 5 of his decision. Further, I find that this error adversely affected his overall decision. In this regard, he went on to find (para. 6), "In assessing these facts, I find that the seriousness of these offences falls at the lower end of the scale of severity."

[27] I would add that had the sentencing judge received evidence in this area it may have been demonstrated that traffic volumes at the times in question would have been relatively high. In this regard, the calendar reveals that the first offence occurred at close to midnight on a Saturday and the second offence happened in the early morning hours of a Saturday. Taking this a step further, it may well have been shown that the police specifically monitored late night driving during

weekends (as opposed to week nights) because this is when there is a prevalence of drivers (and potentially vulnerable pedestrians) on the roads.

[28] In all of the circumstances, I am of the view that the sentencing judge erred when he took judicial notice and that this factored into his sentencing decision. By using the non-proven notion that the offences took place when traffic volumes were light, the judge took into account an erroneous mitigating feature which influenced his ultimate disposition.

Did the Learned Trial Judge impose a sentence that was demonstrably unfit?

[29] In the main, the Crown argues that the imposition of a fine of $10 for an offence under s. 254 of the *Criminal Code* is demonstrably unfit. They say that imposing a $10 fine is tantamount to a s. 24(1) *Charter* remedy seen in only exceptional cases, where a significant breach is found to have arisen as a result of state action, as an alternative remedy to a judicial stay of proceedings. Having reviewed the complete record, I agree with the Crown's position that there is no reference – expressed or implied – to any *Charter* breach or s. 24(1) remedy.

[30] The Crown goes on to argue that the imposition of a $10 fine (whether accompanied by one day time served or not) significantly underemphasizes the principles of sentencing fundamental to impaired driving cases; namely, denunciation, deterrence, and protection of the public.

[31] Against these arguments, the Respondent raises s. 718.2(e) and the principles of sentencing for aboriginal offenders. They say that the sentencing judge appropriately considered the sentencing principles set forth by the Supreme Court of Canada in *Gladue* and *Ipeelee*. In *R. v. Denny*, 2016 NSSC 76, Justice Rosinski had cause to consider these decisions and his comments at paras. 62-70 are helpful in providing relevant background:

> [62] The court has available to it, and is grateful for, a *Gladue* Report prepared through the auspices of the Mi'kmaq Legal Services Network, and signed by Ms. Elizabeth Marshall. That report is particularly helpful in assessing how section 718.2(e) of the *Criminal Code* should be applied in this case.
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> [63] Until July 22, 2015, that subsection read:
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> > All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[64] Since July 23, 2015, the subsection reads:

> All available sanctions, other than imprisonment, that are reasonable in the circumstances *and consistent with the harm done to victims or to the community* should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[65] In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada set out the principles that should guide courts in relation to the application of the then extant s. 718.2(e). More recently, in *R. v. Ipeelee*, 2012 SCC 13 (at paras. 56 – 87), the Supreme Court revisited and reformulated those principles, particularly as applicable in the context of aboriginal offenders who were subject to long-term offender supervision orders.

[66] The majority opinion made the following observations:

> … s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing… [It] directs sentencing judges to pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique and different from those of non-aboriginal offenders… When sentencing an aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection... Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people generally, but additional case specific information will have to come from counsel and from the presentence report….
>
> … to be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, high rates of substance abuse and suicide, and of course higher levels of incarceration for aboriginal peoples. These matters, on their own, and do not necessarily justify a different sentence for aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case specific information presented by counsel.… In current practice, it appears the case specific information is often brought before the court by way of a *Gladue* Report, which is a form of presentence report tailored to the specific circumstances of aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at the sentencing

> hearing for an aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*." – Paras. 59 – 60.
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> …
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> Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.
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> …
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> First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness… The second set of circumstances – the types of sanctions which may be appropriate – bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself.… s. 718.2(e) does not create a race-based discount on sentencing. – Paras. 72-75.
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> [emphasis added]

[67] Furthermore, the court reiterated that it would be extremely difficult for an aboriginal offender to ever establish a direct causal link between his circumstances and his offending. Section 718.2(e) does not logically require such a connection:

> Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. That is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence. (para. 83)

[68] *Gladue* reports are, "a form of presentence report tailored to the specific circumstances of Aboriginal offenders" – *Ipeelee*, para. 60. For this reason, it may be helpful for such report writers to follow more closely the model adopted for presentence reports, with necessary modifications.

[69] I agree with the comments of the court in *R. v. Lawson*, 2012 BCCA 508, at paras. 26-28:

> … Their purpose is to provide the court with individualized information about how intergenerational and systemic effects of colonialism,

> displacement, residential schools, poverty, unemployment and substance abuse have affected the aboriginal offender. They should also include information about realistic restorative or rehabilitative programs suitable to the particular aboriginal offender.
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> …
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> Finally, as a form of presentence report, *Gladue* reports should be subject to the same general requirements of balance and objectivity as conventional presentence reports. Thus, the writer should attempt to remain detached rather than advancing personal opinions.

> [70] Courts have also been consistent in confirming that it is the contents of a *Gladue* report that are critical, not its format, and that such content can come before the court outside of any formal *Gladue* report, or even if none is formally submitted – by way of counsel's representations, agreed statement of facts, or in presentence reports, etc.

[32] It is important to point out that the sentencing judge in this case did not have a *Gladue* report. Nevertheless, this is not a strict requirement and the PSR is quite comprehensive, including *Gladue* report-like content as well as the entirety of the final page of the report entitled "*Gladue* Factors".

[33] In *Gladue*, the Supreme Court explained the purposes of s. 718.2(e), as applied to aboriginal offenders, and set out a "methodology" for sentencing aboriginal offenders. Section 718.2(e) imposes a duty on the sentencing judge to give the remedial purpose of the provision real force in relation to aboriginal offenders. Accordingly, the sentencing judge must take into account the unique systemic and background factors that contributed to the commission of the offence. Further, the judge must consider the type of sentence that is appropriate given the offender's specific aboriginal heritage or connection to an aboriginal community. The section is intended to provide the necessary flexibility and authority for sentencing judges to resort to a restorative model of justice in sentencing aboriginal offenders. It requires judges to thoroughly explore alternative sanctions to imprisonment.

[34] The sentencing judge was alive to *Gladue* and *Ipeelee*, which he specifically referenced at para. 14 of his decision. Indeed, I find the judge took proper judicial notice of the systemic or background factors of the approach to sentencing an aboriginal offender such as the Respondent, who is of Mi'kmaq descent and a

member of the Pictou Landing Band. Indeed, the Supreme Court of Canada directed the approach taken by the sentencing judge at para. 60 of *Ipeelee*:

> Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., *R. v. Laliberte*, 2000 SKCA 27 (CanLII), 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(*e*) of the *Criminal Code*.

[35] Notwithstanding the sentencing judge's proper approach in this regard, the question remains as to whether the ultimate sentence was appropriate. I must answer this question with a resounding "No". In this respect, I have already found that by taking improper judicial notice the judge determined the offences to fall at the lower end of the scale of severity. As I will review below, he went on to impose a sentence which was less than the prescribed statutory minimums.

Did the Learned Trial Judge err in law by failing to impose the minimum sentence as set out in s. 255 of the *Criminal Code*?

[36] The sentencing judge relied on *Hatcher* as authority for imposing $10 fines rather than the statutory minimum $1,000 fines. In *Hatcher*, the accused pled guilty to "over 80" and was sentenced to five days in jail, 12 months' probation and a 14-month driving prohibition. The accused appealed the sentence on the basis that the *Criminal Code* did not authorize imposition of a sentence combining imprisonment and probation on a person convicted for the first time of an offence under s. 253. The Newfoundland Court of Appeal held that s. 255 sets out a minimum fine for a first offence. It does not establish a mandatory sentence. In my view, a sentence for this offence is legal if it is equal to or greater than the minimum set out and does

not exceed the maximum. A person found guilty on summary conviction for this offence is liable to a fine, imprisonment or both.

[37] I do not take *Hatcher* to stand for the proposition that a lesser fine can be inserted for the statutory minimum (which was $300 at the time of *Hatcher* and is now $1,000). Accordingly, I find that the sentencing judge erroneously interpreted *Hatcher* in imposing what I regard as flawed and insufficient $10 fines.

Sentencing Principles

[38] I find these errors in the sentencing decision amount to errors in principle, the import of which was discussed by Justice Saunders in *R. v. Bernard*, 2011 NSCA 53 at paras. 25-30:

> [25] In my opinion, once we find that a trial judge has erred in principle when imposing a sentence, any deference which might otherwise have been paid is ignored, and we are presented with a "clean slate" to decide for ourselves what constitutes a fit sentence.
>
> [26] Our powers on appeal against sentence are set out in s. 687(1) of the *Criminal Code*:
>
> > 687(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
> >
> > (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> >
> > (b) dismiss the appeal.
>
> [27] In *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.), Laskin, J.A. considered appellate variation of sentence when a trial judge has erred in principle. He said at p. 103:
>
> > ... an appellate court may interfere if the sentencing judge commits an "error in principle". Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law. See *Re Fox and Ontario Legal Aid Plan* (1977), 14 O.R. (2d) 668 (Ont. H.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88

> D.L.R. (4th) 1 (S.C.C.); *Reza v. Canada* (1994), 116 D.L.R. (4th) 61 (S.C.C.). If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and an appellate court may impose the sentence it thinks fit.
>
> (Underlining mine)

[28] This passage from *Rezaie* has been frequently quoted with approval. See, for example, *R. v. Brunet*, 2010 ONCA 781 at para. 18; *R. v. Liwyj*, 2010 CMAC 6 at para. 46; *R. v. MacDonald*, 2009 MBCA 36 at para. 25; *R. v. Kozun*, 2007 MBCA 101 at para. 22; and *R. v. Provost*, 2006 NLCA 30 at para. 12.

[29] As my colleague Justice Beveridge recently observed in *R. v. Hawkins*, 2011 NSCA 7 at para. 94:

> [94] Having found an error in principle that impacted on the sentence order, this Court is at liberty to determine what would be an appropriate sentence in light of the factors set out in s. 745.4 of the *Criminal Code*, and keeping in mind the principles mandated by ss. 718, 718.1 and 718.2.

[30] For all of these reasons I would conclude that the judge's error in this instance obviates the deference which would otherwise be paid to the sentence he imposed. We are free to decide the sentence we think appropriate, having regard to the principles of sentencing legislated by Parliament, and the circumstances of this case and this offender.

[39] In the result, I am of the view that I am free to decide an appropriate sentence, having regard to the principles of sentencing as set out in the *Criminal Code* (inclusive of s. 718(e) and Supreme Court of Canada directives in *Gladue* and *Ipeelee*), the circumstances of the case and this offender. I will also bear in mind the seriousness of the offences and the importance of general deterrence and denunciation. In this regard, I refer to the recent case of *Garnett*, wherein Justice Scanlan wrote at para. 6:

> The sentencing court is required to consider the seriousness of the offence and the importance of general deterrence and denunciation. I refer to *R. v. Fallofield*, [1973] B.C.J. No. 559 (B.C.C.A.) and *R. v. Waters*, [1990] S.J. No. 39 (S.K.Q.B.) where the courts referred to the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effect of enforcement of the criminal law taking into account both the offender and the offence.

[40] It is important to remember that this case concerns two refusals to submit to breathalyzer demands within the span of three months. The first occurred during a late Saturday night road check at the intersection of Egypt Road and Pictou Landing Road in Pictou County, Nova Scotia. The other took place in the early morning hours of a Saturday during a routine patrol in New Glasgow, Pictou County, Nova Scotia. Impaired driving is a scourge on society which must be curtailed. The Court of Appeal has consistently condemned drunk driving as a crime of distressing proportions. Drinking and driving is not simply an error in judgement, but rather, a crime. In *R. v. Cromwell*, Justice Bateman encapsulated the concerns as follows at paras. 27-32:

> [27] Drunk driving is a crime of distressing proportions. The Courts have consistently recognized that the carnage wrought by drunk drivers is unabating and causes significant social loss. (*R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), *per* Rosenberg, J.A. at para. 22).
>
> [28] Drunk driving is an offence demanding strong sanctions. In *R. v. MacLeod* (2004). 222 N.S.R. (2d) 56; N.S.J. No. 58 (Q.L.)(C.A.), the Crown appealed an 18 month conditional sentence for impaired driving causing bodily harm and leaving the scene of an accident. Cromwell, J.A., writing for the Court, in allowing the appeal and substituting a sentence of 18 months imprisonment for the driving offence and six months consecutive for leaving the scene, said:
>
> > [22] This and other courts have repeatedly said that denunciation and general deterrence are extremely weighty considerations in sentencing drunk driving and related offences: see for example, *R. v. MacEachern* (1990), 96 N.S.R. (2d) 68; 253 A.P.R. 68 (C.A.); *R. v. Buffett* (1989), 93 N.S.R. (2d) 324; 242 A.P.R. 324 (C.A.); *R. v. Biancofiore (N.F.)*(1997), 103 O.A.C. 292; 29 M.V.R. (3d) 90;119 C.C.C. (3d) 344; 10 C.R. (5th) 200 (C.A.); *R. v. Dharamdeo (R.)* (2000), 139 O.A.C. 137; 149 C.C.C. (3d) 489 (C.A.); *R. v. Proulx (J.K.D.)*, [2000] 1 S.C.R. 61; 249 N.R. 201; 142 Man. R. (2d) 161; 212 W.A.C. 161, at para. 129. I accept the point that generally incarceration should be used with restraint where the justification is general deterrence. However, I also accept the view of the Ontario Court of Appeal in *Biancofiore*, shared by the Supreme Court of Canada in *Proulx*, that offences such as this are more likely to be influenced by a general deterrent effect. As was said in *Biancofiore*, "... [T]he sentence for these crimes must bring home to other like-minded persons that drinking and driving offences will not be tolerated." (at para. 24) I would add that this is all the more important where, as here, the respondent's drunk driving caused serious physical

> injury to an innocent citizen and where, by fleeing the scene of the "accident", the offender has shown disregard for the victim's condition and disrespect for the law.

[29] The sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgment. Those who would maim or kill by driving their vehicles while impaired are as harmful to public safety as are other violent offenders. The proliferation of this crime and the risk that it will be seen by society as less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features. Referring again to *Biancofiore, supra*, *per* Rosenberg, J.A.:

> [26] The drinking and driving offences occupy a unique position in the criminal law. Unlike most other criminal offences, such as crimes of violence or crimes against property, the stigma attached to the drinking and driving offences is often not matched by the objective gravity of these crimes.
>
> [27] Section 718 directs that "the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society". As Ms. Gallin pointed out, it is too easy for otherwise law-abiding people to view what happened in this case as an "accident", an unfortunate consequence of an error in judgment, rather than the commission of a criminal offence. Sentencing courts should be careful to ensure that they do not bolster that view of serious drinking and driving offences.
>
> [28] The pressing need to ensure that the drinking and driving offences not be destigmatized might not be met by a conditional sentence in this case.

[30] Denunciation as a component of sentencing is intended to communicate society's collective condemnation of the offender's conduct (*R. v. M. (C.A.)*, [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.) (S.C.C.) *per* Lamer, C.J.C. at para 81).

[31] In assessing the reasonableness of this joint recommendation, these general considerations in sentencing for drunk driving must be considered in conjunction with the principles of conditional sentencing.

[32] Conditional sentences apply only to offenders who would otherwise be incarcerated. Thus, such a sentence should generally include punitive conditions that are restrictive of liberty. Sanctions such as house arrest or strict curfews should be the norm. There must be a reason for failing to impose punitive conditions (*R. v. Proulx*, [2000] 1 S.C.R. 61; S.C.J. No. 6 (Q.L.) *per* Lamer, C.J., writing for the Court, at paras. 36 and 37).

[41] Specific deterrence is a reason to impose longer prohibition periods than the minimum. For first offenders, the minimum driving prohibition period of one year is most appropriate unless particular aggravating circumstances call for an increase.

Disposition

[42] The Respondent's JEIN report discloses no prior driving offences. However, it bears repeating that the Respondent committed these two offences within a three month period, which I consider to be an aggravating factor.

[43] The Respondent's Aboriginal status and its consequences for him are well described by the sentencing judge at paras. 8-15 of the decision. As *Ipeelee* (para. 75) instructs me to do, I have engaged in an individualized assessment of all of the relevant factors and circumstances, including the Respondent's status and life experiences, which I have gleaned from the PSR and sentencing submissions. At age 33, the Respondent is a relatively young man. He has a history of drug and alcohol abuse but has demonstrated a prospect for rehabilitation. In fact, illicit drugs would appear to be in the Respondent's past and alcohol use, at the time of the PSR, was down to about once a month. The Respondent is gainfully employed in seasonal fishing and has a stable lifestyle. He is of modest financial means.

[44] The Respondent pled guilty to both offences. There was no evidence of speeding. Accidents did not occur and, accordingly, there were no injuries, deaths or property damage.

[45] In arriving at my sentencing decision, I have considered the above factors as well as:

a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the court; and

b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his particular aboriginal heritage and connection.

[46] Once again, s. 254 calls for a minimum fine of $1,000. Under s. 730, conditional and absolute discharges are not available where a minimum punishment is proscribed. In all of the circumstances, I am allowing the Crown's

appeal and imposing what I consider to be a fit and proper sentence, thus replacing the Respondent's original sentence. The sentence shall be as follows:

a) $1,000 fines in respect of each offence, together with victim fine surcharges ($100 for each offence) for a total of $2,200;

b) a 12 month period of probation to include regular reporting and counselling options; and

c) a driving prohibition for 30 months.

Chipman, J.