Citation: R v Romaniuk, 2024 MBCA 20
Date: 20240306
Docket: AR23-30-09887

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

B E T W E E N:

HIS MAJESTY THE KING	)	***C. R. Savage*** *and*
	)	***M. Dueck***
	)	*for the Appellant*
Appellant	)	
	)	***L. V. Kellie-McMillan***
- and -	)	*for the Respondent*
	)	
JOSEPH PETER ROMANIUK	)	*Appeal heard:*
	)	***September 29, 2023***
(Accused) Respondent	)	
	)	*Judgment delivered:*
	)	***March 6, 2024***

CAMERON JA

[1] This case involves the sentencing of a repeat offender who pled guilty to two counts of operation of a conveyance while impaired, pursuant to s 320.14(1) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*] (operation while impaired), and two counts of operation of a conveyance while prohibited, pursuant to s 320.18(1)(a) of the *Code* (operation while prohibited). The Crown applies for leave to appeal and, if granted, appeals the total sentence of 1,326 days' imprisonment, less a credit of 597 days for time served in pre-sentence custody, resulting in a go-forward sentence of 729 days (two years less one day), to be followed by two years' supervised probation.

[2] For the reasons that follow, I am of the view that the sentencing judge erred in his assessment of the principle of general deterrence. As well, he erred in his approach to sentencing for multiple offences. Each of the errors impacted the sentence he imposed.

[3] In the result, I would grant leave to appeal, allow the appeal and vacate the sentence. I would impose two years' imprisonment for each of the convictions for operation while impaired, nine months for the first offence of operation while prohibited and fifteen months' imprisonment for the second. Each of the sentences are to be served consecutively. Applying the principle of totality, I would reduce the sentence for the second operation while prohibited from fifteen months to nine months. Thus, the resultant total sentence is five years and six months' imprisonment, less 597 days of pre-sentence custody.

Facts

[4] The facts involve multiple offences to which the accused entered guilty pleas. They are as follows:

- September 23, 2020—operation while prohibited: The police arrested the accused when they observed him driving an uninsured Jeep Liberty. At the time, the accused was subject to two driving prohibitions (one being a lifetime prohibition) and to an order of judicial interim release which stipulated that he not occupy the driver's seat of a vehicle.

- April 26, 2021—operation while impaired: The police observed a female getting out of an unregistered and uninsured

Pontiac Grand Am in the middle of an intersection. The accused, who had been driving the vehicle at the time, exhibited signs of impairment. He was arrested for operation while impaired and refusing a breath demand. Forty-six cans of beer were found inside the vehicle, most of which were empty, but some of which were partially full.

- May 16, 2021—operation while prohibited: The accused was arrested when he was found driving a Chrysler Sebring that was unregistered and uninsured.

- November 20, 2021—operation while impaired: The accused drove a Lincoln Town Car the wrong way on a one-way street. When the police stopped him, he exhibited signs of intoxication. He was arrested for operation while impaired and refusing a breath demand. Six empty and eight full cans of beer were found in the vehicle.

[5] The accused was detained in custody from the date of his arrest for the November 20, 2021 offence until the time of his sentencing.

Background of the Accused

[6] While the accused's prior record includes other offences, he has a significant number of convictions related to driving offences. At the time of sentencing, he had eighteen such convictions consisting of eight drinking-and-driving-related convictions, eight driving while disqualified convictions (now known as operation while prohibited) and two dangerous operation of a motor vehicle convictions. In addition, he had twenty-eight prior convictions for

violations of *The Highway Traffic Act*, CCSM c H60 [the *HTA*], many of which were for driving while suspended and driving without insurance.

[7] While the accused was detained pending sentencing, a pre-sentence report (PSR) was prepared. The author of the PSR (the probation officer) described the accused's background in a generally positive manner. He was raised by his grandparents, completed grade twelve, was certified as a technician through the Red River College (which he had completed twenty years prior to the offences), has two children, was amicably divorced from his ex-wife and maintained steady employment.

[8] Unfortunately, other aspects of the PSR were concerning, especially regarding the accused's drinking and driving. He told the probation officer that he enjoyed drinking, and that he made the decision to drink and drive when he was sober as he felt he could "get away with it".

[9] While in custody, the accused successfully completed a positive community-living-based program, known as the Winding River Therapeutic Community, which focussed on the treatment of drug and alcohol addiction, and criminal thinking errors (the program). Despite his completion of the program, the program facilitator (the facilitator) stated that she did "not see [the accused make] significant changes to his behaviour within the community." She told the probation officer that "in all likelihood, [the accused] will enter the roadway in an intoxicated state" and that she "is fearful as she does not see him taking his offences in a serious manner and continues to connect drinking with basic daily activities."

[10] In the end, the accused was assessed as a high-risk to reoffend.

Positions of the Parties at the Sentencing Hearing

[11] The Crown emphasized the aggravating features of the accused, including his many previous convictions for related offences. It noted that, on each of the offence dates for which he was being sentenced, he was prohibited from driving and the vehicle he was driving was uninsured. The Crown remarked that he had received two years' imprisonment for his last operation while impaired conviction, which had occurred on March 23, 2018.

[12] The Crown highlighted the negative aspects in the PSR, including the facilitator's observations. After reviewing the case law, the Crown noted that the maximum penalty for operation while impaired had been increased from five to ten years' imprisonment. It emphasized that denunciation and deterrence are the primary sentencing principles to be considered in cases such as this.

[13] The Crown concluded by submitting that the accused be sentenced to consecutive periods of imprisonment as follows:

- September 23, 2020—operation while prohibited: nine months, reduced to six months for totality;
- April 26, 2021—operation while impaired: three years;
- May 16, 2021—operation while prohibited: fifteen months, reduced to six months for totality; and
- November 20, 2021—operation while impaired: three years.

[14] In total, the Crown asked for a sentence of eight years' imprisonment, to be reduced by one year on the basis of the totality principle (see the *Code*, s 718.2(c)).

[15] Counsel for the accused (counsel) disagreed with the probation officer's assessment of the accused. It was his position that there was a fundamental misunderstanding between the accused and the probation officer. He advised the Court of his many conversations with the accused over a period of months, his conversation with the accused's sister and his conversation with the facilitator.

[16] Counsel emphasized that taking the program was the accused's first attempt at recovery. He maintained that the accused was not as lacking in insight as suggested. He attempted to clarify the accused's position, which was that, while alcohol consumption was a problem for him, it was not his biggest problem. Rather, he submitted that the accused's position was that it was his "thought patterns and decision-making that were underlying all the issues with reoffending." In support of his assertion, counsel noted situations where the accused had been drinking alcohol and no problems had arisen. He also observed that the accused did not only offend when he was intoxicated, but that he made the decision to drive while he was prohibited when he was sober as well. In brief, counsel submitted that it was the accused's thought processes that caused him to drink and to drive whether sober or intoxicated. He submitted that the accused was working on these issues in the program.

[17] Counsel indicated that when the accused had been in custody in the past, he had not pursued any treatment options.

[18] Counsel also advised the Court that he spoke with the facilitator, who agreed that the accused had been very good in the group setting, but she believed that he was still in denial. Counsel stated that, when questioned further, she agreed that the accused may not be in denial.

[19] Counsel stated that the accused would like to stay in a provincial institution to continue his rehabilitation. He asked that the accused be sentenced to consecutive periods of imprisonment as follows:

- September 23, 2020—operation while prohibited: six months;
- April 26, 2021—operation while impaired: fifteen months;
- May 16, 2021—operation while prohibited: six months; and
- November 20, 2021—operation while impaired: fifteen months.

[20] In total, counsel asked the Court to impose a sentence of three and one-half years, reduced to three years for totality. Subtracting the time that the accused had spent in pre-sentence custody from this amount would have left him with a sentence of less than two years on a go-forward basis.

Decision of the Sentencing Judge

[21] The sentencing judge began by explaining the principles of sentencing to the accused. He then considered the PSR. He commented that he found the program progress report (attached to the PSR) to be generally very positive. In his view, it did not "really mesh" with the facilitator's comments about the accused, thereby leading him to discount those comments

"to some degree." He also expressed concern about the amount of time that the probation officer interviewing the accused and his sister in preparation of the PSR. According to the accused, the probation officer had only spent twenty minutes with him.

[22] In his reasons, the sentencing judge stated that the accused showed "a glimmer of hope" and determined that he would impose a period of imprisonment that would involve the accused remaining in a provincial institution.

[23] He proceeded to impose the following periods of imprisonment to be served consecutively:

- September 23, 2020—operation while prohibited: 180 days (six months);
- April 26, 2021—operation while impaired: 456 days (fifteen months);
- May 16, 2021—operation while prohibited: 270 days (nine months); and
- November 20, 2021—operation while impaired: 456 days (fifteen months).

[24] Thus, the sentencing judge determined that a total sentence of 1,362 days (roughly 3.7 years) was appropriate. He then reduced for totality the May 16, 2021, operation while prohibited sentence by thirty-six days (to 234 days), and he subtracted 597 days of time served—resulting in 729 days to be served, in effect two year less a day.

[25] The sentencing judge ordered the period of imprisonment be followed by a period of two years' supervised probation for each of the offences. He imposed a lifetime driving prohibition with respect to each of the two operation while impaired convictions.

Grounds of Appeal

[26] The Crown raises two grounds of appeal. First, the Crown argues that the sentencing judge erred in his application of sentencing principles by placing too little weight on the principle of general deterrence and that he overemphasized rehabilitation. Next, it argues that he erred in his approach to sentencing for multiple offences by determining the appropriate total sentence for all offences and then fixing individual sentences for each count to fit the total sentence, contrary to this Court's direction in *R v Ladouceur*, 2008 MBCA 110 at paras 37-46 [*Ladouceur*].

[27] Ultimately, the Crown argues that the errors made by the sentencing judge resulted in an unfit sentence.

Standard of Review

[28] Sentencing decisions are reviewed by appellate courts on a deferential standard. In *R v Lacasse*, 2015 SCC 64 [*Lacasse*], a majority of the Supreme Court of Canada held that appellate courts cannot interfere with a sentence unless it is demonstrably unfit (see para 41); or where the sentencing judge commits an error in principle, fails to consider a relevant factor, or erroneously considers an aggravating or mitigating factor, and such an error has an impact on the sentence imposed (see para 44). As stated in *R v Suter*, 2018 SCC 34, "In both situations, the appellate court may set aside the

sentence and conduct its own analysis to determine a fit sentence in the circumstances" (at para 24).

[29] However, as stated in *R v KNDW*, 2020 MBCA 52 at para 11, "when sentencing afresh, 'the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle' ([*R v*] *Friesen*, [2020 SCC 9] at para 28)."

The Legislation

[30] Prior to embarking on an analysis of the grounds of appeal, I note that in 2018, Parliament overhauled the driving-related provisions of the *Code* through the passage of Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, 1st sess, 42nd Parl, 2018 (assented to 21 June 2018), SC 2018, c 21 [Bill C-46]. The result was the enactment of Part VIII.1 (ss 320.11-320.4) of the *Code*, "Offences Relating to Conveyances".

[31] The preamble to Bill C-46, and the "Recognition and declaration" in Part VIII.1, s 320.12 of the *Code* were neatly summarized by Fairburn ACJO in *R v Boily*, 2022 ONCA 611 at paras 12-13:

> The preamble to Bill C-46 sets out nine considerations motivating the reforms, including the fact that dangerous driving and impaired driving injure and kill "thousands of people in Canada every year"; the need to denounce dangerous driving and impaired driving as "unacceptable at all times and in all circumstances"; and the importance of simplifying the procedures around detecting impaired and dangerous driving and deterring people from engaging in this conduct.

> Section 320.12 of the *Criminal Code* – a statement of principles – is thematically consistent with the preamble to Bill C-46, and emphasizes the fact that driving is a "privilege that is subject to certain limits in the interests of public safety". The statement of principles also recognizes that "the protection of society is well served by deterring" drivers from operating conveyances in a way that is dangerous to the public or while impaired "because that conduct poses a threat to the life, health and safety of Canadians".

[32] Each of the offences for which the accused was convicted occurred after Bill C-46 came into force. The changes to the legislation resulting from Bill C-46 are important in this case to the extent that they defined and expressed the intent of Parliament and increased the penalties for the offences at issue.

Ground 1—The Sentencing Judge Erred in Applying the Sentencing Principle of Deterrence

[33] As indicated, the Crown urged the Court to impose a sentence which reflected the principles of denunciation and deterrence when sentencing for offences involving drinking and driving.

[34] In putting forward the accused's position that a period of provincial imprisonment was appropriate, counsel questioned the effectiveness of deterrence with regard to the accused, noting that he had not been deterred by earlier terms of imprisonment. He also questioned whether a lengthy custodial sentence would serve as a general deterrent.

[35] In explaining the principles of sentencing to the accused, the sentencing judge stated:

> The objectives [of sentencing] are to denounce unlawful conduct and the harm done to victims or to the community that is caused by that unlawful conduct. Now, that has two aspects to it. One is general deterrence, meaning the public as a whole. *So, for example, someone who may hear of your situation, hear the result of today's sentencing and say, I'm not taking that chance and I'm not going to do what he did. Now, to some extent I share [counsel's] views. I question the value of that because I suspect very few people know what goes on inside court on a daily basis except for what they hear on the news or read in the paper, and those are the sensational cases that are geared towards stirring up emotions*.
>
> [emphasis added]

[36] In my view, the above passage demonstrates that the sentencing judge placed little value on the principle of general deterrence. Thus, he erred in his consideration of general deterrence—by underemphasizing the principle.

[37] It is trite to say that, in sentencing for offences involving drinking and driving, the principles of denunciation and deterrence and the protection of the public must be emphasized (see *Lacasse* at paras 5, 7, 73-74). While *Lacasse* involved a case of impaired driving causing death, the importance of denunciation and deterrence and the protection of the public are equally applicable in sentencings involving impaired driving.

[38] Manitoba has similarly emphasized the need to deter drinking and driving. See, for example, *R v Sinclair*, 2021 MBCA 6 at para 7 [*Sinclair*]; *R v Saunders*, 2015 MBCA 98 at para 15.

[39] Indeed, the intent that sentences for drinking and driving serve a deterrent function is consistent with the intention of Parliament, as evidenced

by the passage of Bill C-46 described above. In addition to emphasizing deterrence in the preamble of Bill C-46 and s 320.12 of the *Code*, Bill C-46 increased the maximum period of imprisonment from five years to ten years for the offences of operation while impaired and operation while prohibited, when these offences are prosecuted by indictment (see the *Code*, ss 320.19(1)(a), 320.19(5)(a)).

[40] Finally, I am sympathetic to the argument of the Crown that general deterrence involves not only whether people learn about harsher sentences and are deterred by them, but also the question of "What will happen if people do find out about a sentence that does not deter others?" To be sure, the public hears about cases where a sentence imposed is considered to be low.

[41] In my view, the comments made by the sentencing judge indicate that he erred by underemphasizing the principle of general deterrence, contrary to Parliament's stated intention in enacting Bill C-46. This error directly impacted the sentence he imposed and is reflected in the overemphasis that he placed on the rehabilitative aspect of the accused's sentence. It is also evidenced by the approach that he took to sentencing for multiple offences.

Ground 2—The Sentencing Judge Erred in His Approach to Sentencing for Multiple Offences

Sentencing for Multiple Offences

[42] The approach to sentencing for multiple offences was set out in *Ladouceur*. In that case, Chartier JA discussed and rejected the *Jewell* approach to sentencing for multiple offences (see *R v Jewell*, 1995 CanLII

1897 (ONCA) [*Jewell*]). The *Jewell* approach involves the consideration of what the total appropriate sentence should be for all of the offences and then fixing the individual sentences to fit the total sentence while, at the same time, considering whether a particular sentence should be served concurrently or consecutively (see *Ladouceur* at para 37). In rejecting this method of sentencing, Chartier JA noted that the *Jewell* approach "does not respect the basic tenet that the sentence imposed must bear some relationship to the offence and offender" and that "it does not allow this court to properly review the fitness of the sentence" (at para 39). See also *R v LLP*, 2016 MBCA 28 at paras 25-26 [*LLP*].

[43] Rather, when sentencing for multiple offences, a sentencing judge must first determine whether the sentences for each offence should be consecutive or not, and then set a sentence for each offence (see *Ladouceur* at paras 47-50). If some of the sentences are to be served consecutively, the sentencing judge must then consider the principle of totality (see the *Code*, s 718.2(c); *Ladouceur* at paras 32-35). The totality consideration involves a "last look at the total sentence . . . to make sure that it does not exceed what would be just and appropriate in light of the overall culpability of the offender" (*Ladouceur* at para 35). This assessment "requires an examination of the gravity of the offences, the offender's degree of guilt or moral blameworthiness with respect to the crimes committed and the harm done to the victim or victims" (*ibid*). See also *R v James (GM)*, 2013 MBCA 14 at para 73; *R v Draper*, 2010 MBCA 35 at para 30.

[44] In the present case, the Crown argues that the sentencing judge reverse-engineered a global sentence in order to allow the accused to serve his sentence in a provincial institution. It submits that, only after having made

this decision did the sentencing judge apportion what he considered to be the appropriate sentences for each offence.

[45] I agree with the Crown. In my view, the sentencing judge intended that the accused serve a sentence that would allow him to remain in a provincial institution and apportioned the individual sentences to fit this objective.

[46] A review of the record demonstrates that, at the conclusion of submissions of counsel, the sentencing judge addressed the accused stating that counsel had taken an "interesting position" by suggesting that a penitentiary sentence would be "less useful" than a provincial sentence in protecting the public by furthering the accused's rehabilitation.

[47] While the above comment in itself is not objectionable, it puts into context the sentencing judge's remarks when, in sentencing the accused, he stated:

> . . .
> . . . Everyone has to be concerned about what you're going to do when you get out, but the fact you're 56 years old, you've been offending for a long time in the same way, basically, but this is the first time you've taken a program, for me, gives a glimmer of hope, and I hope I'm not mistaken, but *I've crafted a sentence that will allow you to stay in a provincial institution* and be placed on probation afterward, because it clearly has helped you so far, and hopefully it will continue to help you.
> . . .
>
> [emphasis added]

[48] He immediately thereafter stated, "Now, *part of the reason I took so long was because of the math*, but I think I've got it figured out" (emphasis added).

[49] There is no question that the sentencing judge wanted to craft a sentence that was rehabilitative in nature. However, his overemphasis on the rehabilitative nature of the sentence and his desire to ensure that the accused would remain in a provincial institution caused him to impose sentences that failed to acknowledge the significance of each individual offence. As in *Ladouceur* and *LLP*, this error was material.

[50] Having found that the errors that I have identified had an impact on the sentence, I will now consider the matter afresh.

Sentencing Repeat Offenders for Operation While Impaired

[51] As earlier indicated, the principles of denunciation and deterrence are significant factors in sentencing for offences involving drinking and driving. These considerations take on even more significance in sentencing repeat offenders.

[52] A brief review of appellate sentences imposed on repeat offenders of drinking and driving offences prior to the enactment of Part VIII.1 of the *Code* demonstrates that, generally, they ranged from nine months to four years' imprisonment. See, for example:

- *R v Joe*, 2017 YKCA 13: Sentences of twelve months for refusing to provide a breath sample and eleven months

consecutive for operation while impaired, where the accused had twelve prior convictions for drinking and driving offences;

- *R v Walker*, 2017 ONCA 39: Refusing to impose the maximum sentence of five years' imprisonment, the Court imposed four years in total for the offences of operation while impaired, resisting a peace officer, dangerous driving, flight while being pursued by a peace officer, driving while disqualified and failing to provide a breath sample, where the accused had seventeen prior convictions for driving offences;

- *R c Gauthier*, 2013 QCCA 2161: Two years for the accused's eighth conviction for operation while impaired, and two years concurrent for operation while prohibited;

- *R v Clarke*, 2013 SKCA 130: Two years less a day for drive over .08, where the accused had nine prior convictions, but had taken alcohol treatment while incarcerated;

- *R v Minaker*, 2009 ABCA 189: Twelve months for the accused's fifth operation while impaired conviction, fifteen months for another operation while impaired conviction, and nine months for his eighth conviction for driving while disqualified;

- *R v Bear*, 2007 SKCA 127: Four years for operation while impaired and two years concurrent for driving while disqualified, where the accused had fifteen prior convictions

for drinking and driving and twenty prior convictions for driving while disqualified;

- *R v Moreau*, 2007 BCCA 239: Three years for operation while impaired where the accused had eight prior convictions for drinking-and-driving-related offences;

- *R v Noel*, 2006 CanLII 26574 (ONCA): Total sentence of forty-three months in addition to time spent in custody for two sets of offences, each involving operation while impaired and driving while disqualified, where the accused had eight prior convictions for drinking and driving offences; and

- *R v Stone*, 2004 YKCA 11: Nine months for the accused's sixth convictions for drinking and driving.

[53] Sections 320.19(1)-320.19(4) of the *Code* are now the applicable sentencing provisions for the offence of operation while impaired. As stated above, the maximum sentence is now ten years' imprisonment—double the previous maximum of five years.

[54] In *Sinclair*, this Court upheld a global sentence of three and one-half years, consisting of three years' imprisonment concurrent for the offences of flight from peace officer and dangerous operation, six months concurrent for possession of property obtained by crime over $5,000 and operation while impaired, and six months consecutive for breach of recognizance and breach of probation. In consideration of whether the sentence was harsh and excessive, this Court referred to the relevant provisions of Part VIII.1, stating at para 8:

> . . . The new sections of the *Code* contain a number of noteworthy characteristics, including a statement of general principles about offences relating to conveyances (see section 320.12) and an increase of the maximum penalty for the flight from peace officer and dangerous operation offences from five years to ten years on indictment (see section 320.19(5)). An increase in sentence has to be taken into account in the assessment of proportionality (see [*R v*] *Friesen*, [2020 SCC 9] at para 97).

[55] In *R v Whincup*, 2021 MBCA 64, this Court upheld an intended sentence of twenty-two months' imprisonment, less time served in custody of nine and one-half months, for the offences of theft over $5,000, dangerous operation of a conveyance, operation while impaired, operation while prohibited and breach of probation (failure to report) where there were significant mitigating circumstances and *Gladue* factors (see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*]). The accused had multiple prior convictions for operation while prohibited and drinking-and-driving-related offences. In considering the issue of parity, Simonsen JA stated at para 12:

> With respect to the principle of parity and whether the total sentence was unfit, the sentences from earlier cases provide guidance but are not conclusive of an appropriate sentence in a given case. We note that some of the cases referred to by counsel for the accused are readily distinguishable as they were decided under a different sentencing regime in the *Code* in relation to driving offences (see *R v Amyotte*, 2020 MBCA 116 at para 6; and *R v Sinclair*, 2021 MBCA 6 at para 8). The new sentencing regime established by Parliament for driving offences must be given effect by the courts. . . .

[56] In *R v Hotomanie*, 2022 SKCA 119, the Court upheld a total sentence of two years' imprisonment followed by three years' probation where the accused, a serious repeat offender, entered guilty pleas to offences that occurred on four separate occasions, including operation while impaired,

dangerous driving, refusing to provide a breath sample, two counts of operation while prohibited, obstruct peace officer, breach of a release order, and two counts of breach of probation (see para 14).

[57] In dismissing the Crown appeal, the Court referred to the sentencing judge's detailed analysis of the accused's *Gladue* factors, which were found to significantly reduce his moral culpability (see para 33), and to the significant rehabilitative aspect of the sentence (see paras 52-54). However, the Court noted that the sentencing judge stated that, absent the reduction that he was giving for significant *Gladue* factors, a total sentence in the range of four to six years would have been appropriate (see para 17).

[58] Other post Bill C-46 cases involving repeat offenders of operation while impaired include:

- *R v DiPietro*, 2021 ABCA 372: Thirty-two months imposed for driving while disqualified, operation while prohibited and operation while impaired for the accused who had twelve prior convictions for driving while disqualified or prohibited and four convictions for drinking-and-driving-related offences, and where the Crown had requested a total of twelve months;

- *R v Serré*, 2020 ONCA 311: Six years' imprisonment less twenty-six months' credit for time spent in custody for operation while impaired, dangerous driving, failing to stop while being pursued by police and driving while disqualified imposed on the accused who had forty prior convictions, twenty of which were directly or indirectly related to driving

and alcohol, and where comprehensive *Gladue* factors were considered by the sentencing judge; and

- *R v Mitchell*, 2020 YKCA 2: Noting the significance of denunciation and deterrence in sentencing for drinking and driving offences, the Court increased a sentence of 120 days' imprisonment to nine months for a third time offender.

Sentencing the Accused for the Operation While Impaired Offences

[59] Applying the deferential standard required, I must accept the sentencing judge's findings that the tenor of the program progress report attached to the PSR did not "really mesh" with the facilitator's comments in the PSR, as well as his resulting decision to discount those comments. I must also accept his expressed concern about how much time the probation officer spent interviewing the accused and his sister.

[60] Given the authorities that I have referred to, the significant prior and related record of the accused, his personal circumstances, the fact that the sentencing judge found a "glimmer of hope" that the accused would rehabilitate and accepting the sentencing judge's comments about the facilitator and the PSR, it is my view that the sentences of two years' imprisonment, consecutive for each of the convictions for operation while impaired, are fit and appropriate. On the facts of this case, the accused should not receive a lower sentence than he did for his 2018 operation while impaired conviction.

Sentencing the Accused for the Operation While Prohibited Offences

[61] Like the increase in maximum penalties for the offence of operation while impaired, s 320.19(5) of the *Code* increased the maximum term of imprisonment for the offence of operation while prohibited. In *R v Amyotte*, 2020 MBCA 116, this Court recognized that the amendments increased the maximum penalty for the offence of operation while prohibited from five to ten years' imprisonment where the offence is prosecuted by indictment (see para 6). In that case, the Court upheld a one-year sentence of imprisonment for operation while prohibited for the accused who had nine previous motor-vehicle-related *Code* convictions, four of which were for driving while disqualified. He also had five prior *HTA*-related convictions.

[62] As well, in *R v Simeunovich*, 2023 ONCA 562, the Court recognized that, since 1999, Parliament has increased the maximum sentence for driving while disqualified (see para 7). It upheld an eight and one-half year total sentence imposed for five counts of driving while disqualified for the accused who had more than thirty previous driving convictions, fifteen of which were for driving while disqualified.

[63] In the present case, the Crown proceeded summarily on the first count of operation while prohibited dated September 23, 2020. Therefore, the maximum amount of imprisonment available is a term of not more than two years less a day. The Crown proceeded by indictment on the offence dated May 16, 2021, rendering it eligible for a maximum period of ten years' imprisonment.

[64] Given all the circumstances of this case, I would impose nine months' imprisonment for the offence dated September 23, 2020, and

fifteen months for the offence dated May 16, 2021. These sentences are to be served consecutively to each other and to the sentences imposed for the offences of operation while impaired.

Conclusion and Disposition

[65] In the result, I would vacate the sentence imposed by the sentencing judge in its entirety. I would impose the following consecutive periods of imprisonment:

- September 23, 2020—operation while prohibited: nine months;
- April 26, 2021—operation while impaired: two years;
- May 16, 2021—operation while prohibited: fifteen months; and
- November 20, 2021—operation while impaired: two years.

[66] Having imposed consecutive sentences, it is now incumbent to give a last look at the total sentence of six years' imprisonment. Given the considerations that I have earlier reviewed in *Ladouceur*, I am of the view that a just and appropriate sentence considering the overall culpability of the accused should result in a reduction of the sentence of imprisonment. Thus, I would reduce the fifteen-month period of imprisonment for the offence of operation while prohibited dated May 16, 2021, by six months, resulting in a nine-month sentence.

[67] In conclusion, the total sentence of imprisonment is five years and six months, less the 597 days served for pre-sentence custody.

Cameron JA

I agree: Simonsen JA

I agree: Spivak JA