# Court of Queen's Bench of Alberta

**Citation: R v Calahoo, 2019 ABQB 30**

**Date:** 20190118
**Docket:** 170141501Q1
**Registry:** Edmonton

Between:

**Her Majesty the Queen**

- and -

**Brandon James Calahoo**

Accused

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**Reasons for Decision**
**of the**
**Honourable Madam Justice J.M. Ross**

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## Introduction

[1] Brandon James Calahoo is a 22 year old man who pled guilty to criminal negligence causing the death of Raelyn Supernant, a two month old infant, on July 25, 2016, contrary to s 220 of the *Criminal Code*, RSC 1985 c C-46 [*Criminal Code*]. At the time of the offence Mr. Calahoo was 20 years old. Raelyn was not his biological daughter, but he was her caregiver, as he and Raelyn's mother, Carley Supernant, had been in a relationship for about four months and were living together.

[2] In their submissions on sentencing, the Crown sought a sentence of between eight and ten years' imprisonment. The Defence sought a sentence of three and one-half years, which has been

fully served as a result of credit for pre-trial custody. The Defence also submitted that Mr. Calahoo should be placed on probation for a period of three years.

**Admitted Facts**

[3] The admitted facts follow.

[4] I will quote the two paragraphs that deal with Mr. Calahoo's admitted actions.

> On July 25, 2016, at approximately 5:30 am Raelyn woke Calahoo with her crying. He shook Raelyn with both hands by the body and the head. Calahoo left Raelyn in the crib even though she was unresponsive.
>
> On July 25, 2016 at approximately 9:30 am, Calahoo told Carley to leave Raelyn and put her back to bed after she expressed concern that she was not responsive. Carley tried to feed Raelyn, but she would not feed and was put back to bed."

[5] I will summarize additional admissions.

[6] The same day at approximately 11:30 am, Carley left the house to run errands and met a friend at approximately 1:30 pm. Carley explained Raelyn was unresponsive. They returned to the home, saw that Raelyn was still unresponsive and took her to hospital, arriving about 3 pm.

[7] Raelynn's condition did not improve. By July 28, 2016, it was determined that if she survived, she would have severe neurological impairment. She was removed from a respirator, and continued to breathe on her own. On August 3, 2016, in consultation with family and the medical team, intravenous nutrition and fluids were withdrawn. She died on August 8, 2016.

[8] An autopsy determined that the cause of death was hypoxic ischemic brain injury, caused by cranial trauma. The injuries were produced by acceleration/deceleration and rotational motion.

[9] The agreed facts include as sentencing exhibits a hospital discharge summary, an autopsy report, and a neuropathology autopsy report. The neuropathology autopsy report notes the presence of subdural hematoma and retinal hemorrhages "consistent with a non-accidental acceleration injury." The neuroautopsy findings confirm imaging studies from Raelyn's stay in hospital (CT and MRI scans). Moderate cerebral edema was seen on the day of Raelyn's admission, consistent with a primary injury-induced brain edema. The severity of the edema increased over time and attenuated intracranial blood flow. This worsened the brain edema which further decreased blood flow in "a vicious circle leading to the death of Raelyn."

**Victim Impact Statements**

[10] Eleven Victim Impact Statements were filed and read in Court by Raelyn's mother, grandmother, great grandmother, aunt, great aunt and uncle, and several of their friends. They express the grief of losing Raelyn and of never having the chance to see her grow up and to express their love for her. Living with this senseless tragedy has deeply affected them. They are living with suffering and grief. They are understandably very angry; they feel betrayed by Brandon Calahoo, a young man who they welcomed into their family and community.

**Sentencing Reports**

[11] Three reports were prepared for sentencing purposes: a pre-sentence report, a Gladue report, and a (Forensic Assessment and Community Services) FACS assessment.

[12] The pre-sentence report sets out Mr. Calahoo's family background. His father was serving a federal custodial sentence when he met his mother. His father stayed sober for some years after his release, but eventually started falling into old patterns, especially consuming alcohol, resulting in mental and physical domestic abuse. Eventually his father was charged and jailed. There were further incidents after his release, and his mother made the decision to end the relationship when Mr. Calahoo was about seven years old. His father was permitted to continue to visit the children if he was sober, but Mr. Calahoo's relationship with his father was never repaired. His father committed suicide in 2008, when Mr. Calahoo was just 12 years old. This death, as well as the death of his older sister from an overdose in 2005, had a tremendous impact on Mr. Calahoo.

[13] Mr. Calahoo lived with his mother and step-father in his teen years, but his relationship with his step-father has not been a good one since Mr. Calahoo was about 16 years old. There were behavioral issues at school at that time. Mr. Calahoo's mother arranged a psychological assessment and Mr. Calahoo was diagnosed with a Major Depressive Disorder and symptoms of Post-Traumatic Stress Disorder and Attention Deficit Hyperactivity Disorder. An attempted treatment plan was not successful. Mr. Calahoo quit school and ran away from home. Mr. Calahoo's relationship with his mother soured at this time. His mother has tried to support Mr. Calahoo since his arrest, but their relationship remains strained and Mr. Calahoo is largely estranged from other family members.

[14] The author of the pre-sentence report concluded that Mr. Calahoo has not fully taken responsibility for Raelyn's death, and that, based on the interviews with Mr. Calahoo and family members, he does not believe that Mr. Calahoo would be a suitable candidate for community supervision.

[15] The Gladue report notes that Mr. Calahoo has Indian status and membership in Piapot First Nation through his father's side of the family. His mother also has Indian status, but her community, the Michel First Nation, does not have band status. Mr. Calahoo grew up in close proximity to the lost land base of this community, near Edmonton.

[16] Mr. Calahoo's maternal grandparents attended residential school. Mr. Calahoo's mother did not have a close relationship with her own parents. She was the youngest of 15 children, felt that she was neglected growing up, and was estranged from her family during her teen years and for much of her adult life.

[17] The Gladue report traces Mr. Calahoo's moves after he left his mother's home, living with a cousin and then with his mother's first husband, but having problems in both situations and moving on. He ended up living in a youth emergency shelter where he met Carley. Carley was pregnant. Mr. Calahoo was not the father but wanted to support Carley through her pregnancy and raise Raelyn as his own daughter. The couple had no issues during her pregnancy, but issues developed after Raelyn's birth.

[18] The Gladue report writer concluded, based on interviews of family members and discussions with Mr. Calahoo, that Mr. Calahoo does not fully accept responsibility for his actions leading to Raelyn's death.

[19] In summary, the Gladue report writer notes that Mr. Calahoo does not have a positive relationship with family, he experienced physical, emotional and verbal abuse as a child, he has abused alcohol, street drugs and prescription drugs, has experienced suicidal ideation, has made suicidal attempts and has experienced poverty and homelessness. His family was displaced from their community and culture and has experienced intergenerational effects stemming from residential schools. He has lost family members to suicide and overdose, he has suffered mental health concerns since his teens, and he has disjointed educational and employment experience. He does not have a support network and will need a structured plan and proper community supports. The report suggests restorative justice options, available through the John Howard society and other agencies.

[20] The FACS assessment was the most recently completed. In his interview with the author of the FACS assessment, Mr. Calahoo did acknowledge that he shook the baby's head. He said "I made my mistake." He was feeling tired, stressed out and depressed at the time. Afterwards, he thought she seemed fine. He continues to believe that Raelyn died because she was taken off life support, noting that he did not have a say in that, and stating his belief that if she remained on life support she would still be here today.

[21] Mr. Calahoo was initially housed on a regular unit at the Edmonton Remand Centre, but since media accounts of his guilty plea, he was transferred to a segregated unit for his own protection. He acknowledged using substances in prison, including methamphetamine, Gabapentin, Seroquel, Clonazepam and Suboxone. He has taken available programming including Anger Management, Parenting, Family Violence, Life Management, Release Planning and computer courses. He is now in a program that allows him to assist the unit cleaner and therefore be out of his cell more.

[22] Mr. Calahoo was assessed regarding his current mental status. He underwent a number of psychological tests. He was found to have no indication of psychotic process. He is anxious, but does not have suicidal ideation at this time. His risk assessment for general criminal recidivism was found to be high, and for violent recidivism to be moderate, if no efforts are made to reduce his risk.

[23] The author provides a general description of Mr. Calahoo:

> Mr. Calahoo impressed as a young man who is holding onto resentment and feelings of being underappreciated. He is quick to find fault with others, perhaps as a means of distancing himself from his own transgressions. Psychological testing outlined an individual who is suspicious and hostile within his relationships, with underlying fears of abandonment and rejection. He uses substances to cope with feelings of sadness, anxiety or stress. Importantly, however, is such personality and interpersonal patterns developed from a history of abuse and loss.
>
> Throughout his childhood and adolescence, Mr. Calahoo witnessed domestic violence, suffered physical abuse, and has had to cope with a complex and conflicted relationship with his now deceased father. Aggression and substance use were role modelled as ways to manage stress and problems. Mr. Calahoo seems to be caught between continual feelings of anger, resentment and confusion, which he does not know how to fully process. He seems to generally

> stuff his emotions and push them away, but ultimately, they emerge and are externalized.

[24] The report notes that Mr. Calahoo's intellectual function is in the average range and he will be able to learn from treatment recommendations and follow supervision conditions. He presently meets criteria for Adjustment Disorder, Opioid Use Disorder and Methamphetamine Abuse.

[25] Regarding Mr. Calahoo's minimization of his accountability, the report says:

> At the time of the offence, Mr. Calahoo was managing a high amount of stress with few supports. He felt overwhelmed and underappreciated. Conflict was present within the relationship with his girlfriend. Mr. Calahoo did not have the emotional resources to manage his circumstances at the time. Given his reluctance to speak of specific details surrounding the death, no comment can be made regarding the presence, if any, of his intention behind his action. Mr. Calahoo's minimization of his own accountability and externalization of blame is noted, but it is also recognized that he may be protecting himself from the shame and grief associated with his actions.

[26] Community supervision and counselling are recommended.

**Case Law**

[27] The Court of Appeal has set out principles for sentencing in cases involving abuse of a caregiver toward a child in ***R v Nickel***, 2012 ABCA 158, 524 AR 366 [***Nickel***]. Nickel pled guilty to aggravated assault and failing to provide the necessaries of life. The victim was his nine month old daughter. He received a global sentence of 90 days imprisonment followed by two years' probation. The sentencing judge relied on ***R v Evans*** (1996), 182 AR 21, 1996 CarswellAlta 208 (Prov Ct) [***Evans***].

[28] The Court of Appeal found that the sentencing judge erred in assessing the seriousness of the offence and Nickel's moral blameworthiness, and failed to give proper consideration to the objectives of denunciation and deterrence. The majority decision held that the framework suggested in ***Evans*** was seriously flawed. The majority imposed a sentence of three years imprisonment for aggravated assault followed by six months consecutive for failing to provide necessaries.

[29] The facts of Nickel are different than those of this case. The child did not die. She did receive third degree burns to her feet, from which she recovered physically, although she might have long term psychological effects. Nickel did not shake her in anger or frustration. He decided, for some inexplicable reason, that he wanted to see how she would react to having her feet placed in hot water. He also tried to hide the child's injuries, and to dissuade the mother from seeking medical help for the child.

[30] The majority decision rejected a categorization approach adopted in ***Evans***, which distinguished between:

> (1) cases where force is applied with the expectation of causing injury, or indifference to it;

(2) cases where a parent was immature and unskilled and acting out of emotional upset, frustration or temper and did not fully appreciate the serious injuries that might result; and

(3) cases involving diminished responsibility through mental disorder.

[31] Instead, the Court adopted an approach to assessing moral culpability along the same lines as the case of ***R v Laberge,*** 1995 ABCA 196, 165 AR 375 [***Laberge***], which dealt with sentencing for manslaughter.

[32] The first consideration, and "perhaps the most important," is the seriousness of the act exposing the child to harm: ***Nickel*** at para 34. This is assessed by the child's exposure to harm, ranging from bodily harm that is more than merely transient or trifling, through more serious forms of harm from which the child may or may not recover, to harm likely to endanger the life of the child.

[33] A further consideration is the extent to which harm was foreseeable, in other words, the risk or likelihood that the offender's conduct would give rise to harm. Further, the offender's state of mind or awareness is assessed – was the offender aware that the conduct was likely to subject the child to harm and, if so, did he intend that consequence?

[34] These factors provide a framework to evaluate the gravity of the offence and the degree of responsibility of the offender as to the offence itself. In addition to these factors, in evaluating the degree of the offender's responsibility, the court must have regard to his personal circumstances.

[35] In determining the appropriate sentence, the majority held that Nickel's conduct of placing the child's feet in very hot water, viewed objectively, was likely to subject her to serious and lingering harm and suffering. The conduct was intentional and without any justification. Nickel must have realized that the child would suffer serious bodily harm and was reckless or indifferent as to the result.

[36] ***R v Laberge*** is the manslaughter sentencing case referred to by the Court of Appeal in ***R v Nickel***. It is of particular interest in this case because it, too, involved the death of an infant under the care of an offender.

[37] Laberge had been trying to change his nine month old daughter's diaper while she kept trying to crawl away. He grabbed her and put her on the floor in such a manner that her head struck the floor first. The extent to which Laberge "lost it" was reflected in the harm – there were multiple skull fractures and lethal brain injuries. The baby's head was "very forcibly struck against the floor."

[38] The sentencing judge imposed a sentence of three years imprisonment; the Court of Appeal substituted a sentence of four and a half years.

[39] The majority decision described the relevant inquiries later repeated in ***R v Nickel.***

[40] The majority in ***Laberge*** commented on the argument that Laberge's act was impulsive, and should be treated as "near accident." They agreed that, all other things being equal, impulsivity is less blameworthy than planned or repeated conduct. But simply because an act was impulsive does not automatically mean it is at the lower end of moral culpability. Impulsive acts can also subject the victim to higher levels of risk, and the offender may know this. At para 22, the Court held:

> [T]he more spontaneous the act, the less likely that the offender subjectively foresaw all the consequences that might result. But … whether the offender intended the consequences of the act, or was willfully blind to them, depends both on what the act involved as well as on other relevant circumstances.

[41] Other relevant factors include the degree of violence or brutality, the degree of deliberation or forethought, the complexity of the act, the time taken to perpetrate it, and the element of chance involved in the resulting death.

[42] Regarding the principles of sentencing, in particular denunciation and deterrence, the Court said at para 28:

> Serious crimes of violence against defenceless children warrant a strong and firm response from the courts. Children are amongst the most vulnerable in our society. And in our society, parents occupy a position of trust vis à vis their children. [...] where a parent or someone who stands in a trust relationship to a child abuses a child, that will be an aggravating factor in sentencing.

[43] The extent of the injuries showed that the force used on the baby was an act likely to cause serious bodily injury. Laberge was willfully blind to this; he lost control of his temper. It was not a case where chance played a large role in the death. The fact that Laberge had a low frustration point was not mitigating.

[44] However, the fact that the act was impulsive and did not involve a high degree of deliberation, and that death was caused by a single act, were relevant factors. Laberge was young at 20 years old, had pled guilty to manslaughter, and had expressed genuine remorse. These were mitigating factors.

[45] In imposing a four and a half year sentence, the majority indicated that this was not a starting point or minimum or maximum sentence for unlawful act manslaughter of a child (at para 50). The concurring judge who agreed with majority indicated that this sentence was at the highest end of the range (at para 51).

[46] I give little weight to this comment about the range by the concurring judge. The majority did not so characterize the sentence. In addition, even if this were at the high end of the range of sentences in 1995, the Crown submits, and I accept, that it does not reflect the range today. I will review other decisions in which higher sentences have been imposed. It seems to me that in the years since 1995, the prevalence of these types of offences has been recognized, and denunciation and deterrence have been given greater weight in sentencing. This development is reflected in provisions of the *Criminal Code* that have been adopted since ***Laberge***, that reflect the concerns discussed by the Court of Appeal in that case. The *Code* now provides, in section 718.2(a) that aggravating factors to be taken into account in determining an appropriate sentence include:

> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years;
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.

[47] In support of a higher sentencing range, the Crown refers to the Ontario decision of ***R v Summers***, 2014 SCC 26, [2014] 1 SCR 575 [***Summers***]. Summers violently shook his infant

daughter, resulting in her death three days later. He pled guilty to manslaughter. The Crown and defence agreed that an appropriate range of sentence was eight to ten years. He was sentenced to eight years, less credit for time in custody (***R v Summers***, [2011] OJ No 6377, 2011 CarswellOnt 16080). The sentence itself was not appealed; the appeals dealt with the issue of appropriate credit for time in custody (***R v Summers***, 2013 ONCA 147, 114 OR (3d) 641). This case is not particularly useful as it was based on a joint submission regarding the sentencing range. However, the sentencing judge did accept that the lower end of the agreed range was appropriate, noting, among other things, that Summers had caused a previous injury to the child and was supposed to be having only supervised visits with her.

[48] Another Ontario decision is ***R v Desmanche***, 2016 ONCA 17, 2016 CarswellOnt 123 (WL Can) [***Desmanche***]. Desmanche was convicted following trial of manslaughter in respect of death of his infant son, as well as assault for an earlier incident. The sentence was ten years for manslaughter, one year concurrent for the assault. The assault was of sufficient severity that the child went into cardiorespiratory arrest. He was initially resuscitated, but given a "terribly grim" prognosis. Following medical advice, life support was removed and he died three and a half weeks after the injury.

[49] The Crown also relies on ***R v Will***, 2015 SKCA 11, 451 Sask R 244 [***Will***]. Will was convicted following trial of manslaughter for smothering his girlfriend's 18 month old son. The trial judge found that the smothering occurred because the accused put his hand over the child's mouth. The accused did not intend to cause death and did not foresee death. There was bruising on the child's head and body; however, the sentencing judge accepted Will's claim that the abusive conduct was an unpremeditated one-time event.

[50] The sentence of seven years was upheld by the Court of Appeal.

[51] The ***Will*** case included comments regarding a possible distinction between the moral culpability for death caused by criminal neglect and death caused by criminal assault.

[52] The Crown sought a higher sentence on the ground that the manslaughter was caused by an unlawful act as opposed to negligence. The trial judge held that there was no rationale to differentiate between the two in law or fact and that this was a distinction of little practical value in achieving consistency in sentencing similar offenders for similar offences in similar circumstances. In both cases, denunciation and deterrence were paramount objectives. The Court of Appeal found no error in the trial judge's approach.

[53] Another Saskatchewan case is ***R v Shorting***, 2009 SKCA 102, 337 Sask R 134 [***Shorting***]. The mother of a seven month old child caused her death by blunt force trauma to the head as a result of multiple impacts. She threw the crying child on a couch, and in a crib, causing the baby's head to hit a wooden part of the couch and bars of the crib. She left the baby in the crib for several hours; when she checked the baby was unresponsive. The mother had an extremely abusive background and was in withdrawal from cocaine. She was sentenced to four years and two months following her guilty plea to manslaughter. The Court of Appeal increased the sentence to six years.

[54] The Crown also referred to the Alberta decision of ***R v Choy***, 2013 ABCA 334, 561 AR 99 [***Choy***]. This was a conviction following trial of manslaughter of a three year old foster child, due to a brain injury found by the trial judge to have been caused by "rather considerable application or applications of force" (at para 3). There was bruising on the child's body caused

by previous assaults. The child had also been punished by being left in an unheated garage on several occasions. Choy was sentenced to six years by the trial judge, which was increased to eight years by the Court of Appeal. The trial judge held that the "act that killed the child was violent and serious;" it could not have been otherwise given the terrible injury (cited at para 10). It also occurred in the context of a repeated pattern of abuse. Given this context, the act "was neither spontaneous nor attributable to a momentary lapse on the part of the respondent" (at para 11).

[55] The cases cited by the Crown indicate that the range of sentencing for death of a child resulting from child abuse goes well beyond the four and a half year sentence in ***Laberge***. The Defence submits that the sentences given in these cases are inappropriate here because they followed guilty pleas or convictions for manslaughter and in particular, unlawful act manslaughter, as opposed to criminal negligence causing death. This argument reflects a distinction drawn in ***R v Lam*** 2004 ABQB 78, 351 AR 332 [***Lam***].

[56] Lam was a day home operator who caused the death of a seven month old baby in her care. She either dropped the baby or put her down on the floor with some force. She pled guilty to criminal negligence causing death. The Crown sought a sentence of three years; the defence sought a sentence of less than two years, to be served in the community. The sentencing judge agreed with the defence.

[57] In discussing the case law, the Court commented on the following distinction at para 9:

> While it is difficult to distinguish between cases of manslaughter by criminal negligence (s 222(5)(b)) and cases of criminal negligence causing death (s 220), there is a distinction to be drawn between cases of unlawful act manslaughter (s 222(5)(a)) and either criminal negligence manslaughter or criminal negligence causing death. The two constants in all of the cases are first, conduct resulting in the death of an infant and second, fault short of intention to kill. In the cases of criminal negligence manslaughter and criminal negligence causing death, the second component can be further defined as an act of wanton or reckless disregard for the life or safety of another or a marked departure from what one would expect of a reasonable person in the circumstances.

[58] The sentences in the cases reviewed by the Court ranged from a suspended sentence to five years. The Court observed that cases at the higher end of the range, including ***Laberge***, were cases of unlawful act manslaughter, as opposed to cases of criminal negligence manslaughter or criminal negligence causing death.

[59] I disagree with the submission of the Defence that the cases referred to by the Crown are inapplicable here. While there may be an apparent difference in range of sentences reviewed in ***Lam***, that is likely due to the fact that cases that are near accident, or at the lower end of culpability as assessed in ***Laberge*** and ***Nickel***, are more likely included in the category of criminal negligence. That was the situation with ***Lam***, where the child was either dropped or put down on the floor. However, that does not mean that all cases of manslaughter by criminal negligence, or criminal negligence causing death, are near accident. ***Will*** is an example. Whether the smothering of the child by covering his mouth was characterized as manslaughter by an unlawful act, or by criminal negligence, was not significant in determining the appropriate sentence. What was significant was the nature of the act and the offender's state of mind.

[60] Distinguishing between unlawful act manslaughter and criminal negligence for sentencing purposes risks underestimating the very real danger posed to vulnerable children by criminally negligent acts or omissions, and the importance of the objectives of deterrence and denunciation in this context. Criminal negligence is an act or omission that "shows wanton or reckless disregard for the lives or safety of other persons": *Criminal Code* s 219. When such an act or omission is perpetrated on a young child by an adult charged with caring for the child, deterrence and denunciation must be paramount sentencing objectives. A similar view was expressed in ***R v McDonald***, 2013 SKCA 38, 409 Sask R 317 [***McDonald***], where the Court of Appeal held that it would be an error in principle to state that the death of a child by an intentional act was more serious than the death by a criminally negligent omission of care.

[61] That the offences of manslaughter and criminal negligence causing death cover a range of conduct that is potentially equivalent in terms of seriousness is shown by the fact that the maximum sentence for both offences is life, and there is no minimum sentence for either offence (unless a firearm is used). The Supreme Court of Canada commented on the overlap between these offences in ***R v Morrisey***, 2000 SCC 39 at para 61, [2000] 2 SCR 90 [***Morrisey***], noting that "[t]here is a great deal of overlap between some of the culpable homicides which are not classified as murder, such as unlawful act manslaughter and manslaughter by criminal negligence" and further, there is "no difference" between criminal negligence causing death and manslaughter by criminal negligence.

[62] Distinguishing between unlawful acts and criminal negligence for the purpose of sentencing is reflective of a categorization approach similar to that in ***Evans***, which was rejected by the Court of Appeal in ***Nickel***. ***Lam*** was decided before ***Nickel***, so the sentencing judge did not have the advantage of the reasoning in that case. After ***Nickel***, it is clear that sentencing in *all* cases involving abuse of a caregiver toward a child, is to be analyzed in light of the ***Laberge*** factors.

[63] The Defence also referred to ***R v Patten***, 218 Nfld & PEIR 303, 653 APR 303 (NL SC (TD)) [***Patten***], ***R v Pauchay***, 2009 SKPC 35, 64 CR (6th) 91 [***Pauchay***], ***R v Pashe***, 100 Man R (2d) 61, 91 WAC 61(Man CA) [***Pashe***] and ***R v Simons***, 2018 ABPC 100, 2018 CarswellAlta 911 (WL Can) [***Simons***] where the sentences imposed ranged from one year (***Pashe***, on a joint submission; the sentencing judge would have imposed two years) to three and a half years. The facts in ***Pauchay*** and ***Simons*** did not involve striking or shaking a child.

[64] In summary, regarding the case law, the proper approach to determining the appropriate sentence in this case is set out in the ***Laberge*** and ***Nickel*** decisions. This approach applies to sentencing in *all* cases involving abuse of a caregiver toward a child, including criminal negligence causing death. There is no separate set of principles or range of sentences for cases of criminal negligence as compared with unlawful act manslaughter.

[65] The cases cited by the Crown are factually more in line with the circumstances of this case than those cited by the Defence. They indicate that the high end of the range of sentences is above the four and a half years imposed in ***Laberge***. While the Crown has cited cases where sentences imposed were in the 8 to 10 year range, these were cases where there was evidence of prior child abuse inflicted by the accused on the victim. That is a significant aggravating factor that is not present in this case. However, in the Saskatchewan cases of ***Shorting*** and ***Will***, sentences of six and seven years respectively were imposed where single incidents of child abuse led to the death of the victim.

**Analysis and Conclusion**

[66] I commence with the first, and perhaps "most important" of the ***Laberge/Nickel*** factors, an objective assessment of the act that exposed Raelyn to harm. In the admitted facts, this is described as:

> On July 25, 2016, at approximately 5:30 am Raelyn woke Calahoo with her crying. He shook Raelyn with both hands by the body and the head.

[67] Mr. Calahoo did not provide more detail when speaking to report writers. However, the admitted facts include medical and autopsy records, which provide some detail about the nature and degree of force that must have been involved. The autopsy indicates that the brain injury was caused by acceleration/deceleration and rotational motion. The neuropathology autopsy report notes the presence of subdural hematoma and retinal hemorrhages "consistent with a non-accidental acceleration injury." This was also consistent with the progress of Raelyn's brain injury as shown in imaging studies from Raelyn's stay in hospital.

[68] This was not a near accident. Chance did not play a significant role in Raelyn's death. This was shaking "with both hands by the body and the head" of a two-month old baby, that applied acceleration, deceleration and rotational motion. I agree with Crown counsel that the term, "shaken baby," does not adequately describe this action or injury. This was a case of non-accidental head trauma.

[69] The Defence acknowledges that through his plea to criminal negligence causing death Mr. Calahoo has accepted that a reasonable person would have appreciated that the consequence of his action was to put Raelyn at risk of non-trivial bodily harm, as that is the minimum required to be found criminally liable.

[70] In my view both Mr. Calahoo's plea and the admitted facts put the seriousness of his action at a higher level than that.

[71] In pleading guilty to criminal negligence causing death, Mr. Calahoo has admitted that his conduct was "such a marked departure from the behaviour of a reasonably prudent person as to show wanton or reckless disregard for the life or safety of others" (***Morrissey*** at para 19). The Supreme Court in ***R v F (J)***, 2008 SCC 60, [2008] 3 SCR 215 [***F(J)***] went further, holding that criminal negligence requires a "*marked and substantial departure* (as opposed to a *marked* departure)" from the conduct of a reasonably prudent person (at para 9, emphasis in original). I have no difficulty concluding that Mr. Calahoo's conduct constituted a marked and substantial departure from the behaviour of a reasonably prudent person and showed wanton or reckless disregard for Raelyn's safety.

[72] I also infer from the facts about the nature of the shaking that a reasonable person would have appreciated that there was a risk of more than non-trivial bodily harm. A reasonable person would know that holding a two-month old baby with two hands and shaking her by the body and head, would expose the baby to *at least* the risk of serious harm from which she may or may not recover. Objectively, at least this type of harm was foreseeable. The vulnerability of a two-month old baby is apparent to any reasonable person.

[73] Was Mr. Calahoo aware that his action was likely to subject Raelyn to harm and, if so, did he intend that consequence?

[74] ***Laberge*** and ***Nickel*** described a range of mental states ranging from objective foreseeability only, through increasing levels of awareness up to subjective intention to harm. This was in the context of the offences of unlawful act manslaughter or aggravated assault. However, Mr. Calahoo pled guilty to criminal negligence causing death. He has thus accepted responsibility for the minimum requirements of that offence. The Supreme Court of Canada is divided as to whether the mental state required for criminal negligence is purely objective or requires some degree of guilty knowledge: ***R v Tutton,*** [1989] 1 SCR 1392, 98 NR 19 [***Tutton***]. In either case, where the negligent act involves such a marked and substantial departure from the standard of a reasonable person as to demonstrate wanton or reckless disregard for the safety of another, and where there is no evidence to suggest a lack of the normal degree of mental awareness, one can infer from the act that the offender was aware of the risk or willfully blind to it. This is reflected in the statement of the Supreme Court in ***F (J)***, holding that criminal negligence requires a marked and substantial departure from the conduct of a reasonably prudent person "in circumstances where the accused either recognized and ran an obvious and serious risk to the life of the child, or alternatively, gave no thought to that risk" (at para 9, citing ***Tutton*** and ***R v Sharp*** (1984), 39 CR (3d) 367, 12 CCC (3d) 428 [***Sharp***]). In the circumstances of this case, it means that Mr. Calahoo either, recognized and ran an obvious and serious risk to Raelyn's safety, or he gave no thought to the risk. This puts Mr. Calahoo's mental state somewhat higher on the scale of moral culpability. However, it does not mean that he intended to or was actually aware of the potential to cause serious harm or death; the evidence does not show that.

[75] In terms of aggravating factors, it is aggravating that Mr. Calahoo left Raelyn in her crib when she was unresponsive, and later told Carley to leave Raelyn in bed. These actions demonstrate an effort by Mr. Calahoo to conceal his action and his responsibility, even in the face of further risk to Raelyn. The evidence does not indicate that earlier medical attention would have alleviated the harm already done to Raelyn. However, just as a reasonable person would have recognized the risk involved in shaking an infant, a reasonable person would also perceive a further risk by not seeking medical help when the shaken infant is unresponsive. This additional exposure to harm is aggravating.

[76] Mr. Calahoo's actions at the time, and his statements since as discussed in the sentencing reports, indicate a lack of remorse. This is not an aggravating factor, but does mean that a mitigating factor that was present in ***Laberge*** is not present in this case. The Defence submits that Mr. Calahoo is simply reacting to the fact that Raelyn did not die until she was taken off life support, including nutrition and hydration. This circumstance, of course, does not change Mr. Calahoo's legal or *moral* responsibility. Raelyn lost all opportunity to have even a minimum quality of life when Mr. Calahoo shook her. She became unresponsive immediately and never regained consciousness. Her death was a direct consequence of Mr. Calahoo's abusive action. Mr. Calahoo has acknowledged that, in a legal sense, through his guilty plea. But, according to all of the report writers, he continues to minimize his responsibility. There is no issue with Mr. Calahoo's intellectual functioning; he is certainly capable of understanding his responsibility for Raelyn's death. The author of the FACS report suggests that his failure to do so may be a way of "protecting himself from the shame and grief associated with his actions." That may be, but in my view that is just another way of saying that he has not fully accepted responsibility and is not truly remorseful. In his statement to the Court, Mr. Calahoo said that he takes responsibility and that he has learned in the years since the commission of the offence and will continue to learn. But he did not communicate any real sense of shame or grief. Having heard Mr. Calahoo, I was

left with the same impression as the report writers, that Mr. Calahoo has still not fully understood or accepted his responsibility for cutting short the life of a helpless baby girl who he says he thought of as a daughter.

[77] As to mitigating factors, Mr. Calahoo is a young man with only a minor and unrelated criminal record: convictions in 2016 for mischief and failure to comply with a recognizance, and in 2017 for obstructing a peace officer. He received fines for these offences. It is mitigating that Mr. Calahoo pled guilty. It was not an early guilty plea, but it saved the institutional cost of a trial and the psychological suffering that Raelyn's family members would have had to go through, had a trial proceeded.

[78] The Court has a duty, under s. 718.2(e) of the Criminal Code, to take into account the systemic factors which played a part in bringing Mr. Calahoo before the court***: R v Gladue,***[1999] 1 SCR 688 at para 69, 171 DLR (4th) 385 [***Gladue***]. The applicable principles were recently summarized by the Alberta Court of Appeal in ***R v Okimaw,*** 2016 ABCA 246, at para 62, 340 CCC (3d) 225:

- There need not be a direct causal link between background factors and commission of offence;
- Gladue factors are not "an excuse of justification" for the criminal conduct, however, they provide context to determine the appropriate sentence;
- Only if the circumstances of the offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized will they influence the ultimate sentence;
- Gladue principles apply to all offences, including serious offences;
- While Gladue principles must be considered; s 718.2(e) is not an automatic discount from what is otherwise a proportionate sentence. The sentencing judge must not "ignore the effects of the offender's conduct on his community … or on the various individuals who have suffered and continue to suffer as a result" of the offence: ***R v Johnny***, 2016 BCCA 61, at para 21.

[79] This is a case in which both the Gladue factors affecting Mr. Calahoo, and the harm caused by his conduct, are very significant. I have already discussed the harm of his conduct. But I acknowledge as well the significant Gladue factors. I refer to the summary in the Gladue report: Mr. Calahoo experienced physical, emotional and verbal abuse as a child; he has abused alcohol, street drugs and prescription drugs; he has experienced suicidal ideation, has made suicidal attempts; and has experienced poverty and homelessness. His family was displaced from their community and culture and experienced intergenerational effects stemming from residential schools. Mr. Calahoo does not have a positive relationship with family, has suffered mental health concerns since his teens, and has disjointed educational and employment experiences. These factors contributed to a situation in which, as stated in the FACS report, at the time of the offence, Mr. Calahoo was experiencing a high amount of stress with few supports, and lacked the emotional resources to manage his circumstances. In other words, systemic factors had a role in bringing Mr. Calahoo before the court and bear on his culpability.

[80] In comparing this case with others cited to me, I view Mr. Calahoo's conduct and mental state to be at least as serious as in ***Laberge.*** There is an additional aggravating factor, in that he

left Raelyn unresponsive in her crib and later told Carley to leave her there. Further, the mitigating circumstance of genuine remorse is not present here. Mr. Calahoo's culpability, in my view, is on a level with the offenders in the ***Will*** and ***Shorting*** cases. There was not a guilty plea in ***Will***, nor Gladue factors, and the sentence was seven years. However, the accused in ***Shorting*** pled guilty, had an extremely abusive background and was in withdrawal from cocaine. She was sentenced to six years. In my view, this case calls for a similar sentence. While Mr. Calahoo's culpapbility is affected by Gladue factors, the Court cannot ignore the effects of his conduct and the suffering he has caused. Denunciation and deterrence must remain paramount sentencing objectives.

[81] In considering the appropriate sentence, in light of Gladue factors, I am directed to take into account what sentencing objectives can and should be actualized. Section 718.2(e) directs the court to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victim." The circumstances of this case clearly call for imprisonment; the issue is the length of the term of imprisonment, including the length of any term of imprisonment after giving credit for pre-trial custody.

[82] Mr. Calahoo has been incarcerated since July 26, 2016. He has served 29 months and 23 days. He is entitled to 1.5 days credit for each day of pre-trial custody, resulting in a credit of 43.5 months and 34.5 days, which I am going to round off to 44.5 months.

[83] For the reasons that I have discussed, it is my view that something close to a six year sentence is appropriate in this case. After giving credit for pre-trial custody, a six year sentence would mean a remaining federal sentence of just over two years – two years and three and a half months to be precise. This is a brief sentence, in federal terms, which could mean that there would be relatively little opportunity for rehabilitative programming in prison, and would certainly mean that any period of parole would be relatively brief. On the other hand, a similar prison term of two years less a day, to be served in a provincial institution, could be followed by a lengthy term of probation, up to three years. The Defence acknowledges the suitability of a lengthy term of probation in order to achieve the sentencing objective of rehabilitation in this case. Mr. Calahoo is a young man with no support system, and only disjointed educational and employment experiences. He will require supervision and intervention in order to achieve successful reintegration into the community.

[84] It is my view that an additional prison sentence of two years less a day, after giving credit for pre-trial custody, is a suitable sentence in the circumstances applicable to this offence and this offender. This is the equivalent of a sentence of five years and eight and a half months, which in my view is a sufficient to achieve the objectives of denunciation and deterrence, while still making possible the imposition of a three year period of probation. A small reduction in the prison sentence that would otherwise apply is appropriate in order to ensure that the objective of rehabilitation is achieved, especially given the Gladue factors and resulting challenges that Mr. Calahoo will face upon his release from prison.

[85] The FACS report contains a number of recommendations for community supervision conditions, including conditions related to substance use, educational and employment programming, and therapy. The Defence has agreed that a probation order should include conditions based on these recommendations. Mr. Calahoo acknowledges that he requires this type of structure and support. The Defence also requests that the FACS report be provided to the probation officer as guidance for the implementation of the conditions. I am directing counsel to

prepare an appropriate probation order, for a three year term. You may arrange another appearance before me if you are unable to agree on suitable wording for the conditions.

[86] Mr. Calahoo, please stand:

> For the reasons I have given I sentence you to a further term of imprisonment of two years less a day to be served in a provincial institution, after having given credit for pre-trial custody. This term of imprisonment will be followed by a period of probation for three years.

[87] As to collateral orders, the Crown seeks and the Defence takes no issue with a ten year mandatory weapons ban pursuant to s 109(1)(a) of the *Criminal Code* and the collection of a sample for DNA analysis under s 487.051(3). Criminal negligence causing death is a secondary designated offence under s 487.04 and I am satisfied, given the nature and circumstances of the offence, that a DNA order would not pose an undue impact on Mr. Calahoo's privacy and security and should be issued. In making this order, I am taking into account my assessment that the circumstances of the offence in this case are essentially equivalent to the offence of manslaughter, which is a primary designated offence.

Heard on the 13th and 25th day of April; 29th day of June; and 17th day of December, 2018.
**Dated** at the City of Edmonton, Alberta this 18th day of January, 2019.

**J.M. Ross**
**J.C.Q.B.A.**

**Appearances:**

Allison Downey-Damato and John P Schneider
for the Crown

Simon Renouf, QC and Amanda Goodwin
for the Accused