IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Naugle 2010 NSPC 11

Date: February 12, 2010
Docket: 2024659
2024660
2024661
2024662
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Terrance Lee Naugle

Judge:	The Honourable Judge Frank P. Hoskins
Sentence Decision:	February 12, 2010
Charge:	252(1); 253(a); 259(4) Criminal Code
Counsel:	C. Byard, counsel for the Crown P. Planetta, counsel for the Defendant

By the Court: (orally)

Introduction

[1] This is the sentencing decision in the matter of *The Queen and Terrance Lee Naugle.* Mr. Naugle, the accused, has plead guilty to the following offences:

> that on or about 28th day of March, 2009, having care or control of a motor vehicle that was involved in an accident with a vehicle, did unlawfully with intent to escape civil or criminal liability, fail to stop his vehicle and give his name and address, contrary to s. 252(1) of the *Criminal Code*, and further at the same time and place aforesaid,
>
> did, unlawfully have care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to s. 253(a) of the *Criminal Code*, and further at the same time and place aforesaid,
>
> did, operate a motor vehicle while prohibited from doing so by an order pursuant to s. 259, contrary to s. 259(4) of the *Criminal Code.*

[2] The Crown proceeded by indictment on all three offences. Thus, the maximum sentence for each offence is five years imprisonment.

[3] Mr. Naugle has plead guilty to three separate and distinct offences, which arose from the same transaction, but constitute invasions of different legally protected interest.

[4] The serious problem of impaired driving is well known in our society. Notwithstanding the efforts to eradicate the problem, the tragic consequences of impaired driving are far too often felt by innocent citizens. Indeed, in *R. v. Bernshaw* [1995] 1 S.C. R. 254 at para. 16, the Supreme Court of Canada's observation is apposite:

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

[5] The gravity of the problem and its impact on Canadian society has been so great that the *Criminal Code* has been amended over the years to help eliminate or, at least, reduce the problem of driving while impaired by drug or alcohol. The most recent amendments to the *Criminal Code* were enacted on July 1, 2008, which included increasing the penalties for impaired driving.

[6] It should be stressed that not only is impaired driving a social problem, but also a serious crime. Impaired drivers are a menace to the lives and safety of not only themselves and their passengers but also to the public. Thus, the purpose of imposing punishment for such offences is the protection of the society. The increased incidents of these offences and what the courts can do to prevent them has been the concern of the courts for many years.

[7] In the present case, Mr. Naugle comes before the court with an atrocious criminal history of related criminal convictions for which he has received various forms of punishments, including fines, probation, varying periods of imprisonment in both Provincial and Federal institutions, and extended periods of driving prohibitions.

[8] Adjectives such as chronic, inveterate or habitual offender best describe Mr. Naugle's history of repetitive and continuous breaches of the criminal law, particularly offences related to impaired driving.

[9] The conduct underlying theses current convictions, and the related convictions contained in Mr. Naugle's horrendous criminal record, is unsettling and appalling. Although, the offences for which the accused has plead guilty did not result in personal injury, the danger to the public was nevertheless present.

[10] In 1986, 24 years ago, in *R. v. McVeigh* [1985] O.J. No. 207, at pp. 4-5, the Ontario Court of Appeal laid down rules of general application to guide the courts as to the proper disposition to be made in such cases. MacKinnon A.C.J.O., in delivering the judgement of the court, stated as follows:

> In my view, the sentences for the so-called lesser offences in this field should be increased. The variations in the penalties imposed for drinking and driving are great and increasing sentences for offences at the "lower end" would emphasize that it is the conduct of the accused, not just the consequences, that is the criminality punished. If such an approach acts as a general deterrent then the possibilities of serous and tragic results from such driving are reduced. No one takes to the road after drinking with the thought that someone may be killed as a result of his drinking. The sentences should be such as to make it very much less attractive for the drinker to get behind the wheel of a car after drinking. The public should not have to wait until members of the public are killed before the courts' repudiation of the conduct that led to the killing is made clear. It is trite to say that every drinking driver is a potential killer
>
> Members of the public when they exercise their lawful right to use the highways of this province should not live in the fear that they may meet with a driver whose faculties are impaired by alcohol. It is true that many of those convicted of these crimes have never been convicted of other crimes and have good work and family records. It can be said on behalf of all such people that a light sentence would be in their best interests and be the most effective form of rehabilitation. However, it is obvious that such an approach has not gone any length towards solving the problem. In my opinion, these are the very ones who could be deterred by the prospect of a substantial sentence for drinking and driving if caught. General deterrence in these cases should be the predominant concern, and such deterrence is not realized by overemphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving.

[11] The challenging issue before this Court is how to deal with habitual offenders such as Mr. Naugle who will not cease to drink and drive, and who have demonstrated a total disregard for the law, including court orders.

[12] Sentencing submissions were completed on January 27, 2010, and I reserved my decision until today.

[13] In assessing the issue of what is the appropriate and just disposition for these offences and offender, I have carefully considered and thoroughly reflected on the following:

1. The circumstances surrounding the commission of the offences and the offender, Mr. Naugle;

2. The relevant statutory provisions under s. 718 of the *Criminal Code*;

3. The case law regarding sentences for breaches of ss. 252(1), 253(a) and s. 259(4) of the *Criminal Code;*

4. The oral and written submissions submitted by counsel; and

5. The Victim Impact Statements.

[14] Sentencing is a difficult and challenging task for a judge as it requires the judge to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The formulation of a fit and proper sentence is not a simple task.

[15] Accordingly, in accordance with s. 726.2 of the *Criminal Code,* what follows are my reasons for imposing the sentence that I view as a just and appropriate, a fit and proper sentence, for this offender and for these offences.

[16] Given the number of issues raised in this case, my decision will include a discussion of the following:

1. The Relevant Statutory Provisions and the Common Law, including a discussion of the relevant sentencing principles;
2. The Circumstances Surrounding the Offences;
3. The Circumstances Surrounding the Offender;
4. The Respective Positions of the Crown and the Defence;
5. The Case Law;
6. Credit for Pre-Sentence Custody;
7. Analysis;
8. The Appropriate period of time for a Driving Prohibition;
9. The appropriateness of a DNA Order;
10. The Forfeiture Order of the Mr. Naugle's car;
11. The Appropriateness of Imposing Restitution Orders, and
12. The Victim Fine Surcharge.

Relevant Statutory Provisions and Common law

[17] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M. (C.A.)* (1996), 105 C.C.C. (3d) 327 and Parliament has enacted new legislation which specifically sets out the purpose and principles of sentencing. Thus, it is to these sources, and the common law jurisprudence that courts must turn in determining the proper sentence to impose.

[18] It is trite to say that the imposition of a just and appropriate sentence

can be as difficult a task as any faced by a trial judge. However, as difficult as the determination of a fit sentence can be, that process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Sentencing is *not* based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings.

[19] As Doherty J.A., in delivering the judgement of the Ontario Court of Appeal, in *R. v. Hamilton*, [2004] O.J. No. 3252 at para. 2, aptly stated:

> A sentencing proceeding is not the forum in which to right perceived societal wrongs, allocate responsibility for criminal conduct as between the offender and society, or "make up" for perceived social injustices by the imposition of sentences that do not reflect the seriousness of the crime.

[20] Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[21] Section 718 of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors which should be considered by a judge in striving to determine a just and appropriate sentence for the offence and the offender.

[22] Although sentencing is highly contextual and necessarily an individualized process, the judge must also take into account the nature of the offence, the victims and the community. As Lamer, C.J., (as he then was), noted in *M. (C.A.)*, *supra,* sentencing requires an individualized focus, not only of the offender, but also of the victim and community as well. He stated at para. 92:

> It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the just and appropriate mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred.

[23] Similarly, in *R. v. Muller* (1993), 22 B.C.A.C. 194 at paras. 32-33, McEachern, C.J., (as he then was), writing on behalf of the British Columbia Court of Appeal, expressed the view:

> ... that it is often unproductive to approach the sentencing process either at trial or in this court as if absolute priorities can be given to various sentencing principles, such as deterrence, in any particular case.

[24] Also, it is unlikely that individually just results can be achieved by the application of formulae in which degree of importance are attached to specific sentencing factors. Sentencing is an art, not a science. It must take into account highly variable human behavior and likely responses to penal

sanctions. In some cases deterrence may be more important than rehabilitation; in others, the opposite will be true. Sentencing, in my view, should not be approached as a contest between those two important principles, for the raw material of sentencing is past and future human behavior, which is never completely predictable.

[25] Thus, in view of these observations, it is arguable that case law is only helpful for the limited purpose of ascertaining the range of sentences imposed on similar offenders for similar offences committed in similar circumstances.

[26] In addition to complying with the principles of sentencing, dispositions or sentences must promote one or more of the objectives identified in s. 718, of the *Criminal Code* which provides:

> 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 by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and others offenders from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the

> community; and
>
> (f) to provide a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[27] The purpose of sentencing is achieved by blending the various objectives identified in s. 718 (a)-(f).

[28] The proper blending of those objectives depends upon the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective, or combination deserves priority. Indeed, s.718.1 of the *Criminal Code* directs that the sentence imposed must fit the offence and the offender. Section 718.1 is the codification of the fundamental principle of sentencing which is the principle of proportionality.

[29] This principle is deeply rooted in notions of fairness and justice.

[30] Section 718.1 of *Criminal Code* states:

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

[31] As Doherty J.A., in *Hamilton*, *supra,* at para. 93 observed:

> Fixing a sentence that is consistent with s.781.1 is particularly difficult where the gravity of the offence points strongly in one sentencing direction and the culpability of the individual points strongly in a very different direction. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account... factors which may accentuate the gravity of the crime cannot blind the trial judge to factors mitigating personal responsibility. Equally, factors mitigating personal responsibility cannot justify a disposition that unduly minimizes the seriousness of the crime committed.

[32] Although proportionality is the fundamental principle of sentencing, it is not the only principle which must be considered by a judge in the determination of a fit sentence. Section 718.2 of the *Criminal Code* sets out other principles of sentencing which must also be taken into consideration. These include the following: separation, specific and general deterrence, retribution, and restorative justice principles of reparation for harm and promoting a sense of responsibility in the offender for the harm done to the victims and the communities. Section 718.2 states, in part:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, ...
> >
> > (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
> >
> > (c) where consecutive sentences are imposed, the combined

> sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) 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.

[33] In *Gladue* (1999), 133 C.C.C. (3d) 385, at para. 39, the Supreme Court of Canada determined that the new sentencing amendments represented "a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law".

The Principle of Proportionality

[34] As stated, the fundamental purpose of sentencing and the objectives underlying that purpose cannot be justified unless they are proportionate to the gravity of the offence and the degree of responsibility of the offender.

[35] As Wilson J. expressed in her concurring judgement in *Reference re: Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 (S.C.C.) at 325:

> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence

> in the fairness and rationality of the system.

[36] This principle is well established in Canadian jurisprudence and was recognized by the Supreme Court of Canada in *M.(C.A.), supra,* at para. 41, as having a constitutional dimension. Lamer, C.J. observed:

> Within broader parameters, the principle of proportionality expresses itself as a constitutional obligation. As this court has recognized on numerous occasions, a legislative or judicial sentence that is grossly disproportionate, in the sense that it is so excessive as to outrage standards of decency, will violate the constitutional prohibition against cruel and unusual punishment under s.12 of the Charter.

[37] The principle of proportionality in punishment is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may only be imposed on those individuals who possess a morally culpable state of mind. This notion was earlier embraced by the Supreme Court of Canada in *R. v. Martineau* (1990), 58 C.C.C. (3d) 353 at 360, in which the court, in discussing the constitutional requirement of fault for murder, noted that the related principle that punishment must be proportionate to the moral blameworthiness of the offender.

[38] More recently, in *M.(C.A.), supra,* the principle of proportionality was at the center of discussion in the context of an analysis of the applicability of the principle of retribution to the sentencing process.

[39] The interrelationship of these concepts was thoroughly examined by the Supreme Court of Canada. In doing so, the court conducted a comprehensive analysis of the objectives of sentencing and the role that retribution plays therein. In its analysis, the court expressly endorsed the concept of retribution as a legitimate and relevant consideration in the sentencing process. Lamer C.J., at para. 79, expressed the view that:

> Retribution is an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" in the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of criminal liability and the imposition of criminal sanctions.

[40] Furthermore, Lamer, C.J., at para. 80, explicitly commented on the need to clarify the meaning of retribution because its legitimacy as a principle of sentencing has often been questioned as a result of its unfortunate association with vengeance. In distinguishing retribution from vengeance, Lamer, C.J. wrote:

> Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of

> the offender's conduct. Furthermore, unlike vengeance, retribution requires the imposition of a just and appropriate punishment, and nothing more.

[41] Lamer, C.J. also conceptually distinguished retribution from "its legitimate sibling, denunciation". He stated, at para. 81:

> Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law... The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behavior, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.

[42] As Rosenberg, J.A., emphasized in *R. v. Priest* (1996),110 C.C.C. (3d) 289 (Ont. C.A.) at 298, in discussing the rationale for the objectives of denunciation and retribution in the sentencing process, the principle of proportionality ensures that an offender is not sacrificed "for the common good". Rosenberg, J.A.'s comments are apposite:

> objectives set by this court and in the Criminal Code are designed to guide the exercise of discretion. The substantial deference that appeal courts are required to pay to the exercise of the trial judge's discretion is not unlimited.

> In R. v. M. (C.A.),supra at page 374, Chief Justice This positive aspect of sentencing, reinforcing the basic values of the society, can only be achieved if the court exercises its broad discretion in sentencing in a just manner having regard to established principles. Section 717(1) (now s. 718.3) of the Criminal Code emphasizes that the sentence to be imposed is in the discretion of the trial judge. That discretion is, however, not unfettered. The various principles and Lamer described the imposition of sentence by the trial judge as a “delicate art” where the judge attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, “while at all times taking into account the needs and current conditions of and in the community”.

[43] In *M.(C.A.)*, *supra,* Lamer. C.J., in his concluding remarks, stressed that neither retribution nor denunciation alone provides an exhaustive justification for the imposition of criminal sanctions.

[44] The meaning of retribution must be considered in conjunction with other legitimate objectives of sentencing, which include deterrence, denunciation, rehabilitation, and the protection of society.

[45] Lamer, C.J. acknowledged the inherent difficulty of separating these interrelated principles and thus affirmed the approach of placing emphasis on the relative weight and importance of these multiple factors on a case-by-case analysis, which will vary depending on the nature of the offence and the personal circumstances of the offender.

[46] In the final analysis, the principles of fundamental justice require that differing degrees of moral blameworthiness in different offences be reflected in differential sentences and that sentencing be individualized. Thus, the duty of a sentencing judge is to consider all of the legitimate principles of sentencing in the determination of a just and appropriate sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.

The Principle of Totality

[47] Closely connected with the principle of proportionality is the principle of totality. The totality principle ensures that the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender. It is within the context of consecutive sentences that the principle of proportionality expresses itself through the more particular form of the totality principle.

[48] This principle is well established in the sentencing jurisprudence. It has now been codified in s. 718.2 (c) of the *Criminal Code*, which provides:

> Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[49] The totality principle requires a sentencing judge who has imposed consecutive sentences for multiple offences to ensure that the cumulative sentence imposed does not exceed the overall culpability of the offender. Clayton Ruby articulated the totality principle in the following terms in his treatise, *Principles of Sentencing* 3rd (Toronto: Butterworths, 1987) at 27:

> The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects. The first limb of the principle can be sees as an extension of the central idea of proportionality between offence and sentence, while the second represents an extension of the practice of mitigation.

[50] Similarly, Professor Allan Manson described the principle of totality in his treatise, *The Law of Sentencing,* (Toronto: Irwin Law, 2001) at p. 102**,** wherein he wrote:

> The global effect of consecutive sentences cannot produce excessive punishment, regardless of the number of offences... In determining whether a merged sentence is excessive, courts usually consider the age and rehabilitative prospects of the offender. Even when there is little evidence of positive rehabilitative prospects, total sentences should not be so long as to crush optimism about eventual re-integration.

Concurrent and Consecutive Sentences

[51] Whether or not the court should impose concurrent or consecutive sentences on Mr. Naugle for having committed three offences which arose out

of the same transaction has been raised. In *R. v. Gummer,* (1983), 1 O.A.C.141, at para. 13-14, the Ontario Court of Appeal dealt with this issue in the context of a driver convicted of dangerous driving as well as failing to remain at the scene of the accident, which arose from the same incident. The Court of Appeal held that the trial judge erred in directing that the sentence imposed on the charge of failing to remain be concurrent to the dangerous driving. The Court stated:

> The learned trial Judge considered that it was appropriate to impose concurrent sentences because so many of the ingredients of the offence of failing to remain were "caused by the earlier offence, the consumption of alcohol, the blurring of Judgment" for which the respondent had already been sentenced in respect of the offence of dangerous driving. Counsel for the respondent ably argued that the trial Judge did not err in imposing concurrent sentences and that sentences for offences arising out of the same transaction or incident are properly made concurrent. We do not consider the rule that sentences for offences arising out of the same transaction or incident should normally be concurrent, necessarily applies where the offences constitute invasions of different legally protected interests, although the principle of totality must be kept in mind. The offences of dangerous driving and "failing to remain" protect different social interests. The offence of dangerous driving is to protect the public from driving of the proscribed kind. The offence of failing to remain under s. 233(2) of the Code imposes a duty on the person having the care of a motor vehicle which has been involved in an accident, whether or not fault is attributable to him in respect of the accident, to remain and discharge the duties imposed upon him in such circumstances.
>
> In our view, the failure of the respondent to stop his automobile, when, as the trial Judge found, he was aware that he had struck someone, was perhaps the more serious of the two offences which the respondent committed. In failing to stop as required, the respondent exhibited a grave failure to comport with the standards of humanity and decency.

[52] In considering whether to impose a concurrent or consecutive sentence,

I need to underscore the principle of totality.

[53] In *R.v. E. T.P.*, [2002], M.J.No. 64, paras. 29-31, the Manitoba Court of Appeal discussed the role of the totality principle in calculating an appropriate sentence. The Court observed:

> I have quoted above the comments of Lamer C.J.C. in M.(C.A.) on the role of the totality principle in calculating an appropriate sentence. Included in that reference is the statement of Mr. Ruby in his text, Sentencing, 4th ed. (Toronto: Butterworths, 1994) at 45: "A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved." No authority is cited for that proposition.
>
> It may well be an offshoot of the principle applied in *R. v. Turland* that when different offences are committed during the same venture, or during the course of a single incident, the consecutive sentences should not exceed the maximum penalty provided for one of those offences.
>
> The statement has been referred to in decisions of the courts across the country, but rarely, if ever, elevated in its application to a principle that must be applied in order to achieve proportionality. In *M.(C.A.)*, for example, the consecutive sentences imposed by the sentencing judge and restored by the Supreme Court were eight and five years respectively for two counts of sexual assault, seven years for incest, and five years for assault with a weapon. The aggregate sentence of 25 years, however, was substantially above, indeed many times above, "the normal level of a sentence for the most serious of the individual offences involved."
>
> Other cases in which the statement has been referred to, but where the aggregate sentences imposed were substantially above the normal level of a sentence for the most serious of the individual offences involved, include: *R. v. Robinson ; R. v. Drouin (M.G.)*; *R. v. Cameron (D.I.)*; *R. v. E.C.S.*; *R. v. G.P.W. and R. v. Johnson*;

[citations omitted]

[54] In my view, the application of the principles of proportionality and totality are critical in the determination of the overall global sentence of an offender.

[55] In addition to foregoing principles, I have also considered the principle of restraint, the gap principle, the jump or step-up principle, and the sad life principle in my determination of just and appropriate sentence for the current offences and the offender, Mr. Naugle. Accordingly, I will briefly touch upon these principles.

The Principle of Restraint

[56] The principle of restraint is clearly reflected in the amendments to the sentencing regime outlined in Part XXIII of the *Criminal Code*. Indeed, the principle of restraint is entrenched in the sentencing process.

[57] The so-called jump or step-up principle is another illustration of the application of the principle of restraint in the sentencing process. The jump principle embraces the notion that the imposition of successive sentences should be increased gradually rather than by “jumps”.

[58] In *R. v. Borde*, [2003] O. J. No. 354, at para. 39, Rosenberg J.A., described the jump principle in these terms:

> This Principle cautions a court against imposing a dramatically more severe sentence than the sentences imposed upon the offender for similar offences in the recent past. It has little application where the severity of the offender's crime shows a dramatic increase in violence and seriousness.

[59] Also, in *R. v. Robitaile* (1993), 31 B.C.C.A.7, at para. 9, Lambert J.A., in delivering the reasons for the judgement of British Columbia Court of Appeal, observed :

> ... the theory that sentences should go up only in moderate steps is a theory which rests on the sentencing principles of rehabilitation. It should be only in cases where rehabilitation is a significant sentencing factor. So the conclusion, in any particular case, that the increase in sentence should not be too large rests on consideration of the circumstances of the particular offender and a desire not to discourage any effort he may be making to rehabilitate himself by the imposition of a sentence that may be seen by him to be a dead weight on his future life.

The Gap Principle

[60] The so-called gap principle directs a sentencing judge to consider the absence of a criminal conviction in an offender's criminal record for a substantial period of time as a factor deserving a measure of leniency. Clayton Ruby described the principle in his treatise, *supra*, at p.115, in these terms:

> Since both sentencing and crime are human endeavors, it is natural for the courts to give credit to someone who has an honest effort to avoid conflict with the criminal law. In the nature of things, an effort such as this will often

> not be completely successful, but if a substantial period of time passes without convictions, this is often a matter which will be taken into consideration.

[61] In *R. v. Lockyer*, [2001] N.J.No. 306 (Nfld., C.A.), at para. 142, Roberts J.A., in delivering the majority judgement of the Newfoundland Supreme Court - Court of Appeal, in considering the issue of whether the trial judge failed to give either any, or due, weight to the gap principle, observed:

> The so-called gap principle plays a role in some instances where there has been an intervening period between a prior criminal conviction in which the offender has maintained a notable period of good behavior. It operates to mitigate the effect that the record of a prior conviction would otherwise have on the sentencing at hand.

The Sad Life Principle

[62] The so-called sad life principle is premised on the principle of restraint and is often considered in cases where the offender has demonstrated a genuine interest in rehabilitation. These cases often involve offenders who are victims of sexual and/or physical abuse, or have experienced a horrific upbringing.

[63] The challenge for the sentencing judge is to consider all of the offenders personal antecedents and put the present offences into that context

in crafting a sentence which underscores the principle of restraint. This approach usually underscores a reluctance to re-incarcerate the offender or to impose a lengthy period of incarceration where one would have otherwise been imposed. In these situations, the objective is to fashion a sentence that will promote self-rehabilitation and thus protect the public in the long-term.

[64] It is difficult to apply this principle in circumstances where the offender has demonstrated no interest in rehabilitation. Generally, the sad life principle is applied in the context of the offender establishing a solid evidentiary basis showing not only a sad life, but also the existence of a comprehensive plan to assist in rehabilitation.

Maximum Sentences

[65] Recently, the Supreme Court of Canada, in *R. v. Solowan*, [2008] 3 S.C.R. 309, at para. 3, held the “worst offender, worst offence” principle has been laid to rest. It no longer operates as a constraint on the imposition of a maximum sentence where a maximum is otherwise appropriate, bearing in mind the principles of sentencing set out in Part XXIII of the *Criminal Code.* The court further stated that unwarranted resort to maximum sentences is adequately precluded by a proper application of those principles, notably the

fundamental principle of proportionality set out in s. 718.1 of the *Criminal Code*, and Parliament's direction in s. 718.2(d) and (e) to impose the least restrictive sanction appropriate in the circumstances.

[66] In *R. v. L.M.*, [2008] 2 S.C.R. 163, at para. 21, the Supreme Court of Canada expressed the view that:

> Even where a maximum sentence is imposed, therefore, regard must be had to the trial judge's discretion, the individualized nature of sentencing and the normative principles set out by Parliament in ss. 718, 718.1 and 718.2 Cr. C. There is still a place in criminal law for maximum sentences in appropriate circumstances.

In view of these observations, the Supreme Court of Canada has recognized that there still is a place in criminal law for maximum sentences in appropriate circumstances.

Circumstances Surrounding the Commission of the Offences

[67] The Crown's submission regarding the circumstances surrounding the commission of the offences was not disputed by the defence. Accordingly, what follows are the facts as submitted in the Crown written submission , at pp.2-3. :

> On March 28, 2009 at approximately 8:38 p.m. David McMillan, his wife Julia, and their daughter Jill were returning home to Tatamagouche after a day of shopping in Halifax. As they approached the exit for Enfield, their vehicle ran

out of gas.

Mr. McMillan coasted his vehicle onto the Enfield exit ramp and pulled over and put on his four-way flasher. He walked to the Irving Big Stop service station to get a can of gas. His family remained in the vehicle.

Upon his return, he was about 40 feet from the front of his vehicle when he observed the defendant's motor vehicle sideswipe his Honda Pilot. The vehicle hit fairly hard in that he had to slow and get his bearings. This allowed Mr. McMillan enough time to get the first three letters of the license plate before the defendant left the scene.

Mr. McMillan ran quickly back to his vehicle to ensure his wife and daughter were okay. Once he had confirmed they were alright, he ran up the exit ramp to see if he could catch the defendant. It was at this time he observed the defendant pull into the parking lot of the Irving and noted the vehicle had blown a tire. Mr. McMillan poured the pas in his vehicle and immediately headed for the Irving. The defendant had pulled over into a dark area of the parking lot and was out of his vehicle inspecting the damage.

When Mr. McMillan approached the defendant he determined it was obvious from the smell on the defendant's breath that he had been drinking. He also noted the defendant to be staggering and had difficulty speaking.

Mr. McMillan asked the defendant why he left the scene to which he replied he had to go to the bathroom and that is why he left. At that point the defendant entered the Irving Big Stop heading for the washrooms. Mr. McMillan remained with him. The defendant then changed his mind and exited the Irving.

Mr. McMillan hollered to a crowd of people at the Irving that the defendant was intoxicated and had just struck his vehicle, and asked to get help because he was going to stay with the defendant. An employee of the Irving and Mr. McMillan pursued the defendant until he cross Highway 102, then some RCMP members took over.

Mrs. McMillan alerted some Enfield RCMP members who were in the dining room of the Big Stop having something to eat. They immediately exited the Irving and observed the defendant crossing north and south bound lanes of Highway #102. After a brief pursuit Cst. Benoit located the defendant banging on the door of a residence on Hall Road. After the defendant was arrested by Cst. Benoit he was turned over to Cst. Furlotte, ofthe RCMP. Cst. Furlotte searched the defendant and located a clipping from the Chronicle-Herald of the accused's last sentence March 1, 2006 for 4 prior impaired driving related offences and 3 driving while disqualified for which he received 3 ½ years

federal sentence.

Cst. Furlotte noted body damage to both the defendant's and victims' vehicles. He noted signs of impairment from the defendant, i.e. strong odor of liquor on his breath, staggering, very blood shot eyes, and slurred speech. He was chartered and cautioned and returned to the Lower Sackville office for purpose of the breath tests

At 9:37 p.m. Cst. McNulty issued the breath demand to the defendant but the defendant refused to provide samples. He was subsequently transported to Halifax Police Headquarters booking. While being transported to booking the defendant demanded that he be transported to the Central NS Correction Facility and raised his voice when told he was going to booking in Halifax. He attempted to kick out the side window of the police cruiser and Cst. McNulty, the transporting officer, asked the defendant to remain calm. Cst. McNulty subsequently return to Lower Sackville where he was assisted by Cst. Smith in putting hobble restraints on the defendant and place him face down on the back seat of the police cruiser for transport. Mr. Naugle cursed and swore and insulted both officers during the transport. He told both the officers that all RCMP officers deserved to die. He showed no remorse for his actions.

Aggravating Circumstances of the Offences

[68] There are several aggravating features or factors surrounding the circumstances of these offences; including the following:

1. It is aggravating that these offences occurred on a busy 100 series highway, at or near a well populated area at a time of the day when it is well traveled by motorist;

2. It is an aggravating factor that the accused was operating a vehicle shortly after being released from prison for having committed related offences ;

3. It is aggravating that the accused hit a parked vehicle which was occupied by two people, whom sustained emotional trauma as a result, as described in their Victim Impact Statements;

4. It is aggravating that the accused was involved in an accident. He hit a parked vehicle and did not remain at the scene;

5. The accused's behavior following his arrest is an aggravating factor as it evidence of his contemptuous attitude towards authority.

Mitigating Circumstances of the Offences

[69] There are no mitigating factors in respect to the circumstances of the offences. The fact that the occupants of the vehicle were not physically injured is not a mitigating factor, but rather it's a wonder that they were not physically injured.

[70] It is a mitigating factor that the accused plead guilty and accepted responsibility. The witnesses, including the victims, did not have to testified.

[71] However, in my view, while a guilty plea on the day of trial, when witnesses are present, and the court has scheduled the day for trial, has some mitigating effect, it does not have the same degree of mitigating effect as an early guilty plea made at the earliest possible opportunity. An early guilty plea, not only saves precious court time, but relieves the anxious anticipation often endured by witnesses , especially victims, while waiting for trial.

Circumstances surrounding Mr. Naugle

[72] Mr. Naugle is 53 years of age and has the support of his wife and other family members. Mr. Naugle has had a very difficult and challenging childhood upbringing and life which has been described in the Defence written submission at p. 1 as follows:

> Mr. Naugle has had a very troubled past which has undoubtedly contributed to his consistent abuse of alcohol and his situation in life. As a young man Mr. Naugle spent time in the Shelburne reformatory. He was abused there and by parole officers and later received a settlement for the damages he had suffered at their hands. These were factors giving rise to Mr. Naugle's alcoholism. He began to drink at the age of 11, which was the same time he first went to Shelburne in 1969.
>
> Counseling was made available to Mr. Naugle on different occasions to cope with the issues arising from his abuse, and he has taken advantage of these programs. It is a matter he is still dealing with, and will be dealing with for the rest of his life.
>
> Having been in custody since the time of these offences, it has not been possible for Mr. Naugle to undergo any substantial treatment or addictions counseling. There is a lack of treatment programs available at the correctional facility. Due to his lengthy and related record, judicial interim release was not sought, Mr. Naugle decided to remain in custody and have his matter dealt with. During his previous period of Federal incarceration, he did take part in a 7 week addictions program offered at the institution.
>
> With respect to future treatment, Mr. Naugle acknowledges and admits his difficulties with alcohol and is interested and motivated to seek assistance in the future. At this point, he naturally finds it difficult to see and to plan beyond this sentencing hearing.
> Mr. Naugle's has health problems which and suffered a heart attack in February of 2009.

[73] It would appear that Mr. Naugle has underlying health issues that require treatment, including a severe alcohol addiction. He is a chronic alcoholic.

[74] As stated, Mr. Naugle has an atrocious criminal history of related criminal convictions for which he has received various forms of punishment.

Mr. Naugle's Criminal Record

[75] Mr. Naugle's criminal record, as submitted at pp. 4-8 of the Crown's written submission, consist of the following:

	Date	**Section**	**Disposition**
1.	1974-12-04 Dartmouth	Arson S. 389(1)(a)	2 years
	1975-09-03	PAROLED	
2.	1977-07-11 Dartmouth	BE & Commit S. 306(1)(b)	3 months
3.	1978-11-07 Dartmouth	Mischief S. 387(4)(b)	30 days
4.	1978-11-07 Dartmouth	Over 80 mgs%	Fine $150.00
5.	1978-11-08 Dartmouth	Theft Under $200 S.294(b)	5 months consecutive With sentence serving
6.	1978-11-08 Dartmouth	Assault S.245(1)	1 month consecutive
7.	1979-01-18 Halifax	ACBH S.245(2)(b)	$400, 1 year Probation
8.	1980-05-16	BE & Theft	3 years

	Dartmouth	S.306(1)	
9.	1980-05-16 Dartmouth	Cause a Disturbance S. 171(1)(a)	30 days concurrent
10.	1980-05-16 Dartmouth	Refusal breath sample S.235(2)	30 days concurrent
11.	1980-09-11 Springhill	Fail to Attend	6 months
12.	1980-09-11 Springhill	Theft Under $200 S.294(b)	6 months concurrent
	1981-06-01	PAROLED	
13.	1981-09-28	Over 80 mgs% S. 236	$600
14.	1982-09-21 Dartmouth	BE & Theft S.306(1)(b)	20 months
15.	1982-09-21 Dartmouth	Poss. Stln pty > $200 S. 313(a)	12 months Consecutive
16.	1982-09-21 Dartmouth	Assault S. 245(1)	30 days consecutive
17.	1984-01-10 Dartmouth	Refusal Breath Sample S.235(1)	2 months concurrent With sentence serving
18.	1984-01-10 Dartmouth	Mischief S.387(1)	1 month consecutive
	1985-03-15	PAROLED	
19.	1985-10-23 Lwr. Sackville	Theft Under $200.00 S. 294(b)	$200.00
20.	1985-11-04 Halifax	BE w/ Intent to Commit S. 306(1)	3 years
	1985-11-22	PAROLED VIOLATION - RECOMMITTED	

21.	1988-09-23	Over 80 mgs % S. 237(b)	90 days, 1 year Probation DPO for 3 years
22.	1989-01-20	Refusal breath sample S. 254(5)	2 months Consecutive DPO 3 years
23.	1989-01-20	Drive while disqual. S. 259(4)	2 months concurrent DPO 3 years
24.	1989-01-30	Over 80 mgs % S 253(b)	60 days consecutive With sentencing Serving. DPO 3 years
25.	1989-01-30	Drive while Disqual S.259(1)	30 days concurrent
26.	1989-01-30	Resist or obstruct Peace officer S. 129	30 days concurrent
27.	1990-11-15 Shubenacadie	Over 80 mgs% S.253(b)	1 month DPO 3 years
28.	1990-11-15 Shubenacadie	Refusal breath sample S. 254(5)	1 month consecutive DPO 3 years
29.	1990-11-15 Shubenacadie	Driving while disqual. S. 259(4)	1 month consecutive
30.	1990-11-15 Shubenacadie	Impaired Driving S. 253(a)	1 month consecutive DPO 3 years
31.	1990-11-15 Shubenacadie	Drive while disqual. S. 259(4)	1 month consecutive DPO 3 years
32.	1990-11-15 Shubenacadie	Theft >$1000 S. 334(a)	7 months consecutive

33.	1990-11-15 Shubenacadie	Drive while disqual. S. 259(4)	1 month consecutive
34.	1990-11-15 Shubenacadie	Theft >$1000 S. 334(a)	8 months consecutive
35.	1990-11-15 Shubenacadie	Drive while diqual. S. 259(4)	1 month consecutive
36.	1990-11-15 Shubenacadie	Refusal Breath Sample S. 254(5)	90 days concurrent
37.	1990-11-15 Shubenacadie	Drive while disqual. S. 259(4)	1 month consecutive
38.	1990-11-15 Shubenacadie	FTC - Recognizance S. 145(3)(a)	1 month consecutive
39.	1991-06-10 Dartmouth	Refusal Breath Sample S. 254(5)	3 months Consecutive with Sentence serving
40.	1991-06-10 Dartmouth	Drive while disqual. S. 259(4)	3 months Consecutive
41.	1991-06-10 Dartmouth	Poss. Stln pty S. 355	1 month concurrent
42.	1992-12-10 Georgetown, PEI	Cause a Disturbance S. 175(1)(a)	$100
43.	1993-10-25 Dartmouth	Impaired Driving S. 253(a)	1 year, 2 years Probation, DPO 3 Years
44.	1993-10-25 Dartmouth	Drive while disqual. S. 259(4)	3 months Consecutive, 2 years Probation
45.	1993-10-25 Dartmouth	Poss. Stln pty S. 354(1)	12 months Consecutive 2 years Probation

46.	1994-07-13 Dartmouth	Utt. Threats S. 264.1(1)(a)	$350
47.	1994-11-09	AWOL S. 145(1)(b)	2 months consecutive
48.	1995-09-12 Moncton, NB	Impaired driving S. 253(a)	6 months
49.	1995-09-12 Moncton, NB	Drive while disqual. S. 259(4)	18 months & 1 day Consecutive, 2 years Probation
50.	1995-09-12 Moncton, NB	Poss. Stln pty S. 354(1)	6 months consecutive
51.	1995-09-12 Moncton, NB	Breach Probation S. 740	4 months concurrent
52.	1997-05-05 Dartmouth	Impaired driving S. 253(a)	2 years
53.	1997-05-05 Dartmouth	Dang. Operation MV S. 249(1)(a)	2 years concurrent
54.	1997-05-05 Dartmouth	Poss. Stln pty >$5000 S. 355(a)	1 year consecutive
55.	1999-02-24 Truro	Refusal Breath Sample S. 254(5)	90 days consecutive With sentence serving
56.	2000-03-06 Bedford	Refusal breath sample S. 254(5)	2 years DPO 3 years
57.	2000-03-06 Bedford	Refusal Breath sample S. 259	2 years concurrent
58.	2000-03-06 Bedford	Poss. Stln. Pty >$5000 S. 355(a)	2 years concurrent
59.	2001-01-17	Conspir to Commit theft	6 months consecutive

	Dartmouth	>$5000 S. 465/s 334(a)	With sentence serving
60.	2002-11-18 Truro	Refusal Breath sample S. 254(5)	2 years & 4 months
61.	2002-11-18 Truro	Theft >$5000 S. 334(a)	2 years & 4 months Concurrent
62.	2006-03-01 Shubenacadie	Refusal Breath sample S. 254(5)	5 months Consecutive, DPO 10 Years
63.	2006-03-01 Shubenacadie	Drive while disqual S. 259(4)	5 months Consecutive
64.	2006-03-01 Shubenacadie	Over 80 mgs% S. 253(b)	5 months Consecutive, DPO 10 years
65.	2006-03-01 Shubenacadie	Drive while disqual S. 259(4)	5 months Consecutive
66.	2006-03-01 Dartmouth	Over 80 mgs% S. 253(b)	5 months Consecutive, DPO 10 years
67.	2006-03-01 Dartmouth	Drive while disqual. S. 259(4)	5 months Consecutive
68.	2006-03-01 Dartmouth	Over 80 mgs% S. 253(b)	6 months Consecutive, DPO 10 years

Aggravating Features of Criminal Record

[76] The aggravating features of Mr. Naugle's Criminal Record includes the following:

- His criminal record extends over **32** years, from 1974 to 2006.
- He has **68** previous convictions, including **22** impaired driving related offences, which consist of: **8** offences of over 80 mgs. ; **10** offences of refusal to provide breath sample, and **4** offences of impaired driving.
- He has **14** driving while disqualified offences under s. 259 of the *Criminal Code* and **1** dangerous driving offence.
- In total, Mr. Naugle has **36** related driving offences extended over **18** years.

Given the number and nature of these previous convictions it is rather amazing that Mr. Naugle has not killed himself or others while operating a motor vehicle.

[77] Mr. Naugle's criminal record is also aggravated by the number of convictions for breaching court imposed orders: he has **14** convictions for driving while prohibited or disqualified, extended over a period of **17** years, from 1989 to 2006.

[78] It is also aggravating that except for 2 impaired driving related offences,

Mr. Naugle has received custodial sentences for all of the impaired driving related offences: from 1984 to 2006, Mr. Naugle repeatedly received custodial dispositions for committing impaired driving related offences, which included penitentiary time.

[79] On March 1, 2006, Mr. Naugle received a total sentence of **36** months for having committed **3** offences of over 80 mg's; **1** refusal offence, and **3** driving while disqualified offences. All of these offences were proceeded by way of summary conviction. Thus, the court imposed almost the maximum sentence permitted under the law; which is 6 months. The court imposed **5** months on each of the first **6** offences, to run consecutive to the other offences and **6** months consecutive for the last over 80mgs. offence. The total sentence was **36** months.

[80] It is a very aggravating factor that on March 28, 2009, approximately 27 days after completing his sentence, Mr. Naugle, re-offended by breaching the same offences, for which he served a penitentiary sentence.

[81] It is aggravating that it only took Mr. Naugle 27 days to re-offend, by committing impaired driving, driving while prohibited and leaving the scene of an accident.

[82] It would appear from the foregoing, that Mr. Naugle has a real and uncontrollable compulsion to drive a motor vehicle while impaired by alcohol. Furthermore, his long criminal record demonstrates a consistent and repetitive pattern of non-compliance of court orders; he has repeatedly violated driving prohibition orders imposed by the courts.

[83] Mr. Naugle's chronic pattern of driving while impaired, including the current offences, coupled with his habitual record for non-compliance of prohibition orders continues to expose members of the public to risk. For over 18 years, the accused has risked the lives and safety of members of society by driving a motor vehicle while impaired. While I understand that alcoholism is a terrible disease, which causes people to become impaired, I do not understand the compulsion to drive a motor vehicle, while impaired. I mention this because Mr. Naugle is not being sentenced for suffering from alcoholism, but rather for his criminal transgressions of driving a motor vehicle while impaired by alcohol, defying court orders which prohibited him from operating

a motor vehicle, and leaving the scene of an accident with intent to escape liability. These are crimes, suffering from alcoholism is not a crime. As referenced by Huddart J.A., in delivering the judgement of the British Columbia Court of Appeal, in *R. v. Newhouse*, [2004] B.C.No. 2288, at para.2. Indeed, presumably there are many people in our society who suffer from alcoholism that do not drive a motor vehicle while impaired, because they do not want to risk the consequences that invariably flows from such selfishness.

[84] Notwithstanding the numerous and varied sentences he has received, nothing up to this point has deterred or discouraged him from re-offending. In fact, the only gaps in his long criminal record which show that he was not active in committing criminal offences, are when he was imprisoned, serving a jail sentence.

[85] The meager or scant evidence proffered of Mr. Naugle's attempt at rehabilitation is consistent with his long and un-broken pattern of criminal behavior which suggest that he is not genuine, sincere, or motivated to engage in appropriate rehabilitative measures. It is not unusual for accused's during the sentencing process to express an interest to rehabilitate.

[86] As stated, the so-called sad life principle is premised on the principle of restraint and is often considered in cases where the offender has demonstrated a genuine interest in rehabilitation. In my view, Mr. Naugle has not demonstrated a genuine interest in rehabilitation as evidence by his past actions. Moreover, there is no appreciable gap in Mr. Naugle's criminal record to mitigate the effect of his record. He has not maintained a notable period of good behavior.

[87] The recency of the criminal record, the nature of the previous convictions, and his long and continuous pattern of criminal conduct would suggest there is a substantial likelihood that the criminal misconduct will continue unless he is separated from society.

[88] However, despite Mr. Naugle's age and his recidivism, rehabilitation remains a factor to be given some consideration. One can only hope that should Mr. Naugle make efforts towards rehabilitation, that he will be successful.

The Position of the Crown

[89] The Crown, having taken into consideration the principle of totality, and

has recommended the following disposition :

- With respect to the s.253(a) offence - the maximum sentence of 5 years;
- With respect to the s. 259(4) offence - the maximum sentence of 5 years, consecutive to the 253 offence; and
- With respect to the s.252(1) offence - 1 year concurrent to the ss. 253 and 259 offences.

The global sentence recommended by the Crown is 10 years, less the time spent in pre-sentence custody, at the ratio of 1:1.

The Position of the Defence

[90] The Defence position is that the range of sentence for these type of offences is between 3 to 4 ½ years. Thus, anything higher than this would violate the totality and proportionality principles. Furthermore, the defence submits that as the highest maximum penalty for any of the offences charged is 5 years, any sentence that is significantly above that would offend the principle of totality.

[91] The defence submits that the appropriate global sentence for Mr. Naugle is a term of imprisonment of 4 years, less 21 months credit for pre-

sentence custody. Thus, the defence recommends the following :

- With respect to the s. 253(a) offence - a sentence of 2 years;
- With respect to the s.259(4) offence - a sentence of 1 year, consecutive to the 253 offence; and
- With respect to the s.252(1) offence - 1 year consecutive to the ss. 253 and 259 offences.

[92] The Crown and Defence have both submitted cases that have considered and applied the relevant sentencing principles in the context of impaired driving offences. Theses cases included: *Duckworth* (1993), 113 Sask. R. 178 (C.A.); *Bear,* 120 Sask. R. 294 (C.A.); *Archie,* [1997] B.C.J.No. 2908 (C.A.); *Howes,* [1998] O.J. No. 3749 (C.A.); *Hawkins,* [2000] B.C.J. NO. 352(C.A.); *Decorte* (2001), 15 M.V.R. (4th) 291 (Ont. Sup. Crt. Jus.); *Rania* (2006), 37 M.V.R. (5th) 104 (Ont. Crt. Jus.); *Moreau,* [2007] B.C.W.L.D.4520 (C.A.); *Tschritter,* [2006] B.C.J.No. 910 (C.A.); *Solowan, supra ; L.M.,supra,; Malicia* (2006), 211 C.C.C. (3d) 449 (Ont. C.A.); *Burke* (1988), 5 M.V.R. (2d) 170 (Ont. C.A.); *Bill* (1991), 31 M.V.R. (2d) 235 (B.C.C.A.); and *E.T.P., supra.*

[93] In addition to these cases, I have also reviewed others. While, all of cases reviewed are helpful, they are distinguishable, particularly as they relate

to the circumstances of Mr. Naugle.

[94] It would appear from a review of the cases across Canada that the range of sentences imposed for the offences of impaired driving, driving while disqualified, and failing to remain at the scene of an accident, varies considerably. Each case appears to turn, very much, on its own unique set of circumstances, and thus, no case can be an exact guide for another. Accordingly, what follows is a brief summary of two of the cases that I have considered.

[95] In *R. v. Bear* (1994), 113 Sask. R. 178 (C.A.), a 1994 decision of the Saskatchewan Court of Appeal, the 49 year old respondent was convicted of refusing to provide a breath sample and driving while disqualified. The Crown successfully appealed a six month sentence for refusing to provide a breath sample and driving while disqualified. The accused was also prohibited from driving for 18 months. The respondent had a record dating from 1965. He had consistently continued to drive while his driving privileges were suspended. The Crown argued protection of the public, and particular and general deterrence had not been achieved. In allowing the appeal, the Court sentenced the accused sentenced to three-and-a-half years for failing to

provide a breath sample and two years concurrent for driving while disqualified, together with a driving prohibition for six years.

[96] The Saskatchewan Court of Appeal addressed the issue of the appropriate sentence for persons previously convicted of driving offences who repeatedly and continuously re-offend by driving while prohibited or impaired.

[97] I realize that this case was decided before the enactment of the s. 718 of the *Criminal Code*, but I found this the case to be helpful as it applies the relevant principles set out in s.718, and the common law. The following observations, at paras. 8-10, of the Court are instructive:

> While in most cases, rehabilitation and reformation would be a strong factor in determining an appropriate sentence, in cases involving repeat offenders with multiple driving offence convictions, who have been given every opportunity to reform, this ceases to be a consideration. The offender has clearly shown himself incapable of rehabilitation, with the result that protection of the public can no longer be achieved, or even hoped for, through his reform.
>
> Similarly, when dealing with an offender who is not only a repeat offender, but a multiple re-offender of driving offences, specific deterrence is not an important principle to consider. The offender has not been specifically deterred, previous penalties have had little or no impact on his criminal activity and he has continued to offend.
>
> The length of sentences for driving offences has been steadily increasing for the so-called lesser offence of impaired driving, as well as for driving

> offences involving bodily harm or death. This Court, and other appellate courts, seek by imposing longer sentences, to inhibit others from committing this criminal activity. It is generally conceded that legal sanctions have an overall deterrent effect, above all when it is generally known by the public that certain criminal activity, such as impaired driving or driving while disqualified, will be fairly certain to produce a known result, that is, a long period of incarceration. What is not known is whether longer sentences for a particular offence, taken by themselves have the effect of reducing the crime rate, or deterring a particular class of offenders.

[98] Later in the judgement, at para. 24, the Court expressed the view that:

> What then, is the result of all this? In my opinion, the sentence imposed on repeat offenders charged with impaired driving, or impaired driving causing bodily harm or death, must bear some relationship to sentences imposed for the more serious offences committed in similar circumstances because of the accused's repeated recidivism. It ought to be in the same range. Depending on the circumstances, including the number of previous convictions and the consequences, it can however be very close to the top of the range or in appropriate circumstances even exceed it (See: R. v. Eashappie issued concurrently). By imposing a lengthy sentence for driving offences involving multi-re-offending, and in particular driving offences involving impaired driving and impaired driving where bodily injury has occurred, the courts will signal a predictability and consistency and achieve the primary objective of the protection of the public.

[99] I endorse this view, keeping in mind the significance of the principles of proportionality and totality.

[100] I have also considered the case of *R. v. Newhouse*, *supra,* a 2004 decision of the British Columbia Court of Appeal. In that case, Mr. Newhouse appealed his sentence, from a sentence of a lifetime driving prohibition and six years of imprisonment.

[101] Mr. Newhouse had pleaded guilty to two counts of driving with a blood alcohol reading over .08, driving a motor vehicle while prohibited and driving a motor vehicle while disqualified. Mr. Newhouse was 61 years of age and had a lengthy criminal record with 51 convictions over a period of 40 years, including 17 previous convictions for impaired driving and three previous convictions for driving while prohibited or disqualified. The sentencing judge inferred that Mr. Newhouse was an alcoholic and indicated that he needed to protect the public from his drunk driving. Mr. Newhouse had refused to follow court orders and due to the aggravating circumstances needed to spend a considerable amount of time behind bars.

[102] The Court dismissed his appeal, notwithstanding that Mr. Newhouse had a 9 year gap in his criminal record, as the totality of the sentence was fit and within the guidelines, and the judge properly considered the primary need to protect the public in ordering the lifetime driving prohibition. The Court of Appeal noted at para. 4:

> The appellant asks that the period of imprisonment be reduced to three years because the totality of six years imprisonment was not necessary to accomplish the sentencing objectives, particularly when the appellant was free of any conviction between 1986 and 1995 and his last previous

conviction was in 1998.

[103] The Court also noted, at para. 8 that:

> The appellant, 61 years of age when he was sentenced, had a lengthy criminal record with convictions beginning in 1960 and continuing for the next 40 years. Included in those were 17 previous convictions for either impaired driving or driving with a blood alcohol level of over .08 between 1970 and 1998, as well as three previous convictions for driving while prohibited or disqualified. The balance of his record were theft or theft related convictions, public mischief, possession of a narcotic, and nine convictions for breaching recognizances or failing to attend court. In all, he had 51 previous convictions.

[104] Lastly, the court, at para. 10, expressed the following view:

> No error in principle was suggested that could give rise to a reconsideration of the appropriate sentence for the appellant. The individual sentence for each of the offences was within the appropriate range for like offences for offenders, even offenders with less serious records. Moreover, the totality of the sentence was fit, including as it did a lifetime prohibition on driving. The trial judge was right in this case to consider the primary need to protect the public. The protection of the public from this appellant's driving demanded the sentence the trial judge gave.

Credit for Pre -Sentence Custody

[105] The Crown has also asked the court not to give Mr. Naugle the customary credit regularly given to offenders by the courts in this jurisdiction. In this court, on a daily basis, almost always with consent of both the Crown and Defence, offenders who have spent time on remand awaiting trial or sentencing, are granted credit for that time in custody at a calculation often referred to as “double time”. Indeed, a 2:1 ratio (1 day of pre-sentence custody = 2 days for global sentence calculation) has emerged as a usual

standard.

[106] In *R. v. Wust,* [2001] 1 S.C.R. 455, at para. 45, Arbour, J. , in delivering the judgement of the Supreme Court of Canada, commented on the rationale for giving two for one credit for time spent in pre-sentencing custody. She observed:

> In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the Corrections and Conditional Release Act apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

[107] The Supreme Court of Canada recognized that while pre-trial detention is not intended as punishment when it is imposed it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3) of the *Criminal Code*.

[108] In *R. v. Fice*, [2005] 1 S.C.R.742, at para. 21, the Supreme Court of Canada, applied the reasoning in *Wust*, *supra*, and held that:

> ... the time credited to an offender for time served before sentence ought to be considered part of his or her total punishment rather than a mitigating factor that can affect the range of sentence

[109] Thus, the imposition of a just and fit sentence, responsive to the circumstances of the individual offender and the circumstances of the commission of the offence, involves consideration of both the pre-sentence custody and any period of imprisonment which may be ordered. This is often referred to as the “global sentence”.

[110] In the present case, the Crown is asking the Court to depart from the usual 2:1 crediting standard and thus bears the burdens of persuasion. This proposition finds support in the case of *R. v. Roulette*, [2005] M.J. No. 459 (C.A.), at para. 25, a decision of the Manitoba Court of Appeal which stated:

> It would seem almost invariable that it will be the Crown rather than the accused seeking a departure from the two-to-one norm. It should therefore be the Crown's responsibility to establish facts which would support a lesser credit than two-to-one, either by agreement or by tendering evidence. It would be open to defence counsel to tender evidence in response. (Obviously, if defence counsel seeks a larger credit than two-for-one, the onus will fall on the defence to establish that case.)

[111] In my view a court should not deny pre-sentence custody without good reason, and if the judge does depart from the well-established norm, he or she must clearly articulate the reasons for doing so, otherwise it would be an error

in principle.

[112] In the present case, the Crown, at p.1, in its written submission, has argued that:

> He has never requested a Bail Hearing or put forward a release plan that included steps to address his alcohol substance abuse. Just minutes to the start of his trial on October 16,2009, he entered change of pleas. No prior notice was given to the Crown. On November 16,2009,the date of his scheduled sentencing Mr. Naugle sought an adjournment, without any notice to the Crown. Considering these circumstances, the Crown submits Mr. Naugle should not be given the benefit of the usual practice to give double -credit for the time spent on remand.

[113] The defence has taken strong objection to the Crown's position on this issue, and has in essence argued that it would be grossly unfair and lead to a disparity between Mr. Naugle and all of the other offenders sentenced before this Court to depart from the norm for the reasons articulated by the Crown is this specific case.

[114] Having carefully considered this issue, I have not been persuaded that this is an appropriate case to depart from the usual practice of this court to apply the 2:1 ratio. While I acknowledge Mr. Naugle's atrocious criminal record, including his convictions for non-compliance of court orders is a factor worthy of consideration, I am not satisfied that in this specific case, Mr.

Naugle deliberately delayed the process or somehow attempted to abuse the legal process.

[115] Often in this court, offenders consent to remand, and plead guilty on the day of trial, in these cases, the Crown most usually consents to the application of the 2:1 ratio in these cases.

[116] In conclusion, the reasons articulated by the Crown do not justify departing from the well accepted practice of our courts.

Analysis

[117] As previously mentioned, Mr.Naugle is charged with having committed three separate and distinct offences, which arose from the same transaction, but constitute invasions of three different legally protected interests.

[118] Accordingly, the court must consider not only the appropriate sentence for each offence, but whether in light of the principles of totality and proportionality, the global sentence is a fit and just disposition for these offences and offender. I am mindful, that the global sentence, the combined sentence, must not be unduly long or harsh so as to impose on Mr. Naugle a

crushing sentence not in keeping with his record and prospects. Although, there is little evidence of positive rehabilitative prospects for Mr. Naugle, a total sentence should not be so long as to crush optimism about eventual re-integration into society.

[119] Mr. Naugle ‘s extremely long criminal record, 68 previous convictions, which dates back to 1974, is a continuous record without a significant gap to date. Included among the other types of offences are 22 related impaired driving offences and 14 driving while disqualified offences which clearly demonstrates that mere disqualification constitutes no impediment to him and imprisonment is necessary to protect society. Mr. Naugle has shown complete disrespect for orders of the Court which prohibits him from driving. Obviously, Mr. Naugle either does not recognize that continuing to operate a motor vehicle while impaired or disqualified is inappropriate behavior which is unacceptable to society or he simply does not care, as expressed in *R. v. Bird,* [1990] S.J. No. 690 (Sask. C.A.) at para. 3.

[120] Although previous terms of imprisonment have been imposed, Mr. Naugle continues to both drink and drive while disqualified. It is clear that all of the previous dispositions, including the previous custodial dispositions,

have not had any impact on him.

[121] In light of the circumstances surrounding the current offences, and Mr. Naugle, the paramount consideration must be the protection of the public.

[122] As previously stated, in view of Mr. Naugle's criminal record, particularly for impaired driving offences there can be little doubt that he is a menace to society when driving a motor vehicle. In fact, it might be fair to say that if he does not break this long entrenched pattern of criminal misconduct, he will likely either seriously injure or kill himself and/or others. As aptly stated by Vancise J.A., in delivering the judgement of the Saskatchewan Court of Appeal, in *R. v. Bear*, [1994] S.J. No. 272, at para. 11, "Injury or death as a result of impaired driving is the worst fear come true".

[123] Mr. Naugle's criminal record for impaired driving related offences is the worst I have ever seen. If he is not the worst offender, he is close to being the worst offender. From a review of the cases across the country, which was not an exhaustive review, it would appear that Mr. Naugle's record for impaired driving related offences, coupled with the number of convictions for driving while disqualified, places him in the group of the worst offenders.

[124] Even after a review of the cases, in an effort to find similar cases, with similar offenders, charged with similar offences, Mr. Naugle's case was clearly distinguishable. Perhaps this exercise is, as Lamer J., stated " the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction".

Disposition regarding the Impaired Driving Offence (s. 253 (a))

[125] Having carefully and thoroughly considered all of the foregoing, and the specific circumstances of this offence, and Mr. Naugle, a just and appropriate sentence for the offence of impaired driving, s. 253(a), is five years, the maximum, permitted under the law.

[126] I have no difficulty in reaching the conclusion that the maximum sentence of 5 years or 60 months is warranted in light of all the surrounding circumstances of the offence and offender.

[127] This offence is a serious offence committed by a habitual offender, who has not been deterred or discouraged from previous sentences. As stated earlier, Mr. Naugle has recently completed a sentence of 36 months for related offences when he committed this offence.

Disposition regarding the Driving while Prohibited Offence (s. 259(4))

[128] With respect to the offence of driving while disqualified, contrary to s.259(4) of the *Criminal Code,* a just and appropriate sentence is 3 years, or 36 months, consecutive to the 5 years for the impaired driving. This sentence is consecutive to the impaired driving, notwithstanding that it arose from the same incident, because the offence of driving while disqualified protects different societal interest than the impaired driving provisions. Moreover, these offences have different essential elements. Mr.Naugle was prohibited from driving a motor vehicle by a court order, so he breached the trust reposed in him by the court and the public when he committed that offence. His state of sobriety at the time of driving is irrelevant, as he was simply prohibited from operating a motor vehicle under any circumstance. This offence requires an intent to disobey a court order. This is Mr. Naugle's 15th conviction for driving while prohibited or disqualified. As stated, he clearly has demonstrated that he has a total disregard for court orders, and respect for the legal process. In reaching the conclusion that 3 years, or 36 months, was a just and appropriate sentence for this offence and offender, I have considered and applied the principles of totality and proportionality.

Disposition regarding the Failing to Remain at the Scene Offence (s.

252(1))

[129] The offence of failing to remain at the scene of an accident is a serious offence, particularly when there are people in the hit vehicle, as was in this case. While I realize that there has been no evidence proffered in this sentencing hearing that Mr. Naugle was aware that the car he struck was occupied, it is still an aggravating factor that the accused, Mr. Naugle, did not stop to check to see whether there was anyone in the car he hit on the highway. He simply drove way without having any concern whatsoever. His attitude and demeanor following the accident is consistent with his pattern of being selfish; demonstrating a complete disregard for the well being of others.

[130] This is Mr. Nagle's first conviction for this offence, although I weighed that against the other 68 previous convictions contained in his criminal record.

[131] Having applied the principles of proportionality and totality in determining a just and appropriate sentence for this offence and offender, I have reached the conclusion that 6 months consecutive to the other offences; namely, the ss. 253(a) and 259(4) of the *Criminal Code.*

[132] This offence is consecutive to the other two offences because it protects

different societal interests. It also involves different essential elements than the other offences. The offence of failing to remain at the scene of an accident imposes a duty on the person operating a motor vehicle which has been in involved in an accident, to remain and discharge the duties imposed upon him in such circumstances. This offence requires an intent to escape criminal and/or civil liability.

[133] Again, consideration and application of the totality principle was underscored in reaching the sentence of 6 months, as it was in reaching the three year sentence for the driving while prohibited offence.

[134] Indeed, it should be stressed that the principles of totality and proportionality were underscored in reaching the global sentence of 8 ½ years, or 102 months.

Global Sentence

[135] It is my view that the global sentence of 8 ½ years is a just and appropriate sentence for these offences and for this offender, Mr. Naugle, for all of the reasons discussed.

[136] Hopefully, this sentence will send a very strong message to not only Mr. Naugle, but to all like minded individuals similarly situated - that repetitive and continuous impaired driving, and violating related offences will not be tolerated, as the risk of injury and or death are just too great.

[137] In my view, the public should not have to wait until someone is seriously injured or killed to justify imposing a significant period of incarceration in circumstances such as in the present case.

[138] I am mindful that this global sentence may seem more than a moderate step or jump from Mr. Naugle's last sentence, at which time the Crown proceeded summarily. However, I am also cognizant of the theory that sentences should go up only in moderate steps is a theory which rests on the sentencing principles of rehabilitation, and should only be applied in cases where rehabilitation is a significant sentencing factor.

[139] In the present case, rehabilitation was not considered to be a significant factor. However, in reaching the decision to impose a global sentence of 8 ½ years, the principles of proportionality and totality were greatly emphasized in an effort to avoid the imposition of a sentence that would be so long a as to

crush optimism about eventual re-integration.

[140] At 53 years of age, Mr. Naugle will have the opportunity to participate in any treatment program or other programs offered in the Federal institution and then in mainstream society following his release should he become genuinely interested and motivated in his own rehabilitation.

Driving Prohibition Order

[141] The Crown has asked that the court to impose a driving prohibition under s. 259(1)(c) of the *Criminal Code* for life. The defence has asked for a 10 year driving prohibition.

[142] In view of all of the foregoing comments regarding the surrounding circumstances of the current offences and the circumstances surrounding Mr. Naugle, it is my view that a driving prohibition for life is warranted. Therefore, pursuant to s. 259(1)(c) of the *Criminal Code*, Mr. Naugle is prohibited from operating a motor vehicle on any street, road, highway, or other public place in Canada for life, effective immediately.

DNA Order

[143] The Crown has also ask this court to exercise its discretion and order a DNA order in respect to these offences, which are presumptive offence under the DNA legislation. Discretionary offences, as defined under the DNA legislation, require an application by the prosecution satisfying the court that the order is appropriate. Hybrid offences become secondary offence only if the prosecution proceeds by indictment in which case they are treated the same as discretionary offences. Accordingly, in the present case, the impaired driving offence is hybrid, and the Crown has proceeded by indictment. The failing to remain at the scene of an accident is discretionary, and driving while prohibited or disqualified offence is a hybrid, which was proceed by indictment. Therefore, all three offences are discretionary.

[144] The inquiry into whether or not the Court should exercise its discretion in ordering a DNA Order is - highly contextual and necessarily individualized.

[145] Some of the relevant factors that the Court is instructed to consider is set out in s. 487.05(1)(e) of the *Criminal Code* the Court, which includes:

- the criminal record of the offender;
- the nature of the offence and the circumstances surrounding its commission;
- the impact of an order on the person's privacy and security of the person.

[146] The Court is also required to give reasons for its decision.

[147] Accordingly, what follows is the Court's reasons for granting the Crown's application for a DNA Oder is this specific case.

[148] As Justice Fish, in delivering the Supreme Court of Canada's judgement in *R.v. R.C.*, [2005] 3 S.C.R. 90, at para. 20, points out, Parliament has drawn a sharp distinction between "primary" and " secondary" designated offences, which are defined in s. 487.04 of the *Criminal Code*.

[149] Where the offender is convicted of a secondary designated offence, as in this specific case, the burden is on the Crown to show that an order would be in the best interest of the administration of justice.

[150] Where an offender is convicted of a primary designated offence, however, ss. 487.051(1)(a) and (2), read together, provide that a DNA Order must be made unless the Judge is satisfied that the offender has established that s. 487.051(2) should apply instead.

[151] It should be noted that the Courts have recognized that a judge has a

discretion to make an order authorizing the taking of a sample of DNA with respect to both primary and secondary offences although that discretion would appear to be more limited with respect to primary designated offences.

[152] It is trite to say that by its terms the DNA legislation implies that the public interest in a DNA Order lies in the protection of society through the early detection, arrest and conviction of offenders.

[153] Section 3 of the *DNA Act,* for example, states that the purpose of the legislation is to assist in the identification of persons alleged to have committed designated offences.

[154] Other objectives include deterring potential repeat offenders, deterring serial offenders, streamlining investigations, solving “cold cases”, and protecting the innocent by eliminating suspects and exonerating the wrongly convicted.

[155] While these objectives are laudable, they may in come into conflict with privacy and security interest which warrant judicial intervention; presumably, that is why in respect to the mandatory orders there exists a rebuttable

presumption.

[156] As noted by Justice Fish, in *R.C.*, *supra,* at para. 39,

> A DNA Oder, while it is not a sentence, is undoubtedly a serious consequence of conviction. This is evident from the comprehensive procedural protections that are woven into the scheme of the DNA data bank and retention of a DNA sample is not a trivial matter, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy.

[157] Now, turning to the present case before this Court, I have considered the relevant factors that the Court is instructed to consider as set out in s. 487.05(1)(e) of the *Criminal Code* he Court, which includes:

- the criminal record of the offender;
- the nature of the offence and the circumstances surrounding its commission; and
- the impact of an order on the person's privacy and security of the person.

[158] In *R. v. Jordan* (2002), 200 N.S. R. (2d) 371, Justice Cromwell, writing on behalf of the Nova Scotia Court of Appeal, at para. 63 asked the following question: How is the criminal record of an offender potentially relevant to the balance struck by Parliament in the legislation?

[159] In addressing this question, Justice Cromwell expressed the view that there are at least three ways for which the record may be relevant.

[160] First, the offender's record may be relevant as one indicator of the likelihood that the offender will re-offend.

[161] He stated, at para. 64, " An important purpose of the DNA bank is to assist in the identification of persons who have committed crimes. The more likely it is that an individual will commit other crimes, the more likely it is that the person's sample will help identify that person as the perpetrator of another crime."

[162] However, Justice Cromwell, further noted, at para. 65, that in considering the criminal record for this purpose, two points must be kept in mind.

> First, as Weiler, J.A., pointed out in the *Briggs* case, a decision of the Ontario Court of Appeal, the identification of offenders is not the only purpose of the DNA data bank. It does not necessarily follow, therefore, that an offender who is considered unlikely to re-offend falls outside the intended purpose of the provision. Second, it is implicit in the legislative scheme relating to convicted persons that individualized reasonable grounds to believe the person will re-offend are not required and, therefore, was not part of the balance which Parliament has attempted to strike.
>
> [citation omitted]

[163] And further, at para. 66, Justice Cromwell, stated:

> The Offender's criminal record may also be relevant in the sense that a serious record for violent or sexual offences may indicate a degree of dangerousness to society which makes the interference with the offender's privacy and security of the person more readily justifiable than it would be, for example, in the case of an offender with a record for on non-violent offences.

[164] In deciding whether make the order in this specific case , I am mindful of the two key aspects of this legislative scheme.

[165] The first, is that individualized grounds for belief that the offender will re-offend are not required and their absence, in general, will not, therefore, weigh heavily against making an order.

[166] On the other hand, if the likelihood of recidivism is low, this will be entitled to due weight in the overall assessment of whether or not it is in the best interest of the administration of justice. I have considered Mr. Naugle's criminal record, the nature of the offences and the circumstances surrounding there commission, as discussed earlier and the impact of an order on the person's privacy and security of the person.

[167] In light of the totality of the circumstances of these offences and the offender, and after weighing and balancing the relevant factors as set out in s. 487.051(3) this court is satisfied that it is in the best interests of the administration of justice to impose the DNA Order.

Forfeiture Order

[168] With respect to the forfeiture order for Mr. Naugle's car, I have considered the materials submitted by Crown Counsel which included: the notice of application, affidavit of service, the affidavit of Detective/Constable MacVicar, and case law. I have also considered the comments of the Defence, who have consented to the application.

[169] I have concluded that this is an appropriate case to order forfeiture of Mr. Naugle's motor vehicle, a 1994 Chevrolet Cavalier, pursuant to s. 490.1(1) of the *Criminal Code,* after being satisfied that the car is offence related property as defined by s. 2 of the *Criminal Code* and that the offences were committed in relation to that property.

Restitution Orders

[170] I am also satisfied that it is appropriate having regard to all of the circumstances of this case, to order Restitution pursuant to s. 738 of the *Criminal Code*. Accordingly, it is ordered that Mr. Naugle make restitution to:

- David and Julia McMillan of 1151 West Tatamagouche Roads, West Tatamagouche, N.S. in the amount of $ 250.00, and to
- The Sovereign General Insurance Company, Suite 1200-1791 Barrington

Street, Halifax, N.S. Attention Ms. Vikki Mytruk in the amount of $3,598.59

[171] Mr. Naugle please stand sir.

[172] This Court sentences you, after having giving you credit for Pre-Sentencing Custody of 21 months to the following:

- With respect to the s. 253 offence of impaired driving: 60 months or 5 years;

- With respect to the s. 259 offence of driving while prohibited or disqualified offence: 15 months or 1 year, plus 3 months, consecutive to the offence of impaired driving, s. 253.

[173] This sentence, 15 months, was reduced to credit you for 21 months of pre-sentence custody, applying the 2:1 ratio. You have been in custody since March 28, 2009, so I have credited you with 21 months.

- With respect to the s. 252 offence of failing to remain at the scene of an accident: 6 months, consecutive, to the other offences; namely, ss. 253, and 259.

Victim Surcharge

[174] In light of your personal circumstances, I am prepared to waive the Victim

Surcharge pursuant to s. 737(5) of the *Criminal Code.*

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Frank P. Hoskins, J.P.C.