

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R.v. Beals*, 2019 NSPC 68

Date: 20191031

Docket: 8200792

Registry: Dartmouth

Between:

Her Majesty The Queen

v.

Galen Beals

Judge:	The Honourable Judge Theodore Tax,
Heard:	October 8, 2019 in Dartmouth, Nova Scotia
Decision	October 31, 2019
Charge:	255(2.1) of the Criminal Code of Canada
Counsel:	Tiffany Thorne, for the Nova Scotia Public Prosecution J. Patrick Atherton, for the Defence Counsel

By the Court:

[1] Mr. Galen Beals is before the Court for sentencing on the indictable offence of having in excess of 80 mg of alcohol in 100 ml of blood while having care or control of a motor vehicle and causing an accident which resulted in bodily harm to Melanie Isles, contrary to section 255(2.1) of the **Criminal Code**. The offence occurred on or about December 22, 2017 in Dartmouth, Nova Scotia.

[2] Mr. Beals elected to proceed in the Provincial Court and on September 7, 2018 and entered a guilty plea to the offence before the Court.

[3] The issue before the court is to determine a just and appropriate sentence in all the circumstances of this offence and of the offender, Mr. Galen Beals.

Background Facts:

[4] The background facts to the incident in question were read into the record on September 7, 2018. There was a 2-vehicle head-on collision in front of 617 Windmill Rd. in Dartmouth at approximately 4:43 PM on Friday, December 22, 2017. Mr. Beals was operating one vehicle and the other was being operated by Ms. Melanie Isles. Ms. Isles had her two infant children in her vehicle.

[5] Ms. Isles had pulled out of a parking lot located at 600 Windmill Rd. and proceeded into the centre lane, which is often referred to as the “suicide lane” as it is a lane between the 2 directions of traffic on Windmill Road to allow traffic proceeding in either direction to turn left from that lane. Ms. Isles was proceeding southbound in that lane, at a slow rate of speed, to merge into traffic proceeding towards the MacKay Bridge. At that point, Mr. Beals, who was proceeding northbound in his vehicle, entered the centre lane and collided head on with the car being driven by Ms. Isles.

[6] Ms. Isles suffered a concussion and was very sore as a result of the impact. In addition, her tongue was split in half. She required 20 stitches to put her tongue back together. Fortunately, her children did not suffer any physical injuries.

[7] When the police arrived on scene, they detected an odour of alcohol coming from Mr. Beals’ breath. They also noticed that his eyes were watery and glossy. When asked if he had consumed any alcohol, Mr. Beals said that he had consumed

one beer. Following that information, Const. Ayotte read a roadside demand at 5:06 PM and Mr. Beals agreed to provide a sample. The result of the ASD was a fail. Mr. Beals was arrested at 5:08 PM for impaired operation of motor vehicle and, shortly thereafter, the police officer made a demand that he provide suitable samples of his breath for analysis to determine the concentration, if any, of alcohol in his blood.

[8] At the police station, Mr. Beals provided samples of his breath, the first sample being at 5:42 PM which resulted in a reading of 220 mg of alcohol in 100 ml of blood. The 2nd sample taken at 6:02 PM resulted in a reading of 210 mg of alcohol in 100 ml of blood.

[9] During this sentencing hearing, the Crown Attorney added that there were multiple witnesses who advised the police that just prior to the accident, Mr. Beals was operating his vehicle at a faster rate of speed than the general flow of traffic at that time on Windmill Road as he changed lanes. Defence Counsel did not contest that additional fact being related to the court at the sentencing hearing.

Positions of the Parties:

[10] It is the position of the Crown that Mr. Beals be sentenced to between 4 to 6 months in jail to be followed by 18 to 24 months on probation. The Crown Attorney also recommends a 3-year driving prohibition in recognition of the serious accident, the harm caused to Ms. Isles and potential harm to other people who were on that very busy stretch of road at that time. The Crown Attorney does not request any additional waiting period for an application for an interlock device.

[11] Defence Counsel submits that there are many similarities between this case and the case of **R. v. George**, 2016 NSPC 12, where the court suspended sentence, ordered 24 months on probation, with the first 90 days of that order to be subject to a “house arrest” provision. Defence Counsel also recommends that a fine be imposed in the amount of \$2500 plus the Victim Fine Surcharge as Mr. Beals does have the ability to pay those fine amounts, within a reasonable time. In addition, Defence Counsel recommends that Mr. Beals perform 50 hours of community service and that, during the first 6 months of the probation order, he would be subject to the terms of house arrest.

Victim Impact Statement:

[12] Although Ms. Isles was not present in court during the sentencing hearing held on October 8, 2019, the Crown Attorney drew the Court's attention to certain key parts of her victim impact statement. Ms. Isles said that her tongue was split in half and that it took approximately 20 stitches to put it back together. It was 9 days before she could eat again and then several more days before she could eat without pain in her mouth. She also experienced pain in her back, neck, hips, knees and face which made her day-to-day household chores and taking care of her infant children quite difficult, especially where she was the sole provider for them.

[13] Ms. Isles was off work for 2 weeks and then initially returned to light duties because of a financial need. Ultimately, the insurance company covered her lost wages, but it took time for that result. She also did physiotherapy for a period of time but hit a plateau and did not improve while she was on light duties at work. As a result, she left that employment and returned to school in September 2018. She has now started a new career with less physically demanding requirements. The accident also impacted her ability to do physical exercise which she used to enjoy, and that has continued the emotional impact of the accident.

Circumstances of the Offender:

[14] In this case, the Court had the benefit of 2 reports to provide information with respect to the circumstances of the offender. The court had ordered a Pre-Sentence Report to be prepared by the probation officer when Mr. Beals entered his plea of guilty to the charge before the court. The sentencing hearing was originally scheduled for December 5, 2018; however, it was adjourned on a few occasions by Defence Counsel and on one occasion by the Crown Attorney to seek a Victim Impact Statement.

[15] On June 3, 2019, Defence Counsel waived any additional delays and requested the preparation of a Race and Culture Assessment Report for Mr. Beals. The Court received that report on September 30, 2019.

[16] The Pre-Sentence Report indicated that Mr. Beals is presently 34 years old, graduated from high school and is in a very positive, long-term relationship with his common-law wife. He is the father of 2 daughters, who were aged 14 and 11 when the Pre-Sentence Report was prepared in October 2018. Mr. Beals indicated that he maintains regular contact with his oldest daughter who lives nearby but has little contact with his younger daughter as she resides with her mother in Cape Breton.

[17] Mr. Beals' common-law wife is very supportive, and she mentioned that she was surprised by this incident and that it was out of character for him. Although she is aware that he has a prior criminal record, she believes that Mr. Beals is a person with very good potential, and he is a good father. Mr. Beals' common-law wife pointed out that he has made significant progress since he began working with his present employer and that he had successfully completed the Driving While Impaired program and was rated as a low risk to reoffend.

[18] Mr. Beals has worked with a construction company since 2015, although he was off work for period of time due to a herniated disc as a result of a hit-and-run accident in March 2018. He has recently returned to work at that construction company and advised the probation officer that he also assists his common-law partner's father with lobster fishing during the months of April and May. During the winter months when the construction work is quite slow, he works with his company doing snow removal.

[19] Mr. Beals acknowledged that he is a social drinker and other than the offence before the court, his use of alcohol has not caused any problems in his life.

[20] Mr. Beals volunteers in the community as an assistant coach and trainer with a North Preston boy's youth basketball team.

[21] During his court appearance as well as during his interview with the probation officer, Mr. Beals acknowledged and accepted full responsibility for the offence. In addition, he expressed remorse for his actions, especially knowing the fact that the victim had her two infant children in the vehicle with her at the time of the accident.

[22] The JEIN report of Mr. Beals' Nova Scotia convictions, was attached to the Pre-Sentence Report. Both counsel pointed out that Mr. Beals does not have any prior convictions for impaired operation of a motor vehicle. He has, however, served a 42-month prison sentence for possession of a prohibited weapon contrary to section 95(1) of the **Criminal Code** and been convicted of uttering threats, as well as failing to comply with court ordered conditions and a dated conviction in 2007 for fleeing from the police, while operating a motor vehicle contrary to section 249.1 of the **Criminal Code** for which he received a \$600 fine. The JEIN report confirms that Mr. Beals has no outstanding fines for payment.

[23] The second report received by the Court was an Impact of Race and Culture Assessment Report prepared by Mr. Robert Wright and Ms. Raytia Turney. They

note that Mr. Beals has experienced significant trauma as part of his development, which has had an impact on him. They point out that two young friends, who were also family members of Mr. Beals in the African Nova Scotia community of North Preston, were killed in a car accident in October 2005. The following year, in December 2006, Mr. Beals was with friends in the African Nova Scotia community of East Preston when a person fired shots at them resulting in the death of two young friends, who were also family members. The authors point out that Mr. Beals did not receive any therapeutic intervention or mental health services to deal with either one of those very traumatic events.

[24] The authors also point out that Mr. Beals may be suffering from post traumatic stress disorder and/or post traumatic slave syndrome. The authors note that there are now culturally appropriate mental health services available to members of the African Nova Scotian community.

[25] Mr. Beals was raised by his mother and lived in a home with his grandparents and a younger sister until age 17. He did not have any relationship with his biological father growing up. The authors spoke with Mr. Beals' former basketball coach and mentor who stated that when Mr. Beals was about 10 years old, he was isolated from other children in the community.

[26] The mentor, Mr. Provo, commented that there were no opportunities for black youth in North Preston and that as Mr. Beals grew older, he fell into "the life." Mr. Provo also noted that after Mr. Beals served a prison sentence for attempted murder in Ontario, he returned to the community and began speaking to young black males in order to deter them from making the same choices that he had previously made. Mr. Provo stated that he was "impressed with the candid and honest way in which Mr. Beals spoke to the group."

[27] The authors note that Mr. Beals has a very stable and good relationship with his common-law wife and that he has a very positive working relationship with his employer. They recommend that Mr. Beals would benefit from culturally appropriate mental health services to address any issues from earlier traumas that may have shaped his life experiences. They also recommend culturally appropriate parenting programs to assist him in his relationship with his daughters.

General Sentencing Principles:

[28] The provisions of sections 718 to 718.2 of the **Criminal Code** set out the fundamental purpose and principles to be applied in sentencing decisions.

[29] Section 718 of the **Code** provides that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions which have one or more of these sentencing objectives, namely, denunciation, deterrence, both specific and general, separation of offenders from society where necessary, rehabilitation, reparation to victims and the community and the promotion of a sense of responsibility in offenders.

[30] The Crown Attorney submits that given the nature of this case, specific and general deterrence as well as denunciation of the unlawful conduct should be emphasized to protect the public from the prevalence of offences which involve motor vehicles being driven by persons impaired by alcohol or drug, and in this case, causing bodily harm to other innocent motorists on the roads in this province.

[31] Defence Counsel does not disagree with those being the primary purposes in this sentencing decision; however, he urges the court to consider all available sanctions, other than imprisonment, and to place an equal focus on assisting Mr. Beals in his rehabilitation and promoting a sense of responsibility in him by providing reparations to the community. In those circumstances, it is the position of the defence that a community-based disposition with very strict conditions, including a requirement to perform community service and pay a significant fine would be the most appropriate sanction. Defence Counsel submits that the Court should consider the circumstances of an African Nova Scotian offender in this sentencing decision, in a manner similar to that of aboriginal offenders as stipulated by section 718.2(e) of the **Criminal Code**.

[32] The Supreme Court of Canada has stated on several occasions that, in all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular circumstances of the specific offender: see **R. v. M (CA)**, [1996] 1 SCR 500 at paras 91 and 92 and **R v. Ipeelee**, 2012 SCC 13 at para. 38.

[33] Section 718.1 of the **Criminal Code** sets out the fundamental principle of proportionality in sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of the sanction for a crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction.

[34] The Supreme Court of Canada stated in **R. v. Lacasse**, 2015 SCC 64 at para. 12, that proportionality is a primary principle in considering the fitness of a sentence. The determination of proportionality is a delicate exercise, as an overly lenient or overly harsh sentence imposed upon the offender might have the effect of undermining public confidence in the administration of penal justice.

[35] As a result, in determining a sentencing decision, the trial judge must do a careful balancing of the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while, at the same time, taking into account the victim or victims and the needs of and current conditions in the community.

[36] Section 718.2 of the **Criminal Code** requires the court to consider several other sentencing principles in determining the just and appropriate sanction. Section 718.2(a) of the **Code** requires the court to consider the aggravating and mitigating circumstances which may either increase or reduce the appropriate sentence.

Aggravating and Mitigating Circumstances:

[37] I find that the aggravating circumstances are as follows:

- The vehicle operated by Mr. Beals collided head on with the vehicle operated by Ms. Isles, causing significant damage to her vehicle and bodily harm to her which continued for a significant period of time;
- The head-on collision occurred during the rush hour on a very busy road in the Burnside area of Dartmouth, Nova Scotia;
- Mr. Beals' ability to operate a motor vehicle was significantly impaired with his breath samples being over 2 ½ times the legal limit;
- Prior to the accident, Mr. Beals was driving at a speed faster than the flow of traffic on a very busy and congested street, weaving in and out of lanes to move ahead of other vehicles on the road.

[38] I find that the mitigating circumstances are as follows:

- Mr. Beals entered an early guilty plea to the charge before the court, relieved the Crown of the burden of proving the charge as well as the necessity of requiring the victim to testify;

- He cooperated with the police and has accepted full responsibility for his actions;
- Mr. Beals has expressed significant remorse and regret for his actions both in the Pre-Sentence Report as well as in court;
- Although Mr. Beals has a dated, prior criminal record for crimes of violence, he has no prior convictions for an impaired driving offence;
- He is in a very positive long-term relationship with a supportive partner who has indicated that the offence was out of character;
- Mr. Beals has full-time employment and also assists his common-law partner's father with lobster fishing as well as volunteering in the community;
- Mr. Beals has successfully completed the Impaired Driving Program offered by the Registry of Motor Vehicles and has been assessed as a low risk to reoffend.

Sentencing Precedents to Establish a Range of Sentence:

[39] In determining the appropriate sentence, the Court is also required to consider the parity principle which is found in section 718.2(b) of the **Code**, that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[40] The sentencing precedents provided by counsel or reviewed by the court may be considered to establish a range of sentence, as a guideline for trial judges. It does not create a hard and fast rule.

[41] In fact, the Court must also consider section 718.2(e) of the **Code** that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victims or the community should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders. In this case, based upon the Impact of Race and Culture Assessment, Defence Counsel submits that this principle should have equal application when the Court considers the circumstances of African Nova Scotians and their overrepresentation on remand and in admissions to sentenced custody.

[42] The Crown Attorney referred to 3 cases in support of her sentencing position of 4-6 months of imprisonment. In **R. v. Cromwell**, 2005 NSCA 137, Ms. Cromwell was 29 years old and pled guilty on the trial date to one charge of impaired driving causing bodily harm to 3 complainants. The trial judge rejected a joint recommendation for a conditional sentence order of imprisonment for 18 months to be followed by one year of probation and a two-year driving prohibition. Instead, the trial judge ordered 4 months of imprisonment on the impaired driving causing bodily harm with probation to follow. The Court of Appeal dismissed the appeal and noted at para. 66 that the sentence of incarceration was “at the very low end of a reasonable range for this offence.”

[43] Ms. Cromwell had been drinking prior to driving, then picked up 3 hitchhikers and operated her vehicle at 20 to 30 km over the posted speed limit. The car was swerving over the centreline of the road and eventually collided head on with an oncoming vehicle. Ms. Cromwell fled the scene of the accident but was apprehended at a nearby restaurant after the police obtained a description of the driver from the occupants of the vehicle. Ms. Cromwell had no related criminal record and had been struggling with the long-standing substance abuse problem. The victims had suffered significant injuries.

[44] In **Cromwell**, *supra*, Bateman JA stated at paras 27-29 that drunk driving is a crime of distressing proportions and that courts have consistently recognized that the carnage wrought by drunk drivers has not diminished and causes significant social loss. She added that drunk driving is an offence demanding strong sanctions and that the sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgement. The proliferation of this crime and the risk that it will be seen by society as less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features.

[45] However, the Crown Attorney did acknowledge that the facts and circumstances of the **Cromwell** case are more serious in terms of the gravity of her offence and her degree of responsibility, than the situation before the Court.

[46] The Crown Attorney also referred to the case of **R. v. Buffett** (1989), 51 CCC (3rd) 509 [NSCA] which involved a head-on collision and the charge of impaired operation of a motor vehicle causing bodily harm to 2 individuals. The trial court had ordered the accused to pay a fine of \$1500, probation for 2 years with the requirement that he perform 150 hours of community service and a

driving prohibition for 3 years. Mr. Buffett's breathalyzer readings were 170 mg of alcohol in 100 ml of blood on the first test and 160 mg of alcohol in 100 ml of blood on the 2nd test, which confirmed that his ability to operate a motor vehicle was impaired by alcohol.

[47] The Court of Appeal noted that Mr. Buffett's breathalyzer readings were twice the legal limit and that he had driven in a negligent manner before colliding head-on with another vehicle. The victim had suffered serious injuries, including lacerations to his face which required 40 stitches and plastic surgery. The Court of Appeal held that the sentence imposed by the trial judge was "clearly and manifestly inadequate" and ordered a sentence of 6 months incarceration. The Court maintained the 3-year driving prohibition, but they directed that the fine payment should be returned to Mr. Buffett and his probation order be revoked, because he had already performed 170 hours of community service.

[48] Finally, the Crown Attorney referred to the case of **R. v. Muise**, 1990 CanLII 2516 (NSCA), which involved criminal negligence in the operation of a motor vehicle, causing bodily harm to the victim. The offender was sentenced to serve 90 days on an intermittent basis, placed on probation for 2 years and ordered to perform 100 hours of community service as well as being prohibited from operating a motor vehicle for 3 years.

[49] At the time of the incident, the offender was driving his car at an excessive speed through four-way stop intersection and without stopping, collided with the victim's car who was making a lawful turn. In addition, Mr. Muise was disqualified from driving a motor vehicle at that time, was intoxicated and was operating a car that was mechanically defective.

[50] Mr. Muise had prior convictions for dangerous driving, refusing a breathalyzer demand, a breathalyzer offence and 3 prior driving while disqualified offences. The Pre-Sentence Report was generally unfavourable although he did have a good work record, despite a long-standing addiction to alcohol.

[51] The Court of Appeal held that the sentence was "inadequate and fails to reflect the serious nature of the offence and the emphasis that must be placed upon both general and specific deterrence." The appeal was granted, and the sentence was varied to 6 months imprisonment. The probation order was maintained, but the Court of Appeal removed the requirement to perform 100 hours of service.

[52] Defence Counsel referred to the case of **R v. Hamilton**, 2008 NSSC 217, which involved a sentencing decision for an offender who had pled guilty to impaired operation of a motor vehicle causing bodily harm. The offender was driving his vehicle in the town of Yarmouth, when it crossed over the centreline and hit 3 vehicles travelling in the opposite direction. None of the victims appeared to be seriously injured. Mr. Hamilton's breath samples showed readings of 200 mg of alcohol in 100 ml of blood, taken 2 hours after the accident. It was estimated that his blood alcohol concentration would have been between 221 to 242 mg of alcohol in 100 ml of blood at the time of the accident.

[53] The trial judge determined that the aggravating and mitigating circumstances were quite similar to the instant case and that Mr. Hamilton's Pre-Sentence Report was "glowing" and that the offence was "out of character" for him. The offender was 31 years old with no prior involvement in the criminal justice system, was soon to be married and had very supportive parents. He was employed in the fishing industry, had completed the Driving While Impaired program prior to sentencing and had already met with a clinical therapist at addiction services on 3 occasions. The therapist advised the court that Mr. Hamilton was a "low risk to reoffend." Mr. Hamilton had pled guilty and had accepted full responsibility for his actions.

[54] In that case, the trial judge accepted the joint recommendation for a six-month conditional sentence to be served in the community under terms of house arrest, followed by one year of probation and a two-year driving prohibition. During their submissions on sentence, both counsel referred to the **Cromwell** decision of the Nova Scotia Court of Appeal, however, the Crown Attorney had also indicated that there were some aggravating circumstances in the **Cromwell** case which did not exist in the **Hamilton** case.

[55] At the time of the **Hamilton** decision, the imposition of a conditional sentence was an available sanction for the court to consider. However, since that decision, section 742.1 of the **Criminal Code** was amended by the *Safe Streets and Communities Act*, S.C. 2012, c.1, s. 34 which came into force on November 20, 2012. That amendment precluded the imposition of a conditional sentence where an offence was prosecuted by way of indictment that resulted in bodily harm and was subject to a maximum term of imprisonment of 10 years or more.

[56] In this case, the offence contrary to section 255(2.1) of the **Code** for the operation of a motor vehicle after having consumed alcohol in a quantity that

exceeds 80 mg of alcohol in 100 ml of blood is an indictable offence and an offender is liable to a term of imprisonment of not more than 10 years. As a result, a conditional sentence order of imprisonment in the community is not an available sentencing option for Mr. Beals.

[57] Defence Counsel also referred to the case of **R. v. George**, 2016 NSPC 12. In that case, Mr. George called 911 to report a motor vehicle accident. He was the driver of a vehicle which had failed to negotiate a very sharp turn in the road and landed in a ditch, injuring his female passenger. After being taken to hospital, it was determined that the passenger had suffered a dislocated hip and required 7 stitches to her chin.

[58] On arrival at the scene, police officers detected an odour of alcohol coming from Mr. George's breath and made a roadside screening demand. The result was a "Fail". Mr. George was arrested for impaired driving and the police officer made a breath demand. Mr. George complied with that demand and the analysis of his breath resulted in readings of 160 mg of alcohol in 100 mL of blood on the first sample and 150 mg of alcohol in 100 ml of blood on the second sample.

[59] In that case, the trial judge was referred to the **Cromwell** case and the **Hamilton** case, and ultimately suspended sentence and imposed a 24-month probation order with very strict conditions, like the one upheld by the Nova Scotia Court of Appeal in **R. v. Martin**, [1996] N.S.J. No. 389. The trial judge had also ordered an 18-month driving prohibition and ancillary orders. The trial judge concluded that there were several mitigating factors including cooperation with the police, an early guilty plea, genuine remorse, full acceptance of responsibility, no prior record involving the operation of a motor vehicle while impaired, full-time employment and a commitment to remain alcohol free by seeking appropriate counselling and intervention. The trial judge concluded that Mr. George was a good candidate for a rehabilitative sentence.

[60] However, it must also be borne in mind that the Nova Scotia Court of Appeal set aside the trial judge's decision in **R. v. George**, 2016 NSCA 88 and imposed a jail sentence of 4 months. The Court of Appeal noted that section 731(1) of the **Criminal Code** only permitted a suspended sentence to be imposed where no minimum punishment was "prescribed by law." Since impaired driving causing bodily harm carries minimum sentence of a \$1000 fine [section 255(2) **Code**], a suspended sentence was legally unavailable for the judge to impose. The Court of Appeal maintained the probation order for a period of 12 months following the

service of the sentence of imprisonment, on the same terms as issued by the trial judge, but removed the house arrest condition. The Court of Appeal ordered a victim surcharge fine of \$200 and confirmed the trial judge's DNA order as well as his order prohibiting Mr. George from operating a motor vehicle.

[61] After considering those sentencing precedents to establish a range of sentence, I find that the circumstances of the instant case may be distinguished from the **Cromwell** case and are similar to the circumstances present in the **Hamilton, Martin and George** cases referred to above.

[62] In this case, I find that there are several significant mitigating circumstances, which may militate in favour of a reduction in the appropriate sentence. However, there are also some equally significant aggravating circumstances to take into account which may tend to increase the appropriate sentence.

[63] In my opinion, in assessing the principle of proportionality in this case, there can be no doubt that Mr. Beals' degree of responsibility for the offence was substantial, having intentionally consumed a significant amount of alcohol, which was found to be 2 ½ times the legal limit and then operating his vehicle in rush hour traffic, weaving in and out of lanes at a much faster rate of speed than the rest of vehicles on the road. Those intentional acts of Mr. Beals ultimately resulted in a head-on collision in the so-called "suicide lane" with the vehicle being operated by Ms. Isles.

[64] In terms of the seriousness or gravity of this offence, I find that the objective gravity of this offence is already relatively high as Parliament has determined that the offence of operating a motor vehicle while the offender's blood-alcohol level was over the legal limit and causing bodily harm contrary to section 255 (2.1) of the **Criminal Code**, is an indictable offence and liable to a term of imprisonment of not more than 10 years.

[65] In this case, I find that the seriousness of this offence must also be considered as being relatively high as the bodily harm suffered by Ms. Isles, which was significant, has had both a longer-term physical impact on her work options as well as an emotional and physical impact on her daily household chores and has limited her ability to continue the exercise options that she used to enjoy before this incident. Fortunately, Ms. Isles' young children who were with her at the time of the collision, were properly secured and did not suffer any physical injuries. They have, however, experienced some emotional impacts as result of this incident.

[66] After having considered the principle of proportionality found in section 718.1 of the **Code** and the comments of our Court of Appeal that offences of this nature require an emphasis on specific and general deterrence, I must also consider all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or the community.

[67] While our Court of Appeal has clearly stated that specific and general deterrence must be emphasized in cases of impaired driving causing bodily harm, I find that this sentencing decision ought to be balanced through the imposition of a sentence that also assists in the rehabilitation of Mr. Beals and promotes a sense of responsibility in him. In considering those latter purposes in this sentencing decision, as I have previously indicated, there are a number of significant mitigating factors in relation to the offender, Mr. Beals, which were highlighted in the very positive Pre-Sentence Report and in the Impact of Race and Cultural Assessment Report.

The Just and Appropriate Sentence:

[68] In the circumstances of this case, as I previously mentioned, the option of a conditional sentence order of imprisonment in the community is not an available sanction, pursuant to the provisions of section 742.1(e)(i) of the **Criminal Code**. The offence contrary to section 255(2.1) of the **Code**, for which Mr. Beals has pled guilty is an offence prosecuted by indictment and it is subject to a maximum term of imprisonment of 10 years as the offence resulted in bodily harm to Melanie Isles.

[69] In addition, by virtue of wording of section 255(3.3) of the **Code**, which was in effect on December 22, 2017, Mr. Beals is subject to a fine of not less than \$1000 for a first offence contrary to section 255(1)(a) of the **Code** for this offence, contrary to section 255(2.1) of the **Code**.

[70] In those circumstances, as pointed out by our Court of Appeal in **George**, *supra*, given the minimum punishment of \$1000 fine “prescribed by law,” the imposition of a suspended sentence is also legally unavailable to Mr. Beals pursuant to section 731(1)(a) of the **Criminal Code**.

[71] Under the new provisions of section 320.19(3)(b) of the **Criminal Code** relating to minimum fines for high blood alcohol concentrations, Mr. Beals would be subject to a fine of not less than \$2000 by virtue of the fact that his blood

alcohol concentration was equal to or exceeded 160 mg of alcohol in 100 ml of blood.

[72] By virtue of section 11(i) of the **Canadian Charter of Rights and Freedoms** and the recent case of **R. v. Poulin**, 2019 SCC 47 (CanLii) at para. 3, Section 11(i) of the **Charter** confers a binary right, not a global or continuing one over a period of time. In other words, the Supreme Court of Canada has made it clear that the binary right involves a comparison of the punishments under the laws in force at two set points in time (the commission of the offence [December 22, 2017] and the date of the sentencing [October 31, 2019]) and the right to receive the lesser of these punishments.

[73] In December 2017, the provision in the **Criminal Code** stipulated that Mr. Beals would be subject to a minimum fine of not less than \$1000 for this first offence contrary to section 255(1)(a) of the **Code**. However, given the seriousness of this offence, Mr. Beals' degree of responsibility and the circumstances in which the offence was committed, I find that a significant fine and a probation order would not sufficiently emphasize specific and general deterrence of the carnage on the roads and injuries to innocent pedestrians or motorists caused by impaired drivers. Mr. Beals actions on December 22, 2017 cannot be minimized by the Court as simply being an "accident."

[74] As a result, I have concluded that a sentence of imprisonment is necessary to provide that clear message that this offence of impaired driving causing bodily harm requires a strong sanction to emphasize specific and general deterrence as well as denunciation of the unlawful conduct. However, as Justice Cromwell stated in **R. v. MacLeod**, 2004 NSCA 31, which was also a case involving impaired driving causing bodily harm, it is important to keep in mind that, generally speaking, incarceration should be used with restraint where its justification is based upon general deterrence.

[75] For the reasons which I have outlined above and taking into account the significant mitigating factors which are present in this case, I find that the just and appropriate sentence, in all the circumstances of this case, is to order that Mr. Beals be incarcerated for a period of 90 days, which sentence shall be served on an intermittent basis. While not in custody and serving the intermittent sentence and for a period of 18 months, Mr. Beals shall be subject to terms and conditions of probation for a period of 18 months, which will start immediately. I will outline the terms and conditions of that order in a moment.

[76] Furthermore, pursuant to section 259(2) of the **Criminal Code**, Mr. Beals is also subject to a discretionary order of prohibition by virtue of the fact that he was convicted of an offence contrary to section 255(2.1) of the **Code**. Having considered all of the facts and circumstances of this case, I hereby prohibit Mr. Beals from operating a motor vehicle on any street, road, highway or any other public place for a period of 24 months. The prohibition on driving shall commence immediately.

[77] In the event that Mr. Beals registered in an alcohol ignition interlock device program pursuant to the former section 259(1.1) of the **Code**, as the law stood in December, 2017 [now section 320.18(2) **Code**], he would have been subject to a minimum absolute prohibition period of 3 months after the day upon which this sentence was imposed, pursuant section 259 (1.2) of the **Code**.

[78] However, based upon the recent amendments to the **Criminal Code** which came into effect on December 18, 2018, there is no prescribed minimum absolute prohibition period in the case of a first offence, before a person may be registered for the alcohol ignition interlock device program. Therefore, in terms of this aspect of this sentencing decision, Mr. Beals is entitled, pursuant to section 11(i) of the **Charter**, to the benefit of the lesser punishment, as stipulated in section 320.24(10)(a) the **Code** which is in effect today. Taking all the facts and circumstances of the offence and this offender into account, the Court will not exercise its discretion to order a minimum absolute prohibition period.

[79] With respect to the probation order, which starts immediately and will run for a period of 18 months, Mr. Beals will be subject to the following terms and conditions:

[80] The statutory terms which will require Mr. Beals to keep the peace and be of good behaviour, appear before the court as and when required to do so by the court and to notify the court or the probation officer in advance of any change of name, address employment or occupation;

[81] In addition to the statutory terms, Mr Beals will also be subject to the following terms and conditions:

- He will be required to report to the probation officer at 277 Pleasant St., Dartmouth, NS, today and thereafter as directed by the probation officer;

- He is to remain within the province of Nova Scotia unless he receives written permission from the probation officer;
- He is not to possess, take or consume alcohol or any other intoxicating substances;
- He is to complete 50 hours of community service as directed by the probation officer on or before December 31, 2020:
- He is to make reasonable efforts to locate and maintain employment or an educational program as directed by the probation officer;
- He is to attend for mental health assessment and counselling as directed by the probation officer;
- He is to attend for substance abuse assessment and counselling as directed by the probation officer;
- He is to attend for assessment, counselling or program as directed by the probation officer;
- He is to participate in and cooperate with any assessment, counselling or program directed by the probation officer.

[82] In addition, the Court hereby orders a Victim Fine Surcharge in the amount of \$200, since Mr. Beals has the ability to pay that surcharge within a reasonable time and the Court could not conclude that the imposition of that fine surcharge represented an “undue hardship.” The Victim Fine Surcharge shall be payable within one year of today’s date.

[83] Finally, the Court will also schedule a status update with Mr. Beals with respect to his progress with respect to the terms and conditions of this probation order, with an update report from the probation officer after 12 months of probation.

Theodore Tax, JPC