NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Bernard***, 2011 NSCA 53

Date: 20110609
Docket: CAC 329696
Registry: Halifax

Between:

Andrew Bernard

Appellant

v.

Her Majesty the Queen

Respondent

Judges:	Saunders, Oland and Beveridge, JJ.A.
Appeal Heard:	February 11, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal is granted, the appeal is allowed and the period of imprisonment imposed in the court below is reduced per reasons for judgment of Saunders, J.A.; Oland and Beveridge, JJ.A. concurring.
Counsel:	Brian Stephens, for the appellant Kenneth W.F. Fiske, Q.C., for the respondent

Reasons for judgment:

[1] In this appeal the Crown acknowledges that the trial judge erred in sentencing the appellant for a series of drunk driving related offences. Thus, the only issue in this appeal is whether the sentences ought to be reduced on account of this error. In effect, the Crown says the mistake does not matter.

[2] Respectfully, I think it does. For the reasons that follow, I would grant leave, allow the appeal and reduce the period of imprisonment imposed in the court below.

Background

[3] On February 15, 2010, Mr. Bernard appeared before Nova Scotia Provincial Court Judge Jamie S. Campbell and entered guilty pleas to a number of charges laid under the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. After credit was given for time spent on remand, the appellant was sentenced for three drinking and driving related offences, and two breaches of recognizance, to a term of imprisonment of two years less one day. The five convictions arose out of four separate incidents. While the sequence of these events is somewhat skewed in the warrant of committal upon conviction I will describe them in their proper chronological order. The first offence occurred on November 5, 2009 at Indian Brook, Nova Scotia and involved a charge of driving while having a blood alcohol content of over .08 contrary to s. 253(1)(b) of the **Criminal Code** . The second offence occurred a month later when on December 3, 2009 at Middleton, Nova Scotia, the appellant again drove while having a blood alcohol content exceeding the maximum prescribed by law. The third offence arose January 13, 2010 at Shubenacadie, Nova Scotia when the appellant breached his recognizance by failing to be at Indian Brook Reserve where he had been ordered to remain, contrary to s. 145(3) of the **Criminal Code**. The last incident occurred on January 28, 2010 at Indian Brook Reserve when the appellant refused a breathalyzer demand contrary to s. 254(3), and violated a recognizance by failing to keep the peace.

[4] At time of sentencing the appellant had prior convictions for drinking and driving and breaching court orders. Those previous convictions had led to fines and probation but never incarceration.

[5] The appellant consented to remand following the charges on January 28, 2010 and remained in custody until his sentencing on April 12, 2010. A pre-sentence report was ordered and introduced at the hearing. After considering counsels' submissions as well as Mr. Bernard's own representations and apologies to the court and his community, Judge Campbell sentenced the appellant to two years less a day. As I will explain later, it would appear that the judge provisionally calculated a total sentence of 29 months in his own mind as being appropriate. He then reduced this transitional sentence by five months (based on a double credit for the 2½ months spent on remand). He then apportioned the remaining sentence among individual offences in a series of consecutive or concurrent sentences, which he then adjusted to arrive at a final sentence of two years less a day.

[6] The appellant says the judge erred in law by failing to properly apply the "totality", "jump", "step" and "gap" principles of sentencing, such that the sentence imposed was clearly unreasonable and demonstrably unfit. He asks this Court to substitute a sentence in the range of 12-18 months incarceration.

[7] The Crown concedes that the sentencing judge erred in principle but says the appeal should be dismissed despite the error because the original sentence was justified when one considers the host of aggravating factors in the case.

Issues

[8] The appellant raises two grounds of appeal. He says the judge erred by:

(i) not giving sufficient consideration to the principle of totality;

(ii) not giving sufficient consideration to the "step" and "gap" principles of sentencing.

[9] Before addressing each of these grounds I will quickly dispose of the standard of review.

Standard of Review

[10] The standard of review in sentencing matters is well known. In **R. v. Knockwood**, 2009 NSCA 98 this Court observed:

> [11] There is no dispute as to the proper standard of review in this case. This Court's review of a sentencing order is a highly respectful one. We must show great deference whenever we are asked to consider appeals against sentence. Absent an error in principle, a failure to consider a relevant factor, or an over-emphasis of appropriate factors, we should only vary a sentence imposed at trial if we are convinced that the sentence is demonstrably unfit. See for example, **R. v. L.M.**, 2008 SCC 31; **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500; **R. v. Longaphy**, 2000 NSCA 136 and **R. v. Conway**, 2009 NSCA 95.

See also **R. v. Solowan**, [2008] 3 S.C.R. 309; **R. v. Markie**, 2009 NSCA 119; and **R. v. A.N.**, 2011 NSCA 21.

Analysis

(i) The Principle of Totality

[11] The appellant says, and the Crown concedes, that Judge Campbell applied the wrong methodology when considering the principle of totality and imposing consecutive sentences for the offences to which the appellant pled guilty.

[12] Section 718.2(c) of the **Criminal Code** legislates what is known as the "totality principle". It provides:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> ...
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

[13] The totality principle is an instrument used by judges in the context of consecutive sentences to ensure that the level of punishment imposed is

commensurate with the moral blameworthiness of the offender. As Chief Justice Lamer observed in **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500 at para. 40:

> 40 ... It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:
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> > 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.
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> Cory J. similarly acknowledged the importance of "the principle of proportionality" in speaking for the Court in *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421, at p. 431, noting that "[i]t is true that for both adults and minors the sentence must be proportional to the offence committed". Indeed, 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 actors who possess a morally culpable state of mind. In discussing the constitutional requirement of fault for murder in *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645, I noted the related principle that "punishment must be proportionate to the moral blameworthiness of the offender", and that "those causing harm intentionally [should] be punished more severely than those causing harm unintentionally". On the principle of proportionality generally, see *R. v. Wilmott*, [1967] 1 C.C.C. 171, at pp. 178-79 (Ont. C.A.); *Sentencing Reform: A Canadian Approach*, *supra*, at p. 154.
>
> 41 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*. See *Smith*, *supra*, at p. 1072; *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 724; *R. v. Goltz*, [1991] 3 S.C.R. 485, at pp. 498-99. However, as I noted in *Smith*, at p. 1072, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation", and thus the review of the proportionality of sentences should normally be left to the "usual sentencing appeal process" directed at the fitness of sentence.

> 42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".
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> Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing, supra*, at pp. 44-45:
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> > 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.

[14] We thoroughly reviewed these principles in **R. v. Adams**, 2010 NSCA 42. There, Justice Bateman, writing for a unanimous Court, rejected an approach that would take totality into account by first calculating a global sentence and then assigning individual sentences to fit within the whole.

[15] Justice Bateman renounced such a methodology as problematic. Uncertainty was sure to arise when attempting to discern what the appropriate sentence might have been for the individual convictions, had they arisen independently. Bateman, J.A. explained the proper approach this way:

> [23] ... The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. ...

[16] Respectfully, the judge's error in this case is the same as that which prompted reversal in **Adams**. In the words of Justice Bateman:

> [28] ... the judge did not turn his mind to the appropriate sentence for each individual conviction, but worked backwards from a global disposition. Although that methodology does not necessarily produce an unfit sentence, here it was an error in principle which, in fact, resulted in a sentence that is manifestly unfit (excessively lenient) for these crimes and this offender.

[17] At Mr. Bernard's sentence hearing the Crown asked that a global sentence of three years' imprisonment be imposed. Although it is not entirely clear, it would appear that the defence recommended a sentence of one year, taking into account the two and a half months spent on remand awaiting sentence. The judge rejected both submissions. He said:

> ... I am not satisfied that three years is the answer, but I don't believe that a minimum sentence is the answer, either.
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> I am satisfied here that, based on that principle of totality that Mr. Stephens talked about, that a period of incarceration for two years would be appropriate.
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> I would be willing to hear from counsel as to whether I should make it specific that it would be two years' Federal or two years' Provincial, because I believe if it is exactly two years, that is an option that's open to you, to make that order or recommendation. ...

The court recessed to give defence counsel an opportunity to consult with his client concerning his preference. When court resumed we see this exchange.

> **MR. STEPHENS**: I've discussed it with Mr. Bernard. He indicates he would prefer to serve this in a Provincial facility. He also asked me to inquire, and obviously Your Honour isn't finished giving his sentence, but, in terms of the remand time that he has spent so far, in terms of that being taken into account.
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> **THE COURT**: That would already have been included in the calculations, so it would be two years less a day, in that case.
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> Is there any preference in terms of how that is assigned for each of the specific cases?

MS. BROWN: Not from my perspective, Your Honour.

THE COURT: Would there be any difficulty with having two years less a day concurrent on each of the three?

MR. STEPHENS: I would think it would probably be preferable to sort of parcel it out consecutively.

THE COURT: Okay, let's do that.

So, that would be eight months on each, with the third one being eight months less a day, if my simple math is correct on that.

MR. STEPHENS: There's also the 145 charges.

THE COURT: I would think that could be concurrent to one of them, in that case. 145 would be one month concurrent to the eight months less a day, and that would be on the 13th of January. And the driving prohibition, did we indicate how long that ...

MS. BROWN: Did not indicate an amount, Your Honour.

THE COURT: It would be substantial.

MS. BROWN: I would suggest it should be substantial. I think, given these circumstances, that 10 years would not be unreasonable, in the circumstances.

MR. STEPHENS: No comment.

THE COURT: Okay. A 10-year driving prohibition.

UNIDENTIFIED VOICE: 10 years on each, concurrent?

MS. BROWN: It can be.

THE COURT: 10 years is 10 years.

THE COURT: Yes.

UNIDENTIFIED VOICE: And a victim surcharge?

THE COURT: Victim fine surcharge is waived. And the remaining charges then would be withdrawn.

MS. BROWN: Thank you, Your Honour.

THE COURT: Thank you.

COURT ADJOURNED **(TIME: 13:52**)

[18] I find that the trial judge erred in the approach he took when imposing consecutive sentences. The case against the appellant proceeded summarily. He pleaded guilty to three drunk driving related offences described in the several Informations by which he was charged, namely, two counts of driving with a blood alcohol concentration exceeding .08 contrary to s. 253(1)(b), and one count of refusal contrary to s. 254(5). His guilty pleas and resulting convictions put s. 255 in play. That section provides (leaving out those parts which are immaterial to this case):

> 255.(1) **Punishment** — Every one who commits an offence under section 253 or 254 is guilty of ... an offence punishable on summary conviction and is liable,
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> > (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
> >
> > > (i) for a first offence, to a fine of not less than $1,000,
> > >
> > > (ii) for a second offence, to imprisonment for not less than 30 days, and
> > >
> > > (iii) for each subsequent offence, to imprisonment for not less than 120 days;
> >
> > ...
> >
> > (c) if the offence is punishable on summary conviction to imprisonment for a term of not more than 18 months.

> ...
>
> (4) **Previous Convictions** — A person who is convicted of an offence committed under section 253 or subsection 254(5) is, for the purposes of this Act, deemed to be convicted for a second or subsequent offence, as the case may be, if they have previously been convicted of
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> (a) an offence committed under either of those provisions;
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> ...

[19] As the transcript reveals, the judge conducted a mental calculus which led him to start with a notional 29 months, from which he deducted a 2:1 remand "credit" of five months, arriving at a global sentence of approximately two years' incarceration which he felt would be appropriate. He then asked counsel for the appellant whether he would prefer to be sentenced in a federal, or a provincial institution. After hearing that Mr. Bernard wished to be incarcerated in a provincial facility, the judge resolved that the global sentence should be two years less a day and then worked backwards by dividing the total into three consecutive custodial blocks of eight months each, the last period shortened by a day. The methodology adopted by the judge here was rejected by this Court in **Adams**, and most recently in **A.N.** (see para. 35).

[20] In fairness, it must be remembered that this Court's judgment in **Adams**, (which re-affirmed our earlier directions concerning the proper consideration of the totality principle when imposing consecutive sentences) was released a month after Mr. Bernard's sentencing in this case.

[21] Having found that the judge erred by not taking the proper approach when imposing sentences for consecutive offences, it falls to this Court to fix an appropriate sentence.

[22] Before doing so I wish to dispose of a preliminary point raised by the Crown at the hearing. Mr. Fiske suggested that before we could decide what we felt to be an appropriate sentence, we would first have to address the fitness of the sentence imposed in the court below. In other words, we could not substitute our own sentence for the sentence imposed by the trial judge unless we had first determined that the trial judge's sentence was "manifestly unfit". To support his argument, Crown counsel emphasized a phrase in Justice Bateman's reasons from **Adams**. For ease of reference I will repeat it here:

> [28] Here, with respect, I would conclude that the judge did not turn his mind to the appropriate sentence for each individual conviction, but worked backwards from a global disposition. Although that methodology does not necessarily produce an unfit sentence, here it was an error in principle which, in fact, resulted in a sentence that is manifestly unfit (excessively lenient) for these crimes and this offender.
>
> (Underlining mine)

[23] In the Crown's submission these four words, "which, in fact, resulted" oblige us to first conclude that the trial judge's legally flawed sentence was *also* "manifestly unfit" before we are entitled to intervene.

[24] I respectfully disagree. The Crown's assertion is tantamount to saying, despite the error, the sentence is entitled to deference any way. I would not accept such a proposition. I do not regard the four impugned words from Justice Bateman's lengthy reasons as establishing some kind of ancillary threshold which must be crossed before we are entitled to decide what we think is a fit sentence in the circumstances. On the contrary, I take the impugned phrase "which, in fact, resulted" as simply emphasizing Justice Bateman's conclusion in **Adams** that the flawed approach taken by the judge in that case when sentencing for consecutive offences had produced an excessively lenient and demonstrably unfit sentence.

[25] In my opinion, once we find that a trial judge has erred in principle when imposing a sentence, any deference which might otherwise have been paid is ignored, and we are presented with a "clean slate" to decide for ourselves what constitutes a fit sentence.

[26] Our powers on appeal against sentence are set out in s. 687(1) of the **Criminal Code**:

> **687**(1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
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> (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
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> (b) dismiss the appeal.

[27] In **R. v. Rezaie** (1996), 112 C.C.C. (3d) 97 (Ont. C.A.), Laskin, J.A. considered appellate variation of sentence when a trial judge has erred in principle. He said at p. 103:

> ... an appellate court may interfere if the sentencing judge commits an "error in principle". Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law. See *Re Fox and Ontario Legal Aid Plan* (1977), 14 O.R. (2d) 668 (Ont. H.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.); *Reza v. Canada* (1994), 116 D.L.R. (4th) 61 (S.C.C.). If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and an appellate court may impose the sentence it thinks fit.
>
> (Underlining mine)

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

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

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

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

[31] It follows that I would allow the appellant's first ground of appeal.

[32] In order for this Court to arrive at a proper sentence, we must also consider the appellant's second ground of appeal which engages the "jump", "step" and "gap" factors of sentencing. It appears that none of these concepts was taken into

account by the judge in arriving at his decision. Unfortunately, neither counsel at trial referred the judge to their possible relevance in their submissions.

(ii) The "Jump", "Step" and "Gap" Principles

[33] In certain circumstances it may be necessary for judges to consider the "jump" (or "step") effect in punishing for unlawful behaviour. This is intended to take into account the level of severity in penalties for previous offences when compared to the sentence about to be imposed. In other words, it is a recognition of the importance of comparing the relative degrees of punishment for past and present offences.

[34] Here, the appellant says the trial judge failed to take account of the fact that he had never been previously incarcerated. Penalties for earlier convictions were limited to fines and probation. The sentence under appeal represents too great a departure or "jump" from his previous sentences and "may have the effect of discouraging what rehabilitative efforts have been made". The appellant says an effective sentence of 29 months in prison (later reduced to 2 years less a day for remand credit) is unreasonable and demonstrably unfit.

[35] The appellant's other submission, which is a corollary to the first, is that the judge ought to have given some weight to the fact that he had not faced criminal prosecution in relation to drunk driving related offences for some years prior to the incidents which now give rise to this appeal. His three prior convictions for "over .08" led to fines in 1991 and 1997, and a fine with probation in 2001. Mr. Bernard says the judge failed to recognize or give him any "credit" for the significant period of time that had elapsed since his last related conviction. He says this "gap" should have been taken into account as a reflection of his efforts to deal with his addiction and avoid further trouble with the law.

[36] While the so-called "jump", "step" and "gap" factors are not explicitly codified in s. 718, their application has become part of the sentencing lexicon. These three factors may be deduced from what the **Criminal Code** terms the "fundamental principle" of sentencing in s. 718.1, that is, that the sentence "must be proportionate to the gravity of the offence and the degree of culpability of the offender". I need not decide whether these concepts have become elevated to recognized sentencing principles or are simply labels used to explain logical and relevant features of sentencing. Essentially, they are concepts or norms which may be applied where consecutive sentences are imposed so as to ensure that "the combined sentence should not be unduly long or harsh" (s. 718.2(c)). As I will

explain, it appears to me that the judge erred by failing to consider these factors when sentencing Mr. Bernard.

[37] From my review of the transcript and the judge's exchanges with counsel, I can only conclude that the first step in his path of reasoning was to start with a base of 29 months' incarceration in a federal penitentiary as a suitable global sentence for these offences, which he then reduced to 24 months after giving the appellant a 2:1 "credit" for the 2½ months he had already spent on remand. The judge's approach is evident from the following exchange with defence counsel, which I will repeat here for ease of reference:

> **MR. STEPHENS**: I've discussed it with Mr. Bernard. He indicates he would prefer to serve this in a Provincial facility. He also asked me to inquire, and obviously Your Honour isn't finished giving his sentence, but, in terms of the remand time that he has spent so far, in terms of that being taken into account.
>
> **THE COURT**: That would already have been included in the calculations, so it would be two years less a day, in that case.
>
> (Underlining mine)

[38] And so we see that the judge started with 29 months, which he later reduced to 24 months and then worked backwards from that initial disposition by trying to fashion a series of consecutive and concurrent sentences so as to fit within the whole.

[39] In my opinion, the so-called "jump" and "gap" effects are factors which may be taken into account in cases where circumstances warrant their application. Respectfully, the judge's initial error in methodology when considering totality was compounded by his failure to address the "jump" and "gap" features that were relevant in Mr. Bernard's case. On appeal, counsel for the respondent referred us to this Court's decision in **R. v. Lohnes**, 2007 NSCA 24 where those same principles were considered but found not to be applicable. In my view, the circumstances that arose in that case are quite different than Mr. Bernard's situation. In **Lohnes** the appellant had a lengthy criminal record including offences for which he had already been incarcerated, as well as a sentence imposed just a week before the charges which led to that appeal. In spite of all of this the defence had sought a conditional sentence to be served in the community. Roscoe, J.A. dismissed the appeal after concluding that the "jump" and "gap" principles had no application in that case such that the trial judge did not err in failing to consider them.

[40] Here, while Mr. Bernard had a criminal record, he had never before been incarcerated. The Crown served notice of its intention to seek increased penalties. Mr. Bernard's convictions in 1991, 1997 and 2001 triggered the statutory minimum for any subsequent offence. Thus, it was not contested that the appellant was facing a minimum of 120 days incarceration for each of the current driving offences, as s. 255(1) directs. By extension, the appellant faced a minimum of one year in jail after pleading guilty to the three drunk driving related charges (3 x 120 days).

[41] However, in starting his analysis with an assumption that a global sentence of almost 2½ years in federal prison was appropriate, the judge does not appear to have accounted for the fact that Mr. Bernard had never faced jail for any previous offence, or that his lawyer at trial had urged that something close to the mandatory minimum (120 days) be imposed for each offence. The judge seems to have overlooked the fact that such a lengthy custodial term would constitute a very marked increase in punishment from the fines and probation imposed for his previous related offences. As the editors of **Sentencing**, 7th ed. (LexisNexis Canada Inc., 2008) observe at § 2.55:

> ... A cumulative sentence may offend the totality principle if it is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if it is "a crushing sentence" not in keeping with the offender's record and future prospects.

In my respectful opinion, a notional sentence of almost 2½ years in federal prison is substantially above the normal level for any one of the drunk driving related offences to which the appellant pleaded guilty. In other words, such a punishment constitutes a substantial and marked departure from the sentence customarily imposed for similar offenders committing similar crimes, and thus requires our intervention. **R. v. M.(C.A.), supra**.

[42] I would also find that the judge failed to take into account the significant passage of time between these incidents and the appellant's last conviction for a similar offence. Mr. Bernard had previous convictions for impaired driving offences in 1991, 1997 and 2001. This represents an eight year gap to the time of his arrest on the present charges. In 2004-05, Mr. Bernard had attended and completed an in-house rehabilitation program and maintained his sobriety for some eight months. The judge accepted that the appellant understood he had a problem with alcohol and was in desperate need of help, noting "you're somebody who I

think is starting to get it". While the judge was undoubtedly right to recognize the "horrible toll that alcohol and drugs are taking on this community" it appears to me that he did not account for the fact that despite Mr. Bernard's life long struggles with alcoholism, he did manage to avoid prosecution for such offences for many years. In his case, respectfully, a failure to take this "gap" into account resulted in a sentence that was excessive.

[43] I will turn now to a consideration of what would be an appropriate sentence for these offences, and this offender.

[44] The material facts may be briefly summarized.

[45] The appellant is 38 years of age. He is a full status member of the First Nations community of Indian Brook, Nova Scotia. He describes himself as a severe alcoholic. So too were his parents. When interviewed for his pre-sentence report Mr. Bernard said he spent much of his youth roaming about his community with friends. He completed Grade 12 and has managed to find regular seasonal employment in the construction industry. His uncle, Mr. Vernon Maloney, described him as a very hard worker who got along well with other employees and customers. Mr. Maloney offered the assurance that the appellant would have work waiting for him upon his release. When not employed, Mr. Bernard receives social assistance benefits. The appellant has three children ranging in age from 5 to 17, by three different women. He reported that he consumes alcohol daily and that if he were "not incarcerated he would have likely been in a bar somewhere".

[46] The only mitigating feature in Mr. Bernard's favour was the point accepted by the trial judge that the appellant had experienced some earlier success in dealing with his alcoholism. The judge was satisfied that the appellant was beginning to recognize the urgency required in seeking professional help for his addiction and was "... somebody who I think is starting to get it."

[47] In terms of aggravating features, there were many. The appellant's brazen conduct showed a flagrant disregard for his own well being and the lives and safety of others. His breathalyzer readings were staggering and almost hard to credit. Shortly after 2:35 a.m. on November 5, 2009, the appellant was pulled over by the RCMP. The police had received a complaint that Mr. Bernard had taken a woman's vehicle and was operating it while intoxicated. The sample of breath provided by the appellant showed a blood alcohol content of 340 milligrams.

[48] At 4:00 p.m. on December 3, 2009, the RCMP in Middleton, Nova Scotia, again acting on a complaint, stopped a vehicle driven by Mr. Bernard while accompanied by several passengers. The sample of breath he gave showed a BAC reading of 270 milligrams.

[49] At approximately 5:50 p.m. on January 28, 2010, an RCMP officer observed a vehicle coming towards him at an excessive rate of speed. It was dark at the time. Pedestrians were walking on both sides of the road. The oncoming vehicle narrowly missed a pedestrian who had to jump out of the way to avoid being struck. The officer turned his police car around to begin pursuit. After stopping the vehicle and approaching the driver he observed the appellant in an intoxicated condition and placed him under arrest. Mr. Bernard refused to provide a sample of his breath and was charged with impaired driving.

[50] On February 15, 2010, the appellant entered guilty pleas to the three drunk driving related offences, and two breaches of recognizance which had been given to secure the appellant's release following his previous arrests.

[51] It is trite to say that Mr. Bernard's conduct is criminal and cannot be condoned. His actions reflect a remarkable disregard for the safety or property of others. It is fortunate that innocent persons were not hurt as a result of Mr. Bernard's actions.

[52] Compounding the seriousness of these crimes is their close proximity in time. This suggests that very little was learned by the appellant from one arrest to another. However, it must also be recalled that Mr. Bernard had not yet been sentenced on any one of those previous offences. His situation is different than someone who has been sentenced, and has served the sentence and been released, only to re-offend again. Here, Mr. Bernard had never been incarcerated for any of his previous drunk driving related offences. It cannot be said that he ever faced but chose to ignore the sharp and unequivocal lesson imprisonment is intended to convey.

[53] Lastly, one cannot overlook the extremely high breathalyzer readings posted by Mr. Bernard. Parliament has explicitly made this an aggravating factor to be taken into account (Section 255.1). His severe intoxication behind the wheel put himself and others at grave risk. Mr. Bernard has a past record for drunk driving related offences and for violating court orders. Previous sentences of fines and probation have not deterred Mr. Bernard's criminal behaviour. Obviously a period of incarceration is required to impress upon Mr. Bernard the serious consequences

that will attach to his actions, satisfy the objectives of specific and general deterrence, and express the community's denunciation for such criminal behaviour.

[54] Before pronouncing Mr. Bernard's sentence I wish to deal with a point made by Crown counsel at the hearing. Expecting that we might be inclined to reduce the appellant's overall sentence, counsel for the respondent cautioned against our imposing incremental custodial sentences for the drunk driving related offences fearing that such an approach would offend the so-called "Coke principle". The Coke principle is derived from Sir Edward Coke's **The Second Part of the Institutes of the Laws of England**, where the learned author stated, at p. 468:

> [*Et si tertio deliquerit et super hoc convicti fuerint.*] *Convicti fuerint* is here taken for *adjudicati fuerint.* Though this branch saith *et super hoc convicti fuer*, and may seem to refer to the third offence, yet cannot he be convicted of the third before he be convicted of the second, nor of the second before he be convicted of the first; and the second offence must be committed after the first conviction, and the third after the second conviction, and several judgments thereupon given: for so it is to be understood in other Acts of Parliament where there be degrees of punishment inflicted for the first, second and third offence, etc., there must be several convictions, that is to say, judgments given upon legal proceeding for every several offence, for it appeareth to be no offence until judgment by proceeding of law be given against him.

[55] The Supreme Court of Canada, per Laskin, C.J., described the principle in the following terms in **R. v. Skolnick**, [1982] 2 S.C.R. 47:

> ... What Coke said literally was that a person cannot be convicted (and, presumably, if I follow him, sentenced) of a third offence before he has been convicted of the second nor of the second before he has been convicted of the first; and the second offence must be committed after the first conviction and the third after the second conviction. As subsequently understood, the principle, or perhaps, better, policy was that an accused does not face the jeopardy of an increased penalty for a third offence unless he has previously been convicted and sentenced for a second offence. ...

A comprehensive consideration of Lord Coke's rule is contained in the reasons of Robertson, J.A. in **R. v. Andrade**, 2010 NBCA 62.

[56] Since the point was only raised in passing and did not receive the benefit of thorough submissions from the parties I decline to explore the matter definitively. That is best left to another day. Whole treatises and a sizeable body of jurisprudence have considered the law and theory surrounding a court's ability to

take into account previous-in-time offences or a series of past offences for which an offender is contemporaneously sentenced at a single hearing. What I will say is that on the facts of this case I do not think the principle would be offended if we were inclined to impose incremental, consecutive sentences here.

[57] First, Mr. Bernard had already been previously convicted of similar offences and so faced the jeopardy of mandatory minimum imprisonment as Parliament has declared in the punishment devised in s. 255(1)(a)(iii) and (4).

[58] Second, Mr. Bernard's astonishing blood alcohol content levels in separate incidents while other charges were pending suggests to me a lack of respect for the law and heightened moral blameworthiness. These are factors I would take into account in imposing incremental and consecutive sentences.

[59] Further s.725(1)(a) of the **Code** obliges judges to "... consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the sentence to be imposed for each of those offences...". Here Mr. Bernard's rapid recidivism after a first arrest is certainly a relevant consideration, whether as an aggravating factor in the sense Parliament intended under s. 718.2(a) leading to an increased sentence on the conviction being sentenced (see **R. v. Larche**, [2006] SCC 56 at ¶ *ff.*), or used to negate whatever mitigating factors could be said to arise in his case. (see **Andrade supra**. at ¶ 14).

[60] Finally, the logical extension of the Crown's concern would be that a trial judge would be prohibited from ever imposing a greater consecutive sentence in cases where an offender had pleaded guilty to a series of several offences. Such a result would very clearly compromise the traditionally broad discretion retained by trial judges whose job it is to craft a fit sentence.

[61] After taking into account the principles and norms of sentencing to which I have previously referred, as well as the circumstances of these offences and this offender, I would impose the following sentence:

Count #1: Over .08:	5 months
Count #2: Over .08:	7 months, consecutive
Count #3: Refusal	9 months consecutive
Count #4: Breach of Recognizance:	1 month, consecutive
Count #5: Breach of Recognizance:	2 months, consecutive
Total:	24 months

Less: 2:1 credit for 2½ months on remand	-5 months
Net sentence to be served:	19 months

Saunders, J.A.

Concurred in:

Oland, J.A.

Beveridge, J.A.