PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Fraser*, 2016 NSPC 49

Date: 2016-08-25
Docket: 2987313, 2987316, 2987317
Registry: Pictou

Between:

Her Majesty the Queen

v.

Barrett Johnston Fraser

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	23, 25 August 2016 in Pictou, Nova Scotia
Charge:	Paras. 249(1)(a), 270(1)(a), and sub-s. 249.1(1) of the Criminal Code of Canada
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Hector J. MacIsaac for Barrett Johnston Fraser

By the Court:

Preamble

[1] Barrett Johnston Fraser was stopped by police the early morning of 8 May 2016 after having been observed driving the wrong way on a short one-way street in New Glasgow. Police questioned Mr. Fraser briefly during which they became concerned that he might be a drug-impaired driver. Mr. Fraser suddenly sped off, dragging one of the officers for a short distance. A high-speed pursuit followed. Mr. Fraser got away. After making a run for it to Ottawa, Ontario, Mr. Fraser thought better of it and decided to head back home; he was picked up in Moncton, New Brunswick. Mr. Fraser was brought before the court on 16 May 2016 and arraigned on a number of indictable counts; he elected to have his charges dealt with in this court and pleaded guilty to the following:

- assaulting a peace officer engaged in the execution of his duty contrary to para. 270(1)(a) of the *Criminal Code*, case number 2987313;
- dangerous operation of a motor vehicle, contrary to para. 249(1)(a) of the *Code*, case number 2987316; and
- flight from police, contrary to sub-s. 249.1(1) of the *Code*, case number 2987317.

[2] The prosecution seeks a prison sentence of twelve to fifteen months which would take into account the 108 days Mr. Fraser has been on remand since his arraignment, along with a secondary-designated-offence DNA-collection order. The prosecution asserts that a conditional sentence order would not be appropriate. The prosecution did not make a recommendation regarding driving prohibition.

[3] Defence counsel argues for a sentence of time served and probation.

[4] In assessing a proportionate sentence, I need to drill down into the facts, examine Mr. Fraser's personal history, and review the pertinent law.

Facts pertaining to the offences

[5] Counsel agreed that the start of the sentencing hearing that, for the purposes of ss. 723 and 724 of the *Code*, the court accept as the facts pertaining to the charges the body of evidence which the court heard on 18 May 2016 during Mr. Fraser's bail hearing.

[6] There is a short segment of George Street, New Glasgow, that is a one-way route for eastbound traffic only; this segment is about 50 meters in length, and runs between Provost and Archimedes Streets. The direct traffic flow through that intersection is counterintuitive and the signage is inadequate. I drive through that intersection several times a day, almost every day; I have seen intermittently

motorists starting to make wrong-way turns onto George Street—sometimes completing them—and have come close to doing it myself.

[7] None of this has any bearing on my sentencing decision; rather, it provides some context to what played out the morning of 8 May 2016.

[8] At about 0420hrs that morning, police saw Mr. Fraser driving the wrong way on that segment of George Street in a small sedan.

[9] What followed that minor traffic *faux-pas* was caught on an array of police-vehicle dash cams; the video recordings were played during the bail hearing.

[10] Police directed Mr. Fraser to pull over, and he did so without delay. There were two police officers who dealt with Mr. Fraser initially; one officer stood beside the driver's door of Mr. Fraser's vehicle, the other stood on the passenger side. Mr. Fraser handed over to police a valid Nova Scotia photographic driver's licence. The officer who stood on the passenger side noticed Mr. Fraser's hands shaking uncontrollably and observed him becoming increasingly agitated. Neither officer detected the smell of alcohol. It appeared to police that Mr. Fraser might be under the influence of some sort of drug, and the officers contacted their shift supervisor. However, they remained alive to the fact that Mr. Fraser might have a medical condition that was causing his physical tremors. Police sought to discuss

with Mr. Fraser any health problems he might have been experiencing. As the officers had effectively detained Mr. Fraser, they advised him of his right to counsel. At this point, Mr. Fraser turned on the ignition of his sedan and started to drive away. The officer on the passenger side opened the sedan's door to try to prevent Mr. Fraser's flight. Mr. Fraser appeared to panic, got the gear engaged, and drove off with the officer on the driver's side attempting to reach inside to turn off the ignition; this officer was pulled along for a short distance, after which he was able to extricate himself from the interior and drop to a roll along the roadway. Mr. Fraser pulled away onto the George Street Bridge, and fled at a high rate of speed. Two other officers who had been called in as backup gave chase; they were soon followed by the shift supervisor. Police pursued Mr. Fraser along residential streets on the west side of New Glasgow. Speed-overlay displays on the dash-cam recordings showed police vehicles reaching velocities of 80 km/h in 50 km/h zones with Mr. Fraser still gaining distance. At one point, Mr. Fraser was recorded on video headed right toward the cruiser operated by the shift supervisor; only at the last moment did he veer off and head toward Abercrombie Road. The pursuit along Abercrombie was at speeds greater than 100 km/h in a 50 km/h zone; police were unable to close the distance. Mr. Fraser blew through a red light at the intersection of Abercrombie Road and George Street, and raced along Westville

Road in excess of 100 km/h—still a 50 km/h zone. Mr. Fraser turned onto the eastbound ramp for the 104 Highway at interchange 23, and charged along at speeds greater than 150 km/h on the 104, which is a posted 100 km/h zone. Mr. Fraser came off the 104 at exit 25; he ran through a red light at the end of the off-ramp, crossed the East River East Side Road, drove onto the eastbound on-ramp and re-entered the 104 at speeds greater than 150 km/h; he exited the 104 at Thorburn, and drover briskly through a stop sign at the intersection with secondary highway 347. The video record shows Mr. Fraser turning off his vehicle's nighttime driving lights at that point. Police broke off pursuit.

[11] This was not a whodunit. Mr. Fraser had been identified with his photo driver's licence back at the point of the original stop, and police still had it. Police sought and obtained a public-interest warrant through the justice of the peace centre. Police were able to make contact with Mr. Fraser over the next several days, by cellular telephone and text message, and tried to get him to turn himself in. Mr. Fraser's replies were evasive and non-committal. Defence counsel informed me that Mr. Fraser got as far away as Ottawa, Ontario before better judgment prevailed and he decided to head back to the Maritimes. Police picked up Mr. Fraser in Moncton. He was brought to court, arraigned and pleaded guilty as I described back at the beginning of this decision. After submissions on

sentencing by counsel, Mr. Fraser made a s. 726 allocution in which he apologized to the court and said that he had fled as a panic response.

Analysis—general principles

[12] Sentencing is a highly individualized process: *R. v. Ipeelee*.[1]

[13] In determining a fit sentence, a sentencing court ought to take into account any relevant aggravating or mitigating circumstances; that is prescribed by para. 718.2(a) of the *Criminal Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham.*[2]

[14] Assessing an offender's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender; that fundamental principle is set out in s. 718.1 of the *Criminal Code*.

[15] In *Ipeelee*, at para. 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality

[1] 2012 SCC 13 at para. 38.
[2] 2013 SCC 15 at para 8.

promotes justice for victims and proportionality seeks to ensure public confidence in the justice system.

[16] In the recent decision of *R. v. Lacasse*, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence.[3] The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. The Court recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of penal justice.

[17] In determining an appropriate sentence, the court is required to consider, pursuant to para. 718.2(b) of the *Code*, that a sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances. This is the principle of sentencing parity. The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the

[3] 2015 SCC 64 at para. 12.

circumstances. These important principles of restraint are set out in para. 718.2(d) and (e) of the *Code*. In *R. v. Gladue*, the Supreme Court of Canada stated that the statutory requirement that sentencing courts consider all available sanctions other than imprisonment was more than merely a codification of existing law; rather, the provision was to be seen as a remedy whereby imprisonment was to be the sanction of last resort.[4]

Analysis—personal history of Mr. Fraser

[18] The presentence report describes Mr. Fraser as a thirty-four-year-old male whose upbringing was unremarkable. He completed high school and has attended community college. He has worked steadily as a labourer; his jobs have taken him out west on a few occasions. He has used drugs and narcotics in the past; the pre-sentence report does not provide a great amount of detail on this point.

[19] Mr. Fraser has struggled with anxiety, and sought appropriate mental-health counselling a few years ago when he lived in British Columbia.

[20] Mr. Fraser has a point-in-time criminal record: he was sentenced on 31 August 2012 in Fort St. John, British Columbia, to a two-year term of probation for offences of breach of undertaking, uttering threats and criminal harassment. Mr.

[4] [1999] S.C.J. No. 19 at paras. 31-33 and 36.

Fraser still has charges outstanding in that province, and there is a warrant out for his arrest. However, there is no evidence of any police officer from B.C. travelling to Nova Scotia looking for a backing endorsement under section 528 of the *Code*. These sorts of limited-radius-by-administration warrants—often referred to as stay-out-of-town warrants—are indicative usually of fairly minor criminal allegations. And that would be another key point for me to keep in mind: any pending charges in British Columbia are allegations only, of which Mr. Fraser is presumptively innocent.

Analysis—deterrence and moral culpability

[21] The prosecution asserts that Mr. Fraser should receive a lengthy prison sentence to deter him and others from engaging in high-speed flight from police. This requires the court to address the principles of specific and general deterrence.

[22] As to the need to deter Mr. Fraser specifically, I note that his very short record does not include any offences involving the dangerous or reckless operation of motor vehicles. As a result of not having been admitted to bail, Mr. Fraser has spent one hundred and eight days in custody; that operates effectively as a significant deterrent.

[23] General deterrence addresses the need for the court to speak to the community at large. My colleague Derrick J.P.C. analysed general deterrence in *R. v. Matheson*:

> 26 The Crown's submission that the right message needs to be sent by the sentence in this case essentially encapsulates what is intended by the concept of general deterrence. General deterrence supposes that others, with similar inclinations to the offender will be deterred, once they learn about the sentence, from committing a comparable offence. A sentence emphasizing general deterrence is intended to "deter those of like-mind who may be lured into the [drug] business with the hope of easy gain." (*R. v. Butler*, [1987] N.S.J. No. 237 (N.S.S.C., App. Div.).) The purpose of general deterrence is to "discourage potential offenders from becoming actual offenders." It has been referred to as the "punishment of the offender for what others might do." (*R. v. McGinn* (1989), 49 C.C.C. (3d) 137 (Sask. C.A.).) Judges, such as Vancise J.A. in dissent in McGinn, have expressed serious reservations about the effectiveness of general deterrence. Vancise J.A. did so with the following comments at page 157:
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> > Contending that longer sentences, for example, six months, would have a greater deterrent effect than a shorter sentence, for example one month, is to contend that: (1) the public will know of the sentence (a dubious proposition); (2) the potential offender will perceive the likelihood of apprehension (a more dubious proposition); and (3) the potential offender knowing he will likely be apprehended would commit the offence for the lower penalty of one month but not for the higher penalty of six months. Viewed in this way it is small wonder that an upward variation in sentences appears to have no effect on the crime rate.
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> 27 The degree of publicity a case receives has also been remarked upon as relevant to the deterrent value of the sentence. Nunn J. in *R. v. Clarke*, [1990] N.S.J. No. 427 (N.S.S.C.), observed about Mr. Clarke's case: "If it receives no publicity then there is no general deterrence, other than the several people who may be in court at the time the sentence is given."

[24] To be sure, in light of the clear language of para. 718(b) of the *Code*, the court is obligated statutorily to consider the principle of general deterrence in

fixing every sentence.[5] However, it is clear equally from the language of the preamble of the section—which requires a sentencing court to impose just sanctions that "have one or more of the following objectives"—that there might be times when general deterrence would not be a provident or high-priority objective. I think that this is one of those cases. Recall that general deterrence is intended to dissuade those of inclination similar to the person being sentenced from committing similar offences. In this case, Mr. Fraser's inclination was a panic-driven response. The prosecution said so in the statement of fact read to the court at Mr. Fraser's bail hearing: "Mr. Fraser appeared to panic." In his s. 726 allocution to the court, Mr. Fraser confirmed that he panicked and made a very bad mistake.

[25] This is an element common to the flight-from-police cases I have heard in the past: panic and take off. There is nothing earth shaking or farfetched in this.[6]

[26] Panic is, in essence, groundless fear; an extravagant overreaction to what is perceived, often erroneously, as a threat. It seems to me that persons who are inclined toward panic are not likely to be deterred very much by the sentence of the

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[5] *See R. v. Tran*, 2010 ABCA 317 at paras. 8-15.

[6] The fact that flight from police is often a fear-induced response without any underlying or predicate criminality was noted in The Royal Canadian Mounted Police Public Complaints Commission, *Police pursuits and public safety—a report*, (Ottawa: The Commission, 1999) at 14-15. I do not rely on this report or consider it as evidence. I observe merely that some of its findings coincide quite closely with the common experience of the court.

court, even if it were the case that the sentence come to the conspicuous attention of the public. Furthermore, panic is not premeditation. This situates Mr. Fraser's moral culpability and degree of responsibility at the lower and of the scale. Accordingly, I do not see an overwhelming case for the application of general deterrence here.

[27] As declared in para. 718(c) of the *Code*, separating an offender from society might operate in appropriate circumstances as a proper sentencing objective, particularly when dealing with persons who pose a threat to public safety. However, when I review Mr. Fraser's record and his fairly pro-social personal history as set out in the pre-sentence report (which records his consistent work history, trades training, and respectful interaction with corrections staff while on remand), I am hard pressed to classify him as someone who poses a danger to the community.

[28] It is true that Mr. Fraser fled the province, and got as far away as Ottawa. Going to ground is not a good thing: it results in the expenditure of scarce resources of the state in trying to locate the fugitive, and leads to delay in the criminal-justice process. While it does not make the original criminal conduct more serious, it has been regarded as elevating the moral culpability of the

offender.[7] It might also contraindicate the imposition of a community-based sentence.[8] Fortunately, not much time was wasted here, as Mr. Fraser's conscience got the better of him, and he decided to head back east to surrender himself into custody. He was arrested by police in Moncton, New Brunswick.

Analysis—seriousness of the offences

[29] This was serious criminal conduct: Mr. Fraser's manner of driving—the high rates of speed and disregard for intersection controls—placed the public at risk. It certainly placed Cst. Watters in real risk that went beyond the notional.

[30] Nevertheless, the force applied to Cst. Watters was not in the course of an attack on an officer, and this all unfolded in the wee hours, when traffic volumes were very light. Furthermore, this was a case of police pursuit. I do not propose to conduct any sort of review of police-operations policy regarding high-speed pursuits. To be sure, the issue has been canvassed quite extensively in the past in forums appropriate for that sort of inquiry.[9] Initiating and continuing a vehicular pursuit is a judgment call; furthermore, if police were to adopt a policy of non-pursuit, such a policy might incentivize flight. What I feel I can say confidently about this case is that, up to the time Mr. Fraser decided to drive off, he had not

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[7] *See R. v. Cromwell*, 2005 NSCA 137 at para. 44.
[8] Id., at paras. 41-42.
[9] *See* note 2, *supra*.

done anything wrong other than heading the wrong way down a short segment of a one-way roadway. That, and the fact that pursuit prolonged his panic lead me to regard the seriousness of this offence as being lesser than if, say, Mr. Fraser were speeding away from a robbery or some other serious predicate offence.

Analysis—sentence parity

[31] I reviewed in detail the sentencing authorities presented to the court by the prosecution and defence. While those cases dealt with offences similar to Mr. Fraser's, I found them of limited assistance as they were decided by courts outside Nova Scotia. In my view, the court's focus ought to be closer to home; not because of come-from-away parochialism—and courts in Nova Scotia hold no monopoly over the dispensing of principles of sentencing—but because cases decided in this province are more likely to be attuned to the criminogenic circumstances that prevail here, and offer a better guide to an appropriate range of sentence, given that the locale of an offence is an integral part of the circumstances of that offence.[10] A good case on point is *R. v. Sears*.[11] Arnup J.A. summed it up:

[10] *See Cromwell*, note 7, at para. 26 for a helpful discussion on the delineation of a sentencing range.

> [2] We agree with the statement that in considering the appropriate sentence to be imposed in cases of shoplifting or related offences, it is appropriate to consider whether in that particular community, at that particular time, there appears to be an unusual amount of that type of crime, which therefore calls for a sentence which will reflect a degree of deterrence to others. At the same time, that situation can never be more than one of the factors which is to be taken into account, the paramount question of course always being: what should this offender receive for this offence, committed in the circumstances under which it was committed?

[32] In my review of decisions from courts in Nova Scotia, I found particularly useful the decision of my colleague Derrick J.P.C. in *R. v. Sullivan*.[12] Mr. Sullivan was charged with two counts of dangerous driving causing bodily harm; he overreacted when being passed by another vehicle, accelerated to 107 km/h in a 60 km/h zone, lost control, and caused an accident involving three other vehicles, resulting in serious injuries. Mr. Sullivan had no prior criminal record, was profoundly remorseful, and had good character references. The sentencing-recommendation gradient between the prosecution and defence was much as in this case: the prosecution sought a 12-24-month term of imprisonment for Mr. Sullivan; defence sought a short term of intermittent-service imprisonment.

[33] After reviewing a number of authorities presented to the court by counsel, Derrick J.P.C. listed what she assessed as mitigating factors:

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[11] [1978] O.J. No. 435 (C.A.). *See also*: *R. v. Gibbon*, 2006 BCCA 219 at paras. 21 and 26, *R. v. Prasad*, 2006 BCCA 470 at para. 12, *R. v Nguyen*, 2013 ONCA 51 at para. 4, and *R. v. Baillie*, 2016 NSPC 11 at para. 14.
[12] 2015 NSPC 40.

- Mr. Sullivan's manner of driving did not involve racing or thrill-seeking; although it was a dangerous lapse in judgment, it was a brief one;
- there was no evidence of Mr. Sullivan having been alcohol-or-drug impaired;
- Mr. Sullivan had no prior criminal record, and only a dated history for provincial vehicular offences;
- Mr. Sullivan was found to be a pro-social member of the community who enjoyed the strong supports of family and friends; and,
- Mr. Sullivan was profoundly remorseful.

[34] Derrick J.P.C. imposed two concurrent sentences of 90-days' imprisonment, to be served intermittently, along with a two-year term of probation, and a five-year driving prohibition.

[35] Also useful was the sentencing decision of my colleague, Scovil J.P.C. in *R. v. Matthews*.[13] Mr. Matthews zoomed on his motorcycle through residential streets of Amherst at breakneck speeds of 100 km/h in 50 km/h zones before police broke off pursuit due to concerns about public safety. The offence occurred the early

[13] 2014 NSPC 84, 2014 NSPC 85; appeal dismissed on jurisdictional grounds, 2015 NSCA 31.

evening hours of a workday, and a school and a church were in the area where the chase played out. Mr. Matthews was charged with dangerous driving and flight from police. There was a trial, and Mr. Matthews was found guilty as charged; based on a joint recommendation, the court imposed concurrent sentences of two months in prison.

[36] *Sullivan* might be said to be factually distinctive of this case in that the offender's bad driving was of brief duration. That is true. However, it was also inherently more dangerous and carried greater risk than Mr. Fraser's criminal conduct, given that it happened in the vicinity of a significant volume of traffic. That risk manifested itself in actual injury to four innocent persons.

[37] *Matthews* is more aligned with the facts of this case in that Mr. Matthews led police on a prolonged chase. Furthermore, the risk to the public was very great, given that things coursed along residential streets at a time of day when traffic and pedestrian volumes would have been significant.

[38] I was able to locate one case out of this province dealing with an assault of a peace officer: *R. v. Marsman*.[14] Distinctively, Mr. Marsman was sentenced for an aggravated assault: the officer who was the victim had suffered a concussion,

[14] 2007 NSCA 65.

needed extensive stitching of lacerating open wounds and was off work for six weeks. This situates *Marsman* as being a far more serious offence than this one, although I appreciate fully the emotional stress suffered by Cst. Watters as described in the pre-sentence report. Upon an appeal from sentence brought by the prosecution, the Court of Appeal imposed upon Mr. Marsman a community-based conditional sentence of two years less a day.[15]

Summary of analyses

[39] The court is dealing with a 34-year-old male with a good work history, realistic prospects for rehabilitation and a minor prior record that does not include any offences involving the dangerous operation of motor vehicles. Mr. Fraser's flight from police was induced by panic; this is not a case of a motorist who chose deliberately to use a public highway to satisfy a thrill-seeking interest. Mr. Fraser's crimes, while serious, occurred at a time of day when traffic volumes—and, consequently, the risk to the public—were low. Although police had some suspicion Mr. Fraser might have been impaired by a drug, there is no proof of that fact, although flight prevented the lawful collection of evidence. Finally, the outcomes in similar cases persuade me that an appropriate range of sentence for the para. 249(1)(a) and sub-s. 249.1(1) counts would be custodial terms of two to

[15] Such a sentence would no longer be legal in virtue of S.C. 2012, c. 1, s. 34.

three months on each, but to be served concurrently, given that the two counts are closely connected circumstantially so as to be regarded as one continuing criminal operation as described in *R. v. Osachie*.[16] With respect to the para. 270(1)(a) count, I believe that a purely community-based sentence would be appropriate, given that the offence did not involve an actual attack upon Cst. Watters and that it did not result in serious injury.

[40] Mr. Fraser was denied bail, and has served 108 days of pre-trial custody. Applying the principles set out in *R. v. Summers*[17] and *R. v. Carvery*,[18] I intend to give Mr. Fraser 1.5 days of credit for each day on remand, for a credit of 162 days.

[41] This credit would account fully for any term of imprisonment the court might have imposed for the para. 249(1)(a) and sub-s. 249.1(1) counts but for the remand time; furthermore, I observe that all of the offences before the court are eligible for suspended sentences pursuant to para. 731(1)(a) of the *Code*. Therefore, I suspend the passing of sentence on each count and place Mr. Fraser on probation for a term of 18 months with appropriate conditions. I order and direct pursuant to the provisions of sub-s. 719(3.2) and (3.3) of the Code that information 732115 be endorsed to record that, but for the remand credit, the sentence of the

[16] [1973] N.S.J. No. 112 at para. 10 (A.D.).
[17] 2014 SCC 26.
[18] 2014 SCC 27.

court would have been 60 days imprisonment for the para. 249(1)(a) count, and 60 days concurrent for the sub-s. 249(1) count.

[42] There will be the mandatory minimum $200.00 victim-surcharge amount for an indictable offence on each count, and Mr. Fraser will be given 12 months to make payment to the court.

[43] In *R. v. R.C.*, the Supreme Court of Canada stated:

> Parliament has thus drawn a sharp distinction between "primary" and "secondary" designated offences, which are defined in s. 487.04 of the Criminal Code. Where the offender is convicted of a secondary designated offence, the burden is on the Crown to show that an order would be in the best interests of the administration of justice.[19]

[44] Given that Mr. Fraser has a prior record, and given his flight which took him some distance from Nova Scotia, I find that the prosecution has discharged the burden of proving that a secondary-designated-offence DNA collection order would be in the interests of justice, and I order it in relation to case number 2987316.

[45] Although not sought by the prosecution, Mr. Fraser is subject to discretionary prohibition orders of up to three years in relation to the para.

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[19] 2005 SCC 61.

249(1)(a) and sub-s. 249.1(1) counts; I prohibit Mr. Fraser from operating a motor vehicle on any street, highway or other public place for a term of 15 months in relation to each count; however, given the connection of the counts, the court declines to order consecutive service under sub-s. 249(2.1) of the *Code*. The interlock-eligibility provisions are inapplicable as these offences did not involve alcohol-impaired operation of a motor vehicle.

[46] With respect to the s. 270 offence, I consider it desirable in the interests of public safety that Mr. Fraser be subject to a two-year s. 110 order, starting immediately.

ORDERS ACCORDINGLY

JPC