SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Arsenault*, 2022 NSSC 325

Date: 20221115
Docket: CRH No. 507101
Registry: Halifax

Between:

His Majesty the King

v.

Donald Francis Arsenault

DECISION ON SENTENCE

Judge:	The Honourable Justice Scott C. Norton
Heard:	October 26, 2022, in Halifax, Nova Scotia
Written Decision:	November 15, 2022
Counsel:	Stephen Anstey, for the Crown Ian Hutchison, for the Defendant

NOTE: In reducing to writing the oral decision rendered in this matter, editing has taken place to include omitted citations and quotes from secondary sources and to make changes to format or to grammar for readability. No changes have been made to the substantive reasons for decision.

By the Court (Orally):

[1] After trial, by Decision dated August 19, 2022, I found Donald Francis Arsenault guilty of offences pursuant to ss. 320.14(1)(a), 320.15(1), 94(1), 86(1), 92(2), 95(1), 86(2), and (2 counts)117.01: *R. v. Arsenault*, 2022 NSSC 242.

[2] The relevant facts were set out in the reported decision as follows:

> [3] The facts are set out in detail in my reported decision of May 20, 2022. In brief summary, on August 3, 2019, at about 03:43 a.m., following a single vehicle accident on the Bedford Highway, in Halifax, Nova Scotia, Mr. Arsenault was arrested by Cst. Brent Woodworth of the Halifax Regional Police ("HRP") for impaired operation of a motor vehicle and refusing to provide a breath sample. He was informed of the charges and advised of his right to consult legal counsel. He was transported to police headquarters and spoke to legal aid duty counsel. A second demand was made for a breath sample which he refused. He was placed in a cell at 05:04.
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> [4] Mr. Arsenault's vehicle was damaged and had to be towed from the accident scene. HRP Policy is that in such circumstances an inventory search is to be conducted to identify and take custody of any items of value in the vehicle to protect against loss or theft of such items and potential civil liability resulting. Cst. Dianne Penfound performed the inventory search. At 05:25 she observed what appeared to be a handgun in the glove box. Two members of the Emergency Response Team ("ERT") took custody of the handgun and made it safe by removing the magazine and ejecting a bullet from the chamber.
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> [5] At 10:51 the ERT members went to Mr. Arsenault's cell and arrested him on new firearms related charges. He was cautioned and given his right to consult legal counsel. He advised that he understood the charges and declined the opportunity to speak with legal counsel.

[3] I received helpful written submissions on the appropriate sentence from the Crown and Mr. Arsenault and heard oral submissions on October 26, 2022. Following the sentencing hearing, counsel referred me to the Ontario Court of Appeal Decision in *R. v. Boily*, 2022 ONCA 611. I will make further comment on *Boily* below.

Pre- Sentence Report

[4] The Pre-Sentence Report dated October 11, 2022, informs me that Mr. Arsenault is 32 years old, has a grade 12 education and is presently in a common law relationship of 11 years, and has an eight-year-old son. He grew up in the west end of Halifax in public housing. His father died when he was very young. He had a good relationship with his stepfather, but his biological uncle stepped in to provide a father figure for him in his formative years. He left home at age 20 as he was going through a period when he was in conflict with the law.

[5] His common law spouse advises that he takes responsibility for his actions related to the current offences before the court and feels responsibility for his involvement. Mr. Arsenault works on a full-time basis and has abided by the house arrest conditions of his release pending trial.

[6] As to the circumstances of the offences before the court, Mr. Arsenault says that he no longer consumes any alcohol or drugs. He says that he felt safer with a weapon and at the time of the offences it "felt normal" to have a weapon in his possession. He now realizes that he was very careless and making a lot of wrong choices during that time in his life.

[7] Mr. Arsenault's court record discloses that he was convicted of trafficking in controlled substances three times between 2010 and 2017, and on one occasion received a sentence in a federal penitentiary. He has two prior convictions relating to possession of firearms, for which he received a 12-month sentence of incarceration on each.

The Parties' Positions

[8] The Crown characterizes the offender as a chronic recidivist, having been involved with the criminal justice system essentially since becoming an adult until the present day. Given the offender's antecedents, the facts of the offences before the court and the nature of the offences for which he has been convicted, denunciation, deterrence and separation are the primary sentencing principles for the court's consideration.

[9] Mr. Arsenault submits that the pre-sentence report is positive and the prospects for his rehabilitation are good. He has the support of his spouse and family and his incarceration will cause difficulties for the family. He has remained alcohol free from 2020 onwards and does not suffer any addictions and is in good physical

health. He asks the court to note that his previous firearms convictions were recorded on January 5, 2010, for an offence date of December 2, 2008.

[10] Mr. Arsenault submits that mitigating factors are:

1. The firearm was not used in the commission of an offence.
2. The firearm remained at all times within the glove box of the vehicle.
3. The firearm was not pointed at any person.
4. The firearm was not discharged.
5. No person was hurt or injured because of his possession of the firearm.
6. His criminal record for firearms is dated – the last offence committed almost 14 years ago.

[11] In response, the Crown says that these are not mitigating factors but, rather, the absence of aggravating factors.

[12] The parties agree on the appropriate sentence for most of the offences as will be discussed below. It is agreed that the most serious firearms offence is possession of a loaded firearm (s. 95(1)) and that the other firearms offences constitute a single criminal venture and thus in large part attract concurrent sentences. Regarding the firearms offences, Mr. Arsenault disagrees with the Crown on two issues. First, the appropriate length of the sentence for the s. 95(1) offence, and second, whether the offences pursuant to s. 117.01 attract a sentence that is consecutive to any other time.

Principles of Sentencing

[13] I am instructed on the fundamental purpose and principles of sentencing set out in s. 718 of the *Criminal Code* and following. Denunciation and deterrence are primary considerations. Further, the sentence to be imposed must be proportional to the gravity of the offence and the degree of responsibility of the offender. The principal of parity mandates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A sentence must be the least restrictive sanction that meets the fundamental principles and purposes of sentencing.

[14] Mr. Arsenault, citing the Court of Appeal in *R. v. Phinn*, 2015, NSCA 27, at para. 29, says that the court must sentence him based on "life on the ground" in Nova Scotia, not Ontario. Gun violence has become a serious issue in the Halifax region. In *Phinn*, the majority noted that "This Court has spoken out many times concerning

the scourge of loaded firearms on the streets of our communities, and the risk they pose to the police and the law-abiding citizens they are sworn to protect" (para. 99). In *R. v. Fraser*, 2019 NSSC 368, Justice Patrick Duncan (as he then was) observed:

> [32] Gun violence has increased in our society particularly among young people engaged in the drug trade. It seems increasingly commonplace to hear of the use of firearms, especially handguns, in public places where residents and visitors alike frequent. Injuries from gun violence are not restricted to warring factions in the criminal element. Because of the presence and use of weapons in populated areas, innocent bystanders are at risk of being injured. The location where Mr. Fraser was apprehended is in the middle of a busy commercial and residential area. He may have seen the weapon as necessary for his self defence, but he puts others in danger by his armed presence there.
>
> [33] These crimes impact on the safety of the community and on our sense of security as we go about our daily lives in the city. These are not victimless crimes. Bringing drugs and guns back into a community such as Uniacke Square perpetuates the cycle of addiction and lost potential for the youth of that community. It represents the same lifestyle that drew Mr. Fraser into the trade and put him here today.

[15] In *Phinn*, the Court recognized the increased seriousness of a firearms offence committed in a vehicle, stating "although weapons are dangerous in most contexts, adding quick portability to the mix by virtue of having a gun in a vehicle, expands the potential for more widespread consequences of misuse" (para. 39).

[16] Mr. Arsenault argues that his bail conditions should be considered in arriving at the appropriate fit sentence. He was granted conditional bail on August 15, 2019 and has been subject to house arrest except for serving a one-year jail sentence imposed on January 6, 2020. He says that the bail conditions have caused hardship. He has had his liberty curtailed. He relies on the following passage from Justice Saunders in *R. v. Knockwood*, 2009 NSCA 98, at paras. 33-34:

> [33] From these authorities I will take the present state of the law to be such that the impact of strict release conditions may be considered or "put into the mix", together with all other mitigating factors, in arriving at a fit sentence.
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> [34] Assuming that to be so, I would conclude that the impact of the particular conditions of release upon the accused must be demonstrated in each case. That is, there must be some information before the sentencing court which would describe the substantial hardship the accused actually suffered while on release because of the conditions of that release. See for example Irvine, supra at paras. 27-30.

[17] In response to this the Crown says that the court should not infer substantial hardship. The Crown submits that the offender applied unsuccessfully to reduce some of the restrictions that he said were causing hardship. He sought permission to take his children to school and to sporting events, to permit him to attend a gym, and to be able to walk the dog.

[18] I note that in *Knockwood* the Court of Appeal did not find hardship. Justice Saunders concluded, at para. 36:

> [36] In my view, this falls far short of identifying legitimate, substantial hardship. Aside from a recitation of the terms of Mr. Knockwood's pre-trial release, nothing further was put on the record. The sentencing judge was asked to infer from the conditions themselves, without more, that the appellant had suffered hardship, which then ought to be taken into account as a mitigating factor. In my opinion the mere reference to the terms of pre-trial release will not satisfy the onus to demonstrate actual hardship as a result of those pre-trial conditions.

[19] There was no additional information provided to me about the extent of the hardship alleged to have been caused by the release conditions. I am not satisfied that the offender has demonstrated the impact of any particular condition of release as amounting to substantial hardship.

Section 95

[20] Pursuant to s. 95(2)(a) Mr. Arsenault is liable to a period of incarceration not exceeding 10 years, the mandatory minimum for a first offence having been struck down by the Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15.

[21] The Crown argues that the appropriate sentence is 5 years. Mr. Arsenault argues the appropriate sentence is 3 years.

[22] Sentencing for firearms offences ranges from what the Supreme Court of Canada referred to as "true crimes" at one end to "conduct that resembles a licensing infraction" at the other end (*Nur*, at para. 122). Mr. Arsenault says that possessing the firearm made him feel "safer" and "normal". No other explanation for its presence was provided. Possession of an unexplained, unlicensed handgun while driving in a densely populated urban area is in my view closer to the "true crime" end of the spectrum.

[23] In *R. v. Kachuol*, 2017 BCCA 292, the British Columbia Court of Appeal said:

> 26 …As Crown counsel aptly put it, most unlawful possession of loaded firearms represents nothing short of "tragedy in gestation". By criminalizing such conduct via s. 95(1), the law intervenes before someone is actually harmed or some other crime actually committed. By imposing severe exemplary sentences for possession simpliciter, courts support and advance the goals of this intervention.
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> 28 There was nothing in the evidence to indicate that Mr. Kachuol's possession of the loaded, prohibited "crime gun" was for anything other than a criminal purpose. Nor did he even suggest it. There was simply no possible benign reason for his unlawful possession of the loaded gun apparent on the evidence. In such circumstances, proof of a direct connection with other criminal activity was unnecessary to situate the offence at the "true crime" end of the s. 95(1) spectrum. In my view, requiring such proof would tend to defeat the purpose of the provision.
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> 29 Mr. Kachuol's possession of the loaded prohibited handgun in a moving car, strategically placed for ready access and entirely outside of the regulatory framework, posed a real and immediate danger to those in his orbit. The risk was increased by his consumption of alcohol and the urban environment in which he possessed the "crime gun".
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> [Emphasis added]

[24] The Nova Scotia Court of Appeal in *R. v. Anderson*, 2021 NSCA 62 reached a similar conclusion, at paras. 59 and 61:

> [59] I pause here to comment on the judge's discussion of the aggravating and mitigating factors. The "potential for violence and physical harm arising from the possession of a loaded handgun" is not so much an aggravating factor in relation to the charges for which Mr. Anderson was convicted as it is an indication of the gravity of the offences…
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> …
>
> [61] Mr. Anderson should be understood as having committed a "true crime" firearms offence albeit not for the purpose of pursuing a criminal enterprise. The evidence established Mr. Anderson had the loaded gun in his possession out of fear that he might be targeted for violence. This does not resemble the end of the spectrum that Justice Doherty described as more in the nature of a regulatory offence…

[25] In *R. v. Steed*, 2021 NSSC 71, Justice Rosinski conducted a review of a large number of authorities from across the country in relation to sentences for s. 95 offences in the "true crime" end of the spectrum and summarized, at para. 151-153:

> [151] More goalposts – In Ontario, using the sentencing range categories I earlier postulated, courts impose sentences for (indictable) s. 95 offences as follows:

> It does appear that this range can be better described, from most serious to least serious as (the first two ranges therefore including "truly criminal conduct"):
>
> > 1-first-time s. 95 offenders who have unlawful possession of loaded prohibited/restricted firearms "as a tool of their trade" (i.e. for an unlawful purpose such as drug-trafficking) - 3 to 5 years.
> >
> > 2-first-time s. 95 offenders who have simple unlawful possession of loaded prohibited/restricted firearms (including offenders who have lawful possession thereof, but engage in "truly criminal conduct" by unlawfully handling or using the firearms – i.e. for an unlawful purpose) - 2 years less one day to 3 years.[41]
> >
> > 3-first-time s.95 offenders who have lawful possession of loaded prohibited/restricted firearms and commit licensing -type offences- up to two years less a day imprisonment.
> >
> > 4-For first-time recidivist s.95 offenders- 5 years (usually plus 12 months consecutive for s. 117.01 CC offence) to 8 years.
>
> [152] I conclude that the Ontario jurisprudence has reached a principled and reasonable conclusion in relation to these crimes and their prevalence within a large urban centre setting.
>
> [153] Generally speaking, as modified by our own jurisprudence, it is an appropriate starting point from which to impose individualized sentences here in Nova Scotia.

[26] The Crown argues that while this is Mr. Arsenault's first conviction under s. 95, it is not his first firearms related conviction. In 2010 he was convicted of two counts under s. 92(1), possession of a firearm knowing possession is unauthorized. Accordingly, says the Crown, this moved the Offender to the very top end of the "first-time offender" category listed by Justice Rosinski. The Crown relies on other Nova Scotia authorities supporting a sentence in the 5-year range including *R. v. Fraser*, 2019 NSSC 368 and *R. v. Holland*, 2017 NSSC 148. In both of those cases the accused entered guilty pleas for their offences, a mitigating factor not present in this case. Mr. Fraser had one prior firearms conviction under s. 94. A sentence of 4 years 9 months was imposed for the s. 95 conviction. Mr. Holland's sentence was the result of a true joint submission which diminishes its precedential value somewhat, but a 5-year sentence was imposed for the offence under s. 95.

[27] As discussed previously, Mr. Arsenault asserts that the decision in *Steed*, being based principally on Ontario decisions, has limited application to this case, and should be sentenced based on "life on the ground" in Nova Scotia. In my view, the analysis in *Steed* is helpful as a starting point. Justice Rosinski, at para. 157,

went on to consider the Nova Scotia cases advanced by Mr. Steed. Mr. Arsenault refers to *R. v. Cox*, 2022 NSSC 95. Mr. Cox has a record of 54 convictions over 24 years. He was found to have used a firearm as a tool of his trade and the facts were far more serious than in this case. Mr. Cox was sentenced to 3 years jail time for the s. 95 offence. The Crown notes that Mr. Cox was a first-time firearms offender, whereas Mr. Arsenault is not.

[28] Having considered the authorities and arguments presented by the Crown and Mr. Arsenault, I consider a fit and proper sentence for the offence under s. 95(1) to be 4 years.

Section 117.01

[29] Mr. Arsenault was convicted on two counts under s. 117.01. Pursuant to s. 117.01(3)(a) the offender is liable to a period of incarceration not exceeding 10 years for these offences. The Crown's position is that Mr. Arsenault should serve one year for each offence, concurrent to each other, but consecutive to the sentence under s. 95(1). Mr. Arsenault submits that the term of the sentence should be 6 months on each offence, both concurrent to the sentence under s. 95(1).

[30] The Crown relies on the decision of Wright J. in *R. v. Chan*, 2011 NSSC 471, for the proposition that the authorities suggest that sentences under s. 117.01 will generally be served consecutively "to reflect the seriousness of flouting court orders aimed at controlling firearms". Justice Rosinski, in *Steed*, supra, similarly imposed a 12-month consecutive sentence, for each s. 117.01 count consecutive to each other. The Ontario Superior Court in *R. v. Noorali*, 2010 ONSC 3747, similarly stated that "[t]the violation of that order constitutes an invasion of a legally protected interest that is different from the interest protected by s. 95(1) and it is open to the court to reflect the seriousness of that separate violation by imposing a consecutive sentence for it" (para. 25).

[31] Mr. Arsenault argues that it is a matter of judicial discretion as to whether the sentence for s. 117.01 is consecutive or concurrent. He refers me to the decision of *R. v. Smith*, 2013 NSSC 77, wherein the court ordered the 6-month sentence for an offence under s. 117.01 to be served concurrently. I note that in that case the sentence was imposed pursuant to a joint recommendation. I also note that in *Cox*, the offender was sentenced to a consecutive sentence for the s. 117.01 offence.

[32] I endorse the reasoning in the cases provided by the Crown that an offence under s. 117.01 is for a different legally protected interest than the sentence imposed

for an offence under s. 95(1) and must reflect the serious consequences of flouting a court order aimed at controlling firearms. Accordingly, I sentence Mr. Arsenault to 6 months on each of the offences under s. 117.01, concurrent to each other but consecutive to the sentence imposed for the s. 95(1) offence.

The Remaining Firearms Offences

[33] The Crown and Mr. Arsenault agree on the terms for sentence on the remaining firearms offences which I accept and impose as follows:

Count 3	s. 94(1)	3 years jail time	concurrent
Count 4	s. 86(1)	6 months jail time	concurrent
Count 6	s. 92(1)	2 years jail time	concurrent
Count 9	s. 86(2)	6 months jail time	concurrent

Offences Relating to Conveyances

[34] Mr. Arsenault was found guilty of offences pursuant to ss. 320.14(1)(a) and 320.15(1). Pursuant to s. 320.19(1)(a)(i) of the *Code*, for a first offence under s. 320.14(1) the offender is liable to a minimum penalty of $1,000 fine and a maximum penalty of 10 years imprisonment. Pursuant to s. 320(1)(a)(i) and (4) of the *Code*, for a first offence under s. 320.15(1) the offender is liable to a minimum penalty of $2,000 fine and a maximum penalty of 10 years imprisonment.

[35] The Crown and Mr. Arsenault agree, and I accept, that the imposition of a fine of $2,000 for each count would be a fit sentence. The parties disagree on the interpretation of the provisions of the *Code* requiring the court to make an order prohibiting the offender from operating the type of conveyance in question (i.e. a motor vehicle) for a period of time. Their disagreement is over the interpretation of the words "plus the entire period to which the offender is sentenced to imprisonment". The Crown argues that the period of prohibition must be "in addition to the entire period for which the offender is sentenced to imprisonment". In this case that would mean in addition to his sentence of 4 years, 6 months on the firearms offences. Mr. Arsenault says that the prohibition period is in addition to any other punishment that may be imposed for "that offence", in this case the fine.

[36] As a consequence of findings of guilt under ss. 320.14(1) and 320.15(1), s. 320.24 of the *Code* requires the court to make a driving prohibition order as part of the sentence:

Mandatory prohibition order

320.24 (1) If an offender is found guilty of an offence under subsection 320.14(1) or 320.15(1), the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating the type of conveyance in question during a period to be determined in accordance with subsection (2).

Prohibition period

(2) The prohibition period is

(a) for a first offence, not less than one year and not more than three years, plus the entire period to which the offender is sentenced to imprisonment;

(b) for a second offence, not less than two years and not more than 10 years, plus the entire period to which the offender is sentenced to imprisonment; and

(c) for each subsequent offence, not less than three years, plus the entire period to which the offender is sentenced to imprisonment.

….

Prohibition period

(5) The prohibition period is

(a) if the offender is liable to imprisonment for life in respect of that offence, of any duration that the court considers appropriate, plus the entire period to which the offender is sentenced to imprisonment.

(b) if the offender is liable to imprisonment for more than five years but less than life in respect of that offence, not more than 10 years, plus the entire period to which the offender is sentenced to imprisonment; and

(c) in any other case, not more than three years, plus the entire period to which the offender is sentenced to imprisonment.

Effect of order

(5.1) Subject to subsection (9), a prohibition order takes effect on the day that it is made.

….

Consecutive prohibition periods

(9) If the offender is, at the time of the commission of the offence, subject to an order made under this Act prohibiting the offender from operating a conveyance, a court that makes a prohibition order under this section that prohibits the offender from operating the same type of conveyance may order that the prohibition order be served consecutively to that order.

> [Emphasis added]

[37] I note at the outset that s. 320.24(1) expressly authorizes a prohibition order "in addition to any other punishment that may be imposed for that offence" (emphasis added), with its duration "to be determined in accordance with subsection (2)". In other words, the prohibition is only imposed in respect of the offences under ss. 320.14(1) or 320.15(1). Section 320.24(2) merely sets out the method of calculation. Read in isolation, then, ss. 320.24(1) and (2) indicate that the imposition of the prohibition is attributable to the driving offences alone. A prohibition order comes into effect on the day it is made (s. 320.24(5.1)), subject only to the discretion to make the prohibition consecutive to any pre-existing prohibition order (s. 320.24(9)).

[38] However, this does not end the analysis. Statutory interpretation requires the court to read the words of a statutory provision "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (Driedger's "modern approach", cited, e.g., in *Bell ExpressVu Limited Partnership v Rex*, [2002] 2 SCR 559, at para. 26).

[39] The Ontario Court of Appeal commented on the purpose of the 2018 amendments by which s. 320.24 was introduced in *R v Boily*, 2022 ONCA 611, where the court was considering the apparently accidental omission of the offence of criminal negligence causing death from the prohibition provisions. (The court held that this was a matter for Parliament to remedy.) Summarizing the "clear legislative intent" of the 2018 amendments, Fairburn ACJO said:

> 51 … In short, Bill C-46 was designed to create a stronger approach to punishing driving offences. It is against this backdrop that it seems highly unlikely that Parliament would have intended to limit sentencing judges to the most lenient sentencing arsenal for the most serious of the driving offences.

[40] If a prison sentence for a driving offence is consecutive to a longer sentence of imprisonment for an unrelated offence – or, as in this case, if there is no prison sentence on the driving offence, but the offender is receiving a prison sentence for another offence – the result could be that the driving prohibition runs, and possibly even expires, while the offender is still incarcerated. As the court said in *R. v. Kalejaiye*, 2021 ONCJ 236, with respect to identical language in s. 320.24(5):

> 92 It is difficult to determine the appropriate length of a prohibition order in conjunction with a period of incarceration. Subsection 320.24(5) of the Criminal Code, states that any driving prohibition is "**plus** the entire period to which the

> offender is sentenced to imprisonment". Furthermore, subsection (5.1) states that a prohibition order takes effect on the day that it is made. Presumably, since the prohibition takes effect on the date that it is made, Parliament intended that the prohibition order should be crafted so that it reflects the period of imprisonment and then the period of time that the court determines is appropriate for the person to be prohibited from driving once s/he is released into the community. That makes sense since the loss of the privilege to drive is of no consequence while a person is incarcerated.
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> [Bolding in original; underlining added.]
>
> 93 There are some practical challenges with determining the amount of time to be attributed to the "entire period to which the offender is sentenced to imprisonment". I do not know how much time Mr. Kalejaiye will actually stay in custody. With the ongoing pandemic, many inmates are being released early on temporary absence programs to alleviate the spread of COVID-19 in forced congregate settings like a jail. In addition, with any period of incarceration, an inmate is entitled to parole.
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> 94 In *R. v. Lacasse*, [2015] S.C.J. No. 64 at para. 109 (S.C.C.), the Supreme Court concisely stated that:
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> > By adding the words "plus any period to which the offender is sentenced to **imprisonment**", Parliament was making it clear that it intended driving prohibitions to **commence at the end of the period of imprisonment**, not on the date of sentencing.
>
> [Emphasis in *Kalejaiye*.]

[41] As noted in *Lacasse*, the predecessor to s. 320.24, namely the former s. 259, provided for a prohibition period in addition to “any period to which the offender is sentenced to imprisonment…” There is no apparent substantive difference between this language and the “entire period to which the offender is sentenced to imprisonment”, as in the current provision.

[42] The Ontario Court of Appeal expanded on the *Lacasse* reasoning in *R. v. Gauthier-Carrière*, 2019 ONCA 790. The trial judge had erred in “ordering that the driving prohibition commence on the date of sentencing rather than at the end of the period of imprisonment.” Based on *Lacasse*, the court confirmed, “an order that the driving prohibition commence on the day the sentence commences rather than on the date of release is an error in law.”

[43] In *R. v. Miller*, 2017 BCCA 122, the court cited *Lacasse* for the proposition that

> when coupled with a term of imprisonment, the driving prohibition commences on the date of sentencing and is the aggregate of two components, namely, the term of imprisonment and the period of driving prohibition... Accordingly, judges should articulate the two components when imposing such sentences and, in doing so, should use the words of the *Criminal Code*...

[44] The precise issue before the court – when the prohibition commences where a cumulative prison sentence includes unrelated offences, or where there is no prison sentence on the driving offence – does not appear to have been expressly considered, although there are sentencing decisions that address it without explicit comment.

[45] In *R. v. Burke*, [2020] NJ No 262 (Nfld Prov Ct), the offender received a cumulative sentence of 240 days for 8 offences, some concurrent and some consecutive, with a reduction to 160 days for time served. These included dangerous driving (60 days consecutive) and flight from police (60 days concurrent), with the remainder being non-driving related offences, including uttering threats, being unlawfully in a dwelling, and bail offences. The court ordered a 12-month driving prohibition pursuant to s. 320.24(4), to follow the 160-day sentence. Had the driving prohibition been ordered to follow the 60-day sentence on the driving offences, it would have commenced while the offender was still imprisoned.

[46] Similarly, in *R. v. Moonias*, 2022 ABPC 83, the offender was sentenced on a range of firearms, driving, and stolen property offences. The starting point for the cumulative sentence, before reductions for time served and totality, was 1,230 days. This included a consecutive sentence of 120 days for dangerous driving. To this count was attached "a driving prohibition of 24 months <u>on that count</u>, plus the entire period of time that Mr. Moonias is incarcerated <u>on these offences</u>, pursuant to section 320.24(5)(c)…" (emphasis added).

[47] In *R. v. Grob*, 2021 BCPC 215, by contrast, the offender received consecutive sentences of 6 years' imprisonment for impaired driving causing death and 16 days for a provincial motor vehicle offence. The sentencing judge imposed a driving prohibition on the impaired driving offence to run 8 years "plus the period of imprisonment imposed" on that specific count. The provincial offence also carried a driving prohibition, of 18 months, which the court ordered to run concurrently with the prohibition on the impaired driving charge. While the court did not specifically address the point, the implication is that the driving prohibition would start running at the end of the 6-year sentence for the impaired driving offence, while the offender was still serving the (much shorter) sentence on the provincial offence. There is no indication that the court turned its mind to the issue, however.

[48] I find that the most persuasive interpretation of s. 320.24 of the *Criminal Code* is that (1) the driving prohibition is calculated as part of the sentence for the designated offence, or offences, to which it relates; but (2) where the accused is sentenced to a cumulative term of imprisonment exceeding that for the specific designated offences, the prohibition only begins to run when the offender is actually released. In my view, to have a driving prohibition commence running while the offender is imprisoned could not have been Parliament's intention. As the court said in *Kalejaiye*, "the loss of the privilege to drive is of no consequence while a person is incarcerated." Several sentencing decisions at the trial level (discussed above) illustrate the point, by specifying that the driving prohibition commences upon release from prison at the end of a cumulative sentence that includes consecutive terms on charges that are not subject to the driving prohibition.

[49] As to the period of prohibition, I agree with Mr. Arsenault that the appropriate period of prohibition is one year. The aggravating factors in s. 320.22 of the *Code* are not present. Mr. Arsenault does not have any convictions for similar offences. At the time of the offences, Mr. Arsenault was not prohibited or suspended from operating a motor vehicle.

[50] Mr. Arsenault is sentenced to a driving prohibition order for one year for each offence under ss. 320.14(1)(a) and 320.15, concurrent to each other, plus the entire period of time that Mr. Arsenault is incarcerated on the firearms offences. More specifically, the driving prohibition commences upon release from custody at the end of the cumulative sentence that includes consecutive terms on charges that are not subject to the driving prohibition.

Summary of Sentence

[51] Mr. Arsenault please stand.

[52] It appears from the information before me that you have made a change in your life following these offences. I certainly hope that is true for your sake and for the sake of your family, in particular your 8-year-old son. You are going to jail for a significant period. I urge you to take that time to further your reflection on the kind of person and father you want to be, the poor decisions you have made in the past, and your rehabilitation.

[53] In summary, I sentence Mr. Arsenault as follows:

Count 1	s. 320.14(1)(a)	$2,000 fine	
Count 2	s. 320.15(1)	$2,000 fine	
Count 3	s. 94(1)	3 years incarceration	concurrent
Count 4	s. 86(1)	6 months incarceration	concurrent
Count 6	s. 92(1)	2 years incarceration	concurrent
Count 7	s. 95(1)	4 years incarceration	consecutive
Count 9	s. 86(2)	6 months incarceration	concurrent
Count 12	s. 117.01	6 months incarceration	consecutive
Count 14	s. 117.01	6 months incarceration	concurrent

Ancillary Orders

[54] Mr. Arsenault does not contest the requests by the Crown for ancillary orders. Pursuant to s. 109(1)(d) the Court imposes a lifetime firearm prohibition. The Court will also order that Mr. Arsenault provide a DNA sample pursuant to s. 487.04. Pursuant to s. 115(1), the forfeiture of the firearm, ammunition and magazine seized will be automatically forfeited upon the prohibition ordered under s. 109. The two driving prohibition orders pursuant to s. 320.24 shall be for a period of one year, concurrent to each other, commencing upon Mr. Arsenault's release from custody at the end of the cumulative sentence that includes the consecutive terms on charges that are not subject to the driving prohibition.

[55] Mr. Arsenault shall be credited for the 13 days' time served on remand at a rate of 1.5:1 for a total credit of 20 days. The victim surcharges are waived.

Norton, J.