

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Foster*, 2004 YKSC 47

Date: 20040512
Docket: S.C. No. 03-01511
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And:

ROBERT CLIFFORD FOSTER

Before: Mr. Justice L.F. Gower

Appearances:

David A. McWhinnie
Edward J. Horembala, Q.C.

For the Crown
For the Defence

MEMORANDUM OF SENTENCE DELIVERED FROM THE BENCH

[1] GOWER J. (Oral):

INTRODUCTION

[2] This is the sentencing of Robert Foster on the offence of dangerous driving causing death, contrary to s. 249(4) of the *Criminal Code*.

[3] Last summer, Mr. Foster drove his motor vehicle with excessive speed near the Walmart in Whitehorse. He lost control of his vehicle and collided with Austin Avrit,

a 67-year-old visitor to Whitehorse from the United States, who was seated on a bench at a bus stop and was instantly killed.

[4] The main issue is whether Mr. Foster is deserving of a conditional sentence.

FACTS

[5] The facts in greater detail are that on July 22, 2003, at approximately 6:10 p.m., Mr. Foster was driving his Subaru Impreza northbound on Quartz Road, past the intersection with the entrance to Walmart, at which time the traffic was heavy in the area. Witnesses at the scene said that Mr. Foster was driving “at or near highway speeds”, which I take to mean in the 90 to 100 kilometre per hour range. The speed limit in that area is 50 kilometres per hour. I understand this was particularly evident to all northbound motorists by a speed limit sign posted just south of the Walmart intersection.

[6] Quartz Road has four lanes in that area and Mr. Foster was initially travelling in the inside lane. As he approached the Walmart entrance intersection, he came up behind a taxi that was also northbound and in the inside lane but apparently turning left towards Walmart. Mr. Foster turned his wheel to the right and started to skid across the outside lane.

[7] At this point, Mr. Foster’s counsel made reference to a second vehicle being a pickup truck, which was apparently in the vicinity as Mr. Foster was moving to the outside lane. While this may have contributed to Mr. Foster’s loss of control of his vehicle, it is in no way offered as any excuse for his driving behaviour, because the speed at which Mr. Foster was travelling would not have allowed him enough reaction time to avoid the accident in any event. Also, as I understand it, it is only Mr. Foster

who has any recollection of the presence of a pickup truck. The Crown was unable to prove with any degree of certainty whether the pickup truck was present as Mr. Foster says.

[8] The RCMP performed an accident reconstruction investigation. They determined that the primary cause of the accident was Mr. Foster's excessive speed, which was estimated to be between 99 and 104 kilometres per hour just prior to impact. Had Mr. Foster's speed been under 80 kilometres per hour, I am told he would have been able to brake and avoid the accident.

[9] Once Mr. Foster commenced skidding across the outside lane, he travelled onto the gravel shoulder and into the bus stop bench where Mr. Avrit was seated. Mr. Foster's vehicle then rolled over and ended up in the ditch on its roof, approximately 60 metres away from the point of collision.

[10] Ambulance attendants were immediately summoned to the scene and determined that Mr. Avrit died instantly in the collision. Mr. Foster suffered a minor cut to his head which caused some initial bleeding but no serious injuries.

[11] Mr. Foster was arrested at the scene and brought to the police detachment. On questioning by the police, he initially acknowledged some alcohol consumption on the preceding day. However, the police had Mr. Foster provide a breath sample on a roadside screening device which produced a reading of .041. Further investigation determined that Mr. Foster had been at a sports bar in Whitehorse earlier in the day and had consumed a couple of drinks. He was also taking prescribed antidepressant medication at the time, but both Crown and defence counsel agree that this was not a contributing factor to the offence.

[12] Mr. Foster's motor vehicle was subsequently examined and was determined to have no significant mechanical problems, other than being in need of a wheel alignment. Given that the primary cause of the accident was excessive speed, I did not understand the Crown to say that the wheel alignment issue was significant.

THE GUILTY PLEA

[13] The procedural history and the submissions of Mr. Foster's counsel indicate that this is clearly a case where Mr. Foster made an early determination to plead guilty and he should be given full credit in that regard.

[14] Although arrested at the scene on the date of the accident, Mr. Foster was released without any charge being laid. He was then apparently rearrested on December 18, 2003, and released on an undertaking to an officer in charge, as well as a promise to appear for his first appearance on January 28, 2004. The information charging him with dangerous driving was not sworn until December 31, 2003. Presumably the reason for the delay was that the RCMP took some amount of time to complete their accident reconstruction investigation.

[15] On February 18, 2004, Mr. Foster consented to be committed to trial in this Court. Mr. Foster then entered his guilty plea on March 30, 2004. A pre-sentence report was ordered and the sentencing was adjourned to May 11, 2004.

[16] Had Mr. Foster chosen to contest the charge and proceed to trial, the Crown says a considerable number of witnesses and presumably a significant amount of trial time would have been required.

CIRCUMSTANCES OF THE OFFENDER

[17] Mr. Foster was 40 years old at the time of the accident; he is now 41. He has been married for over 20 years and has two sons, aged 18 and 16. He was born in Whitehorse and primarily raised in the Yukon by his mother. Mr. Foster reports that his mother always provided care for him and that he was always well clothed and well fed. She moved about frequently from job to job. Periodically, Mr. Foster had to stay with relatives until his mother would send for him when she was settled. This resulted in Mr. Foster attending several different schools in the Yukon, British Columbia, Alberta and Alaska, which he found quite disruptive. It ultimately caused him to quit school at the end of Grade 7. He left home at the age of 15 to make his own way. His relationship with his father, whom he did not meet until he was 17 years old, is distant.

[18] Mr. Foster returned to school when he was 18 years old and completed his general education diploma. He followed this with an industrial electrical program at the Yukon College, and a cable slicing and pole climbing course in British Columbia.

[19] He has been steadily employed for the last 20 years. For approximately 10 years, he worked almost exclusively on the road with Northwestel as an installation technician. As this was taking a toll on his family, he decided in 1997 to look for other work closer to his family's home in Carcross, where they have lived for the majority of the marriage.

[20] In 1998, he began employment with White Pass and Yukon Route on the Carcross rail section as an equipment operator, which employment generally runs from May to October, seasonally. Beginning in 2002, he also began winter employment as the lead mechanic at Mount Sima, a ski facility operated by Great Northern Ski Society.

His supervisor at White Pass and Yukon Route has indicated that if Mr. Foster is unable to return to work this coming summer season, then there is no guarantee he will be able to retain that job in the future.

[21] Mr. Foster and his family decided about two years ago to obtain a second residence in Whitehorse so that their teenaged boys could complete their high school education here. The eldest boy has currently graduated and the 16-year-old will presumably be doing so in a couple of year's time. Accordingly, while the family lives in Whitehorse during the winter, Mr. Foster and his wife live in Carcross during the summer.

[22] Mr. Foster is the primary income earner in the family. His wife works part time. Although they have some savings, they live on a tight budget.

[23] The pre-sentence report indicates that Mr. Foster has been devastated by the accident. He apparently has not been sleeping well for several months and he has confined himself to his home and to his work since the accident. Although previously involved in numerous volunteer community activities, he has withdrawn from that almost totally since the accident.

[24] The pre-sentence report also indicates that Mr. Foster was administered a test entitled "Problems Related to Drinking Scale" where he scored one (1) out of 15, which ranked him as "moderate" in terms of having some problems related to alcohol abuse. However, this is apparently offset by information from his wife and other community members who say he does not have a substance abuse problem. Mr. Foster was administered a drug abuse screening test which indicated no drug problems at all.

[25] Mr. Foster was also rated using the “Level of Service Inventory Revised Criminogenic Risk Assessment,” which placed him in the low risk category. That apparently means that, statistically, offenders with similar scores have an 11.7 per cent likelihood of re-offending within one year.

[26] The area of risk identified in Mr. Foster’s case was in the “emotional and personal” realm. The pre-sentence report says that further work is needed in this area to decrease the risk of recidivism.

[27] In summary, the pre-sentence report paints a positive picture of Mr. Foster as a self starter who has developed some solid family values, notwithstanding an unstable upbringing. He has become a valued member of the community of Carcross, as attested to by the authors of several letters of reference. He has been devastated by the position he has put his family and himself in as a result of this offence. Those interviewed by the probation officer, who prepared the pre-sentence report, are of the view that he has imposed punishment on himself because of the harm he has done. The probation officer is of the opinion that he would be an appropriate candidate for a conditional sentence if he is eligible.

[28] A total of 13 letters of reference were attached to the pre-sentence report. Various friends who have known him for several years describe him in the following terms: intelligent; well regarded in the community; steady; very close to his family; reliable; not wild or impulsive; very responsible; great father and husband; very honest and sincere; very caring; good moral qualities; great asset to the community; gentle; trustworthy; active as a volunteer; dependable; an inspiration to the community; courageous; has good judgment.

[29] His co-workers at White Pass and Yukon Route, and also at the Mount Sima ski facility used the following language: safe and reliable; always safety minded; never had any accidents costing the company expense due to negligence; eager to learn; adept student; responsible; trustworthy; sets standards for honesty, hard work and ability; very conscious of safety; promotes safety to all staff; quiet and courteous.

[30] Mr. Foster has a minor, unrelated criminal record for theft which occurred in 1982. I am advised that this was an incident of stealing gas when Mr. Foster was about 18 or 19 years old. He also has a number of speeding tickets, however, the vast majority of them are quite dated. Three of them are 21 years prior to the offence date, three are over 12 years prior, one is eight years prior, and the most recent is three years prior to the offence date.

[31] I heard from Mr. Foster directly at the end of the sentencing hearing. I am satisfied that his remorse is deep and genuine. I am satisfied that he will carry this burden with him for the rest of his life. I am satisfied that he does not need to be specifically deterred and that it is highly unlikely that he will repeat this kind of behaviour.

[32] I was particularly impressed with his courage and his accountability. He is prepared to pay the price for his actions, including time behind bars, if need be. He is not pleading for mercy or trying to make excuses why he should not go to jail.

POSITIONS OF COUNSEL ON SENTENCE

[33] Parliament has determined that the offence of dangerous driving is punishable by a maximum of 14 years in prison and may be accompanied by a driving prohibition of up to 10 years. While that is indeed serious, in relative terms, it is important to remember,

especially when reviewing the case law on the sentencing precedents, that this offence is not as serious as the offences of impaired driving causing death and criminal negligence causing death, which are both subject to a maximum of life imprisonment.

[34] Based upon the sentencing precedents he filed at this hearing, Crown counsel suggests a term of imprisonment of 16 to 20 months. He also very fairly acknowledges that the decision of the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61; 2000 SCC 5, indicates that I must give serious consideration to allowing the offender in this case to serve his sentence conditionally in the community.

[35] The Crown points out that it was Mr. Foster's speed in relation to the traffic and pedestrian conditions which made his driving dangerous and which caused him to lose control of his vehicle. Of course, the Crown properly notes that this is an offence where the tragic outcome of a fatality does result in an increase in penalty. However, he does not give much weight to the dated speeding infractions or the unrelated and very old criminal record. The Crown also suggests that a driving prohibition in the vicinity of three years should follow any sentence of imprisonment.

[36] Defence counsel submits that this is an appropriate case for a conditional sentence, and that the term of that sentence should be no more than two years less a day, and potentially less than that. He suggests that the driving prohibition be not greater than three years in total, assuming that part of the period of the driving prohibition would be concurrent to the conditional sentence. He emphasizes that his client is generally of good character and has made a significant contribution to his community. He has entered an early guilty plea and exhibits genuine remorse. His criminal record is dated and unrelated. His moral fault for the driving behaviour is less

than the type of fault acknowledged in cases of criminal negligence causing death. Finally, defence counsel submits that an appropriately crafted set of conditions can achieve the objectives of deterrence and denunciation in this sentencing.

THE CASE LAW

[37] I begin with the case of *R. v. Bhalru*, [2003] B.C.J. No. 2695, a decision from the British Columbia Court of Appeal from 2003. This was a case of criminal negligence causing death as a result of a driving incident. The penalty imposed by the sentencing judge was two years less a day, followed by probation for three years and a five-year driving prohibition. The criminal negligence in that case was by racing at speeds in excess of 100 kilometres per hour. As a result, it was recognized that the behaviour there was worthy of greater moral blame than ordinary cases of dangerous driving. As well, the Court of Appeal made reference to the deferential standard of review which applies when an appellate court considers the decision of a sentencing judge. The Court determined that it can only interfere if it is convinced that the sentencing judge's order was clearly unreasonable. Therefore, I conclude that the *Bhalru* case is of limited precedential value in establishing a range for dangerous driving causing death, but it is important for its general principles. Having said that, reference was made to the finding of the sentencing judge that sentences for similar offenders and for similar offences ranged from 18 months to four years in jail and included a conditional sentence.

[38] In commenting on the different degrees of blameworthiness between criminal negligence causing death and dangerous driving causing death, the Court said at paragraph 29 that, with respect to criminal negligence causing death:

...This is a higher degree of moral fault than the "marked departure from the standard of a reasonably prudent person"

that s. 249 requires for a conviction of dangerous driving causing death. The greater opprobrium of a conviction for criminal negligence causing death is also reflected in its maximum sentence of life imprisonment, as compared to a maximum sentence of 14 years for dangerous driving.

[39] The Court continued at paragraph 37:

The assignment of blameworthiness for a particular course of conduct depends not only on the circumstances of the offence, but also on the nature of the offender. The fundamental principle of sentencing requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[40] The Court recognized that there are a number of aggravating factors commonly present in cases of dangerous driving and situations of criminal negligence. Those include a lengthy history of dangerous driving conduct; a refusal to take responsibility for one's behaviour; a significant role played by alcohol consumption; a history of prior criminal offences; the commission of other offences in addition to the driving behaviour; attempts to evade the police or flee the scene; failure to show remorse; refusal to acknowledge substance abuse problems; and a likelihood of re-offending. The Court concluded that those factors were not present in the case involving Mr. Bhalru and his co-accused.

[41] The Court also reviewed a number of sentencing precedents involving criminal negligence causing death, as well as impaired driving causing death. The total number of those precedents were 15.

[42] At paragraph 74, the Court said:

Several decisions of this Court, although not dealing with the offence of criminal negligence causing death, have recognized that conditional sentences can achieve the objectives of general deterrence and denunciation. These

include a series of dangerous driving causing death or bodily harm cases.

[43] A number of those decisions are cited, after which the quote continues:

I am mindful that the offences in these cases did not involve the same mental element that is present in the offence of criminal negligence causing death. These cases do, however, repeatedly articulate and give effect to the view that general deterrence and denunciation can be achieved through a properly structured conditional sentence.

[44] Earlier, the Court said the following at paragraph 46:

In my opinion, in determining the weight to be given to the objectives of general deterrence and denunciation, it is important to consider the overall tenor of the sentencing amendments Parliament introduced in 1996. Obviously, listed as they are in ss.718(a) and (b) as objectives of sentencing, general deterrence and denunciation retain a valid role in the process of sentencing. Equally important, however, is the concerted shift towards a restorative justice approach and call for restraint in the use of incarceration represented in the amendments. The Supreme Court of Canada has recognized that the 1996 sentencing amendments were a watershed event in this respect: see *Gladue, supra* 29-57; *Proulx, supra* 15-20. The punitive objectives of general deterrence and denunciation should not overwhelm the restorative objectives that are also embodied in the new sentencing regime.

[45] In the case of *Proulx*, cited above, Chief Justice Lamer said for the Supreme Court of Canada at paragraph 114:

... conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence and the circumstances of the offender and the community in which the conditional sentence is to be served.

[46] It is also important to remember that *Proulx* determined at paragraph 127:

...

No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence or specific offences.

[47] The Court said earlier at paragraph 105:

The stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison.

[48] Turning to other authorities filed by the Crown, reference was made to the case of *HMTQ v. Tsandaya*, 2004 YKCA 3, from the Yukon Court of Appeal in 2004. That was a case of dangerous driving causing bodily harm. The sentence imposed was a 15-month conditional sentence after trial, which means that the offender was not subject to the usual credit for an early guilty plea. In addition, the offender was prohibited from driving for a period of 20 months after the termination of the conditional sentence. That case noted both *Proulx* and the *Bhalru* decisions just discussed.

[49] Reference was also made to the *Lam* case from the Ontario Court of Appeal in 2003, *R. v. Lam*, [2003] O.J. No. 4127. That Court in turn referred to its earlier decision in *R. v. Linden* (2000), 147 C.C.C. (3d) 299 (Ont. C.A.), where the Court said as follows at paragraph 9, and I quote:

...The cases demonstrate that criminal negligence causing death can be committed in so many different ways that it defies the range-setting exercise. The cases do not demonstrate a range, only a series of examples that are

driven by the almost infinite variety of circumstances in which this offence can be committed. ...

[50] Having said that, the Court in *Lam* then went on to say at paragraph 10:

However, while the court in *Linden* stated that there is no set range for the criminal negligence causing death offence, it recognized that driving offences involving reckless conduct and the consumption of alcohol are generally subject to more severe sentences. In addition to the consumption of alcohol or drugs, courts have also treated multiple deaths, racing, reckless driving for a lengthy period of time, a lengthy criminal record, a bad driving record, flight from the police, and leaving the scene of the accident as aggravating circumstances.

[51] I pause here to simply interject that, of course, these aggravating circumstances are not present in the case of Mr. Foster.

[52] *R. v. Thornton*, [2000] B.C.J. No. 2019, was a case from the British Columbia Supreme Court. It was a case of dangerous driving causing death and the sentence imposed was a conditional sentence of 18 months, followed by a driving prohibition of two years. There, the offender crossed an intersection at a high rate of speed and struck a left turning vehicle, killing the passenger in the other vehicle. He was travelling at what was estimated to be approximately 142 kilometres an hour in an 80-kilometre zone. He struck the victim's car so hard that it was split into two pieces. He was noted to have a record of speeding violations with some 12 infractions between 1992 and 1997.

[53] *Thornton* noted a number of cases involving dangerous driving causing death and determined that the range was between four months to six years, although the sentences at the higher end tended to be for impaired driving causing death and not

dangerous driving. The Court also noted that conditional sentences had been given where appropriate.

[54] In the end, the Court reviewed some 16 sentencing precedents and determined that it was clear that the courts, particularly those in British Columbia, have embraced the use of conditional sentences for dangerous driving causing death where circumstances warrant it.

[55] One additional case that I came upon in my research was from the Province of Quebec, *R. v. Tousignant*, [2000] J.Q. no. 3773. That was a case involving a 20-year old offender who pled guilty to dangerous driving causing death. He received a sentence of 18 months to be served conditionally.

CONCLUSION

[56] The *Proulx* case directs that I must consider four criteria before deciding whether to impose a conditional sentence: first, whether the offender is convicted of an offence that is punishable by a minimum term of imprisonment, and that is not the case here; second, I must consider a term of imprisonment of less than two years and I am prepared to consider such a term; third, the safety of the community would not be endangered by the offender serving the sentence in the community; and fourth, a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. I am satisfied that appropriate conditions can meet the objectives of the third and fourth criteria that I have just mentioned, which arise from the *Criminal Code*.

[57] In determining the length of the term of imprisonment, I have taken into account the sentencing authorities provided and the factors noted by both Crown and defence counsel.

[58] I have to say though that I am inclined to give a little more weight to Mr. Foster's driving record than counsel seemed inclined to do. While I acknowledge it is mostly quite dated, the number of violations is not insignificant for a 40-year old offender. This record, coupled with the current offence, does tend to indicate something of a pattern of fast driving by Mr. Foster, at least up to the date of the offence. While I am satisfied that Mr. Foster will likely never speed again, the record does distinguish him from someone with no history of driving infractions whatsoever. In the latter case, you could truly say the speeding was out of character; in Mr. Foster's case, I cannot, and I think that adds somewhat to his blameworthiness.

[59] Mr. Foster, would you please stand?

[60] I sentence you to imprisonment for a term of 20 months but I order that you serve your sentence in the community, subject to having to comply with the following conditions:

- (1) That you keep the peace and be of good behaviour.
- (2) That you appear before the Court when required to do so.
- (3) That you report to a conditional sentence supervisor by 5:00 PM today, and then after that, as required by the supervisor and in the manner directed by him or her. I am assuming that will be Mr. Sutton and so I will refer to the sentence supervisor in the male gender.
- (4) That you not leave the Yukon Territory unless written permission is given by the Court or your supervisor.
- (5) That you obtain written permission of your supervisor before changing

your address, and also notify your supervisor of any change of name, and advise him rapidly of any change in employment or occupation. With respect to your change of address, this also includes your move between your seasonal residences. So if you are taking up the residence for the summer in Carcross, then you are obliged to inform your supervisor.

(6) You will also remain inside your residence at either 195-986 Range Road in Whitehorse, or your residence in the Watson River subdivision in Carcross for the first six months of the present sentence, that is, until November 12, 2004. This condition is subject to the following exceptions:

- (a) to meet with your supervisor following a pre-arranged appointment;
- (b) to attend court or other legal proceedings as a witness or a party in a case;
- (c) for religious purposes at a specific place and time, and at the time specified in writing by your supervisor;
- (d) for medical treatment for yourself or your immediate family;
- (e) for family emergencies, providing that you notify your supervisor as soon as possible and follow his directions thereafter;
- (f) to shop for groceries and items required for daily living during the period of no more than two hours, twice a week, on Saturday and Sunday from 2:00 to 4:00 PM, or with written permission during other periods deemed reasonable by your supervisor;
- (g) to exercise every day from 8:00 to 9:00 PM without, however, going any further than one kilometre from your residence, or at any other time authorized in writing by your supervisor;
- (h) for the purposes of your work with White Pass and Yukon Route, from 7:00 AM to 7:30 PM, or for the purpose of your work with the Great Northern Ski Society, from 7:00 AM to 7:00 PM, or as approved in writing by your supervisor. While employed by White Pass and Yukon Route, if you are required to work outside your regular hours and cannot abide by this condition, then immediately upon completing that shift of work, report in person to the RCMP Detachment in Carcross or by phone if no one is present, and also notify your supervisor by phone;
- (i) there is an exception as well to meet with any person, and by

this I am intending to include professionals, therapists or councillors, provided your supervisor has approved in advance and in writing, the nature, place, time and duration of the meeting;

(j) you are to have at all times in your possession a copy of the Conditional Sentence Order and any written permission given to you by your supervisor and at the request of any peace officer, you must exhibit them immediately.

(k) there is also a condition that when you are permitted to be away from your home for a specific purpose, you cannot stop anywhere along the way to have coffee, visit someone or shop. Instead, you must travel directly to and from your permitted destination.

(7) Commencing November 13, 2004, you are to abide by a curfew. That curfew will continue until May 12, 2005. That curfew will require you to remain inside your residence from 7:30 PM to 7:00 AM, subject only to the conditions above regarding medical treatment or family emergency, unless with written permission of your supervisor. What I intend here is that there will be, as Mr. Sutton has recommended, a gradual loosening of the conditions and a gradual restoration of more freedom, but that will depend on the determination of the sentence supervisor.

(8) For the term of your detention in your residence and your curfew as provided above, you must answer all telephone calls you receive so that your supervisor can check that you are inside your residence. Also, in order for your supervisor to be able to verify that you are inside your residence, you are not to converse on the telephone for more than 15 minutes at a time. In addition, when a supervisor comes to your residence during the time that you are to be inside your residence, you must allow him to enter in order to ensure that the conditions of your conditional sentence are abided by.

(9) You are to perform 170 hours of community service work at the times and places as directed by your supervisor or such other person as he may designate. This community service work is to be completed by November 12, 2005. That is within a period of 18 months from today which is required by the *Criminal Code*. What I anticipate here, I interject, is that you will not have much time to do community service work until the end of your curfew on May 12, 2005, but after that curfew is over, you should be able to do approximately five hours per week, and in the remaining time you should be able to complete that 170 hours. I also anticipate that your community service work might include participation in the kinds of volunteer activities identified in the pre-sentence report. But I also specifically direct you to do the following as part of your community service work:

(a) that you prepare and forward to the Yukon News and the

Whitehorse Star by June 12, 2004, a letter to the editor of not less than 200 words, describing the circumstances of the crime you committed, the consequences for the victim and his loved ones, for your own family and for your community, the lessons you have learned from this crime, and the advice that you give to motor vehicle users, and in particular to young drivers.

(b) Using that letter as a basis that you prepare and make a presentation on the general topic of motor vehicle safety to:

(i) members of the Teamsters Local 213 for the Canadian Section in connection with White Pass and Yukon Route;

(ii) your co-workers employed by Great Northern Ski Society at Mount Sima;

(iii) the Carcross Fire and Rescue Team; and

(iv) students at the Carcross school, presumably in a general assembly.

(10) It is also a condition of your conditional sentence that you not drive a motor vehicle at any time and you must surrender your driver's licence to the Clerk of the Court forthwith.

(11) You must abstain from consuming alcohol, including non-alcoholic beers or other intoxicating substances.

(12) You must abstain from consuming any drug except in accordance with a medical prescription.

(13) At the request of a peace officer, you must give a urine sample. You must also, at the option of a peace officer, give a sample of your breath, on the spot or at the police station, with the use of an approved screening device or an approved instrument as defined in s. 254 of the *Criminal Code*.

(14) You must abstain from being in a place where alcohol is served except restaurants, and then only to eat a meal and without consuming any alcohol.

(15) You must also submit to a demand for a urine sample or a breath sample from your sentence supervisor.

[61] That completes the terms of your conditional sentence.

[62] As for the driving prohibition, as I understand the provisions of s. 259, if you read ss.(1) and (2) together, it was the intent of Parliament that the driving prohibition would run during the period of imprisonment, whether it is behind bars or in the community, and also for a specified time after the period of imprisonment. So in effect, the order will run from today, and in that sense, it will be duplicating the condition in your conditional sentence order. However, the important point for you to remember is that if you are found driving during the term of your conditional sentence, it could also be grounds for a breach of your conditional sentence, which could result in a collapse of your conditional sentence and you having to spend the rest of that sentence behind bars. I am sure your counsel will explain that to you and the clerk will also explain it to you when she reads over the conditional sentence and has you sign it. I am just bringing that to your attention in a general way.

[63] After the term of your conditional sentence is up, it is my intention that you will be prohibited for a further period of two years. In setting that time, I have taken into account that the lack of a driver's licence and lack of your driving privileges will be a particular hardship on you, given that you have two residences, one in Carcross and one in Whitehorse. Presumably, there is a need to commute on a fairly regular basis between the two communities. As well, there is the fact that you will need to commute back and forth from Whitehorse to Mount Sima for your work in the winter months.

[64] I have not heard anything about the Victim Fine Surcharge, Mr. McWhinnie.

[65] MR. McWHINNIE: I think, sir, you are only able to waive it in the case of economic hardship. In this case, I think the minimum fine of \$100.00.

[66] GOWER J.: I impose a Victim Fine Surcharge in the amount of \$100.00.

How much time do you require that to be paid?

[67] THE ACCUSED: No time, any time.

[68] GOWER J.: Immediately?

[69] THE ACCUSED: Yes.

[70] GOWER J.: You have seven days to pay.

[71] Counsel, have I overlooked anything or do you have any questions?

[72] MR. HOREMBALA: No, My Lord.

[73] MR. McWHINNIE: Nothing, sir. I can indicate for the record that this is a secondary DNA Order type of offence. Given the nature of the offence and the circumstances, I see no purpose even applying for one. For the record, it should be noted.

[74] GOWER J.: Thank you for that then. Thank you to both counsel.

[75] Mr. Foster, good luck.

GOWER J.