Citation: *R.* v. *Echeverri,* 2013 YKTC 39

Date: 20130510
Docket: 12-00759A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Chief Judge Cozens

REGINA

v.

JASON WILLIAM ECHEVERRI

Appearances:
Terri Nguyen — Counsel for the Crown
Lynn MacDiarmid — Counsel for the Defence

REASONS FOR SENTENCING

[1] Jason Echeverri has entered guilty pleas to having committed the offence of dangerous operation of a motor vehicle, contrary to s. 249(1) of the *Criminal Code* (the "*Code*"), failing to stop his vehicle for a peace officer, contrary to s. 249.1(1) of the *Code* and entering Canada without appearing for examination, contrary to ss. 18 and 124(1)(a) of the *Immigration and Refugee Protection Act* (the "*Act*").

[2] An Agreed Statement of Facts has been filed. In brief, on October 2, 2012, just before 8:00 a.m., Mr. Echeverri attempted to drive into Canada at the Port of Entry at Beaver Creek. He was refused entry and offered the opportunity to drive back into Alaska. Once at the United States Port of Entry, Mr. Echeverri was detained by United States border officials. After some time elapsed, Mr. Echeverri managed to escape

from these officials and he headed back towards Beaver Creek. He drove through the Beaver Creek Port of Entry at a high rate of speed at 2:59 p.m. and a police chase ensued heading south on the Alaska Highway.

[3] South of Beaver Creek, an RCMP member placed a spike belt across the Alaska Highway and signalled to Mr. Echeverri to stop. He did not stop and continued to drive southbound, avoiding the spike belt in the process.

[4] Mr. Echeverri was spotted putting gas into his car at the Koidern Gas Station. Upon observing the RCMP, he entered his vehicle and continued driving south at a high rate of speed. He was again spotted putting gas into his vehicle at Destruction Bay and, upon seeing the RCMP, he drove away at a high rate of speed.

[5] A second spike belt was placed across the highway by RCMP officers dispatched from Haines Junction. Mr. Echeverri drove over this spike belt, causing his two front tires to deflate. RCMP members continued to pursue Mr. Echeverri's vehicle southbound for a further distance of over 16 km, reaching speeds of 130 – 160 km/hr. Mr. Echeverri's vehicle had two deflated front tires and damaged rims.

[6] Mr. Echeverri ultimately pulled his vehicle over into the northbound shoulder and ran into the woods. The RCMP were subsequently able to locate him in an empty cabin approximately eight km from where he fled his vehicle. He was arrested without incident in a high-risk takedown involving numerous members of the RCMP.

[7] The distance from the United States Port of Entry to where Mr. Echeverri pulled his vehicle over was 264 km.

Positions of Counsel

[8] Crown counsel submits that Mr. Echeverri should be sentenced to a global disposition of 3.5 to 4 years in custody, with a three year driving prohibition.

[9] Defense counsel submits that a more appropriate disposition is 12 months custody.

Personal Circumstances of Mr. Echeverri

[10] Mr. Echeverri is 29 years of age. He is an American citizen who has resided alternately with either his Yupik mother in Alaska or his Spanish father in Florida. He was diagnosed with Attention Deficit Hyperactivity Disorder and has been on and off of medication for this. He has an older sister and younger half-siblings. He was living on the streets by the time he was 15. He has a four year old child.

[11] He has a number of criminal and/or motor vehicle convictions from Alaska and Florida. Frankly, from a review of the filed criminal record, it is not particularly clear to me exactly what the convictions were for and what sentences he received for these convictions. It is apparent, however, that he was been convicted for several theft or theft-related offences, some of which were felony convictions, as well as for possession of a controlled substance. It also appears that he was on both probation and parole at the time he committed these offences. Attempting to cross into Canada was a violation of the conditions of his probation and parole as I understand it. While there was no warrant for his arrest or charges against him at the time he first attempted to enter into Canada, once he returned to the United States Port of Entry he was arrested on the

basis of information provided by his probation officer in a conversation with Alaska Border Officials.

[12] Currently, Mr. Echeverri faces charges in Alaska of Escape in the Second Degree (a Class B Felony), two counts of Assault in the Fourth Degree (Class A Misdemeanour), Resisting Arrest by Use of Force (Class A Misdemeanour), and Resisting Arrest by Causing Risk of Injury (Class A Misdemeanour). There is an extraditable Parole Warrant for his actions that will cause him to be brought before the Parole Board upon his return, and he will face a petition to revoke his probation upon his return.

[13] Mr. Echeverri says that he cannot explain why he left Alaska. He states that he just wanted to change his life and start over. He acknowledged, both by his guilty pleas and by his comments in Court that what he did was wrong. He apologized for the risk he caused others on the highway. There was nothing in what Mr. Echeverri stated or in how he stated it that would cause me to treat his expression of remorse or apology as being anything other than genuine.

Law and Analysis

Immigration offence

[14] Section 18(1) of the *Act* reads as follows:

> 18.(1) Every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may be authorized to enter and remain in Canada.

[15] Failure to do so constitutes an offence under s. 124(1)(a) punishable by a fine of up to $50,000.00 and/or imprisonment of up to two years, when the Crown elects, as in this case, to proceed by indictment.

[16] No case law was provided to assist in determining a fit and appropriate sentence for the s. 18 *Act* offence and I was unable to locate any on point.

[17] I was, however, able to locate several cases dealing with individuals who entered Canada without proper authorization.

[18] In ***R.*** v. ***Zuniga***, 2008 BCPC 74, an offender was sentenced to 30 days in jail for illegally entering Canada. Mr. Zuniga had been removed from Canada and came back in without permission. There is no indication as to how he did so.

[19] In ***R.*** v. ***Nistor***, 2011 ONCJ 763, itself a case of judicial interim release, reference is made to Ms. Nistor having previously received a $700.00 fine, in addition to 13 days pre-trial custody, for having committed an offence under s. 18(1) of the *Act*. No additional details were provided.

[20] In ***R.*** v. ***Willis***, [2010] O.J. No. 3930 (C.J.), an offender was sentenced to two years in custody for having committed an offence under s. 52(1) of the *Act* for unlawfully entering into Canada without the authority of an Immigration Officer, thus committing an offence under s. 124(1)(a). He had been arrested for impaired driving and obstructing a peace officer thus bringing his illegal status to light.

[21] Mr. Willis had been deported from Canada on ten previous occasions and had been convicted of doing so five times. He had been sentenced to 19 months

imprisonment for his last conviction. He had an extensive criminal record in both Canada and the United States and was described as a career criminal.

[22] In ***R.*** v. ***Rojo Beltran***, 2010 ABPC 113, the offender was sentenced to the equivalent of five months in custody for returning to Canada without prescribed authorization in contravention of s. 52(1) of the *Act*. Mr. Beltran had been deported twice previously. His offence was considered to be planned, deliberate and calculated and constituted an ongoing offence.

[23] The circumstances of Mr. Echeverri's offence are not the same as in these cases and thus their usefulness in determining an appropriate sentence is somewhat limited.

[24] It is clear that Mr. Echeverri knew when he "blew through" the Canadian Port of Entry that he had just been denied entry into Canada and would not be allowed in. He initially attempted to return to the United States when turned away at the Canadian border, but was not able to do so other than under arrest. He then chose to enter Canada illegally rather than to try to escape within Alaska. His actions, although perhaps planned between the time of his arrest at the United States border and subsequent escape, were not carefully and deliberately planned and not very calculated and/or sophisticated. He, somewhat spontaneously, decided to escape the legal consequences he was facing in Alaska and fled into Canada, with very little idea of what he was actually going to be able to do to facilitate his escape.

[25] Mr. Echeverri had not previously been deported as the individuals in the cases noted above had been and his wilful action in attempting to come into Canada is not as

egregious as that of individuals who continually ignore previous orders and come back into Canada, whether without authorization or without attending for an examination.

[26] The manner of his entry into Canada is aggravated in that he "blew through" the Port of Entry in his vehicle, although I have no evidence before me that any individuals or their property were actually placed at immediate risk of harm.

[27] Denunciation and deterrence are the purposes of sentencing most at play here. Crossing the border into Canada without attending for examination is a serious offence and the sentences imposed need to denounce such conduct and deter other individuals from acting similarly.

[28] In all the circumstances, I find that a sentence of three months is an appropriate sentence.

Criminal offences

[29] Section 249.1(1) reads:

> Everyone commits an offence who, operating a motor vehicle while being pursued by a peace officer operating a motor vehicle, fails, without reasonable excuse and in order to evade the peace officer, to stop the vehicle as soon as is practicable in the circumstances.

[30] Section 249(1) reads:

> Everyone commits an offence who operates
>
> (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place.

[31] As the Crown proceeded by indictment in this case, a sentence of up to five years imprisonment can be imposed for both of these offences.

[32] Numerous cases were filed, or referred to in the case law filed, setting out the circumstances and sentences imposed for charges under s. 249(1) and 249.1(1).

[33] In ***R.*** v. ***Roberts*** (2004), 361 A.R. 149 (C.A.), the Crown appealed the sentences imposed for a s. 249.1(3) offence (flight causing bodily harm), and a s. 354 offence. The Court concluded that the charges for dangerous driving causing bodily harm and fleeing the scene of an accident were not pursued in exchange for obtaining guilty pleas on the noted offences.

[34] The circumstances in ***Roberts*** were that Edmonton police officers responded to a citizen complaint about a truck prowling among cars in a residential area. The truck, (subsequently determined to have been stolen by Mr. Roberts), was located and the police cruiser's siren and emergency lights were activated in order to direct the driver to pull the vehicle over. The truck pulled away and a pursuit ensued. The pursuit started on major roads at speeds up to 100 km/hr. There was civilian traffic early on and the roads were slippery. Mr. Roberts drove onto a median, and through major intersections without stopping, including one red light and a flashing amber.

[35] Mr. Roberts then entered into a residential area where he drove at speeds between 80 and 110 km/hr. He made no attempt to stop at any of the intersections. Two police officers were directed to place a spike belt across the road. They had unbuckled their seatbelts and were about to leave the police cruiser when Mr. Roberts

crashed head on into the cruiser, demolishing it and seriously injuring both officers, injuries they had not recovered from at the time the sentence appeal was heard.

[36] Mr. Roberts then fled on foot and hid, subsequently being located by a police service dog. He resisted arrest and fought with the police officers until the police service dog subdued him.

[37] The Court considered the issue of concurrent vs. consecutive sentences for flight offences in paras. 32 – 34, stating:

> **32** But a sentencing court needs some reason to give concurrent sentences for the possession offence and the flight offence. They have completely separate elements and intents, even though they overlapped in time and one fact (the truck). These sentencing reasons do not explain, and do not mention the topic. I cannot see any facts here making concurrence appropriate. See R. v. Hindes (2000) 261 A.R. 108, 2000 ABCA 197 (para. 23); R. v. Breton, 2004 ABCA 391, #0403-0192-A3 (Dec. 2) (para. 17); and note the Court of Appeal's approval of a consecutive one-year sentence for leaving the scene, in R. v. Konkolus, infra.
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> **33** Furthermore, flight causing bodily harm is a new separate crime. Why would anyone lead police on a chase if he had been doing nothing wrong when told to stop, and was not wanted by police? Why would he do it if he were driving his own vehicle with his own license plate? Flight then would be pointless. That rarely occurs. Usually drivers flee because they are either then committing another offence, or have clear evidence of another offence in their vehicle. Often the vehicle is stolen.
>
> **34** To give concurrent sentences then would be to wipe out one of the offences, for all practical purposes. So long as the penalty given for flight were not larger, this would be a virtual judicial repeal of Parliament's new criminal flight crime. That would violate Parliament's strong message (described in Part L below). Alternatively, if the flight sentence were equal or higher, a concurrent sentence would wipe out the predicate offence which the criminal was fleeing, and so make the flight successful. It would reward flight, not punish it. It would take Jonathan Swift to appreciate the irony.

[38] The Court, in para. 95, found that Mr. Roberts was fleeing from the police because he:

> …was on the run from an arrest warrant and had broken his bail, he was driving a stolen truck, and he was even more concerned to avoid detection of his amphetamines and his needle for their intravenous ingestion. He had a relevant record. He had three reasons to take his chances in flight rather than serve sentences for three or more crimes. Indeed, he told the court that he made that choice for such a reason.

[39] The Court went on to state in para. 96 that:

> If the sentence for flight is less than the likely sentence for the other pre-existing crimes, then deciding to flee becomes a good business decision for him and for anyone else similarly situate. I do not suggest a fixed or arithmetical floor for sentences under s. 249.1, but such considerations are very weighty.

[40] The Court emphasized the seriousness nature of the then recently added s. 249.1 offence by stating in para. 87:

> In no sense is this a regulatory offence; it is an aggravated criminal offence. Parliament obviously added it recently because the existing offences and penalties did not suffice. This new crime cannot be committed in a trivial or technical fashion, because s. 249.1(3) incorporates the elements of s. 249 (dangerous driving). Nor was there anything technical or trivial about the driving in the present case.

[41] The Court considered the aggravating factors to include:

- The serious and incapacitating nature of the injuries the two police officers suffered (para. 88);
- The high probability of a vehicle collision resulting in maiming or death, given the many kilometers driven, the slippery roads, the speeds reached, failure to stop at intersections, number of roads and intersections crossed and continual evasion of police (paras. 88-90);
- Choosing to drive after knowingly consuming drugs or alcohol (para. 57);

- Fleeing the vehicle and taking further steps to avoid detection (para. 59);
- Fighting with the police when they arrested him (para. 60); and
- Litany in Edmonton of nightly illegal flights from police and climbing statistics for dangerous driving while doing so (para. 62).

[42] In addition to the breach of his bail on charges of being in possession of a stolen truck for which the arrest warrant had been issued, Mr. Roberts then again broke his bail conditions by failing to show up at the preliminary inquiry on these charges and failing to show up for the three-day trial. Mr. Roberts had a relevant criminal record that included prior convictions for being in possession of stolen vehicles.

[43] Minimal credit was given for the late guilty plea (paras. 38 – 43).

[44] The s. 249.1(3) offence carried a maximum sentence of 14 years. Mr. Roberts, who was 22 at the time he committed the offences, was sentenced to three and one-half years on the s. 249.1(3) offence and six months to be served consecutively for the s. 354 offence (reduced from one year due to the totality principle that requires sentencing courts to look at the overall global sentence being imposed). The Court did not interfere with what it considered to be an "effective driving prohibition" of a little over two years.

[45] In ***R.*** v. ***Prymak***, 2005 ABCA 377, a sentence of six months for a s. 249(1) offence and six months consecutive for a s. 249.1(1) offence was considered appropriate on appeal from a sentence of 90 days. In consideration of the principles of s. 718, in particular that of totality, the sentence was reduced to nine months in total. A two year driving prohibition was also imposed.

[46] The facts of ***Prymak*** are that a 27 year old individual led police on a 43 minute, 25 – 30 mile high speed chase on country roads. Speeds reached as high as 155 km/hr and at one point 135 km/hr in a 50 km/hr zone. Mr. Prymak failed to stop at stop signs, went the wrong way down a one-way road, swerved on the road and encountered other vehicles and pedestrians. Mr. Prymak admitted to having been drinking and there were numerous empty and full beer cans in the car. He fled on foot when the police were able to box him in. He had a passenger in the car. Although there were no injuries, the Court stated that "…the risk brought about by this conduct was very high".

[47] The Court of Appeal considered the decision in ***Roberts***, as providing guidance on sentencing where flight was one of the offences, and stated in paras. 7 and 12 that:

> The Roberts decision found that Parliament intended the flight crime to be dealt with as a serious, aggravated criminal offence. It is an offence potentially very dangerous to the public, the moral turpitude is great, and there can be no deterrence unless the penalties equal or exceed those for the pre-existing offence whose detection or prosecution is being fled. Deterrence and denunciation are paramount considerations in sentencing for this crime.
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> …
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> In arriving at a new sentence we must consider the binding direction from the Roberts case that sentences must be consecutive where there is flight.

[48] Mr. Prymak had two prior convictions for driving with over .08 mg% alcohol in his blood and five prior convictions for speeding. The aggravating circumstances of the offence were apparent, including the Court's recognition stated in ***Roberts*** that choosing to drive after consuming alcohol can be an aggravating factor. In mitigation

were Mr. Prymak's youth, family support, good employment record and need to support his young family.

[49] The Court stated in para. 10 that Mr. Prymak "…made the decision to evade the police because he had been drinking and was frightened."

[50] The reasoning in ***Prymak*** regarding concurrent v. consecutive sentences has been followed by the British Columbia Supreme Court in ***R.*** v. ***Johnny***, 2008 BCSC 1126 in paras. 36 and 45, where the Court made the sentence for a s. 249.1(1) offence consecutive to the sentence for robbery.

[51] In ***R.*** v. ***Sicotte***, 2006 BCPC 337, the offender was being sentenced after being convicted at trial, for ss. 249.1(1), 249(1)(a), 355 and 259(4) offences. At approximately 4:00 a.m., a Vancouver police officer, investigating a complaint of violence, activated the police cruiser's emergency lights to have Mr. Sicotte pull over. He fled instead through a quiet residential area, travelling at speeds between 120 to 140 km/hr in a 60 km/hr zone. He drove into oncoming lanes of traffic; failed to stop at a stop sign and was noted to be fishtailing. He then continued at a speed of 150 km/hr in a 50 km/hr zone of mixed residential and commercial buildings, running a red light and proceeding across the Second Narrows bridge at a speed of 140 km/hr. His speed increased to 180 km/hr in an 80 km/hr zone. He then exited onto a road and at 120 km/hr partially lost control of his vehicle, swerving on the road. He ran a red light through an intersection that had traffic stopped by police. He drove into an oncoming driving lane at an intersection with traffic present, at a speed of 120 km/hr. He continued to drive at speeds of 100 to 140 km/hr through stop signs and residential areas. He again partially

lost control in an intersection and skidded into a parking lot before regaining control. He continued to drive at speeds up to 140 km/hr, passing a dump truck. He drove across a spike belt which deflated his tires and slowed the vehicle down. His vehicle was finally rammed by a police cruiser and flipped onto its side and he was arrested at gunpoint.

[52] As it turned out, Mr. Sicotte and his three passengers had been driving around and breaking into vehicles, which is one explanation for why he tried to evade the police officer's attempts to have him pull his vehicle over.

[53] Mr. Sicotte was prohibited from operating a motor vehicle at the time pursuant to a s. 259(4) suspension. He had previously been convicted in 2004 for dangerous operation of a motor vehicle and failing to stop or evading police. He had prior convictions for offences of theft and speeding infractions. He was on bail at the time he committed these offences. He was also on probation at the time.

[54] The Court noted that:

> The high-speed pursuit undertaken by the police with respect to Mr. Sicotte presented a very clear danger to persons who would be expected to be using the highway and who indeed were using the highway. Mr. Sicotte showed a wanton disregard for the lives and safety of innocent people. He is, in my view, a very dangerous man.

[55] Emphasizing denunciation, deterrence and protection of the public, the sentencing judge imposed a four year sentence, with concurrent three year sentences imposed for the s. 249(1) and s. 249.1(1) offences, and one year consecutive for the s. 259 offence, as well as the maximum three year driving prohibition set out in the *Code* and a five year driving prohibition under s. 98 of the British Columbia *Motor Vehicle Act*.

[56] In ***R.*** v. ***Kidd***, 2004 ABPC 100, sentences of 18 months concurrent were imposed upon a driver who plead guilty to having committed s. 249(1) and 249.1(1) offences. Police officers responded to a complaint of erratic driving. When a police officer on foot approached the vehicle being driven by Mr. Kidd, he needed to take evasive action to avoid being struck when Mr. Kidd drove straight at him. A pursuit followed on the six lane Yellowhead highway, reaching speeds of 110 km/hr. Mr. Kidd drove into an oncoming lane for one block. His vehicle passed through a street cleaning area, knocked over plastic highway cones and struck a curb, causing two tires to blow out. He continued to drive until the vehicle became inoperable. Mr. Kidd was grossly impaired by alcohol and had to be pepper-sprayed in order to be subdued. He was convicted of the offence of impaired driving under s. 253(a) but a conditional stay was entered on that charge following the principle set out in ***Kienapple*** v. ***The Queen*** (1974), 15 C.C.C. (2d) 524 (S.C.C.).

[57] Mr. Kidd was 39 years of age and, some years earlier, had been previously convicted of causing death by criminal negligence and leaving the scene of an accident. He also had two prior convictions for impaired driving and one for refusing to provide a breath sample, along with two unrelated entries for aggravated assault and break and enter.

[58] In ***R.*** v. ***McLeod***, 2003 YKSC 70, a sentence of 7 months was imposed for a conviction on a s. 249.1(1) offence. Mr. McLeod was also sentenced to one day deemed served and 15 days consecutive on s. 145(3) and 145(2) charges. Guilty pleas were entered to all these offences. Mr. McLeod was made subject to a two year probation order and a one year driving prohibition.

[59] At approximately 11:15 pm on October 31, 2003, RCMP in Whitehorse noticed the vehicle operated by Mr. McLeod to be travelling at a rate of speed between 117 and 123 km/hr in a 70 km/hr zone. The police cruiser's emergency lights were activated but Mr. McLeod failed to pull over. He avoided one police cruiser that tried to obstruct his driving lane and continued down 2nd Avenue in Whitehorse at a rate of speed of 85 km/hr in a 50 km/hr zone. He proceeded through a red light at 2nd Avenue and Main Street (after stopping briefly) and up Two Mile Hill at a rate of speed of 100 km/hr in a 60 km/hr zone. A spike belt was deployed and Mr. McLeod drove over it, deflating his front left tire. The vehicle then decelerated and was able to be brought to a stop by a police officer on the Alaska Highway.

[60] The following aggravating factors were noted:

- Likelihood of vehicular and pedestrian traffic at that time on Halloween night;
- Excessive speeds;
- Driving seven km through some of the busiest thoroughfares in Whitehorse;
- Going through a red light;
- Continuing to drive on a deflated tire, creating an additional risk of losing control of the vehicle;
- Having four passengers who were pleading for him to stop;
- He was moderately impaired; and
- He was on a Recognizance at that time.

[61] In mitigation were Mr. McLeod's guilty pleas, acceptance of responsibility and admission to a substance abuse problem.

[62] Mr. McLeod had five previous *Criminal Code* convictions for failure to comply with dispositions, three for failing to comply with a Recognizance and one for escaping lawful custody, as well as other convictions. He also had a conviction for taking a motor vehicle without consent.

[63] In terms of the relevant facts in this case, Mr. Echeverri was fleeing an arrest in Alaska for either or both a breach of probation and a parole violation. When he first attempted to cross into Canada, there were no warrants out for his arrest and there is no information before me to indicate that he had committed any offence from which he was fleeing in an attempt to avoid arrest. I say this recognizing that Mr. Echeverri would have clearly been aware that he was violating his probation order and his parole restrictions by attempting to leave Alaska in the manner that he did.

[64] In this case, when he returned to the Canadian Port of Entry the second time, Mr. Echeverri was aware that he had escaped unlawfully from border officials in the United States. He then unlawfully entered into Canada, knowing full well that he was doing so. His refusal to stop at the direction of RCMP officers and continuing flight in his vehicle and then on foot was an attempt to evade arrest for, at a minimum, unlawfully entering into Canada, besides the offence(s) for which he had been arrested at the United States Port of Entry and the offences he is alleged to have committed in escaping the border officials. It is clear that the sentence for the s. 249.1(1) charge should be consecutive to the sentence imposed for the s. 18 *Act* offence of illegally entering Canada.

[65] However, the principles set forth in ***Roberts***, as I read the case, do not apply as clearly to the s. 249.1 charge. I am not satisfied that Mr. Echeverri was in flight from the

RCMP because he was concerned about being arrested for dangerous driving. The dangerous driving offence commenced after Mr. Echeverri had fled the United States law enforcement officials, although prior to the actual commission of the s. 249.1(1) offence, and remained a continuous act until he pulled his vehicle over. It, in essence, was part of the flight and, had he not been charged with dangerous driving, the manner of his driving would clearly have been an aggravating factor to be considered in determining an appropriate sentence for the s. 249.1(1) offence.

[66] The approach set out in ***Roberts*** best applies to circumstances where an offender is also facing charges for a predicate offence, or in the act of committing an offence and thus fleeing from the police to avoid being caught. In ***Roberts***, ***Prymak***, ***Sicotte***, ***Kidd*** and ***MacLeod***, the drivers were fleeing because they had been breaking into vehicles, were disqualified from driving, were on bail or probation, had been consuming alcohol or were using illicit drugs. Certainly a consecutive sentence should be imposed in addition to any conviction for the predicate offences.

[67] I cannot say I agree with the reasoning in ***Prymak*** that ***Roberts*** stands for the proposition that the sentence for a s. 249.1(1) offence must be consecutive to the sentence for a 249.1 offence, when the flight offence is committed more or less contemporaneously with the dangerous driving offence and when the flight offence is not committed in an attempt to evade arrest for dangerous driving. Certainly there could be circumstances where an offender would flee from police in an attempt to avoid investigation and arrest for dangerous driving and, in such circumstances, the sentences imposed for the two offences should be consecutive.

[68] While an argument could be advanced that, in the present case, at some point in the flight, the intent of Mr. Echeverri became to also avoid arrest for dangerous driving, I am not satisfied that this possibility brings the matter into the realm where a strict application of ***Roberts*** is appropriate. I find, from a review of all the circumstances, that Mr. Echeverri refused to stop and fled from the police in an continuing attempt to escape from United States law enforcement officers and the legal jeopardy he faced in Alaska. Crossing the border into Canada, having once been denied entry, was something Mr. Echeverri clearly knew was wrong and he fled from the police in a continuing attempt to avoid being arrested for having done so, even continuing on foot and hiding, once his vehicle became inoperable.

[69] I note that the offence of dangerous driving is not an included offence under s. 249.1(1). Unlike in ***Roberts***, where the offence of flight was under s. 249.1(3), dangerous driving is not an element of the offence under s. 249.1(1). Therefore, in principle at least, consecutive sentences can be imposed for each. See ***R.*** v. ***Cardinal*** 2011 ABPC 11 where the Court states the following:

> **29** Defence counsel relied on the ruling and reasoning in *R. v. Melnick,* [2005] A.J. No. 1153 (Alta. Prov. Ct.) to justify concurrent sentencing for Cardinal's dangerous driving and police evasion crimes. In *Melnick,* Allen P.C.J. imposed concurrent sentences for dangerous driving and police evasion *simpliciter*. If at para. 45 in his reasoning he intended [to] imply those two crimes can never merit consecutive sentences the subsequent decision in *Prymak* overrules that conclusion. It is important to be mindful there is a significant technical difference between the crime of police evasion *simpliciter* (s. 249.1**(**1)) and police evasion causing bodily harm (s. 249.1(3)) which latter crime was addressed in *Roberts*. By its specific wording s. 249.1(3) incorporates dangerous driving and makes it an included offence. One cannot commit an offence under the *Code*'s s. 249.1(3) without driving dangerously in

> breach of s. 249(1)(a). In contrast s. 249.1(1) does not incorporate in its wording dangerous driving or any of the detailed elements thereof as stated in s. 249(1)(a) except the requirement both crimes must be committed with a motor vehicle. In result it can be said although the crime of police evasion *simpliciter* often is accompanied by the crime of dangerous driving the two crimes are legally independent of each other qualifying them for consecutive sentencing just as in *Roberts* police evasion causing bodily harm and possessing a stolen motor vehicle occurred together but were treated as independent crimes requiring consecutive sentences subject to a need to consider the global effect thereof.

[70] While I am not precluded from imposing consecutive sentences, I am not bound to do so. I find that concurrent sentences are available for the s. 249.1(1) and 249(1) offences. I also keep in mind that I must be careful in sentencing Mr. Echeverri for the dangerous driving offence and then, in sentencing him for the flight offence, of the extent to which I take the circumstances that constituted the dangerous driving as an aggravating factor in the flight offence, unless I impose a concurrent sentence for the dangerous driving offence. In my opinion, the sentence imposed for the flight offence should, in order to properly capture the circumstances of the offence itself, contain the aggravating features of the dangerous driving offence.

[71] I find that the circumstances of the driving portion of Mr. Echeverri's flight are less aggravated than in all the cases I cited above. I recognize that this was the longest pursuit of all of these referenced, covering approximately 264 km, although there is no evidence Mr. Echeverri had any knowledge of an actual police pursuit until he ignored Cst. Poulin's indications to stop and avoided the spike belt at some point south of Beaver Creek. The fact that Cst. Poulin passed Mr. Echeverri's vehicle in the opposite direction between the two Ports of Entry does not allow me to assume he had any

actual such knowledge that he was being pursued and directed to stop and that he was choosing not to. I also note that the Agreed Statement of Facts, in paragraph 16, states that after Mr. Echeverri avoided the spike belt set up by Cst. Poulin: “A pursuit coordinator was then arranged as it was clear that the Accused had no intention of stopping for police”. It appears that from the time Mr. Echeverri was observed at the Koidern Gas Station that there was a relatively close RCMP presence, although it appears that contact had at one point been lost until Mr. Echeverri was again spotted at the Destruction Bay FasGas station.

[72] I also appreciate that the speeds reached were as high as 160 km/hr, however there is no evidence before me that these speeds were reached when Mr. Echeverri was passing through a community. Many of the above referenced cases, although shorter, involved chases at high speeds through intersections, red lights and through residential areas. There was also no accident here, although, had there been one, the consequences likely would have been catastrophic. From the video, it appears that the roads were bare.

[73] There is no evidence that any pedestrians and/or vehicles were forced to take evasive action, prior to the portion of the pursuit caught on video. I consider, however, that “blowing through” the Beaver Creek Port of Entry at a high rate of speed, carries a significant level of risk of harm and, as such falls within the definition of dangerous driving, although I have no information as to whether there were any other vehicles or pedestrians present when Mr. Echeverri did so. Leaving the Koidern Gas Station and the FasGas station at a high rate of speed falls within the spectrum of dangerous driving, as does avoiding the spike belt at the first instance and driving on blown tires for

16 km at a high rate of speed after striking the second spike belt, notwithstanding the lack of evidence of any actual erratic driving pattern and concomitant evasive responses by other drivers or pedestrians.

[74] Based upon the facts provided and a review of the DVD covering the last 16 km of the pursuit, I note that while several northbound vehicles were passed as well as one southbound vehicle, there is no indication that Mr. Echeverri's vehicle was swerving into oncoming traffic lanes (although he did cut the corner on a left bend where he would have been able to see oncoming traffic, none of which was present at the time he did so). There is also no indication that any vehicles had to take evasive action or were nearly struck by Mr. Echeverri's vehicle. Frankly, this is surprising given the rate of speed he was travelling on two blown tires. Even when Mr. Echeverri pulled his vehicle onto the northbound shoulder, he did so after passing a northbound vehicle, pulled back out to let another northbound vehicle pass and then back into the shoulder again. Certainly this would have likely caused some concern to the second northbound driver, but there is no evidence of any actual evasive action being taken.

[75] I do take into account, however, that there was a danger posed to the police officers who set out the spike belts and who had to drive at high speeds to continue the pursuit. There was also a significant impact on RCMP resources in order to pursue and locate Mr. Echeverri. When officers are taken out of their community in order to pursue and locate an offender, there is an immediate impact on the community in that these officers are not as readily available to perform their duties in that community.

[76] The aggravating factors in this case include:

- "Blowing through" the Beaver Creek Port of Entry;
- The overall high rate of speed on the highway;
- The length of the pursuit;
- Driving at a high rate of speed away from the two gas stations;
- Driving on blown tires for approximately 16 km at a high rate of speed;
- The fact that there were other vehicles on the road and the risk of harm posed to them;
- The risk of harm posed to the RCMP officers involved;
- Fleeing the vehicle on foot and hiding;
- The RCMP resources involved; and
- Mr. Echeverri's criminal history in the United States.

[77] I have decided not to consider Mr. Echeverri's escape from United States border officials and the manner in which he did so as aggravating factors for which I would increase his sentence. He will have to deal with the consequences for these actions when he faces the charges that have been laid in Alaska and, if convicted of any or all of them, will be sentenced appropriately there.

[78] In mitigation are Mr. Echeverri's guilty pleas and acceptance of responsibility.

[79] Denunciation and deterrence are the primary purposes of sentencing for the s. 249(1) and s. 249.1(1) offences. Individuals choosing to flee legal consequences in the United States should be aware that doing so by illegally entering Canada and refusing to stop for the police will attract a significant jail sentence. As I cannot speculate on what sentences Mr. Echeverri could ultimately receive for his actions in the United

States, should he be convicted on any or all of the charges he faces, and what these sentences would find as equivalents in the Canadian justice system, I cannot, in accordance with the principle in ***Roberts***, impose a sentence that exceeds what sentence(s) he may receive there. Clearly, however, the sentence needs to be greater than that imposed for the s. 18 *Act* offence of entering Canada illegally.

[80] I also cannot state that the need for denunciation and deterrence is greater when dealing with a resident of the United States fleeing into Canada in order to avoid legal consequences in the United States, than it is when dealing with an individual in Canada fleeing police in order to avoid legal consequences here. What Mr. Echeverri did is not particularly commonly done and therefore the need for denunciation and general deterrence is arguably less. Police officers are much more likely to be engaged in pulling over individuals in Canada for offences committed in Canada and, therefore, the need for denunciation and deterrence in sentencing an offender for fleeing police officers is, if anything, greater in such cases. I am not imposing a lesser sentence on Mr. Echeverri on this basis, simply pointing out that I am not imposing a greater one on him in order to stress a higher need for denunciation and deterrence.

[81] Therefore, for the s. 249.1(1) offence, taking into account all the aggravating and mitigating factors of the offence, and comparing the circumstances here to the case law referred to, I impose a sentence of 240 days. This sentence will be consecutive to the one of 90 days imposed for the s. 18 *Act* offence.

[82] For the s. 249(1) offence I impose a sentence of 120 days, to be served concurrent to the s. 249.1(1) offence.

[83] If I am ultimately determined to have erred in having imposed concurrent sentences for the ss. 249.1(1) and 249(1) offences, I will state that had I imposed consecutive sentences for these offences, in considering and applying the totality principle, and not unduly emphasizing as aggravating the same elements that constituted dangerous driving in imposing a sentence for the flight offence, I would have not exceeded a total of 240 days consecutive to the 90 days imposed for the s. 18 *Act* offence and that the sentences would have been 5 months for the s. 249.1(1) offence and three months for the s. 249(1) offence.

[84] In respect of both the s. 249(1) and s. 249.1(1) offences, Mr. Echeverri will be subject to a s. 259(2) driving prohibition for a period of two years.

Credit for Time in Custody

[85] Mr. Echeverri has been in custody since October 2, 2012, or a total of 221 days. As I have determined that a Territorial sentence is warranted, the reasoning in ***R.*** v. ***Vittrekwa*** applies. Crown counsel submits that Mr. Echeverri should receive credit less than 1.5:1 for his time in custody on remand and defense counsel submits that he should receive close to 1.5:1 credit.

[86] When this matter was first before me for sentencing, Crown counsel sought an adjournment in order to proffer evidence regarding Mr. Echeverri's time in custody, expressing particular concern regarding an incident wherein numerous inmates refused to comply with the direction given to them to return to their cells.

[87] When the sentencing hearing resumed, Blaine Demchuk was called to the stand. He is a Manager of Correctional Services at the Whitehorse Correctional Center

(“WCC”). He testified to an incident that occurred on January 6, 2013. On that date, the 16 inmates in Mr. Echeverri’s unit complained about the amount of coffee they were given and insisted on receiving more. They were repeatedly directed to return to their cells and lock up. They refused to comply with that direction and continued to sit at the tables.

[88] Approximately 11 minutes into the incident, Mr. Echeverri, who was sitting down, told the other inmates not to lock up as directed and that “it would be repeated every day if they gave in now”. A Code Yellow, meaning in this case that an incident was occurring, had been signalled and the entire facility went into lockdown. Through negotiations the matter was resolved and the inmates were locked up.

[89] It appears that the entire incident was resolved within an hour. Five individuals were subsequently identified as having taken a more active role in the incident, including Mr. Echeverri. These inmates were housed in the segregation unit for varying periods of time. Mr. Echeverri remained in the segregation unit until February 19 when he was moved to the observation unit. He was then subsequently moved back to F Unit approximately one week later. Only one of the five inmates spent more time in segregation than Mr. Echeverri.

[90] Mr. Demchuk testified that outside of this incident, there were no major areas of concern regarding Mr. Echeverri’s behaviour. There were minor incidents such as covering lights with a towel, blocking an officer’s view of the cell with a towel, an occasion when he had two batteries in his cell, an occasion when he had a small tattoo gun motor in his cell, and an occasion when a length of blue bedding was found in his

cell. This item could be used to pass items from cell to cell. These incidents all constituted contraventions of WCC regulations. For possession of the batteries he received a strong verbal warning. Mr. Demchuk was not aware of the consequences, if any, from possession of the motor.

[91] Mr. Demchuk testified that Mr. Echeverri had been regularly employed as a cleaner while at WCC and that he was good at this job.

[92] He also testified that Mr. Echeverri was involved in some counselling, programming and educational activities while on remand and that he had sought out these opportunities. He had not refused to participate in any of the opportunities afforded him.

[93] A Behavioural Summary from WCC dated February 14, 2013 had been filed when the matter first came before me for sentencing. Out of 154 entries in Mr. Echeverri's log, 24 were negative. The remaining entries highlighted the positive activities he had been involved in.

[94] As per ***Vittrekwa***, I find that Mr. Echeverri would in all likelihood have earned full remission for the employment and programming components of earned remission. The question remains as to whether it is likely that he would have earned full remission for the component related to behaviour. The evidence supports the position that, overall, Mr. Echeverri's behaviour was mostly compliant with some minor exceptions that appear to have been dealt with internally. The exception is the January 6, 2013 incident. That was a serious incident. I say this because the day-to-day operation of WCC requires that inmates follow directions without hesitation and, certainly, without

defiant opposition. While this incident involved no violence or threats of violence, the potential for an escalation into violence exists when a correctional officer's directions are ignored and not complied with, particularly so when it involves a group of inmates acting in concert. Therefore a failure to follow a correctional officer's directions needs to be treated seriously, and not necessarily on the basis of what actually ended up happening, but on the basis of what could have happened.

[95] Mr. Echeverri received significant internal consequences for his role in the inmates' failure to follow directions. I cannot be satisfied, with any degree of certainty, however, that these consequences would have been considered sufficient to deal with the matter. It may well be that Mr. Echeverri could have lost the five days remission for the 30 day period encompassed within January for his behaviour. It may well be, based upon his continued placement in segregation into February, that there could have been some lost remission time for that 30 day period. Speculation as to what would have happened had Mr. Echeverri's earned remission been up for consideration for this time frame is not helpful, because no-one is in a position to answer that question. Mr. Echeverri is not able to satisfy me that he would likely have earned full remission for this period.

[96] This said, based upon his generally fairly compliant behaviour and positive reports, I am satisfied that, for most of his time in custody on remand, he would likely have received full remission. As such, I will award him a total of 1.46:1 credit for his time in custody on remand. This amounts to a total of 323 days in custody time served.

[97] This will be credited to all offences, leaving a total of seven days remaining to be

served on the s. 249.1(1) offence.

[98] The Victim Fine Surcharges will be waived.

COZENS C.J.T.C.