PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Jones,* 2015 NSPC 87

Date: 2015-12-14
Docket: 2640893,2640894
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Kevin Douglas Jones

Decision on Curative Discharge Application

Judge:	The Honourable Judge Timothy Gabriel,
Heard:	September 22, 2015, November 10, 2015 and December 15, 2015, in Dartmouth, Nova Scotia
Oral Decision	December 15, 2015
Charge:	253(1)(a) of the Criminal Code
Counsel:	Scott Hughes, for the Crown (September 22, 2015) Cheryl Byard, for the Crown (November 10, 2015 and December 15, 2015) Ethan Kim, for the Defence

By the Court:

Introduction

[1] On August 30th, 2013, Halifax Regional Municipal Police Sergeant Morris was patrolling in the vicinity of Portland Street and Manor Drive in Dartmouth when he observed the accused's vehicle, parked on the wrong side of Manor Drive, on the grass.

[2] Upon Sergeant Morris' approach, the vehicle pulled away and this resulted in pursuit for a short distance. The accused was observed to proceed through a stop sign, although he did bring his vehicle to a halt a very short distance thereafter.

[3] The accused, upon being directed to exit the vehicle, did so and promptly fell to the ground in front of it. He was emitting a very strong odor of alcohol.

[4] Mr. Jones has been charged with operating his vehicle at a time when his ability to do so was impaired by alcohol, contrary to section 253(1)(a) of the **Criminal Code**, and also with refusal of the breath demand, contrary to section 254(5). He has entered a plea of guilty to the former charge, and the Crown has withdrawn the latter.

[5] Mr. Jones has three prior alcohol related driving offences. The first occurred in 1994, the second, which occurred in 2000, resulted in a charge of impaired driving causing bodily harm which netted him a custodial sentence. The third occurred in 2007, in relation to which Mr. Jones received a curative discharge.

[6] As noted, what is now his fourth offence occurred in 2013. In the words of his counsel (in his prehearing brief), "there was no accident involved, but Mr. Jones was heavily intoxicated." Mr. Kim goes on to indicate that his client was "…shocked and appalled by his behavior, especially upon reviewing the Crown disclosure."

[7] We are now at the point where Mr. Jones must be sentenced for his crime. The Crown is seeking a one year term of custody. Mr. Jones seeks another curative discharge, and his counsel recommends (in the event that I was to agree that a discharge is appropriate) a two year probationary term, with strict conditions, as well as a four year driving prohibition.

[8] As may be inferred from the these contrasting positions, the Crown is opposed to the accused's application. The hearing proceeded accordingly.

[9] The defence called three witnesses in support of its' application: psychologist Dr. Andrew Starzomski, common law partner Peggy Doucet, and Mr. Jones himself.

Evidence

(i) Dr. Andrew Starzomski:

[10] Dr. Andrew Starzomki is a registered psychologist who practices primarily in the fields of clinical and forensic psychology. He is possessed of a PHD with specialization in the latter discipline. He is a member of both the Canadian Psychological Association and the Association of Psychologists of Nova Scotia since 2000. He has served both as a member at large on the Canadian Council of Professional Psychology Programs (CCPPP) – the body that coordinates the training of psychologists in Canada, and is a past director of that body.

[11] His resume is eleven pages long, and fully five of those pages covers the publications and presentations that he has delivered in relation to various topics in the field of Forensic Psychiatry both in Canada and internationally.

[12] He has been qualified as an expert and given opinion evidence in Nova Scotia Family, Provincial and Supreme Courts, as well as in sentencing hearings, including dangerous offender hearings and long term offender hearings, as well as

with respect to management of offenders. He also appears regularly before the Criminal Code Review Board.

[13] The Crown conceded that his qualifications were sufficient to enable him to provide opinion evidence with respect to alcohol addiction treatment options and prognosis (as he has done on at least fifteen prior occasions), with particular reference of the accused. I ruled that in this case, Dr. Starzomski would be permitted to do so, as such testimony in these circumstances meets the criteria noted in *R. v. Mohan*, [1994] 2 SCR 9, 1994 CanLII 80 (SCC). I also admitted into evidence his written report dated September 17th, 2015 (Exhibit 4).

[14] In the introductory portion of that report, Dr. Starzomski explained the extent of the contact that he has had with the accused:

> The report which follows is based on the following:
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> -interviews with Mr. Jones [May 28 (2 hours), june 2 (2 hours), June 18 (2 Hours), July 28 (1.5 hours), August 26 (1.5 hours) and September 11 (30 minutes); total time = 9.5 hours]
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> - an autobiographical document prepared by Mr. Jones as part of his residential alcohol abuse treatment at Crosbie House in 2014;
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> -psychological testing completed at my request
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> - a Pre-Sentence Report by Probation Officer Henk Van Voorst (June 15, 2015),
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> -Contact with his former common law partner (Ms. Peggy Doucet), addictions therapist Mr. John Fuller of Crosbie House in New Minas, N.S., his pastor Martin Zwicker and family physician Dr. Beverley Eisner.

[15] On the basis of the information collected from these services, Dr. Starzomski concluded at page 12 of his report:

> Mr. Jones meets DSM-V criteria for:
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> Alcohol Use Disorder Severe, in early remission (more than 3 but less than 12 months of sobriety). There are no other mental disorders present. It can be particularly challenging for those with multiple types of mental disorders to achieve a healthy and stable level of functioning. In Mr. Jones' case, his treatment needs to resolve around management of his alcohol use disorder than several concurrent cures of dis… Despite his chronic and severe history of alcohol use, in my estimation, Mr. Jones has a fair to good prognosis for continuing his recovery….

[16] Dr. Starzomski elaborated on the above in his *viva voce* evidence, and also upon Mr. Jones' proposed treatment plan, which he summarized in his report as follows:

> Mr. Jones has indicated that he has been maintaining his sobriety by applying concepts acquired at the Crosbie House Addictions Program and by attending Alcoholics Anonymous groups in the Halifax Area several times per week. Beyond complying with formal justice conditions, he also reports that he is motivated to adhere to these processes in order to remain meaningfully involved in the lives of his children, to show his estranged partner that he is interested to repair their relationship and to be more positively engaged in his relationship with his mother.
>
> While it would seem these approaches to sobriety have been helpful and should continue, in my estimation a few other elements should be added to his current maintenance regime to maximize his ongoing stability and chances of success in the future. The more formal and clinical service aspect of the new components below lend themselves better to ongoing collateral checks by a probation officer in the context of community supervision than the Alcoholics Anonymous work. With that in mind, the following elements of a treatment plan are proposed:
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> a) Ongoing attendance at AA groups at least twice per week;
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> b) Working to develop a relationship with a sponsor within AA for additional support on a personalized basis;

c) Formally engaging with Addiction Prevention & Treatment Services (APTS) public addiction service, most likely via their Wyse Road location in Dartmouth; by going through the intake process he will become a client of the service and have access to a therapist who will be able to help him determine which group counseling and sessions by APTS earlier this year and found them helpful; APTS programming offers a diverse range of empirically supported treatments, with a focus on Structured Relapse Prevention strategies for identifying and using robust coping measures for one' triggers of use;

d) Through APTS involvement Mr. Jones would potentially have access to consultation with a psychiatrist specializing in addictions in order to determine if there may be merit to augmenting his treatment plan with some form of medication;

e) Developing a more robust relationship with his family physician, Dr. Beverly Eisener of Dartmouth; with Mr. Jones' permission I spoke with Dr. Eisener about his present circumstances regarding alcoholism recovery and the pending sentencing and she expressed a willingness to meet with him and to discuss how she can assist him in his ongoing pursuit of healthy living;

f) Ongoing involvement with volunteering at his church and contact with Reverend Zwicker in order to help maintain positive structure and social contact in his weekly routine;

g) There could be an option of bolstering his motivation and focus on sobriety by having a chance to meet with a representative from Mothers Against Drunk Driving (MADD) in order to gain more personalized perspective on the harm caused by impaired driving; I have learned from the reginal director of MADD that a program of that sort may be coming here pending outcomes of a pilot project in Western Canada; she noted that MADD volunteers periodically speak at local addictions treatment programs and Mr. Jones could likely access that sort of information via that avenue.

[17] In the course of his *viva voce* testimony, Dr. Starzomski also approved and adopted the research and conclusions contained in an article by Dr. Robert B. Huebner and Lori Wolfgang Kantor entitled "*Advances in Alcoholism Treatment*", a publication of the National Institute in Alcohol Abuse and Alcoholism, which was entered as Exhibit 2. The article, as introduced by its authors '… reviews the

origins of alcoholism treatment and major studies of behavioral therapies and medication for treating alcohol dependence."

[18] While approving of the entire article, Dr. Stamzomski particularly endorsed the authors' conclusions insofar as they deal with a treatment plan that combines medications and behavioral interventions for alcoholism. Appropriately, the approach has been tagged with the acronym "COMBINE". The "medication component" of this approach is discussed at page 2 of the paper and the authors have concluded that 'Patients who received Naltrexone, behavioral therapy, or both demonstrated the best drinking outcomes after 16 weeks of treatment." After indicating that the use of Antabuse has also achieved positive outcomes in this context, the authors noted that "Naltrexone helps to reduce the craving for alcohol after someone has stopped drinking. "

[19] Dr. Starzomski explained that Naltrexone, because it interrupts the registration of pleasure in the brain as a result of alcohol consumption, should be discussed by Mr. Jones with his family physician to determine whether he might derive some benefit from the use of this medication. I will return to this later on in these reasons.

[20] Dr. Starzomski considered the accused to be sincere in his desire to eliminate alcohol from his life. The fact that Mr. Jones attended (in 2014) at Crosbie House for a 28 day residential addictions treatment program (at his own expense) his attendance at AA on a "regular basis", his volunteer work at his church, and the fact that he acts as a full time, paid caregiver for his ailing mother, were all considered to be emblematic of that desire to turn his life around.

[21] After describing Mr. Jones' account of the three alcohol related driving offences that preceeded the current one, Dr. Starzomski had this to say at page 6 of his report (Exhibit 3):

> In August 2013 Mr. Jones incurred his fourth charge related to impaired driving. He has indicated that this indecent, along with Peggy's intolerance of his ongoing alcohol abuse provided the impetus to finally "grow up" and not treat so much of his life as a game. He enrolled in a New Brunskwick residential treatment program, though found it had too much focus on religious matters for his preference. Additionally, the program allowed minimal phone contact and in-person visits with loved ones.
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> He left and would soon thereafter enroll in the one-month residential addictions program Crosbie House program in Nova Scotia in early 2014. Mr. Jones described that program to me in positive terms, but noted he has found it difficult to get back there for follow-up support meetings due to the distance involved. He suggested that staff a the house do not seem to have a particularly positive outlook towards him, which he attributed to not getting to follow-up meetings. While the program was generally quite effective for him, he acknowledged he had a few brief slips with alcohol in 2014 before launching into a period of sobriety that has lasted from the end of 2014 until the present time.
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> Mr. Jones reported that he has been getting to AA meetings in the local area several times per week. Though he does not have an AA sponsor, he said he would like to find one and noted that it has been difficult to find a good one. I have encouraged him to make and maintain more of a connection with the Addiction Prevention & Treatment program office on Wyse Road in Dartmouth.

> Having support at the ready is desirable given the chronicity of his alcoholism and the relatively early phase of sobriety that he continues to foster.

[22] Mr. Jones experienced pancreatitis in 2014, a condition which is often associated with severe alcohol abuse. As a result of this he was in contact at that time with his mother's physician, Dr. Beverly Eisener. Dr. Eisener is quoted (by Dr. Starzomski) to the effect that she has not met with Mr. Jones much at all after this crisis had subsided. Mr. Jones indicated that he is willing to work with Dr. Eisner in relation to combatting his alcohol abuse.

[23] Dr. Starzomski felt that Mr. Jones' prognosis is "fair to good", adding that has a very long history of severe alcoholism. Although the accused was noted by him as being willing to work on it, he added that it will require a lot of structure around him to bring about success. This structure includes his family, regular AA attendance, and the development of a more robust relationship with Dr. Eisener, among other things.

[24] When discussing his views about why the 2007 curative discharge that Mr. Jones received did not work, Dr. Starzomski had this to say at pages 5 and 6 of his report:

> He incurred his third situation of a charge related to impaired driving in March 2006 in Nova Scotia. He noted that Peggy was very disappointed in this. Nonetheless, he did not engage in any serious effort to change his drinking. He was sentenced in March 2007 to a conditional discharge, 30 months of probation

> and a license suspension of 3 years. Mr. Kim informed me that that was also a curative sentence, though Mr. Jones was not particularly aware of that in discussions with me. I have no information before me to indicate what sorts of treatments were required of him or how that was monitored by probation services or others. It seems possible to me, for the information available to me, that his prior curative sentence was not especially robust and its failure (in the sense that alcohol abuse and impaired driving recurred subsequently) was inevitable without greater structure.
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> …
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> … Also during that period he provided frequent assistance to his aunt after she suffered a stroke, attending to various domestic needs at their home nearby several times per day in addition to providing care for his father. He acknowledges that he was maintaining his habit of substantial alcohol consumption during this period (eg., 10-15 or more beer/day). He had a central role in facilitating his father's eventual move to a nursing home in early 2012, where he died soon after. During that period of caring for his father Mr. Jones and Peggy formally became estranged though he continued to maintain contact and have visits to Moncton to see their children, a pattern that continues to the present day. He stayed on in Dartmouth at his mother's residence, collecting a stipend for providing daily living assistance to his mother.

[25] Since completion of the 28 day residential program at Crosbie House in New Minas, Nova Scotia, in January 2014, Mr. Jones admitted that he did have a couple of "slips", but said that he has been sober since the end of 2014.

[26] Dr. Starzomski's proposed treatment plan on a "go forward" basis has been earlier referenced. I will return to it further on.

(ii) Peggy Doucet:

[27] Ms. Doucet is someone who has known the accused for 14 years, nine of which were spent in a common law relationship with him.

[28] They have two children, aged 7 and 12, and are currently separated. They jointly own a home in Riverview, New Brunswick, where Ms. Doucet and the children reside. Mr. Jones presently resides in HRM, where, as indicated, he is employed as a full time caregiver for his 85 year old mother, who has memory loss and other cognitive impairment.

[29] Ms. Doucet testified that although they are legally separated, they see each other "on and off", as she puts it. He comes to their home most weekends to see the children, and the couple is working towards what they hope will be a reconciliation.

[30] Ms. Doucet works part time at a call centre in Moncton, New Brunswick and she and the children are very financially dependent upon Mr. Jones, as her total income from all sources (including child tax credit) is about $2400 per month. Mr. Jones has paid for a lot of the children's expenses, as well as those related to the maintenance and upkeep of their home in Riverview, as well as upon debt retirement.

[31] Ms. Doucet testified that she is committed to providing Mr. Jones with support in his efforts to eliminate alcohol from his life. There is no alcohol at all in her house. Moreover, she indicated that she was the one who chose Crosbie House,

a private facility for which they personally paid, and said that they did not do it merely because it would look better in court, either. Mr. Jones was diagnosed in February 2014 with pancreatitis after being rushed to the hospital in crisis. As she elaborated in her supportive letter, which was introduced as Exhibit 4 (and largely mirrored her *viva voce* evidence) "Kevin has been diagnosed with pancreatitis. The doctor told him to quit drinking. I do believe that he will continue to abstain from alcohol. Otherwise he will die."

[32] She testified that she had genuinely noticed a difference in him, notwithstanding his slips in 2014, after Crosbie House (January 2014), and after his diagnosis with pancreatitis (February 2014).

[33] She is proud that he has remained alcohol-free since the end of 2014. According to her, when he left Crosbie House in 2014, he was a different man. She also stated: "If I thought jail would fix him, (then) go ahead and take him. But he'll just come out worse", and also that "we chose a very expensive facility (Crosbie House) because we wanted him fixed. He could have gone somewhere else taxpayer funded."

[34] Notwithstanding this, she indicated that Mr. Jones is not participating in the Crosbie House on-line seminars that are offered to former attendees for support. She says that they cannot hook up to "Skype" in order to view them.

(iii) Kevin Jones

[35] Mr. Jones testified and confirmed much of the evidence provided by Ms. Doucet. He is a 50 year old man, and he feels that he has abused alcohol for 35 of those years. That said, his evidence is that he has not consumed any alcohol in the last 9 months.

[36] The accused said that he is motived to change his life, and that this took hold after he was charged with the subject offence in 2013. This is in contrast with what he said was his attitude in 2007, when he received a curative discharge in the aftermath of his last previous alcohol related driving offence in 2006. Mr. Jones testified that (then) he just was not ready to change his lifestyle. As he put it, he still thought that he could "get away with anything" at the time.

[37] When he entered Crosbie House, in January 2014, they set him up with AA, and he still attends. He did add that he finds it hard to get to AA meetings when he is in Moncton visiting Ms. Doucet and the children (which happens most weekends) because he would rather play with the children than attend. He

acknowledges that he would have to rebuild his support system in the event he were to relocate to Moncton permanently (which is the expected outcome once his services in relation to his mother's care are no longer required, and he and Ms. Doucet have fully reconciled). He expresses the hope that Dr. Eisener can assist him in "setting things up" in that locale by the time of the move. Currently, he has not explored the treatment options available to him in Moncton. When asked if he had seen Dr. Eisener yet in relation to maintaining his sobriety, Mr. Jones responded that he plans to make an appointment to do so "next week when I bring my mother in for an appointment". Dr. Eisener is currently his mother's physician.

[38] It necessarily follows that the accused is not on medication to assist him with respect to his efforts to maintain sobriety such as Naltrexone (as recommended by Dr. Starzomski) or Antabuse, as this has not been explored with "his" physician.

[39] Finally, Mr. Jones testified that he has been attending AA approximately 5 times per week, and that his has been the case since his discharge from Crosbie House in January 2014. Although he does not yet have a sponsor, he said that he is working with Dr. Starzomski to obtain one at the 99 Wyse Road location. He indicates that he is "not sure how the system works" to go about getting a sponsor.

The Law and Analysis

[40] Against this background, Mr. Jones has plead guilty to the charge that he operated a motor vehicle at a time when his ability to do so was impaired by alcohol, contrary to section 253(1)(a) of the **Criminal Code**. This is his fourth such offence. Section 255(1) therefore prescribes a minimum term of imprisonment of 120 days, to a maximum of 5 years, since the Crown has proceeded by way of indictment.

[41] That said, section 255(5) provides:

> (5) Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.

[42] Mr. Jones has applied for a curative discharge in accordance with the provisions of section 255(5). As such, I must be satisfied on a balance of probabilities that:

(a) He is in need of a curative treatment in relation to his consumption of alcohol, and

(b) That the relief which he seeks would not be contrary to the public interest.

[43] Criterion number one may be readily addressed. Clearly, on the basis of the testimony of Dr. Starzomski, as well as the background to which both Mr. Jones and Ms. Doucet testified, the accused suffers from alcohol dependency and is in need of the curative treatment. The Crown tacitly concedes as much.

[44] I move on, then, to the second phase of the test. I note that I do not have to be satisfied that the discharge being sought is in the public interest, merely that it is not contrary to that interest.

[45] When considering whether the curative discharge is 'not contrary to the public interest", the factors with which I must deal are set out in the case or *R. v. Ashberry* [1989] O.J. No. 1001, a decision of the Ontario Court of Appeal. There, they were expressed as follows:

> (a) The circumstances of the offence and whether the offender was involved in an accident which caused death for serious bodily injury. The need to express social repudiation of an offence where the victim was killed or suffered serious bodily injury will generally militate against the discharge of the offender. Parliament has seen fit to expressly provide for more onerous sentences in those cases (s-ss. 255(2) and (3)).
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> (b) The motivation of the offender as an indication of probable benefit from treatment. One can expect that a person facing a sentence of imprisonment may quite readily agree that he or she will take treatment for alcoholism and give up alcohol. The important question is the bona fides of the offender in giving such an undertaking. The efforts of the offender to obtain treatment before his or her conviction is of some importance. If the offender has a history of alcohol-related driving offences and has never before sought treatment for his or her condition, then one may regard with some suspicion his or her efforts to obtain treatment at this stage, when faced with a probable term of imprisonment.

(c) The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the program.

(d) A probability that the course of treatment will be successful and that the offender will never again drive a motor vehicle while under the influence of alcohol.

(e) The criminal record and, in particular, the alcohol-related driving record of the offender. Normally, where the offender has a previous record of alcohol-related driving offences there is a high risk of the offence being repeated and a greater need for a sentence emphasizing specific and general deterrence. The offender with a previous bad driving record will obviously have a higher burden of satisfying the court that his or her case is exceptional and that a discharge with curative treatment is appropriate and in the public interest.

[46] The Court also noted the following in *Ashberry*:

> However, if all other conditions are met, specifically where the evidence establishes both the need for treatment and the probability of rehabilitation, the offender's bad driving record should not by itself deprive the offender of the remedy of a discharge with appropriate safeguards imposed as conditions of probation under s. 255(5) of the Code. The multiple offender may well be a more suitable candidate for curative treatment because of his or her chronic alcoholism or drug addiction. In addition, the fact that he or she has on a number of prior occasions received fines or sentences of imprisonment may lead the court to conclude that these penalties have had no deterrent effect on the offender and that the public interest would best be served by directing curative treatment under a formal supervised program.

[47] The Ontario Court of Appeal further observed in *Ashberry*:

> One should not overlook the fact that the principle of specific deterrence is not undermined by granting a conditional discharge under s. 255(5), having regard to the strict obligations imposed on the offender under the probation order and the consequences attendant on a breach by the offender of any of these terms. Unlike s. 736, s. 255(5) of the Code does not provide for absolute discharges. The offender who is discharged will always be subject to a probation order with the mandatory condition that he or she attend for curative treatment and, in addition, he or she should be subject to other stringent conditions to afford a measure of protection to the public.

[48] Lastly, the Court noted that:

> The reported cases with respect to conditional discharges under s. 255(5) indicate that those courts which have granted discharges have ordered probation for periods of between two to three years, usually much longer terms than would be imposed as terms of imprisonment.

[49] I have also considered a number of other cases that have commented upon and applied the guidelines set out in *Ashberry*, including *R. v. MacCormick*, [2000] N.B.J. No. 24; *R. v. Aucoin*, [1987] N.S.J. No. 177 (N.S.C.A.); *R. v. Beaulieu* (1980), 7 M.V.R. 21 (N.W.T.S.C.); *R. v. Debaie* (1991), 106 N.S.R. (2d) 241 (N.S.S.C.); *R. v. Earle* (1989), 90 N.S.R. (2d) 138 (N.S.S.C.); *R. v. MacArthur*, [2009] N.S.J. No. 603 (N.S.P.C.) and *R. v. Lohnes*, [2007] N.S.J. No. 72 (N.S.C.A.).

[50] Each case turns upon its own set of circumstances. The Defence has the burden, of course, to establish (on the balance of probabilities) that a curative discharge is appropriate.

[51] In the case at bar, it is clear that the offender was not involved in an accident (unless it could be said that ending up off the road upon the grass could be categorized as such). Certainly, no death or serious injury was involved in any event. This is not in any way to downplay the potential, which always exists in alcohol related driving cases, for a member of the public (or Mr. Jones himself) to have been seriously injured, or killed. Only that, fortuitously, such did not occur this time.

[52] Next, I consider the second *Ashberry* factor, which relates to Mr. Jones' motivation. This is Mr. Jones fourth conviction for an alcohol related driving offence. In December of 2000

> …Mr. Jones incurred two charges for impaired driving causing bodily harm as a result of causing a car accident while driving during a blackout. He said he was driving while blacked out, went through a stop sign and struck 3 cars, hit a lamp post and needed 72 stitches to his head. He was not aware in detail about the extent of the injuries suffered by the victims. For his sentence he said he served 6 months on weekends and made a modest attempt to engage in alcohol recovery through Alcoholics Anonymous. He acknowledges that he did not apply sufficient effort and was soon drinking heavily again.
>
> (Report of Dr. Starzomski, Page 4)

[53] That was his second offence. He received a curative discharge in March of 2007 in relation to a third, prompting Dr. Starzomski to speculate (without any real knowledge as to what types of conditions were attached to his probation, because Mr. Jones could not remember them) that "It seems possible… that this prior curative discharge was not especially robust and its failure (in the sense that alcohol abuse and impaired driving recurred subsequently) was inevitable without greater structure."

[54] Implicit in this comment is the need for current structure in Mr. Jones's life. This was made explicit in Dr. Starzomski's *viva voce* testimony. It is against this pressing need, on a go forward basis, that I assess the accused's motivation.

[55] Mr. Jones' evidence is that he now has motivation, in the aftermath of the predicate offence. His partner, Ms. Doucet, is no longer prepared to tolerate any type of alcohol consumption on his part. It has led to their separation, and he is anxious to repair their relationship, and to play a positive role in the lives of his children, who are now 12 and 7 years of age (he does have another child, 17 years of age, from another relationship). To quote from his counsel's post hearing brief "…Mr. Jones and his family are considering the possibility of having him relocated to Moncton to be closer to his family."

[56] And yet, although he indeed testified that his ultimate objective is to reunite with his family in Moncton, when his mother is able to do without his assistance, he had not, as of the date he testified, investigated the suitability of the resources in Moncton to his rehabilitative goals.

[57] Moreover, although he expressed his hope that Dr. Eisener could connect him to the services he required in Moncton, as of the date of date of his testimony, he had not spoken with her at all with respect to his recovery from alcohol abuse or with respect to follow up care after his completion of the Crosbie House program in January 2014. This, despite the fact that, as his mother's care giver, he would have been taking her to her appointments with Dr. Eisener all along, and could have made an appointment himself (while there) long ago. Not only is he therefore

deprived of Dr. Eisener's vigilance and follow up, he does not have the benefit of any medications such as Naltrexone or Antabuse, which a doctor could conceivably prescribe to assist his recovery.

[58] Mr. Jones is involved in AA (and that is certainly to the good) yet he was involved with AA to some extent after the 2000 offence (his second one, for which he was imprisoned), and after the 2007 (his third) in relation to which he obtained a curative discharge. He is going to AA now, but he clearly needs more than this. Of some importance is the fact that he has been attending AA (this time around) since the end of January 2014, and still has not yet obtained a sponsor. The accused said Dr. Starzomski is making efforts to assist him to get one at the Wyse Road location. The accused also noted that he is unsure even of "how the system works" in order to acquire a sponsor. (By letter dated December 10, 2015, his counsel advised me that he has just now acquired a sponsor, almost two years after his discharge from the Crosbie House program).

[59] Mr. Jones advised that he found the programs at Crosbie House in early 2014 helpful. What appears in Dr. Starzomski's report (page 6) is a mixed message on that score: "Mr. Jones describes that program in positive terms, but noted he has found it difficult to get back there for follow-up support meetings due to the distance involved." Ms. Doucet testified that, although these sessions might have

been attended "on-line", Mr. Jones has not done so, because they do not have a Skype link.

[60] There is no evidence that he has followed up with Dr. Starzomski's recommendation (p. 6) that he

> … make and maintain more of a connection with the Addiction Prevention and Treatment program office on Wyse Road.

[61] Dr. Starzomski said it was important for Mr. Jones to do so because:

> Having support at the ready is desirable given the chronicity of his alcoholism and the relatively early phase of sobriety that he continues to foster.

[62] There is some suggestion that Mr. Jones' motivation at present derives not only from Ms. Doucet's lack of tolerance for his alcohol use, but also from the health issues that have arisen after his diagnosis with pancreatitis in February 2014, and the realization that he could die unless he makes a lifestyle change. Yet after this, and after his stint in Crosbie House in early 2014, he "slipped twice".

[63] I conclude that given the extent and chronicity of Mr. Jones' alcoholism, he requires significant structure to prevent a future relapse, notwithstanding the nine month stint of sobriety that he has indicated that he has achieved. As Dr. Starzomski observed, he is still in the "relatively early phase of his sobriety".

When weighed in the balance, the structure gained from involvement in AA (at his current level) and with the Church, (and Reverend Zwicker) does not suffice.

[64] Given the paucity of evidence with respect to his efforts to make even those efforts that common sense should have indicated to him were required in order to acquire the needed supports, I am left with significant concern with respect to Mr. Jones' willingness to make the effort to do what is (vitally) necessary in order to achieve success and change his life this time around. Despite his professions to the contrary, the evidence does not satisfy me that he has the motivation that is necessary to the task.

[65] I now deal with the third factor in *Ashberry*, namely, the suitability of the facilities that are available to Mr. Jones to assist in his recovery. The regimen purposed by Dr. Starzomski can certainly be implemented locally. Presumably, similar facilities would be available in Moncton as well. Unfortunately, Mr. Jones has not, as of yet, made any inquiries to test that hypothesis, even though it is his ultimate goal to relocate to that community.

[66] The fourth *Ashberry* criterion requires the court to assess the probability that the treatment will be successful. This is, of course, predicated upon the assumption that the program will be followed. It is genuinely difficult to deal with

this independent of the concerns that I have expressed regarding Mr. Jones' motivation. While, overall, the combination of Dr. Starzmoski's *viva voce* evidence and that contained in his report could be described as (guardedly) optimistic, it is dependent upon a greater dedication by Mr. Jones to a victory in his literally life and death struggle with alcohol, than he has demonstrated to date.

[67] The final criterion evaluates Mr. Jones' prior criminal record, including whether he has been the recipient of a curative discharge in the past. To repeat what has been said multiple times earlier, this is his fourth alcohol related driving offence, one of which involved (in 2000) the infliction of bodily harm to another, and which resulted in a custodial sentence. I must also consider what efforts have been made to facilitate his rehabilitation after the previous curative discharge in 2007.

[68] The case law is clear. Neither the fact of Mr. Jones' prior record, or his prior receipt of a curative discharge, precludes my consideration of his request in this case.

[69] Indeed, there are examples of instances where a recidivist has received a discharge (for example, see *R. v. Wallner* (1988), 44 C.C.C. (3d) 358, 66 C.R. 79 (Alta. C.A.). The goal in crafting an appropriate sentence is the same whether a

discharge is ultimately granted or not: to attempt to protect the public from the repetition of the offence. A curative discharge is adopted when rehabilitation may be more suited to that purpose than a more traditional punishment or deterrence based sentence.

[70] Mr. Jones carries the burden of satisfying me on a balance of probabilities that a rehabilitative focussed sentence under the auspices of a curative discharge (and the conditions attached to the probation that would necessarily accompany it) would have more efficacy in that regard.

[71] Largely because of my concerns arising from the chronicity of Mr. Jones' alcohol abuse, his serious record, and his prior criminal record involving three other alcohol related driving offences, (including the fact of his prior curative discharge in 2007, which was very unsuccessful in eliminating, or significantly curbing his alcohol abuse) and his insufficient motivation in seeking out and putting in place sufficient structure (to date) to guard against future alcohol use, the evidence does not satisfy me (when weighed against the criteria noted in *Ashberry, R. v. Storr* (1995), 102 W.A.C. 65 (Alta. C.A.) and the other authorities to which reference has been made) that it would be appropriate to provide Mr. Jones with a (second) curative discharge in relation to his current section 253(1)(a) offence. His application in that respect is therefore dismissed.

[72] What necessarily follows is that Mr. Jones will serve a custodial sentence of at least 120 days. I am at a distinct disadvantage, as there has been little to no discussion by counsel as to what the appropriate sentence should be in the event that I were to dismiss Mr. Jones' application. I know the Crown's position (a one year custodial sentence) but have been referred to virtually no authorities in support of it. I have not been provided with any submissions at all by the accused on the topic.

[73] I would ask that counsel provide me with written submissions on sentence, which should include a discussion of the punishment imposed with respect to all prior convictions, as well as any conditions to which Mr. Jones was subject in the past, in the aftermath of such convictions.

[74] The Crown is to file its submission within 30 days, defence within 45 days. The Clerk will provide a date in mid to late February, 2016, to conclude this sentencing hearing in order to accommodate those timelines.

Timothy Gabriel, JPC