

**IN THE PROVINCIAL COURT OF NOVA SCOTIA**

**Citation: R. v. Graves, 2008 NSPC 44**

**Date: July 16<sup>th</sup>, 2008**

**Docket: Annapolis Royal, NS**

**Registry: Digby, NS**

**Between:**

Her Majesty The Queen

Plaintiff

v.

Paul Graves

Defendant

**Judge:** The Honourable Judge Jean-Louis Batiot, J.P.C.

**Heard:** January 14<sup>th</sup>, 2008

**Written Decision:** July 16<sup>th</sup>, 2008

**Counsel:** David Acker, for the Crown

Chris Manning, for the Defence

BATIOT, J.P.C.

1. Mr. Graves comes before the court with a horrendous motor vehicle record, i.e. ten prior convictions contrary to section 287(2) and seven contrary to section 230(1) of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293, committed between the 27<sup>th</sup> of March 2002 and the 15<sup>th</sup> of September 2006.
2. The court record shows a total of \$40,487.26 in outstanding fines, court costs and victim fine surcharges. No payment was ever received.
3. He must be sentenced on four further convictions, three contrary to s. 287(2) (driving motor vehicle while privilege of obtaining license revoked); and one contrary to s. 230 (driving a motor vehicle without a liability policy). They occurred between the 23<sup>rd</sup> of November 2006 and the 9<sup>th</sup> of October, 2007, and are all in breach of the **Motor Vehicle Act**.
4. The Crown originally initiated an application pursuant to section 734 of the Criminal Code for Mr. Graves to serve a substantial amount of time in default, but has abandoned it.
5. The issue is what sentence should this court pronounce against Mr. Graves, to specifically deter him from continuing his illegal acts. Heavy fines have obviously been ineffective.
6. Mr. Manning, for Mr. Graves, argues for further fines, as Mr. Graves has changed his line of work – delivering paper on a rural route – and he no longer has to drive. Mr. Acker argues that the sentencing goals of s. 718 of the CCC are applicable, and, in this unusual case, in order to deter the accused from such conduct in the future, imprisonment should be imposed.
7. That default time, at the rate of fifty dollars per day, amounts now to other 800 days, should each fine provide consecutive default time. Failing this, the maximum that can be imposed is 180 days, as per s. 299B of the **Motor Vehicle Act**:

*299B An individual who is in default of payment of a fine imposed as a penalty pursuant to Sections 292 to 299A may be imprisoned for*

*(a) two days if the amount of the fine is less than one hundred dollars; or*

*(b) two days plus one day for each fifty dollars or part thereof over one hundred dollars if the amount of the fine is more than one hundred dollars, to a maximum of one hundred and eighty days. 2002, c. 10, s. 20.*

8. Any further fine, to serve the sentencing objective of deterrence, both general and specific, if not paid, may not trigger any further default time, unless each fine is treated separately, and default is consecutive.

## **SENTENCING PROVISIONS**

9. The **Motor Vehicle Act**, *supra*, in its Penalties section (ss. 292 to 299A), classifies the infractions of ss. 287(2) and 230 as Category G, H and I:

### ***Category G offences***

*298 Any person who violates any of the provisions of Section 41, 43, 53, 56, 80 or 97, subsection (11) of Section 98, subsection (8) of Section 201, Section 214, subsection (4) of Section 279, subsection (1) or (2) of Section 287 or Section 301 is guilty of an offence and liable on summary conviction to the penalties provided for a category G offence in the Summary Proceedings Act. 2002, c. 10, s. 20; 2005, c. 8, s. 14.*

### ***Category H offences***

*299 Any person who violates any of the provisions of Section 230 is guilty of an offence and liable on summary conviction to the penalties provided for a category H offence in the Summary Proceedings Act. 2002, c. 10, s. 20;*

### ***Category I offences***

*299A Any person who violates any of the provisions of Section 46, 49, 51 or 287 is guilty of an offence and liable on summary conviction to the penalties provided for a category I offence in the Summary Proceedings Act. 2002, c. 10, s. 20; 2005, c. 8, s. 15. [my underline]*

10. It will be noted that s 287 is both a Category G and I offence, with the higher minimum fines imposed by the second Category.

11. S. 4B of the **Summary Proceedings Act**, RSNS 1989, c. 450, creates these Categories. It states the minimum fines – and no maximum – for these offences, in derogation of the general provisions of s. 4, **infra**:

*(g) where an enactment makes an offence punishable as a category G offence, a judge shall impose a fine of not less than five hundred dollars for the first offence, not less than one thousand dollars for the second offence and not less than two thousand dollars for the third or a subsequent offence;*

*(h) where an enactment makes an offence punishable as a category H offence, a judge shall impose a fine of not less than one thousand dollars for the first offence, not less than two thousand dollars for the second offence and not less than five thousand dollars for the third or a subsequent offence;*

*(i) where an enactment makes an offence punishable as a category I offence, a judge shall impose a fine of not less than one thousand dollars for the first offence, not less than two thousand dollars for the second offence and not less than four thousand dollars for the third or a subsequent offence.*

12. Therefore, the defendant is liable to total fines of \$6,000 or \$12,000 for the three s. 287 offenses, and \$5,000 for the offence contrary to s. 230, unless another disposition can be made.

13. The general penalty provision is found in s. 4 of the **Summary Proceedings Act**, **supra**:

*Every one who, without lawful excuse, contravenes an enactment by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless some penalty or punishment is expressly provided by law, guilty of an offence punishable on summary conviction and liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both. R.S., c. 450, s. 4; 1990, c. 46, s. 2 [my underline].*

14. These are the same sanctions as provided by s. 787, found in **Part XXVII** of the **Criminal Code of Canada**, R.S.C. 1985, c. C-34 dealing with Summary Convictions.

15. Is s. 4 of the Summary Proceedings Act, or s. 787 of the Criminal Code of Canada, available to impose a different penalty, including one of imprisonment, on the defendant? Or are the minima, stated in each Category, *some penalty or punishment .... expressly provided by law* (s.4), thus exempting the defendant of the application of these sections?

## **JURISPRUDENCE**

16. In **R. v. Rafuse** (1986), 74 N.S.R. (2d) 167, the Nova Scotia Court of Appeal decided that even though the provisions for summary proceedings of the **Criminal Code** were applicable to proceedings under Provincial Legislation, such application was restricted to procedure and not substantive matters. Since the **Motor Vehicle Act** provided specific penalties for breaches of its provision, the alternative or different or greater penalties found in the Criminal Code ought not to be imposed, without clear legislative language to that effect. At issue was whether probation was available as a sentencing option for a breach of the Motor Vehicle Act. The Court held it was not.

17. The Court confirmed this principle, without referring to **Rafuse**, in **R. v. Gilkie** (1983), 60 N.S.R. (2d) 220, confirming a decision, of O’Hearn, Co.Ct. J., **infra**. It held a para. 6, that s. 5(1) of the then **Summary Proceedings Act**, S.N.S. 1972, c.18 and s. 722 of the **Criminal Code** *make it abundantly clear that the provisions of the Criminal Code do not apply where the statute specifically provides for the penalty to be imposed for its breach.*

18. In **R. v. Gilkie** (1983), 59 N.S.R. (2d) 290, O’Hearn, Co Ct J. held then that the penalties

sections of the **Motor Vehicle Act** did not permit imprisonment as a sentencing option in the first instance, even though, had it been available, it could have been considered, for specific deterrence, in the case of a fifth conviction for driving while suspended in the same year.

19. These sections were different than the present ones, in that the minimum sentence was less, and default time was provided as part of each minimum sentence.

20. Judge O’Hearn also refers to s. 3A of the **Summary Proceedings Act** (the exact predecessor of s. 4, but for the fine), and was of the view that (at para. 6), by using the word “wilfully”, it was *doubtful whether it is intended to apply generally to the Motor Vehicle Act, where many offences do not require either intention or recklessness of a quasi-criminal nature.*

21. There was also no provision for imprisonment as a possible minimum penalty; thus the better view was that none was intended, but only in default of payment of the fine.

## **PRESENT STATUTES**

22. Since then both provincial **Acts** have been amended, as already mentioned. The **Summary Proceedings Act** incorporates, through s. 7, the provisions of the **Criminal Code of Canada**, as follows:

*7 (1) Except where and to the extent that it is otherwise specially enacted, the provisions of the Criminal Code (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, mutatis mutandis, to every proceeding under this Act.*

Does this underlined addition, in effect address the ruling of **R. v. Rafuse, supra**, where the Court held, at p. 2, that, prima facie, its predecessor, s. 5, only referred to procedural, and not substantive, matters:

*The intent of that statute was to substitute the procedure under the Criminal Code for the provisions of the Summary Convictions Act. The object was to provide a uniform practice for the enforcement of summary conviction offences including the use of common forms. Prima facie, in our view, the reference to s. 5 of the Summary Proceedings Act is to Part XXIV of the Code. Part XXIV does not specifically adopt Part XX of the Code. Section 728 of the Code, on the other hand, specifically adopts Part XIV and Part XV of the Code.*

23. **Part XXIV** is now **Part XXVII** (Summary Conviction). Its s. 787, the general penalty section, has already been mentioned. S. 728, now s. 795, adopts the provisions of **Parts XVI**, (formally **XIV** (Compelling Appearance of Accused), **XVIII** (formally **XV**, Procedure on Preliminary Inquiry), **XX** (formally **XVII**, Procedure in Jury Trials), and **XX.1** (Mental Disorder).

24. **Part XX**, alluded to by the Court of Appeal is now **Part XXIII** (Sentencing). That Part was not adopted then, and is not now, by the present s. 795.

25. The Court opined that specific language ought to be present, as it was then in Ontario, for the adoption to be clear and unequivocal, because

*[t]he provisions of Part XX of the Code are substantive. They impose additional penalties and liabilities on convicted persons including probation. The Legislature has provided under the Motor Vehicle Act the specific penalties for infractions of that Act. It should not be implied that any greater or alternative penalty can be imposed under the Code without express language to that effect from the Legislature, nor, in our view, can it be said that it is desirable to impose probation for a violation of provincial offences which are prima facie regulatory in character.*

26. The only allusion to **Part XXIII** of the **Criminal Code of Canada** in s. 7 of the **Summary Proceedings Act** is the specific reference to s. 734.2, a section that dictates the procedure in making an Order imposing a fine, to ensure the convict is aware of the options open to him or her to pay that fine. It is a time consuming procedure, but a condition precedent to enforce a fine Order through a Warrant of Committal (s. 734.7). S. 7 excepts its application. This is not sufficient to adopt the whole **Part**.

27. Indeed, in light of **Rafuse**, there ought to be *express language ...from the Legislature*, a clear intention to adopt **Part XXIII**, either through s. 795 of the **Criminal Code**, or any other, specific, provisions of the **Summary Proceedings Act**. There is none.

28. There is case law that holds that since the maximum default time in summary conviction is six months (s. 787), such default time ought to be calculated by reference to s. 734 (**R.v. Purewal**, [2004] B.C.J. No 63 (B.C.S.C.)). Again, this is not language *from the Legislature*, sufficient to adopt the whole **Part**, dealing with sentences generally under the **Criminal Code**.

## CONCLUSION

29. It will be noted that for most of the Categories, the minima prescribed are less than the maximum fine provided in s. 4 of the **Summary Proceedings Act**.

30. However, categories G, H and I, in question, require the imposition, for a second offence, of that maximum (H and I), at least double that maximum (I), or more than double (H), for a third or subsequent offense.

31. The only default provision for these sentences, is found in s. 299B of the **Motor Vehicle Act** as seen above, and not the **Summary Proceedings Act**. That section is specific in its calculation of default, fifty dollars per day, different from that provided by s. 734(5), where a day is equivalent to eight times the minimum wage of that Province.

32. Each penalty section, s. 4 (*Except where and to the extent that it is otherwise specially enacted*) and s. 795 (*Except where otherwise provided by law*), recognize exceptions created by law, and the sentencing provisions created by the **Motor Vehicle Act** are such provisions.

33. It is reasonable to conclude, that in spite of the amendments to both **Acts**, the intent of the Legislature, in re-organizing the sentencing options, was to continue with a regimen of fines, indeed increased and substantial fines, for infractions of these Motor Vehicle sections. These continue to be the only sentencing options available in the first instance, until more specific language adopts the



more general penalty sections.

34. These particular sections are the only ones to be invoked in sentencing Mr. Graves in spite of his horrendous record. He is entitled to the benefit of the doubt in the case of the ambiguity created by the two categories with respect to the punishment under section 287.

35. I thus sentence Mr. Graves to a fine of \$2000.00 on each of the section 287 offences for a total of \$6000.00, and \$5000.00 for the offences contrary to section 230, together with costs, pursuant to section 4(a) of the **Summary Proceedings Act** and victim fine surcharge. The default time will be consecutive to any other time of incarceration and I give Mr. Graves twelve months to pay.

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Jean-Louis Batiot, J.P.C.

July 16<sup>th</sup>, 2008

Annapolis Royal, NS

