PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacKenzie, 2012 NSPC 4

Date: 2012-01-16
Docket: 2153877, 2153879, 2163597
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

v.

Neil Wayne MacKenzie

Judge:	The Honourable Judge Laurel Halfpenny MacQuarrie
Date Heard:	January 12, 2012, in Port Hawkesbury, Nova Scotia
Oral Decision:	January 16, 2012, in Port Hawkesbury, Nova Scotia
Charge:	On or about the 7th day of March, 2010, at, or near Louisdale, Nova Scotia, did operate a motor vehicle while disqualified from so doing by reason of an order pursuant to Section 259(1) of the Criminal Code contrary to Section 259(4) of the Criminal Code of Canada; FURTHERMORE On or about the 7th day of March, 2010, at, or near Louisdale, Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did operate a 1995 Buick Regal bearing Nova Scotia License Plate number DZU 653 contrary to Section 253(1)(a) of the Criminal Code of Canada; FURTHERMORE On or about the 7th day of March, 2010, at, or near Hwy 320 Louisdale, Nova Scotia, did unlawfully commit the offence of driving motor vehicle without motor vehicle liability policy contrary to Section 230(1) of the Motor Vehicle Act.
Counsel:	Robin Archibald, for the Crown Kevin Patriquin, for the Defence

By the Court:

[1] Neil Wayne MacKenzie is charged on an information that he did:

> On or about the 7th day of March, 2010, at, or near Louisdale, Nova Scotia, did operate a motor vehicle while disqualified from so doing by reason of an order pursuant to Section 259(1) of the Criminal Code contrary to Section 259(4) of the Criminal Code of Canada;
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> FURTHERMORE On or about the 7th day of March, 2010, at, or near Hwy 320 Louisdale, Nova Scotia, did unlawfully commit the offence of driving motor vehicle without motor vehicle liability policy contrary to Section 230(1) of the Motor Vehicle Act.

[2] Mr. MacKenzie appeared before me on January 12, 2012, and entered a plea of guilty to these offences.

[3] The facts are that on the date and place shown on the informations, the RCMP located a motor vehicle for which they had received a report of a possible impaired driver. Mr. MacKenzie was stopped at a gas bar and was the only occupant of the vehicle seated in the driver's seat. As he stepped out of the vehicle

he was unsure on his feet and there was an odour of alcohol from his mouth. He was a prohibited driver as a result of a three year prohibition from March 11, 2009. He was arrested for driving while suspended and impaired operation. There was no motor vehicle liability insurance on the vehicle either.

[4] Mr. MacKenzie, through Mr. Patriquin, gave notice to the Court that he was going to be seeking a curative discharge pursuant to subsection 255(5) of the **Criminal Code** as it related to the section 253(1)(a) offence. Subsection 255(5) provides:

> 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.

[5] Mr. MacKenzie is also before the Court for sentencing with respect to the driving while prohibited charge, and the offence of not having motor vehicle liability coverage.

[6] In the past eight years or so, I have done four or five of these cases and that gives an indication of their rarity. I believe Mr. Patriquin also noted in this 25 year career that this is the first application of this nature that he has made, thus confirming my comments. The burden is on Mr. MacKenzie to meet the provisions of subsection 255(5) and the burden is one of a balance of probabilities.

[7] Section 718 and the provisions that follow it in the **Criminal Code** outline the purposes and principles of sentencing. The protection of the public and denunciation of criminal conduct are the overall goal in any sentencing that the Court undertakes, and how this is best achieved is my role. To ensure the protection of the public, the Court has to deter specific offenders and the general public as well, through sentences that demonstrate the seriousness of the offence, and that the Court treats such offences as this one very seriously.

[8] Rehabilitation is also always a principle of sentencing. If issues require rehabilitation and such are identified to the Court, the Court does its best to ensure that such resources and services are provided, and it is never an understatement for this Court in this town, or this county, on this Island or in this Province, to say that the operation of a motor vehicle by a person under the influence of alcohol is an

extremely serious and dangerous offence. We all are aware of what happens unfortunately sometimes when people operate motor vehicles when they should not because of their blood alcohol level.

[9] The need to deter such conduct is great and when subsection 255(5) talks about the public interest, I have to weigh your interest Mr. MacKenzie against that of the public.

[10] Now Mr. Archibald, who is the bearer of the public interest, so to speak, is saying that he leaves the decision in the Court's hands having heard your application. He had at the onset recommended a six to nine month period of incarceration for the two driving offences, followed by two years probation with conditions, and a ten year driving prohibition, and a fine for the **Motor Vehicle Act** matter.

[11] The public interest in this type of offence requires denunciation so that the general public gets the message from Courts that people who have alcohol problems and who drive over the legal limit will be dealt with sufficiently to deter and to protect.

[12] The law on subsection 255(5) has been canvassed by Mr. Patriquin in his submissions and I am very familiar with Nova Scotia decisions of **MacArthur, DeBaie** and **Pearson**, which he has provided. He also gave the Court and the Crown decisions from other jurisdictions where subsection 255(5) has been proclaimed in force.

[13] In the **MacArthur** decision, Judge Stroud refers to the **Wallner** decision:

> I am of the view that public protection may well be best served by effective measures to reduce the risk of repetition. That protection may, in a proper case, be secured by rehabilitation. The fact that public protection is also served by retribution, denunciation or deterrence does not enable us to say that any particular objective of the sentencing function predominates in these cases, given the legislative scheme.

[14] In **R. v. Cromwell** (2005), N.S.J. No. 428, Justice Bateman writing for the Court of Appeal at paragraph 29 stated:

> The sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgment. Those who would maim or kill by driving their vehicle while impaired are as harmful to public safety as are other violent offenders. The proliferation of the crime and the risk that it will be seen by society is less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features.

[15] The **Ashberry** case, (1989), 47 C.C.C. (3d) 138, is a leading decision in this area, and case law has evolved from it over the years as it affects this type of application. **Ashberry** refers to the considerations relevant to whether the question is answered in the affirmative or the negative in terms of curative treatment conditional discharges.

[16] Justice Griffiths, in **Ashberry** discussed the test to be applied in determining whether a conditional discharge with a treatment order was not contrary to the public interest. Judge Stroud refers to it in **MarArthur** and you will see it in just about every other decision on this section that you read. Justice Griffiths stated:

> Among the considerations relevant to the question of whether a given case is sufficiently exceptional to warrant recourse to the curative treatment conditional discharge provisions of s.255(5) of the **Code** are:
>
> a) circumstances of the offence and whether the offender was involved in an accident which caused death or serious bodily harm. The need to express social repudiation of an offence where the victim was killed or suffered serious bodily injury will generally mitigate against the discharge of the offender. Parliament has seen fit to expressly provide for more onerous sentences in those cases;
>
> b) the motivation of the offender as an indication of probable benefit from treatment. On can expect that a person facing a sentence of imprisonment might 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;
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> c) the availability and caliber of the proposed facilities for treatment and the ability of the participant to complete the program;
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> 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 charge of curative treatment is appropriate and in the public interest.

These factors are longstanding ones in law and are the appropriate considerations that a sentencing court must look at.

[17] In looking at these factors, Mr. MacKenzie has established the following: his involvement on this particular occasion was not out of the ordinary that we see in most cases in this type of offence scenario; there was no accident; there were no injuries; there were no other persons or vehicles involved.

[18] As to his motivation, Mr. MacKenzie has been without alcohol for 18 months. That is significant because as noted in Court, and in his pre-sentence report also, he has been drinking for 40 plus years. Mr. MacKenzie had a relapse last June, but he self- referred himself back to the local detox, which can be seen as a positive.

[19] The addiction worker Ms. Hachey-Boucher says in her evidence, he is highly motivated, that he has not only admitted he is an alcoholic but that he has accepted such. She testified both need to be present for long term recovery.

[20] Mr. MacKenzie has, after this offence, completed a 28 day addictions program in Middleton, Nova Scotia, as well as other programs locally through Addictions Services, including a 5 day program and a 4 day education session. Most recently he did a 2 day program in mid December to look at relapse prevention methods for the impending holidays.

[21] Mr. MacKenzie has regular sessions with Ms. Hachey-Boucher, the outreach worker with the local Health Authority's Addictions Services office, and she testified he will call her between appointments for support if he needs it.

[22] He testified he feels alive and proud of his accomplishments and receives praise for the same from his family and friends. This, he says, is a true motivator.

[23] Mr. MacKenzie is also a regular attendee at the local Alcoholics Anonymous meetings, going to a meeting at least 2 times per week, and more if he can. He is thankful to those who provide him with transportation.

[24] Drugs have never been an issue for Mr. MacKenzie and he advises that he plans to continue taking all programs Addictions Services is offering, including a program going to be offered throughout the Province and here locally called, "Seniors in Recovery". It is an 8 week program and he advises he is going to participate. He also intends to continue regular contact with Ms. Hachey-Boucher and attending AA meetings. Mr. MacKenzie testified that his physical health has improved greatly as a result of his non-consumption.

[25] Ms. Hachey-Boucher testified that Mr. MacKenzie's recent cancer scare could very well have led him to a major relapse and step back, but he was able to use all of the tools he had been given through the programming and not turn to

alcohol. Her opinion was that such is a good indicator of his commitment and motivation to sobriety. His keeping of regular appointments, calling between appointments, and his being proactive in seeking programming, demonstrates to her his positive motivation.

[26] On the factor of availability and caliber of local treatment and the ability of Mr. MacKenzie to participate and complete the same, the Court has heard evidence that continuous local addiction programs, a local detox unit at the Strait Richmond Hospital, and both inpatient and outpatient counselling are available to him. The staff appear to be well trained and importantly, they have a good rapport with Mr. MacKenzie. AA's is also available locally in many communities.

[27] On the issue of probability that treatment will be successful and that the offender will never again drive while under the influence of alcohol, Mr. MacKenzie has no motor vehicle, he sold it shortly after this last offence. This can be seen as a commitment to not drinking and driving, and it was his evidence that he will never seek a reinstatement of his Nova Scotia driver's license. Treatment has thus far been successful for Mr. MacKenzie. He told the Court that the last time he has been alcohol free for this length of time is about 20 years ago.

[28] The fact of his relapse is not a major concern to the Court for two reasons. First, as noted by Judge Campbell of this Court in the decision in **Pearson**:

> Slips and relapses are the rule. The fact is, according to Mr. Cashman, Mr. Pearson has been making good progress. Furthermore, the fact that Mr. Pearson admitted to that alcohol use, when there was no other evidence of it, speaks to his frankness, which, while a good thing in its own right, is also a benefit for someone seeking treatment of this kind.

And secondly, as Mr. Pearson did, so did Mr. MacKenzie. He admitted to the relapse and sought out treatment on his own.

[29] There is, in my opinion a very reasonable prospect that he will be successful in his recovery.

[30] Lastly, I have to look at his criminal record. As **Ashberry** states: "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 curative treatment is appropriate and in the public interest.".

[31] Mr. MacKenzie has 5 prior convictions from 1991, 1996, 1999, 2000, and 2009 for offences under either Section 253(b) or 254(5). Such, in the Courts mind tends to show a higher risk of repeating these offences in the future, and the Court must give careful consideration to the application before it.

[32] Mr. MacKenzie testified he has been incarcerated for some of these prior offences, that he would be released and within weeks, to use his words, “be back to the bottle”. He has done programming in the past for alcohol abuse, but he says he didn’t take it seriously. His intention is to continue his recovery, that naturally the thought of further incarceration is a fact for him, but that at 66 he wants to continue to feel good physically and emotionally, and he, “feels alive for the first time in years”, and he wants that feeling to continue.

[33] There is no dispute from the Crown but that Mr. MacKenzie is in need of curative treatment and the Court agrees.

[34] As to the second requirement, whether the granting of such would not be contrary to the public interest, the Court takes very seriously its role in this regard. The public interest in keeping impaired drivers off highways in Nova Scotia goes

without saying. The carnage and potential for serious injury or death are very great and unfortunately too often felt in this Province. It is horrible, and it is too frequent an occurrence, too often the headline. How is the public best protected from Mr. MacKenzie and like minded individuals who do drive under alcohol such that they are impaired?

[35] The Courts goal is to have such individuals not operate motor vehicles when such a risk exists. Again, it goes without saying that every case must be decided upon its own unique factors and each individual offender's circumstance.

[36] Section 255(5) of the Criminal Code exists for a purpose and a reason. It is an acknowledgment that persons can be dealt with by the Courts in terms of impaired operation cases by a sentence other than incarceration if particular and exceptional circumstances exist. It is of no use to the public interest if I simply deal with the chronic or acute alcoholics by dealing with the offence and not the underlying cause, that is not dealing with the risk for future difficulties.

[37] Rehabilitation is a key component of any sentencing and certainly is very much required in Mr. MacKenzie's case. I have no crystal ball. What I have is a

self-referral from Mr. MacKenzie, his word to the Court and evidence from Ms. Hachey-Boucher that he has been alcohol free for 18 months with the one relapse. He has family and community support. He has shown an honest and concerted effort to seek out services and to use those services to stay sober. He has a plan and a desire to continue such along with the help of his counsellor who says his motivations in her opinion are genuine. The public can only be protected from habitual repeat offenders such as Mr. MacKenzie if they remain substance free. The imposition of fines, probation and jail in the past as well as a conditional sentence order has not had the desired deterrent effect on Mr. MacKenzie. To incarcerate him at this point and remove the available treatment would surely be counter-productive and not in the public interest. If Mr. MacKenzie was to be incarcerated at this point his treatment would cease.

[38] The Court will impose a significant driving prohibition and strict and lengthy probation that will also serve to protect the public interest.

[39] Mr. MacKenzie has met the burden on him and I grant the curative treatment discharge and I do not enter a conviction.

[40] Mr. MacKenzie your sentence is probation, and this is in relation to the 253, probation for two years:

1. Keep the peace and be of good behaviour;

2. Report to and be under the supervision of a Probation Officer;

3. You are to not possess or consume alcohol or non prescription drugs;

4. You are not to be in any establishment where alcohol is offered as a primary product;

5. You are to participate in substance abuse assessment and counselling as directed by your Probation Officer, including any residential facility if such is recommended;

6. You are to participate in and complete the addiction program “Seniors in Recovery”, if offered during your probationary period;

7. You are to take any other assessment and counselling as directed by your Probation Officer;

8. You are to continue to attend Alcoholic Anonymous meetings on a regular basis and no fewer than two meetings per month;

9. You are not to operate a motor vehicle during the period of your probation.

There will also be a 10 year driving prohibition on that charge

[41] With respect to the 259(4) matter, there will be a fine of $500, $50 costs, $75 victim fine surcharge, with the 2 years probation with the same conditions, and

on the 230 **Motor Vehicle Act** matter, the minimum fine is $1000. I impose that with no costs.

[42] I take it Mr. Patriquin from your comments, and the evidence of your client there's no application for interlock.

MR. PATRIQUIN: No, Your Honour.

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Laurel Halfpenny MacQuarrie
A Judge of the Provincial Court
for the Province of Nova Scotia