PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacAulay, 2012 NSPC 135

Date: 20120418
Docket: 2131558, 2135383
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Michael Daryl MacAulay

Decision

Judge: The Honourable Judge Frank P. Hoskins, J.P.C.

Oral Decision: April 18, 2012

Charges: **THAT** on or about the 27th day of November, 2009, at or near Eastern Passage, Nova Scotia, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to section 253(1)(b) of the *Criminal Code*.

AND THAT on or about the 21st day of December, 2009, at or near Dartmouth, Nova Scotia, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to section 253(1)(b) of the *Criminal Code*.

Counsel: Alex Keaveny, for the Crown
Elizabeth Buckle, for the Defence

By The Court (Orally):

Introduction

[1] This is the sentencing decision in the matter of *The Queen and Michael MacAulay.* Mr. MacAulay, the defendant, has plead guilty to two separate and distinct offences of section 253(1)(b) of the *Criminal Code,* which occurred within days of each other. The first offence occurred on November 27, 2009. His breathalyzer reading at the time of apprehension was 170 milligrams of alcohol in 100 milliliters of blood. The second offence, occurred on December 21, 2009, while Mr. MacAulay was prohibited from operating a motor vehicle, as a result of the first offence. His breathalyzer reading at the time of apprehension was 180 milligrams of alcohol in 100 milliliters of blood.

[2] Obviously, there was no death or bodily harm involved in this case.

[3] However, there are several aggravating factors surrounding the circumstances of these offences, including the following:

a) both breathalyzer readings are deemed to be an aggravating factor under section 255.1 and, therefore, are deemed to be aggravating circumstances relating to both offences;

b) it is an aggravating factor that on November 27, Mr. MacAulay, was in his vehicle with liquor, in an extremely intoxicated state;

c) it is an extremely aggravating factor that Mr. MacAulay, while prohibited from operating a motor vehicle as a result of impaired charge, was charged, again, for impaired operation on December 21, 2009, less than a month from the first offence; and

d) it is also aggravating feature that he was involved in a single motor vehicle accident, and his breathalyzer reading was 180 milligrams of alcohol in 100 milliliters of blood.

[4] It is a mitigating factor that Mr. MacAulay has plead guilty to both offences, accepted responsibility for his transgressions, and has expressed genuine remorse for his misconduct.

[5] The Crown proceeded by Summary conviction, in respect to both offences, therefore, the maximum sentence for each offence is six months imprisonment.

[6] The serious problem of impaired driving is well known in our society. Notwithstanding the efforts to eradicate the problem, the tragic consequences of impaired driving are far too often felt by innocent citizens. Indeed, in *R. v. Bernshaw* [1995] 1 S.C.R. 254 at paragraph 16, the Supreme Court of Canada's observation is apposite:

> Every year drunk driving leaves a terrible trail of death, injury, heartbreak and obstruction. From the point of view of numbers alone it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the

most significant social loss to the country.

[7] The gravity of the problem and its impact on Canadian society has been so great that the *Criminal Code* has been amended over the years to help eliminate or, at least, reduce the problem of driving while impaired by drug or alcohol. The most recent amendments to the *Criminal Code* were enacted on July 1, 2008, which included increasing the penalties for impaired driving.

[8] It should be stressed that not only is impaired driving a social problem, but also a serious crime. Impaired drivers are a menace to the lives and safety of not only themselves and their passengers but also to the public. Thus, the purpose of imposing punishment for such offences is the protection of society. The increased incidents of these offences and what the courts can do to prevent them has been the concern of the courts for many years.

[9] In determining whether a curative discharge is an appropriate and just disposition for these offences and offender, Mr. MacAulay, I have carefully considered the following:

a) The circumstances surrounding the commission of the offences and the offender, Mr. MacAulay;

b) The relevant statutory provisions under section 718 of the *Criminal Code*;

c) The case law regarding curative discharges under section 255(5) of the *Criminal Code;*

d) The Pre-Sentence Report dated September 14, 2011;

e) The evidence of Mart Roberts, a Registered Nurse employed with Capital Health as a counselor in addictions, Lynn MacAulay, and Mr. MacAulay the offender; and

f) The submissions of counsel.

[10] Sentencing is a difficult and challenging task for a judge as it requires the judge to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The formulation of a fit and proper sentence is not a simple task.

[11] Accordingly, in accordance with section 726.2 of the *Criminal Code,* what follows are my reasons for imposing a just and appropriate and a fit and proper sentence, for this offender and for these offences.

[12] The Supreme Court of Canada has enunciated the correct approach to sentencing in *R. v. M. (C.A.)* (1996), 105 M.C. (3d) 327 and Parliament has enacted new legislation which specifically sets out the purpose and principles of sentencing. Thus, it is to these sources, and the common law

jurisprudence that courts must turn to in determining the proper sentence to impose.

Relevant Statutory Provision

[13] Mr. Macaulay is seeking a curative discharge under section 255(5) of the *Criminal Code.* Section 255(5) of the *Criminal Code* 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.

[14] As counsel have indicated in their submissions the factors that a court must consider when granting a discharge under section 255(5) of the *Criminal Code* are set out in the seminal case of *R. v. Ashberry* [1989] O.J. No. 101, a decision of the Ontario Court of Appeal. They are as follows:

> (a) The circumstances of the offence and whether the offender was involved in an accident which caused death or 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)).
>
> (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 are 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 caliber 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.

[15] The Court also expressed the following view:

> 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 section 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.

[16] The Ontario Court of Appeal further observed:

> 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 section 736, section 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. The offender should be ordered as a term of his probation to abstain from the consumption of alcoholic beverages and will be subject to a mandatory order prohibiting him or her from driving under section 259(1) of the *Criminal Code*.

[17] Lastly, the Court noted that:

> The reported cases with respect to conditional discharges under section 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.

[18] There is a plethora of cases from all levels of court across the country that have considered and applied the instructive factors or guidelines set out in *Ashberry, supra*, including the following cases: *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.); *R. v. Pearson* [2010] N.S.J. No. 78 (N.S.P.C.); *R. v. Wallner* [1988] A.J. No. 847 (Alta. C.A.); *R. v. Storr* [1995] A.J. No. 764 (Alta. C.A.); *R. v. Brown* [2003] A.J. No. 1448 (Alta. P.C.); *R. v. Lohnes* [2007] N.S.J. No. 72 (N.S.C.A.).

[19] While each case turns very much on its own unique circumstances, the factors articulated in *Ashberry, supra,* serve as instructive guidelines in focusing the analysis of the central issue.

[20] The defence has the burden of establishing, on the balance of probabilities, that a curative treatment discharge is appropriate.

[21] At a minimum section 255(5) of the *Criminal Code* requires that the defendant is in need of curative treatment in relation to the consumption of alcohol or drugs and it would not be contrary to the public interest to grant a discharge.

[22] Further, as stated in the case law, the defendant must establish that he or she is genuinely sincere and well-motivated to cure his or her alcohol or drug addiction.

[23] There must also be a reasonable prospect of rehabilitation, in the sense, that the offender has a reasonable chance of curing his or her addiction and related problems, so as to not re-offend.

[24] There must be an adequate rehabilitative treatment plan for the offender, which presupposes that he or she has the motivation and ability to successfully complete it.

Circumstances Surrounding the Offender

[25] As revealed in the Pre-Sentence Report and discussed in submissions, Mr. MacAulay has one previous conviction for having committed the offence of impaired driving causing bodily harm. This offence, which is directly related to the current offences, occurred on January 30, 2001. Mr. MacAulay was sentenced on October 31, 2001. He received a 12 month conditional sentence, in which there were no compliance issues; he complied with the terms and conditions of his sentence order.

[26] Mr. MacAulay is a 46 year old father of two children and recently became a grandfather. He separated from his wife, Lynn MacAulay, but remains very good friends with her, as they continue to support each other, their children and family.

[27] All of the personal antecedents of Mr. MacAulay are contained in his Pre-Sentence Report, which include the following.

> a) That he has two children, a male aged 21 and a female aged 15. He also attributed his alcoholism as the reason for the marital breakdown and he reports a close and positive relationship with his children and his ex-wife. That was bored out in the evidence, his close relationship with his family. I have noted here, under Family Background, that Mr. MacAulay advised that he did complete the detox program through the Nova Scotia

Hospital and he is genuinely motivated to continue to seek treatment.

b) Mike MacAulay, Mr. MacAulay's father, stated that he has been trying to get his son into counseling for addiction for years, but recognizes that he cannot force him into treatment. Yet his father stresses that he is very proud of his son and he has obviously seen the recent changes and positive outlook that he has and it is very supportive of his son. He has been described as a very good worker and reliable, when he's not drinking, and it looks like he has no difficulty finding gainful employment and is perceived to be a good guy.

c) Under the Offender Profile, he presented as a cooperative, polite, and pleasant person. He made no attempt to deny or justify his actions and took full responsibility. He claims that once he starts drinking alcohol he finds it difficult to stop. When questioned as to why he makes the decision to drive he said he does not know why and then suggested that he is unaware of how intoxicated he is. The probation officer stated that given Mr. MacAulay's stated intensions of compliance he is considered a suitable candidate for a period of community supervision with possible urinalysis testing and immediate sanctions should the Court consider such a disposition.

[28] Notwithstanding Mr. MacAulay previous conviction for impaired driving

causing bodily harm in 2001, the law does not preclude him from making an application for a curative discharge. However, the previous conviction is a factor for consideration in this application.

[29] In support of this application, Mart Roberts testified. She has been Mr. MacAulay's alcohol addiction counselor since October, 2011. In her testimony, Ms. Roberts provided an overview of her treatment sessions with Mr. MacAulay. She estimated that there have been approximately seven sessions, and expressed the opinion that Mr. MacAulay is a severe alcoholic, who is in need for curative treatment. Ms. Roberts described the one on one sessions that she has had with Mr. MacAulay, and stressed that Mr. MacAulay requires further treatment, which should include group therapy, something which Mr. MacAulay has shown some trepidation toward doing. This is presumably because of his innate inhibition which is making it difficult for him to share his most personal issues with others in a group setting.

[30] Ms. Roberts candidly stated that she could not predict a person's chances of success in rehabilitation, but did say that from her experience, relapses are common. That was in reference to Mr. MacAulay's one relapse.

[31] I carefully listened to and observed Mr. MacAulay, as he testified, and he strikes me as somewhat of an introvert, shy and restrained in his deportment, yet forthright in his answers. He was not evasive, or argumentative, but rather passive and straightforward. Indeed, while he

was not very articulate, he was genuine, sincere and reflective in his responses. At times, early in his testimony, I wondered if Mr. Macaulay truly understood and appreciated the seriousness of his addiction to alcohol, and that he is in need of curative treatment, particularly when he suggested that he has always been able to work or get through things on his own. I initially thought that he had very limited insight into his addiction and because of that was in a state of unbeknownst denial. However, as he further explained himself, I understood him to be saying that he has only recently come to the realization that he needs the assistance of others as he cannot control his addiction on his own and that he is in need of curative treatment, because he is indeed an alcoholic suffering from a serious alcohol addiction. I also considered the evidence Lynn MacAulay, who described her current and past relationship with Mr. MacAulay, which included his history of drinking alcohol and how it impacted upon their relationship. She commented that Mr. MacAulay complied with all of the terms and conditions of his conditional sentence, which included abstaining from the consumption of alcohol. Ms. MacAulay stated that she has noticed significant changes in Mr. MacAulay since he stopped drinking alcohol. He seems to be doing very well, including being more alert and engaged in conversation and seems to be enjoying being a grandfather. In her view, Mr. MacAulay is very motivated to cure his addiction. She attributed this recent change to his realization of the trauma that his behaviour has caused his family and that he is concerned about the adverse impact that his drinking could have on his grandchild.

[32] The defence, in essence, has contended that the following factors support the application:

a) Mr. MacAulay is an admitted alcoholic, with a greater appreciation and understanding of his addiction than he had before the date of the current offences. He is sincerely motivated to rehabilitate and control his addiction and has greater insight into his problems;

b) He has sought and continues to seek treatment for his addiction and underlying issues which have manifested the addiction; and

c) He has a rehabilitation plan, it doesn't require it to be sophisticated or complex, but it's the intent and the fact that he is in need of curative treatment, but he has a rehabilitation plan, which includes subsequent treatment for his alcohol addiction. This treatment plan involves receiving continued treatment from Mart Robinson or others similarly qualified. Mr. MacAulay is both forthcoming and sincere in his desire to obtain support and counseling for his substance abuse. At this point, he has completed several sessions, and is about to participate in a group clinical therapy program, including regular and consistent attendance at AA meetings. With the necessary curative treatment, the defence argues, which includes a structured and controlled plan of rehabilitation that will be put in place with the guidance of the Court through probationary services, as well, there is a real and substantial likelihood that Mr. MacAulay will not re-offend.

[33] Further, the defence contends that Mr. MacAulay has had only one relapse, which is not uncommon, and he has made the necessary lifestyle changes, which includes: the avoidance of relationships that encourage drinking alcohol; he has an excellent relationship with his former wife and has the full support of his family, who supports and encourages his efforts to maintain sobriety; his family is very supportive of his efforts to maintain curative treatment; and Mr. MacAulay has complied with the terms and conditions of his previous disposition and took it very seriously.

[34] The defence has also argued that the present offences, which occurred in 2009, impressed upon Mr. MacAulay that he is suffering from an illness that requires intensive treatment. He also acknowledges and appreciates that he has to address it. This invaluable insight was not as intense as it was before 2011, in the fall when it had its effect. Further, it is argued that Mr. MacAulay has demonstrated a genuine willingness to engage in curative treatment in a meaningful way in an effort to avoid re-offending.

[35] The Crown is opposed to the application, and thus, is asking the Court to impose the statutory minimum number of days in jail, as the accused has been properly served with a notice of increased penalty. The Crown is also recommending a driving prohibition, an extended one, under section 259 of the *Criminal Code*.

[36] The Crown questions, in essence, the sincerity of Mr. MacAulay's motivation and his ability to successfully complete a rehabilitative or curative

treatment program. The Crown contends that Mr. MacAulay's real motivation is to avoid a period of incarceration and questions whether there is a reasonable chance of success for Mr. MacAulay.

[37] In other words, Mr. MacAulay is not deserving of a curative discharge, because he is not genuinely motivated to cure his alcohol addiction and is only paying lip service to what has to be stated in order to avoid a minimum sentence of 120 days of incarceration. Moreover, Mr. MacAulay has not established that there is a real prospect for rehabilitation.

[38] Indeed, the Crown submits that arguably, but for the threat of going to jail, Mr. MacAulay would not be seeking a curative discharge. The Crown argues that Mr. MacAulay's lack of commitment to cure his substance abuse problem is the reason why he is being sentenced here today for another related impaired driving offence. In fact, the Crown contends that the lack of commitment towards a rehabilitation or curative treatment plan is demonstrated by what he has not done to date or has recently done, in respect to putting in place a structured and effective curative treatment plan.

[39] The Crown ably argued that Mr. MacAulay did not undertake any meaningful, long-term therapy of any kind, after he was charged, until sometime in 2011, and other than a promise, there is very little, if any, reason to believe that he will in participate in meaningful long-term therapy in the future.

[40] While the Crown contends that the risk of re-offending is too great and,

thus, it would be contrary to the public interest to impose a curative treatment in these circumstances, because the principles of denunciation and deterrence, both specific and general, must be emphasized in this case, and that the appropriate disposition for this offence and offender is 120 days in jail, followed by an extended driving prohibition.

[41] Again, I am mindful that the burden lies on the applicant, Mr. MacAulay, to establish on the balance of probabilities, that a curative treatment discharge is appropriate in the circumstances.

[42] Notwithstanding the aggravating factors, which have been fairly emphasized by the Crown, I am persuaded on the totality of the evidence that Mr. MacAulay is clearly in need of curative treatment in relation to his consumption of alcohol and that it would not be contrary to the public interest, by order I direct that Mr. MacAulay be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting his attendance for curative treatment in relation to the consumption of alcohol.

[43] In reaching this conclusion, I find that Mr. MacAulay is well motivated to cure his substance abuse in a meaningful way, over a long-term period of time with intensive therapeutic intervention.

[44] I accept Ms. Roberts' evidence that Mr. MacAulay is in need of curative treatment and is well motivated to cure his alcohol addiction.

[45] I find that Mr. MacAulay has gained greater insight into his addiction problem and I accept that Mr. MacAulay has very recently shown a sincere interest and commitment to cure his addition. After considering all of the evidence, including the treatment services available to Mr. MacAulay, which will undoubtedly assist him in his rehabilitation. With Mr. MacAulay's family providing invaluable assistance and guidance supporting him, which includes his parents, and good friend Lynn MacAulay, coupled with the proposed rehabilitative treatment plan involving probation services assistance and others, there is, in my opinion, a reasonable prospect of rehabilitation; in the sense, that Mr. MacAulay has a reasonable chance of curing or controlling his alcohol addiction so as not to re-offend. I accept that Mr. MacAulay has gained more insight into the seriousness of his alcohol addiction, and is committed to staying sober for the sake of his family and himself. I must say that while Mr. MacAulay, perhaps in fairness, was not the most articulate witness, he certainly, unlike some, didn't pay lip service to phrases or terms and polish over comments to impress upon the Court that he is interested in doing it. I struck him as being quite reflective and serious and honest when he testified and that he understands that he does have a problem and he is in need of curative treatment, and he is prepared to continue his rehabilitation plan, so as to not bring more trauma to his family. I accept that.

[46] As stated, sentencing is highly contextual and necessarily an individualized process, and thus having considered the totality of the evidence, including the circumstances surrounding the offences and those of the offender, Mr. MacAulay, I am satisfied that Mr. MacAulay has established

on the balance of probabilities that he is in need of curative treatment and it would not be contrary to the public interest to impose a curative discharge, coupled with a significant period of probation and a three year driving prohibition.

[47] The gravity of the problem of impaired driving and its impact on Canadian society has been so great, as I said, that the *Criminal Code* has been amended. As stated by Justice Bateman, in *R. v. Crowmell*, 2005 N.S.C.A. 137, most cases of drunk driving denunciation and general deterrence are the prominent objectives of sentencing. In *Ashbery, supra*, the Ontario Court of Appeal explained a section 255(5) order does not undermine specific deterrence and may provide protection for the public. I am also mindful that the principal of restraint which is now statutorily articulated in the *Criminal Code* underlies all of the provision of section 718 and arguably this provision is one example of the principal of restraint at play. It should be stressed that not only is impaired driving a social problem, but is a serious crime. Impaired drivers are a menace to the lives and safety of not only themselves and their passengers but also to the public. Thus, the purpose of imposing punishment for such offences is for the protection of the society. The increased incidents of these offences and what the courts can do to prevent them has been the concern of the courts for many years. Notwithstanding these recent amendments to the *Criminal Code,* the peculiarity of section 255(5) has survived amendment. Presumably, if Parliament felt it was necessary to amend the section, they could have.

[48] The principal of restraint, as I said, which underlies the section 718, and is specifically addressed in sections 718(c), 718.2(d) and (e) of the *Criminal Code.* In any event, it would seem that the aim of the curative treatment provision is to protect the public by curing re-offenders from their alcohol or drug addiction and thus, eradicating the threat to the public of re-offending impaired drivers, like Mr. MacAulay. So, if the curative treatment is successful, then risk of re-offending is eradicated. While I understand and appreciate that alcohol is a disease, which manifests a compulsion to consume alcohol, I do not understand the connection or nexus between the compulsion to drink alcohol and the compulsion to drive a motor vehicle. In passing sentence, I also have taken into account the purpose and principles of sentencing as they relate to a term of imprisonment, particularly the fundamental principle in section 718.1 of the *Criminal Code*, that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender and further principle in section 718.2 that sentences should be similar to those imposed on similar offenders in similar circumstances. On the basis of the evidence proffered in this sentence hearing, I am satisfied, on the balance of probabilities, that Mr. MacAulay is an alcoholic who is in need of curative treatment, that he is motivated to cure his addiction and there is a reasonable prospect of rehabilitation, as Mr. MacAulay has the ability and is well motivated to participate in an adequate rehabilitative treatment plan to assist him. In granting the application, I am mindful that there is always a risk of re-offending, as nothing can completely reduce or remove the risk of Mr. MacAulay driving while impaired. In fact, not even a substantial period of incarceration can completely eliminate the risk. I also realize that Mr. MacAulay will be prohibited from operating a

motor vehicle for significant period of time, which should provide some measure of public protection should Mr. MacAulay suffer a relapse. Moreover, he will also be subject to a lengthy period of probation with stringent terms and conditions which are aimed at both protecting the public and the rehabilitation of Mr. MacAulay. I should also mention, an imposition of a curative discharge, is conditional upon the successful completion of all of the probationary terms and conditions. Indeed, the *Criminal Code* provides for specific provisions to deal with breaches of probation while under sentence of a discharge.

[49] Therefore, should Mr. MacAulay breach any of the terms or conditions, of his probation, the Crown has the ability by virtue of section 732 of the *Criminal Code*. Breaching the probationary term is serious, as it is a breach of a court order. This process authorizes the Court that ordered the discharge the power to revoke the discharge, convict the offender of the offence for which the discharge was granted, and impose any sentence that could have been imposed at the first instance. As stated, with respect to the section 253 offence, the sentence of this Court is as follows:

[50] Please stand Mr. MacAulay:

[51] With respect to the offence date, where you, on or about the 27th day of November, 2009, breached section 253(1)(b), the sentence of this Court is a curative discharge and with respect to the second offence, which occurred on the 21st day of December, 2009, the sentence of this Court is curative discharge and I discharge you on the 253(1)(b), but there will be a significant

period of probation with both of these charges, as well as, prohibition.

[52] You shall be subject to a prohibition order under 259 for three years, both those orders will run concurrent and I will deal with them in a moment. You are granted a conditional discharge or a curative treatment discharge, for a period of 36 months from the date of this order, you shall be placed on probation.

[53] You shall keep the peace and be of good behaviour; appear before the Court when required to do so by the Court; notify the Court, probation officer, or supervisor, in advance, of any change of name, address, employment or occupation, and in addition; report to a probation officer, on today's date and thereafter as directed by your probation officer or supervisor; remain within the Province of Nova Scotia, unless you receive written permission from your probation officer; you are not to possess, take or consume alcohol or other intoxicating substances; you are not to possess, use or consume a controlled substance as defined in the controlled drugs and substances act, except in accordance with a physician's prescription for your or legal authorization, it would be illegal to do that in any event, now it will be a breach of probation; you are to complete 60 hours of community service work, as directed by your probation officer by April 18, 2014; you are to attend for mental health assessment and counseling as directed by your probation officer; you are to attend for substance abuse assessment and counseling as directed by your probation officer; you are to attend for assessment, counseling or program directed by your probation officer; and participate in and cooperate with any assessment, counseling or program as

directed by your probation officer and pay the cost or portion of the cost as directed by your probation officer.

[54] Pursuant to section 259 of the *Criminal Code*, you, Mr. MacAulay, are also prohibited from operating or driving a motor vehicle on any street, road, highway, or other public place anywhere in Canada, for a period of 36 months, three years, commencing on today's date. The prohibition periods will run concurrently.

[55] Victim Surcharge, in this case will be $100.00 in total, pursuant to section 737(3), which is $50.00 per charge, the Crown proceeded summarily, due on or before October 11, 2012. In my view, this is appropriate having considered the circumstances surrounding the offence and those of Mr. MacAulay, and I am satisfied that Mr. MacAulay is able to pay this amount.

[56] That is the sentence of the Court.