

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Hamilton*, 2018 NSPC 18

Date: 2018-06-04

Docket: 8023230

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Michael Hamilton

Judge:	The Honourable Judge Theodore Tax,
Heard:	May 16, 2018, in Dartmouth, Nova Scotia
Decision	June 4 th , 2018
Charge:	Section 253(1)(b) of the Criminal Code
Counsel:	Stacey Gerrard, for the Crown Counsel Karen Endres, for the Defence Counsel

By the Court:

Introduction:

[1] Mr. Michael Hamilton has pled guilty plea to having had care or control of the motor vehicle on July 31, 2016 after having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 mg of alcohol in 100 mL of blood, contrary to section 253(1)(b) of the **Criminal Code**. The events occurred at or near Middle Sackville, Nova Scotia.

[2] Mr. Hamilton seeks a curative discharge pursuant to section 255(5) of the **Criminal Code** which provides that if the Court considers a person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it is not contrary to the public interest, that person may be discharged under section 730 of the **Criminal Code** on conditions prescribed in a probation order.

[3] Defence Counsel submits that this is a meritorious application for a curative discharge and that her client is a person in need of curative treatment in relation to his consumption of alcohol and that it would not be contrary to the public interest to grant a discharge in all the circumstances of this case. She proposes a term of probation of twenty-four months for the curative treatment discharge and a two-year driving prohibition.

[4] The Crown Attorney submits that this is not an appropriate case for a curative discharge and since this is Mr. Hamilton's second recent conviction for an offence contrary to section 253 of the **Criminal Code**, she seeks a jail sentence of between three to five months followed by a three-year term of probation. She also seeks a driving prohibition of three years pursuant to section 259 of the **Criminal Code**. The Crown Attorney pointed out that Mr. Hamilton has a recent prior conviction contrary to section 253(1)(b) of the **Criminal Code** on January 9, 2012 for which he received a \$1500 fine and a fifteen-month driving prohibition.

Background Facts:

[5] The incident which brings Mr. Hamilton before the Court occurred at about 1:30 PM on July 31, 2016 as Mr. Hamilton was driving to work in the Halifax area from his residence in the Annapolis Valley. Mr. Hamilton failed to negotiate a turn

on Highway 101 at Exit 2A and was involved in a single vehicle accident. He was the sole occupant of the vehicle which went off the road and flipped over in the ditch. Paramedics and a police officer attended at the scene and while Mr. Hamilton was in the ambulance, the police officer noted an odor of alcohol. A search of Mr. Hamilton's vehicle located a 1.14 litre bottle of vodka with about one third of the bottle gone. Mr. Hamilton had sustained superficial cuts to his face but in a conversation with the officer, he acknowledged that he was going too fast for the exit and that he had consumed some alcohol around 8:00 AM. Based upon that information and observations of bloodshot and watery eyes and the odor of alcohol, the police officer made a breathalyzer demand at 1:44 PM. A short time later, Mr. Hamilton provided two suitable samples of his breath for analysis. The first sample of his breath at 2:24 PM resulted in a reading of 280 mg of alcohol in 100 mL of blood and the second sample at 2:45 PM resulted in a reading of 270 mg of alcohol in 100 mL of blood.

[6] Mr. Hamilton was not seriously injured in the single vehicle accident. No other cars or any pedestrians were involved in the accident.

[7] Mr. Hamilton was arraigned on these charges in October 2016 and entered a plea of guilty on January 30, 2017. When he pled guilty to the charge before the Court, Mr. Hamilton indicated that he would be seeking a curative discharge. Prior to the hearing of his application, several adjournments were granted to facilitate the opportunity for Mr. Hamilton to attend counselling, treatment and programming. Defence Counsel pointed out that some delay was caused by long waiting lists to get into certain counselling, treatment or programming and the delay occasioned by that was waived by Mr. Hamilton.

[8] The application for curative discharge proceeded on May 16, 2018 and the Court heard evidence from Mr. Dale Sharkey who has been a long time clinical therapist and social worker with Addiction Services of Nova Scotia. The Court reserved its decision until today's date.

Circumstances of the Offender:

[9] A Pre-Sentence Report was completed and prepared on March 24, 2017. Given the passage of time between the guilty plea and the previously scheduled dates for the curative discharge application, the Court requested an update to the Pre-Sentence Report, which was prepared on March 28, 2018. It was noted in that update report that the Probation Officer had attempted to contact Mr. Hamilton's

employer, sister and the clinical therapist but he was unsuccessful in obtaining their information prior to submitting the updated Report.

[10] Defence Counsel noted those gaps in the Pre-Sentence Report update and advised the Court that Mr. Hamilton's clinical therapist, Dale Sharkey would be called as a witness on this hearing. In addition, during the hearing, Defence Counsel filed, as Exhibits, letters received from several of the people whom the Probation Officer had attempted to contact for the Pre-Sentence Report. Mr. Sharkey provided his evidence on May 16, 2018 by video link and letters were submitted by Mr. Hamilton, his sister Michelle Gravelle, his employers, Talbot House, Peter Kiefl and Jean Lusk who are clinical therapists with Addiction Services of the Nova Scotia Health Authority, Ms. JoAnn Crocker who is the charge Nurse of the Intensive Treatment Program at Soldiers Memorial Hospital in Middleton Nova Scotia as well as a couple of longtime friends.

[11] Mr. Hamilton is fifty-four years old. He completed his grade twelve diploma in the 1970's, attended Acadia University for four years and graduated with a Bachelor of Economics.

[12] Mr. Hamilton's mother indicated that her son's alcohol abuse worsened over time and she acknowledged what Mr. Hamilton had said to the Probation Officer, namely, that there was alcohol abuse within his family.

[13] Mr. Hamilton's sister observed, in her letter which was filed as an Exhibit that her brother has been an alcoholic for several years and that he suffers from high anxiety and severe depression. Although his sister said that several previous attempts at rehabilitation from his alcohol abuse have not succeeded, she noted that after Mr. Hamilton's treatment in residence at Talbot House, when he was released, "a different Michael emerged." She noted that he had been depressed in the past, had severe anxiety, rarely slept, did not go anywhere or have any interest in activities or hobbies. However, all of that changed after his stay at Talbot House and he has been following their guidelines since being released from the program.

[14] Mr. Hamilton's common-law wife of approximately three years reported that they have a very good relationship and she is very supportive of his continued efforts to follow his treatment plan.

[15] The Probation Officer noted in the Pre-Sentence Report that Mr. Hamilton's employer provided a very positive work reference. Additional letters of support from employers were filed by Defence Counsel as Exhibits, which indicate that he

is a dependable, conscientious and highly valued employee who readily goes the extra mile to assist his clients. The employers were well aware of Mr. Hamilton's alcohol addiction and they are fully prepared to continue to work with him and add their support to the professional support to live a sober lifestyle. The Probation Officer also noted that Mr. Hamilton has been an active volunteer in the community helping several local organizations. Mr. Hamilton's longtime friends described him as a "standup guy" who supports his friends and community projects such as the local food bank.

[16] The Pre-Sentence Report stated that Mr. Hamilton is generally in good health, however, he did have a serious attack of pancreatitis approximately three years ago which was brought on by the overconsumption of alcohol. In 2012, Mr. Hamilton was involved in a farming accident where he was pinned underneath a tractor tire with the result being that surgery was required with pins and screws being placed in his leg to aid the healing. However, he did indicate that it took two years to be able to walk pain-free.

[17] The Probation Officer also noted that Mr. Hamilton has consumed alcohol socially throughout his life time, but the consumption of alcohol really became problematic approximately ten years ago. Following the conviction for driving under the influence of alcohol approximately five years ago, he began seeking addiction based programming and while he was able to remain sober for one year, largely around the time of the farming accident, he did turn to alcohol to alleviate some of the pain. Mr. Hamilton told the Probation Officer that he continued to live a pro-alcohol lifestyle up until the July, 2016 incident. He informed the Probation Officer that he had sought treatment in the past, which included a twenty-eight-day residential program at Crosbie House in 2012, multiple sessions in detox, and in February, 2017, a twenty-five day Intensive Treatment Program offered through Addiction Services. In addition, he has also attended Alcoholics Anonymous meetings regularly for the past three years and has had the added support of Addiction Services over the past five years.

[18] The Probation Officer contacted Ms. Cindy Harvey, a clinical therapist with Addiction Services who informed him that Mr. Hamilton was a subject "well known to their service," whose issues with alcohol were "long-standing and chronic." She confirmed that Mr. Hamilton had attended their Intensive Treatment Program from January 31 to February 24, 2017, which was a group based program, which emphasizes life skills and relapse prevention. She said that he was actively engaged in the program as well as showing interest in additional programming

which was offered throughout the week and open to alumni of previous Addiction Services programs. Ms. Harvey stated that ongoing treatment is necessary for Mr. Hamilton to work towards sobriety.

[19] It is clear from Mr. Hamilton's interaction with the police officer that he immediately accepted responsibility for the offence before the court and entered an early guilty plea. When asked whether Mr. Hamilton wished to add any of his comments on this application, Defence Counsel explained that Mr. Hamilton's high anxiety made it very difficult for him to speak directly with the Court and therefore, she filed his email to her dated April 19, 2018 as an Exhibit to be considered as his remarks to the Court. In that email, Mr. Hamilton mentioned the progress that he has made in addressing his alcohol addiction issues through his work with clinical therapist, Mr. Dale Sharkey at Talbot House. He has identified the triggers to his abuse of alcohol, addressed his anxiety issues and improved his communication skills as he continues towards a sober lifestyle. Mr. Hamilton also indicated that he continues to follow the guidelines for that lifestyle which were provided by Mr. Sharkey and others at Talbot House.

[20] In addition to the information obtained by the Probation Officer, as I mentioned previously, Defence Counsel filed several letters as Exhibits on this application and called Mr. Dale Sharkey, clinical therapist as a witness. Mr. Sharkey confirmed that he had been an addictions counsellor for many years and he was Mr. Hamilton's counsellor during the three-month residential program at Talbot House between November, 2017 and late February, 2018. During that time, he worked with Mr. Hamilton in several one-on-one sessions as well as in group counselling sessions several times a week. At the outset, Mr. Sharkey noted that Mr. Hamilton struggled with his anxiety and the steps towards sobriety as it took him some time to trust the people around him and to engage in the process. After a short time, however, it was apparent to Mr. Sharkey that Mr. Hamilton began to participate fully in the counselling and always expressed insight towards dealing with his addiction to alcohol.

[21] Mr. Sharkey was of the view that Mr. Hamilton was "fully committed" to maintaining sobriety. In particular, Mr. Sharkey stated that he was well aware of the fact that Mr. Hamilton had a relatively recent severe attack of pancreatitis and it was made very clear to him by his doctor and the Talbot House counsellors that his next drink would probably kill him. Mr. Sharkey stated that knowledge of that reality instilled a level of fear in Mr. Hamilton and he also expressed a strong desire to move to sobriety so that he would not let down or disappoint his mother

or his common-law partner. Mr. Sharkey noted that an alcohol abuse dependency requires long-term programming and he was not surprised that Mr. Hamilton had struggled with alcohol abuse over the last ten years, despite having gone to detox on a few occasions as well as other residential programs.

[22] During Mr. Hamilton's three-month stay at Talbot House, Mr. Hamilton actively interacted with addictions counsellors and he was provided with a treatment and maintenance plan for the community, which is abstinence based, attending AA meetings, having an AA sponsor and having regular follow-up with counsellors. Mr. Sharkey believed Mr. Hamilton was fully motivated to sobriety in the long term as he quite bluntly stated "if he chooses to drink, he chooses to die" because of his pancreatitis. Mr. Sharkey also noted that Mr. Hamilton has gained great insight and, most importantly, he has accepted the fact that he is an alcoholic and cannot drink again.

[23] Mr. Sharkey noted that, while there was no guarantee that Mr. Hamilton would remain committed to sobriety, he believed that Mr. Hamilton's prospects for maintaining a sober lifestyle are quite good, based upon his work at Talbot House and strong support of family, friends and employers. Mr. Sharkey noted that dealing with alcohol abuse is an ongoing struggle, but Mr. Hamilton has taken the steps to activate his follow-up action plan after leaving Talbot House. Furthermore, during the program at Talbot House, it was apparent that Mr. Hamilton became fully aware of the triggers to continuing his alcohol addiction and that he now has strategies for dealing with or avoiding the people, places and things that might trigger drinking alcohol.

Has the Court Heard "Medical or Other Evidence" on this Application?

[24] Subsection 255(5) of the **Criminal Code** states:

"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 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." [Emphasis added]

[25] During her submissions, the Crown Attorney opposed the application made by Mr. Hamilton in stating that Mr. Sharkey was not qualified as an expert in order

to give opinion evidence and there was no evidence before the Court with respect to his responsiveness or rehabilitation from treatment and counselling. The Crown Attorney also submitted that the letters which were filed by Defence Counsel did not provide “medical or other evidence” and that therefore, the application should be dismissed. The Crown Attorney relied on **R. v. Soosay**, 2001 ABCA 287 in support of her submission that a curative discharge application requires the accused to lead “medical or other evidence,” which should preferably come from a medical practitioner who could indicate that a careful assessment of the accused has been made and that the accused is well motivated and has a reasonable chance of overcoming his alcoholism and related problems.

[26] The Crown Attorney pointed out that in **Soosay**, *supra*, at para. 7, the Court considered what would qualify as “medical or other evidence” within the meaning of subsection 255(5) of the **Code**. Based upon the specific wording of section and principles of statutory interpretation, the Alberta Court of Appeal concluded that “the ‘other evidence’ must be similar in kind and quality to ‘medical evidence’, that is, given by an expert qualified to give opinion evidence regarding the accused’s illness, motivation and responsiveness to curative treatment.” In **Soosay**, *supra*, at para. 7, the Court added: “for example, a medical doctor, psychologist, or Alberta Alcohol and Drug Abuse Commission (AADAC) counsellor with training and experience in treating alcoholics might well be qualified to give such evidence, whereas a friend or acquaintance of the accused merely experienced with alcoholism would not.”

[27] At the outset, I should note that counsel did not cite any Nova Scotia case from our Court of Appeal nor am I am not aware of a case where a Court of Appeal in Nova Scotia has applied the **Soosay** case. Therefore, I have not been referred to any binding authority in Nova Scotia and while a decision of the Alberta Court of Appeal may have some persuasive effect, it is clearly not a binding authority on this Court.

[28] In addition, after having conducted some additional research with respect to subsequent cases where the **Soosay** decision has been considered, I note that the Saskatchewan Court of Appeal clearly distinguished the **Soosay** decision in **R. v. Ahenakew**, 2005 SKCA 93 (CanLII). In **Ahenakew**, *supra*, at para. 54, Bayda C.J.S. stated:

“[54] In my respectful view, the question of proper expertise is, in most cases, best left to the trial judge upon whom the statute casts the obligation to “consider [whether an accused] is in need of curative treatment in relation to his

consumption of alcohol”. Often it is not the evidence of one person alone that will establish that need. It may take the evidence of the accused himself, some person such as a spouse who is familiar with his patterns as well as a person with some professional expertise. As Tallis J. said in *Beaulieu* ([1980] NWTJ no.7) at p. 345, “[i]n most cases, one would expect medical *and lay evidence* outlining in detail the accused’s condition” (emphasis added). Each case will depend upon its own circumstances. In my respectful view, the *Soosay* decision does not go so far as to exclude that type of lay evidence from constituting “other evidence” as that phrase is used in s. 255(5). [Emphasis in original text]

[29] While the Saskatchewan Court of Appeal decision in *Ahenakew* is not a binding precedent in this province, I find that it is highly persuasive and I am in agreement with their opinion regarding the statutory interpretation of the words “medical or other evidence.” I find that the “medical or other evidence” should be given a broad interpretation and that the court should take into account other evidence that is credible and reliable, including laypersons or other people with some professional expertise, such as addictions counsellors, given the practical realities of these applications and the people with whom accused persons seek assistance to address alcohol abuse issues.

[30] In this case, Defence Counsel introduced the evidence of Mr. Dale Sharkey, a social worker and addictions counsellor with well over twenty-five years of experience, who has worked directly with the accused. Although Mr. Sharkey was not qualified as an expert, I find that he certainly provided material evidence which was clearly relevant to the issue of whether the offender is a “person in need of curative treatment in relation to his consumption of alcohol or drugs.”

[31] Furthermore, other witnesses or exhibits filed by laypeople who know the accused person may provide additional evidence to assist the Court in determining whether the accused person is truly in need of curative treatment in relation to his or her consumption of drugs or alcohol. Evidence from laypeople may also provide their personal insights into the accused’s motivation and the accused’s efforts to maintain a sober lifestyle before, during and after any interventions to address an alcohol abuse issue.

[32] On this application, although Mr. Sharkey was not qualified as an expert who was entitled to provide opinion evidence, I have no doubt that the evidence that he provided in court, referred to Mr. Hamilton’s medical issues around pancreatitis and the future impact of any alcohol on that condition based upon his experience as an addictions counsellor. Furthermore, I found that Mr. Sharkey’s evidence was highly relevant to the issues before the Court when he described all

of his work with Mr. Hamilton at Talbot House, including Mr. Hamilton's motivation and the counselling, treatment and programming that were provided to him while he was at Talbot House and the treatment plan going forward after the residential stay was completed.

[33] I find that Mr. Dale Sharkey provided "medical or other evidence" which was tendered to the court during the hearing of this application. Furthermore, I also find that information which was contained in the Pre-Sentence Report as well as the letters filed by Defence Counsel provided "other evidence" which could be considered on this application together with the "medical or other evidence" which was "heard" during the application and was subject to cross-examination.

[34] In those circumstances, having concluded that the application for a curative discharge was made "after hearing medical or other evidence," the issue is whether Mr. Hamilton has established, on a balance of probabilities, based upon that "medical or other evidence" that he is in need of curative treatment in relation to his consumption of alcohol and that it would not be contrary to the public interest to grant him a curative discharge.

Applicable Legal Principles and Application to the Facts:

Is the Accused in Need of Curative Treatment for his Alcohol Consumption?

[35] I find that the testimony of clinical therapist, Mr. Dale Sharkey, which was heard during this application, clearly established that Mr. Hamilton has an addiction to alcohol for which he has sought and needs curative treatment. The evidence of Mr. Sharkey was completely supported by and was consistent with the comments of Mr. Hamilton himself as well as the "other evidence" provided by his family members, long-time friends, his past and present employers as well as Ms. Cindy Harvey, who is a clinical therapist with Addiction Services who previously worked with Mr. Hamilton.

[36] I find that an alcohol addiction has been a long-standing issue of well over ten years with Mr. Hamilton, and that he has voluntarily taken several steps in the past to address that addiction. Although he has attended various detox and residential treatment programs in the past, he still appears to be struggling with an alcohol addiction.

[37] Furthermore, I find that the relatively recent prior conviction for a drinking and driving offence obviously did not deter him from assuming care or control of a motor vehicle after having consumed a significant quantity of alcohol. I also find that his consumption of some alcohol first thing in the morning on July 31, 2016 and the fact that he was operating a motor vehicle around 1:30 PM on his way to work with a blood-alcohol reading of three and a half times the legal limit, also speaks volumes of the extent of his alcohol addiction.

[38] Finally, I find that the fact that Mr. Hamilton had attended counselling treatment and programming for substance abuse prior to this sentencing decision does not preclude a finding that he is still a person in need of curative treatment. In fact, the evidence that he has sought out counselling, treatment and programs prior to this sentencing decision is certainly a relevant fact in determining whether he is a person in need of curative treatment in relation to his consumption of alcohol.

[39] Having considered all of the “medical or other evidence” which was either “heard” or placed before the Court through Exhibits or information provided to the court by the Probation Officer in his Pre-Sentence Report, I find on a balance of probabilities that Mr. Hamilton is a person in need of curative treatment for his alcohol consumption.

Is the Granting of a Discharge for Curative Treatment Not Contrary to the Public Interest?

[40] In terms of the determining the issue of whether the granting of a curative discharge would not be contrary to the public interest, the guidelines or factors to be considered in determining that issue, on a balance of probabilities, were clearly articulated by the Ontario Court of Appeal in **R. v. Ashberry**, [1989] O.J. no. 101 (CA). Those guidelines or factors have been adopted by several other Courts of Appeal, including **R. v. Storr**, 1995 ABCA 301; **R. v. MacCormack**, 2000 Canlii 9996 (NBCA); **R. v. Ahenakew**, 2005 SKCA 93 (Canlii) and **R. v. Lohnes**, 2007 NSCA 24.

[41] However, as my colleague Judge Hoskins noted in **R. v. MacAulay**, 2012 NSPC 135 at para. 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.”

[42] Furthermore, I find that the list of those “instructive guidelines” should not be considered as being exclusive. In fact, in **Ashberry**, *supra*, Griffiths J.A.

referred to the considerations as “[a]mong the considerations relevant...” In effect, the considerations are a useful set of guidelines, but in the end, each case must be judged on its own merits.

Analysis of the Ashberry Factors or Guidelines:

The Circumstances of the Offence and Whether the Offender was Involved in an Accident Which Caused Death or Serious Bodily Injury:

[43] The offender was charged after his vehicle was located flipped over in the ditch as he was driving to work around 1:30 PM on July 31, 2016. The police officer who attended at the scene of the single vehicle accident noted an odor of alcohol and observed alcohol in the vehicle. Mr. Hamilton fully cooperated with the police investigation and acknowledged that he had consumed some alcohol that morning. The lower of his two blood alcohol readings was 270 mg of alcohol in 100 ml of blood. This incident involved a single vehicle accident, with Mr. Hamilton sustaining superficial injuries. Mr. Hamilton was not subject to a driving prohibition at the time of this incident.

The Motivation of the Offender as an Indication of Probable Benefit from Treatment/The bona fides of the Offender to Obtain Treatment:

[44] The evidence of Mr. Dale Sharkey, clinical therapist, confirmed that he was one of the clinical therapists who worked with Mr. Hamilton during his residential stay at Talbot House from November 13, 2017 to February 13, 2018. Based upon Mr. Sharkey’s interactions with Mr. Hamilton, it was clear to him that, since July, 2016, Mr. Hamilton has recognized that he is an alcoholic and that acceptance of that fact would allow him to actively take positive steps to manage that addiction. Mr. Sharkey noted that Mr. Hamilton came to Talbot House “broken” with a high degree of anxiety from his prior dealings with the counsellors or clinical therapists. Given his relatively recent severe attack of pancreatitis, Mr. Sharkey and others at Talbot House made it very clear to Mr. Hamilton that if he continues to consume alcohol, it will be a fatal choice. In Mr. Sharkey’s opinion, the clarity of the impact of future consumption of alcohol together with a treatment and maintenance plan, has instilled a great motivation to maintain a sober lifestyle.

[45] Furthermore, given the support of his family, his common-law partner, friends and employers, Mr. Sharkey believed that Mr. Hamilton has made a clear choice towards maintaining sobriety. In addition, given the treatment plan which

was established at Talbot House and the maintenance plan going forward with Mr. Hamilton continuing to attend AA meetings, having an AA sponsor and knowing the people, places and things that may trigger further drinking of alcohol, Mr. Sharkey believes that Mr. Hamilton has a good chance of maintaining sobriety.

[46] In terms of Mr. Hamilton's bona fides, it is also significant to note that Mr. Hamilton felt immediate remorse and regret for his actions on July 31, 2016 and sought to be admitted in the two-week Intensive Treatment Program of Addiction Services at Soldiers Memorial Hospital in Middleton, Nova Scotia on August 15, 2016. In addition, letters were filed as Exhibits on this application which confirmed that he had also participated in other treatment programs through the Nova Scotia Health Authority's Addiction Services office in Kentville, Nova Scotia, including the Intensive Treatment Program for three weeks in February, 2017, twelve Substance Abuse Group meetings between May 16 and August 29, 2017, a Withdrawal Management program in May, 2017 and again for five days in July, 2017. Prior to that, Mr. Hamilton had sought treatment and programming in 2012 with a twenty-eight-day residential program at Crosbie House as well as multiple sessions in detox.

[47] Mr. Sharkey stated that Mr. Hamilton has had several successes to date, but since there is no real "cure" for an alcohol abuse disorder, dealing with that issue will be an ongoing struggle for him. The progress which was made by Mr. Hamilton during his residential program at Talbot House was best noted by his sister. After his release from the program, she observed, in her own words, that "a different Michael emerged" and he returned to most of the things that had given him enjoyment in life before he became an alcoholic.

[48] I find that the evidence before me clearly establishes that Mr. Hamilton has a strong motivation and bona fides in maintaining sobriety and through the treatment and programming that he has already received as well as through his continuing efforts on his maintenance plan for sobriety. In the past, Mr. Hamilton may not have believed that his consumption of alcohol was problematic, however, I find that Mr. Sharkey's evidence and several of the letters filed as exhibits have confirmed that his insight and acceptance of the problem is genuine and he has taken several steps in good faith to address his alcohol abuse disorder. While there are clearly no guarantees for dealing with an alcohol abuse disorder, I find that the evidence established that Mr. Hamilton has a reasonably good chance of succeeding in his efforts to maintain a sober lifestyle.

The availability and Quality of the Treatment Facilities and the Ability of the Participant to Complete Programming:

[49] Mr. Hamilton is a resident of Lawrencetown, Nova Scotia, located in the Annapolis Valley. The letters which were filed as Exhibits on this application documented the fact that various mental health and addiction services programs were available within a reasonable distance of his residence. Mr. Hamilton has availed himself of detox programs, short-term residential programs, group therapy programs and longer-term residential programs like the one at Crosbie House located in the Annapolis Valley. In addition to those programs, Mr. Hamilton who is certainly a person of relatively limited financial means, personally paid for the very highly regarded three-month residential program at Talbot House located near Frenchvale, Nova Scotia on Cape Breton Island.

[50] The maintenance plan going forward involved attending AA meetings, having an AA sponsor and continuing with individual and group counselling on relapse prevention programs. I find that the evidence established that Mr. Hamilton has been attending, on a regular basis, AA meetings and he has located an AA sponsor within his community. As outlined above, all of the individual and group programs aimed at relapse prevention and other ongoing treatment and counselling programs are available through the Nova Scotia Health Authority near his residence.

The Probability that the Course of Treatment will be Successful and that Offender will not Drive a Motor Vehicle Under the Influence of Alcohol:

[51] I find that, in many respects, the analysis of this issue has been addressed under previous headings since Mr. Hamilton has already participated in and has completed several different types of counselling, treatment and programming to address an alcohol abuse disorder since August, 2016. In those circumstances, I find that this is not a situation involving an offender who has not yet become involved in any counselling, treatment or programming or someone who has just commenced counselling, treatment or programming. In this case, Mr. Hamilton has made significant progress towards his “recovery” from his alcohol addiction disorder. In those circumstances, I find that there is a high probability that the treatment, counselling and programming already taken and his maintenance plan towards sobriety will keep him on the path that he will not, again, drive a motor vehicle while under the influence of alcohol.

[52] Having said that, it is also important to remember that clinical therapists have repeatedly stated that there is no “cure” for an alcohol abuse disorder, and in that respect, it is practically impossible to predict with any certainty that he will never again drive a motor vehicle while under the influence of alcohol. Defence Counsel has pointed out that Mr. Hamilton no longer owns a motor vehicle and when I consider that fact and the significant progress to date, I find that there is a high probability that the counselling, treatment and programming will be successful in the long term.

The Offender’s Criminal Record and any Alcohol-Related Driving Record:

[53] Mr. Hamilton has one prior criminal conviction which was for an “over 80” drinking and driving offence contrary to section 253(1)(b) of the **Criminal Code**. The offence occurred on November 3, 2011 and Mr. Hamilton was sentenced on January 9, 2012 to a fine of \$1500 and he was prohibited from operating any motor vehicle for a period of fifteen months. Mr. Hamilton entered a guilty plea at a relatively early opportunity, but the Court does not have any details relating to the facts and circumstances of that previous incident which would have reflected the elevated fine and a slightly longer driving prohibition than the minimum order.

[54] Mr. Hamilton is now fifty-four years old and the sentence for the offence of driving under the influence of alcohol is his only prior criminal conviction. The offence for which Mr. Hamilton comes before the court on this sentencing hearing occurred approximately four and a half years after that previous incident. The Pre-Sentence Report indicated that Mr. Hamilton did seek out some counselling, treatment and programming after the earlier sentence was imposed in 2012 by participating in the twenty-eight-day residential program at Crosbie House.

[55] Based upon that one prior conviction and the steps taken after it as well as following the second offence for operating a motor vehicle while under the influence of alcohol, I cannot conclude that he is a high risk to reoffend and that this sentencing decision should emphasize specific and general deterrence as opposed to employing the rehabilitative aspects of a curative discharge to protect the public.

[56] In **Ashberry** and several other cases, Courts have noted that granting a curative discharge would not be contrary to the public interest, if the combination of appropriate therapy or curative treatment would likely have a more positive

effect on an accused person overcoming his or her problems with alcohol. In those circumstances, it would probably be in the best interests of society to take that route because such a solution is clearly preferable to repeated incidents of impaired driving which are not deterred by jail terms imposed on a person suffering from chronic alcoholism. In those circumstances, the public interest may best be served by curative treatment with proper safeguards being imposed and the accused being subject to stringent terms of probation.

[57] After having considered all of the “medical or other evidence” that has been proffered during this sentencing hearing on an application for a curative discharge pursuant to section 255(5) of the **Criminal Code**, I have concluded, on a balance of probabilities, that Mr. Hamilton is a person in need of curative treatment in relation to his consumption of alcohol.

[58] Having reached that conclusion, the second issue for the Court to determine on an application for a curative discharge pursuant to section 255(5) of the **Criminal Code**, which must also be established on a balance of probabilities, is whether the granting a conditional discharge would not be contrary to the public interest. With respect to this issue, I find that Mr. Hamilton was well-motivated and has made significant progress in his counselling, treatment and programming to address his alcohol abuse disorder and that he remains well-motivated in following his treatment and maintenance plan towards sobriety.

[59] In those circumstances, I am satisfied that there is an adequate rehabilitative treatment plan to assist him going forward and given his motivation and the strong support from family, friends and employers, there is a very reasonable prospect that Mr. Hamilton’s rehabilitation will be successful. While there can be no guarantee that he will never again operate a motor vehicle while under the influence of alcohol, I am satisfied on a balance of probabilities that the risk to the community has, at the very least, been greatly reduced. After having considered all of the **Ashberry** factors or guidelines, I conclude that it would not be contrary to the public interest to grant this curative treatment discharge.

[60] As a result, I conclude that Mr. Hamilton has met the two criteria set out in section 255(5) of the **Criminal Code** on a balance of probabilities and I am prepared to impose a curative treatment discharge for a period of thirty months from the date of this order, which will be conditional upon the successful completion of the following probationary terms and conditions:

1. Keep the peace and be of good behaviour;

2. Appear before the court as and when required to do so by the Court and notify the probation officer in advance of any change of name, address, employment or occupation;
3. Report to the probation officer today and thereafter as directed by the probation officer;
4. You are not to possess, use or consume alcohol or any other intoxicating substances;
5. 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 you or a legal authorization;
6. You are to perform 50 hours of community service work, as directed by your probation officer on or before June 4, 2020;
7. You are to attend for mental health assessment and counselling as directed by your probation officer;
8. You are directed to attend for substance abuse assessment and counselling as directed by your probation officer;
9. You are to attend for assessment, counselling or programs as directed by your probation officer which may include Alcoholics Anonymous or other addiction counselling programs of a similar nature;
10. You are to participate in and cooperate with any assessment, counselling or program as directed by your probation officer;
11. You are to make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer; and
12. You are to report back to the Court with a status update to be prepared by the probation officer on any of the recommended assessments, counselling or programming after 10 months of probation.

[61] In addition to the terms and conditions of the curative discharge, Mr. Hamilton, you will be prohibited from operating a motor vehicle pursuant to section 259 of the **Criminal Code**, which prohibits you from operating any motor vehicle on any street, road, highway or any other public place anywhere in Canada for a period of twenty-four months, commencing today.

[62] Finally, there is the matter of the Surcharge for Victims pursuant to section 737(3) of the **Criminal Code** in the amount of one hundred dollars, as the Crown proceeded summarily in this matter. That surcharge shall be due and payable on or before June 4, 2019.

Theodore Tax, JPC