PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. McNeil, 2013 NSPC 125

Date: 20131210
Docket: 2495286/2495288
Registry: Sydney

Between:

Her Majesty the Queen

v.

Edward Alphonse MacNeil

SENTENCING DECISION

Judge:	The Honourable Judge Jean M. Whalen
Heard:	In Sydney, Nova Scotia
Oral Decision:	December 10, 2013
Written decision:	December 19, 2013
Charges:	Section 253(1)(a) of *Criminal Code of Canada* Section 259(1) of the *Criminal Code of Canada*
Counsel:	Steve Melnick, for the Crown Darlene MacRury, for the Defence

By the Court:

I Facts

[1] On August 20, 2012, Mrs. MacNeil called the Cape Breton Regional Police Service to report her husband (the defendant) had been drinking and he took the car to drive to the Nova Scotia Liquor Commission to buy more liquor. She described the make and model of the vehicle.

[2] When the police arrived in the parking lot they saw the "red" sports utility vehicle parked in front of the liquor store. The defendant was seated behind the wheel in the driver's seat, the engine was running and the lights were on.

[3] Upon further investigation the police observed the usual signs of impairment and he was unsteady on his feet.

[4] Mr. MacNeil plead guilty to Section 5.253(1)(a) of the *Criminal Code of Canada,* impaired driving on October 25, 2012. The crown stated two tests were taken and they were "significantly high". Mr. MacNeil was also the subject of a

Prohibition Order dated 14 November 2011 and he plead guilty to that charge (Section 259(1)) as well.

II. Record

[5] Mr. MacNeil has a previous record for a related offence. He has one conviction for a Section 253(1)(b) charge. On November 14, 2011 he received a fine and was prohibited from driving for one year.

III Pre-Sentence Report

[6] The pre-sentence report states hat Mr. MacNeil is 67 years old and married to Maureen MacNeil. They have four adult sons. Mrs. MacNeil is a retired nurse and Mr. MacNeil is retired from Nova Scotia Power after having worked for 37 years.

[7] Mrs. MacNeil reported that her husband struggled with depression and alcoholism since the 1970's. He has been in “detox” on several occasions. He was sober between 1990 and 2005.

[8] Mr. MacNeil began consuming alcohol again several months after he retired in 2005. He also began abusing "over the counter" drugs in spring of 2011.

[9] The defendant stopped drinking after he was charged in August 2011, but by August 2012 he was drinking again. He stopped once charged on August 20, 2012. He has been sober ever since.

[10] Mr. MacNeil appears to be financially stable; receiving several pensions. His wife also receives a pension.

[11] Mr. MacNeil is on several medications for high blood pressure, cholesterol and depression.

[12] Mr. MacNeil reported he began drinking alcohol at the age of 16 years. He readily admitted he is an alcoholic and quite likely since his teen years.

[13] On November 5, 2012 Mr. MacNeil "signed himself into Nova Scotia Addiction Services Detox Program". He completed five days.

[14] He has seen Ms. Paula McMullen-Beaton and plans to continue to see her. He doesn't attend Alcoholics Anonymous, stating "it is not for him".

IV Reports and Testimony

[15] Dr. O'Brien testified on behalf of the defence. He is a licensed practitioner and has been for 35 years. He also referred to his report (Exhibit # 1). Dr. O'Brien testified that Mr. MacNeil has been his patient since the 70's. He has treated him for "significant depression", not for alcohol or drug abuse.

[16] Paula McMullen-Beaton, a clinical therapist with Cape Breton Addiction Services testified and referred to her report (Exhibit # 2).

[17] All the information Ms. McMullen-Beaton obtained was from the defendant's self reporting. Mr. MacNeil told her he relapsed after 16 years of sobriety; several months after his retirement.

[18] Mr. MacNeil participated in and completed the Structured Relapse Prevention Program, and the Self Care Program. He readily acknowledged his abuse of alcohol and continued to develop insight into his choices and established positive coping skills.

[19] Ms. McMullen-Beaton testified that as long as the defendant is engaged and active there would be no termination of her services. She stated Mr. MacNeil was very active and forthright in the sessions.

[20] On cross-examination Ms. Paula McMullen-Beaton stated there has been no discussion of the defendant's abuse of over-the-counter medicine.

[21] Dr. Christians report (Exhibit #4) was tendered with consent of the crown. The doctor reported the defendant was referred by Dr. O'Brien because of a "possible mood disorder; which may contribute to alcohol dependence". Dr. Christians is not treating him for alcohol dependence. He saw the defendant five times beginning January 14, 2013 and last June 4, 2013.

[22] The defendant presented with features of attention deficit hyper disorder, major depression, anxiety disorder and panic attacks. He had “reasonable insight” into his issues.

[23] Dr. Christians reported the defendant has had a long history of alcohol dependence going back at least 20 years, abstinent for 16 years, and then relapsed off and on for the last seven years.

[24] Dr. Christians opined “There is a correlation between Attention Deficit and Alcohol Dependence as well as a correlation between depression and alcohol. Both can be contributing factors to alcohol dependence.”... “at least 70% of people with substance abuse have psychiatric disorders. By treating the psychiatric disorders it has “curative” aspects. It lessens the need to drink as well as the urges.”

[25] Dr. Christians reports “He is clearly motivated to stop completely.”.

[26] Mrs. Maureen MacNeil testified her husband has struggled with alcohol and depression since the 1970's. He has seen numerous doctors and been in “Detox”

on several occasions. He was sober for 16 years until July 2005, several months after his retirement. “He seemed to be okay for a couple of years, then in 2009 - 2010 his decision making became poorer.”. He was drinking off and on and began using over the counter medication because of his back. He went to detox in July of 2012. He was “good for about a month”. He began drinking “off and on all day”. After he was [caught] in August 2012 he stopped. He went to detox in November 2012, then he was referred to Paula McMullen-Beaton.

[27] Mrs. MacNeil testified she took her husband to all of his appointments with Paula McMullen-Beaton and Dr. Christians. He is “not drinking” now. She thinks the treatment he is receiving is helping him abstain.

[28] Mrs. MacNeil testified that as a result of this second offence he spent six days in jail. (In fact, the defendant was released immediately on an undertaking with conditions but violated that by returning to his home under the influence of alcohol. He was subsequently arrested and eventually released on a recognizance.)

[29] Mr. MacNeil readily admits he is an alcoholic and most likely from the time he took his first drink at seventeen. He also says he has a mental illness (depression). He was in detox three times prior to 1991, then he was sober for 16½ years.

[30] After his retirement, he thought he could have a few drinks because he didn't have to go to work. So he began drinking again in the summer of 2005. He didn't seek any counselling or treatment until he "hit rock bottom" (charge of August 20, 2012).

[31] This second charge separated him from his wife, caused extreme shame and embarrassment. He subsequently did programs with Addictions Services. He see's Paula McMullen-Beaton and will continue because he finds the sessions beneficial and helps him maintain his sobriety.

[32] He is motivated to remain sober because he said if he does not he will die. He wants to see his grandchildren graduate.

[33] All of his prescribed medication is under lock and key, dispensed by his wife (a retired nurse).

[34] On cross examination the defendant admitted he never had any one to one counselling until meeting with Paula McMullen-Beaton. He readily admitted to relapsing and abusing over the counter medication and trying to hide it.

[35] Mr. MacNeil said jail is not his concern, his "biggest concern is to take full responsibility, apologize to the court, community, and his family". He is seeing Paula McMullen-Beaton voluntarily and will continue to do so, "as long as she agrees".

V Crown and Defence Positions

[36] The crown is opposed to a curative discharge, arguing:

(i) Mr. MacNeil was subject to a driving prohibition at the time.

(ii) Mr. MacNeil threatened his wife when she said she would call police.

(iii) Mr. MacNeil breached his undertaking within one day.

(iv) Sought counselling only after he plead guilty to second offence. Started same on November 26, 2013 (six hours).

(v) Public interest demands Mr. MacNeil go to jail.

(vi) Public safety is key to driving prohibition orders. The defendant did not follow that court order.

[37] The crown seeks thirty days for 253(1)(a) and thirty days consecutive for 259(1) plus a two year driving prohibition.

[38] Defence counsel argues:

(i) That the crown acknowledges the defendant needs treatment but that it is contrary to public interest to grant a curative discharge.

(ii) The defendant has a true family background. His wife supports him, but she is not an enabler.

(iii) The defendant has a long history of abstinence which "shows he can do it".

(iv) Since his second offence there have been controls in place.

(v) The reports shows the defendant "bona fides", for fifteen months the defendant is "on the right track".

[39] Defence counsel seeks a curative discharge for the impaired charge and a $1,000 fine on the driving while disqualified charge.

VI Issue

[40] Should Mr. Edward Alphonse MacNeil be granted a curative discharge pursuant to Section 255(5) of the *Criminal Code of Canada*.

VI The Law

[41] Section 255(5) of the *Criminal Code of Canada* states:

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

[42] The burden is on Mr. MacNeil to meet the provisions of s. 255(5) and the burden is one of a balance of probabilities.

[43] The leading case is *R. v. Ashberry*, 47 C.C.C. (3d) 138 and case law has evolved from it over the years. Ashberry refers to considerations relevant to whether a curative discharge is granted or not.

[44] Justice Griffiths at paragraph 70 states:

> **When is a Discharge for Curative Treatment "Not Contrary to the Public Interest"?**
>
> 70 Parliament has framed the criteria in s. 255(5) of the Code in a positive fashion with respect to the offender, placing the primary emphasis on the need of the offender for curative treatment and only in a negative fashion with respect to the public interest, in that the discharge must not be contrary to the public interest. If the court could be satisfied on the evidence that curative treatment would guarantee that the offender would never again drive a motor vehicle while under the influence of alcohol, then obviously a discharge would be in the public interest. The difficulty is that such absolute assurances can rarely, if ever, be given by those charged with the care and treatment of the alcoholic. However, in those narrow circumstances where the evidence demonstrates that the accused is in need of curative treatment and that his or her rehabilitation is probable, then it would not be contrary to the public interest to grant a discharge subject to stringent terms of probation.
>
> 71 Among the considerations relevant to the questions 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:

72 (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. 255(2) and (3)).

73 (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 questions 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.

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

75 (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.

76 (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.

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

78 One should not overlook the fact that the principle of specific deterrence is not undermined by granting a conditional discharge under s. 255(5), having regard to the strict obligations imposed on the offender under the probation order and the consequences attendant on a breach by the offender of any of these terms. Unlike s. 736, s. 255(5) of the Code does not provide for absolute discharges. The offender who is discharged will always be subject to a probation order with the mandatory condition that he or she attend for curative treatment and, in addition, he or she should be subject to other stringent conditions to afford a measure of protection to the public. 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 s. 259(1) of the Criminal Code. Under s. 26(3) of the Highway Traffic Act, R.S.O. 1980 c. 198, the court is empowered to extend the licence suspension imposed under that Act for up to three years if it is desirable for the protection of the public. The reported cases with respect to conditional discharges under s. 255(5) indicate that those courts which have granted discharges have ordered probation for periods of between two and three years, usually much longer terms than would be imposed as terms of imprisonment. With respect to the

> consequences of a breach of probation, I agree with the observation of Tallis J. In R. v. Beaulieu, supra, where he said at p. 349:
>
> > Under the foregoing section [s. 736(4) of the Code] it is very clear that if the accused fails to abide by the conditions of a probation order the discharge granted can be evoked and the Court may convict him of the offence to which the discharge relates and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged. I refer to the aforementioned provisions of the Criminal Code because it clearly indicates that any breach by the accused of the terms of his conditional discharge can result in being brought back before the Court for an appropriate sentence. In other words, the effect of failure to comply with or observe the conditions of the probation order carries with it very serious consequences for the appellant and in my view, this offers some measure of protection to the public.

[45] In *R. v Pearson*, 2010 NSPC 14, J. Campbell discusses the curative discharge provision beginning at para 23:

> Curative discharge provision:
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> 23 The curative discharge provision has been referred to as being an anomaly. It seems to not make sense that when the law seeks to deter drunk driving and make it clear that it is a criminal offence, there is an "out".
>
> 24 It could be argued that it is simply not fair. A person with no alcohol addiction or problem, who has, on one night, underestimated his or her level of consumption ends up with a fine, a driving prohibition and a criminal record. A person who does the very same thing, who has an alcohol problem, can be discharged. That can be

difficult to square with the importance of deterrence and the need for strong sanctions.

25 The law recognizes however, that deterrence and strong sanctions are not the only way to protect the public against drunk drivers. There are those situations where a fine and driving prohibition will have the desired effect. Sometimes jail time has to be introduced. Even with those penalties, courts see repeat drunk driving offenders. For them, traditional sanctions of fines and imprisonment seem to have made little impact. Each time they drive the public is placed at risk.

26 The law recognizes that there are times when treatment, along with the incentive of a discharge can provide better long term protection to the public than fines or imprisonment. A fine and a driving suspension may do little to deter a first time offender who is addicted to alcohol. He or she can usually expect a minimum fine of $1000.00, a one year driving prohibition, a criminal record and non-court imposed consequences such as higher insurance premiums. The untreated alcoholic may be undeterred from driving while drunk again. Court ordered treatment, with a driving suspension and the motivation that comes with knowing that the discharge is conditional, may result in a potential drunk driver being taken off the road permanently.

27 The court has to balance the continuing need for strong sanctions, with that positive potential. There will be times when the sanctions are simply more important. When a person has been involved in an incident where there has been damage to property or injury to another person the need for a strong statement may trump the potential for treatment. When the person has a record of such offences, that can be an issue as well.

28 The prospect of time in jail can have redemptive power that is either apparent or real. Those who find themselves facing jail time may, for a time, become the most fervent of abstainers. A person may make the application simply as a way to avoid the more severe penal sanctions. The extent to which the commitment is a sham or is sincere

is important is assessing the prospects of success. The person has to show that he or she is in earnest about obtaining treatment and has to show on the balance of probabilities that there is a reasonable prospect that the treatment will be successful.

29 If the reasonable prospect for a positive outcome has not been shown, there is little reason for deterrence to make way for treatment. That does not mean, of course, that it must be shown that the treatment will be likely to succeed. A reasonable prospect is not the same as a probability.

30 There is another aspect to the curative treatment provision that can, to some extent, achieve a compromise between deterrence and treatment. Treatment is not without consequences for the person involved. Rather than simply paying a fine and resuming his or her lifestyle, the person can be under court supervision for some considerable time. Many may prefer to take the punitive sanctions rather than be required to spend many months attending counselling with the requirement that they entirely abstain from the consumption of alcohol. A curative discharge is in that respect, not a "pass".

31 The curative discharge provision is an anomaly, but only to some extent. The deterrence and strong sanctions required to respond to drunk drivers are intended to protect the public. The curative discharge provision must be considered within that context. A curative discharge is not grant of absolution but another tool in achieving the goal of public protection.

32 It should be used only when it can be reasonably shown to be potentially effective and in circumstances where it does not feed the misconception that drunk driving is not a serious criminal offence.

[46] In R v Beaulieu, 53 C.C.C. (2d) 342, Mr. J. Tallis stated:

8 In most cases, one would expect medical and lay evidence outlining in detail the accused's condition. Furthermore, in considering the

public interest there should be evidence before the court, preferably from a medical practitioner, indicating that a careful assessment of the accused has been made and also indicating on the balance of probabilities that the accused is well motivated and has a reasonable chance of overcoming his alcoholism and related problems.

9 In my opinion parliament intended that the court should carefully consider the medical condition of an accused and his need for curative treatment when an application is made under section 236(2) of the Criminal Code. The public interest must be given careful consideration because legislation such as section 236(1) was passed with a view to protecting the public from the hazards associated with drivers who have been drinking. The right or licence to drive a motor vehicle carries with it certain responsibilities and one of those responsibilities is to refrain from driving a motor vehicle while in violation of section 236 of the Criminal Code.

10 From the foregoing it will be seen that the court is charged with the heavy responsibility of weighing the various factors to be considered when sentencing and striking a proper balance between them in any given case. In dealing with the general principles of sentencing I can do no better than to quote from the unreported judgment of the British Columbia Court of Appeal in R. v. Shaffer, unreported, October 18th, 1979, C/A 790230, pp. 9 and 10 [now reported at 50 C.C.C. (2d) 424, at 429]:

> "The principles of sentence have been expressed a countless number of times in various ways. Generally, they relate to the following:
>
> 1. the protection of the public;
> 2. the punishment of the offender;
> 3. the deterrent effect of the punishment not only on the offender but others who might be tempted to commit such an offence;
> 4. the reformation and rehabilitation of the offender.

> How much emphasis will be placed on each of these principles will depend on many circumstances and will, obviously, vary from case to case. In some cases the major, if not the only, concern will be the protection of the public and little, if any, concern will be given to the reformation and rehabilitation of the accused. In other cases the emphasis will be altered. How much weight will be attached to any of these principles will depend on a number of things including (a) the degree of premeditation involved; (b) the circumstances surrounding the commission of the offence;© the nature of the crime and the gravity of it; (d)the attitude of the offender after the commission of the crime; (e)the previous criminal record, if any, of the offender; (f) the age, mode of life, character and personality of the offender; (g) any recommendation of a probation officer; and (h) character references. See R. v. Hinch and Salanski [1968] 3 C.C.C. 39, 2 C.R.N.S. 350, 62 W.W.R. 205.

11 Having regard to the plain language of section 236(2) I do not think that a Court can now assume that a conditional discharge is not in the best interests of society. Once this section has been proclaimed in a jurisdiction, the Court is entitled to assume that adequate facilities will be provided for curative treatment. In some cases the evidence adduced may indicate that appropriate therapy or curative treatment will probably result in the accused overcoming his problems with alcohol. If such is the case, it is probably 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 such cases society is only protected when the offender is in jail. In any given case the public interest may best be served by curative treatment as long as proper safeguards are imposed. Each case must be judged on its own merits. If rehabilitation is accomplished, then the public will be protected in the future.

[47] In R. v Storr, [1995] A.J. No. 764, C.J.A. Fraser stated in paragraph 13:

> Furthermore, in considering the public interest there should be evidence before the Court, preferably from a medical practitioner, indicating that a careful assessment of the accused has been made and also indicating on the balance of probabilities that the accused is well motivated and has a reasonable chance of overcoming his alcoholism and related problems.
>
> 14 However, it is evident from these factors that Tallis J. was not purporting to give an exhaustive list of those factors which properly enter into an assessment of whether a curative discharge is contrary to the public interest.
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> 15 The defence also relies on R. v. Wallner (1988), 9 M.V.R. (2d) 7 [62 Alta. L.R. (2d) 111], a decision of the Alberta Court of Appeal. But there, too, we do not read Stevenson J.A.'s comments as attempting to provide a complete list of the factors to be taken into account in addressing this issue. In fact, we note two points about that case. First, Stevenson J.A. made it clear that the Court was not invited to attempt to formulate guidelines for the curative discharge and specifically refrained from doing so. Second, in any event, it is apparent that in addition to the considerations identified by Tallis J., Stevenson J.A. added at least one additional factor to the analysis in evaluating the public interest: is there a real risk of recidivism and, if so, then a curative discharge would be contrary to the public interest.
>
> 16 The curative discharge provision of the Criminal Code focuses on one purpose - the rehabilitation of the accused. As Ayotte J. noted in R. v. Stupar (1990), 26 M.V.R. (2d) 81 (Alta. Prov. Ct.) [p. 83]:
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> > It will be seen immediately that this provision, unlike its companions in the fight against the impaired driver, attempts to encourage treatment rather than to threaten detection and punishment. How are we to interpret this

> island of rehabilitation floating, as it were, in a sea of deterrence?
>
> 17 Without attempting to provide a complete list of considerations that should be taken into account in assessing whether a curative discharge would be contrary to the public interest, we are of the view that the trial judge did not give adequate consideration to the following factors, all of which we consider to be relevant in this case.

[48] In *R. v Harding*, [1999] N.S.J. No. 19, 1999 NSCA 48, J. Cromwell writing for the appeal court states at page 3:

> Mr. Harding's background and circumstances are most sympathetic and we have given them careful consideration. However, these are not the only matters that must be taken into account. In cases of drinking and driving offences, general deterrence, that is, the deterrence of others from committing the offence, is an important, if not the paramount, consideration in sentencing: see, e.g. R. v. Biancofiore (1997), 35 O.R. (3d) 782 (C.A.). Moreover, drinking and driving, as the appellant knows from his own tragic loss of his mother, creates situations of danger to the public at large and from which the public should be protected by the courts. While we must carefully consider the personal circumstances of the appellant, we must also consider and give appropriate weight to the need to deter others and protect the public.

[49] In *R. v Tardiff*, [1995] M.J. No. 377, Provincial Court J. Pullan stated at para 47:

> The Ontario Court of Appeal, in dismissing the Crown appeals against sentence and upholding the curative discharges imposed at

trial, indicated considerations relevant to the question of whether a given case is sufficiently exceptional to warrant recourse to the curative discharge provision. They are:

> (a) The circumstances of the offence and whether the offender was involved in an accident which caused death or serious bodily injury . ...
>
> (b) The motivation of the offender as an indication of probable benefit from treatment. ...
>
> (c) The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the programme.
>
> (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. ... (at p. 162)

48 It must be noted that these considerations are merely guidelines that a trial judge should consider and not a test that an accused must meet. The common sense considerations are not additional requirements but simply a guide for applying the two statutory conditions (R. v. Debaie (1991), 35 M.V.R. (2d) 288 (N.S. Co. Ct.), at p. 292).

49 The interpretation of the curative discharge provision is complicated by the fact that it is an "island of rehabilitation floating, as it were, in a sea of deterrence" R. v. Stupar (1990), 26 M.V.R. (2d) 81 (Alta. Prov. Ct.), at 83).

50 Serious recidivists particularly test the meaning of "public interest" in the context of this section.

VII Analysis

[50] Factors considered by other courts.

(a) Circumstance of the offence:

The Defendant was not involved in any accident but he did utter threats to cause death or bodily harm to his wife when she told the defendant she was going to call the police if he took the car to go to the liquor store. Fortunately, Mr. MacNeil was arrested in the parking lot.

(b) Motivation of the offender:

Although Mr. MacNeil is facing a jail sentence, he testified that is not his “big concern”. He wants to take responsibility and apologize and he is “willing to pay his debt”. His motivation is to stop his demise. He wants to see his grandchildren graduate.

Mr. MacNeil has no history of alcohol related during offences as some others, despite the fact he has been drinking off and on since 2005. He has

only one previous Section 253(1)(a) conviction (offence date, 18 August 2011).

Although in detox several times prior to 1991, he did not seek counselling or treatment until after pleading guilty to his second offence.

(c) Availability / Calibre of Facilities:

There are facilities and programs the defendant can and has accessed. He continues to see a clinical therapist and a psychiatrist.

(d) The 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.

No one can say with 100% certainty what the defendant may do in the future. Dr. Christians says “by treating the psychiatric disorders it has “curatiave” aspects. It lessens the need to drink as well as the urges.”.

Ms. Paula McMullen-Beaton says it is not uncommon for people to falter, but she cannot definitely say the defendant will or will not relapse. She does know he is motivated to remain sober.

Mr. MacNeil says he is motivated to remain sober. He has plans to apply for the "interlock system".

(e) Criminal record

Section 253(1)(b) - 18 Aug 2011 - fine

Driving Prohibition - 14 Nov 2011

Does the evidence establish both the need for treatment and the probability of rehabilitation? Has Mr. MacNeil shown he is earnest about obtaining treatment on a balance of probabilities or that there is a reasonable prospect that treatment will be successful?

IX Conclusion

[51] Based on all of the circumstances before me I do not believe a curative discharge should be granted. Mr. MacNeil is to be commended for seeking assistance and remaining sober since the second offence. However, he does not have lengthy record for drinking and driving. He has had a lengthy period of sobriety without intervention and he is already doing what a court would otherwise order him to do and he plans to continue counselling.

[52] Given the prevalence of drinking and driving the court must consider the public interest and the principle of deterrence in the circumstances. Therefore, I sentence the defendant to the following: (i) s.253(a) thirty days in jail; (ii) s.259(4) $1,000 fine plus $150 victim fine surcharge plus $112.41 court costs for a total of $1,262.41 (in default 28 days); (iii) driving prohibition two years, no interlock for six months.

Dated at Sydney, Nova Scotia this 19th day of December, A.D. 2013.

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Jean M. Whalen, J.P.C.