PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Smith*, 2014 NSPC 44

Date: 2014-06-23
Docket: 2609588
Registry: Amherst

Between:

Her Majesty the Queen

V.

Travis Christopher Troy Smith

DECISION

Judge: The Honourable Judge Paul B. Scovil

Heard: April 24, 2014 in Amherst, Nova Scotia

Oral Decision: June 23, 2014

Written Decision: July 21, 2014

Charge That he on or about the 6th day of June, 2013 at or near Parrsboro, Nova Scotia while being bound by a probation order made by Judge Paul Scovil, Amherst Provincial Court on December 16th, 2012, fail without reasonable excuse to comply with such order, to wit: keep the peace and be of good behaviour contrary to Section 733.1(1) of the Criminal Code.

Counsel: Bruce C. Baxter, for the Crown
Malcolm S. Jeffcock, Q.C., for the Defence

By the Court:

INTRODUCTION

[1] Mr. Smith was placed on probation on the 16th day of December, 2012. He was ordered, among other things, that he had to keep the peace and be of good behaviour. On the 6th day of June, 2013, Mr. Smith agreed through intermediaries to meet for consensual participation in pugilism with another young man. The police became involved and, while no other charges were laid, the authorities did charge Mr. Smith with breaching his probation by failing to keep the peace and be of good behaviour. Mr. Smith argues that because he had not contravened any criminal statute, the charge cannot stand. The Crown disagrees and argues a conviction lies on the facts before this Court without requiring any underlying offence. While a review of the law at first glance reflects this dichotomy, the reality of the state of the law is fairly complex.

FACTS

[2] Both Mr. Smith and the Crown agreed as to the facts that I am to consider. On the date in question, Mr. Smith and another young man arranged to meet at what appeared to be a local ball field in a residential area of Parrsboro, Nova Scotia. Two separate videos were introduced from two separate videographers showing Mr. Smith aggressively approaching the other combatant and then striking him. The other individual fell to the ground, but proceeded to get back up saying, "Is that all you got?" He then proceeded to charge at Mr. Smith. Mr. Smith slapped the other combatant in the face several times knocking him to the ground. The accused then backed off retreating to his vehicle and issuing the challenge, "Does anybody else want to have a fucking go?" No one else took up the invitation.

[3] Someone in the area had called 911 during the fracas to report what was occurring. In addition, there were at least eleven other people observing the activities that were taking place that day. At least two of those individuals were recording videos of the encounter on their phones. Some of the bystanders were shouting and at least one indicated that the other person involved in the altercation with the accused had had enough.

CASE LAW

[4] As indicated earlier, Mr. Smith argues that an individual cannot be convicted of a breach of the term of probation to keep the peace and be of good behaviour without committing a criminal offence. In putting forward that position, Mr. Smith relies on **R. v. Docherty** [1989] S.C.J. No.105, **R. v. D.R.** [1999] N.J. No. 228 (Nfld.C.A.) and **The Minister of Citizenship and Immigration v. Stephenson** [2008] F.C.J. No. 97.

[5] The Crown argues that a failure to be of good behaviour can refer to "conduct that falls below the conduct expected of all law abiding and decent citizens". The Crown cited **R. v. Johnston** [1993] M.J. No. 539 (Man. Q.B.), **R. v. Jefferson**, [2011] N.S.J. No. 735 (N.S.Prov.Ct.) and **R. v. F.(C.G.)** [2003] NSCA 136. With all due respect to both Mr. Smith and the Crown, the law surrounding what it means to "keep the peace and be of good behaviour" is far more complex.

[6] I intend to initially deal with **Canada (Minister of Citizenship and Immigration) v. Stephenson** (*Supra*). That case is one of a series of decisions dealing with the concept of "keep the peace and be of good behaviour" as it applies to findings by the Immigration Appeal Division concerning deportation of immigrants who have not yet obtained citizenship status. Particularly before the Court was the question as to whether infractions of provincial motor vehicle statutes breached the term "to keep the peace and be of good behaviour". While **Stephenson** was distinguished in **Canada (Minister of Public Safety and Emergency Preparedness) v. Ali** [2008] F.C.J. No. 518, I can say that both of these decisions together with other decisions from immigration courts dealing with the question of keeping the peace and being of good behaviour are distinguishable based on the unique background of immigration concerns which are conceptually different from criminal matters and criminal law. These cases are quite frankly of little assistance in resolving the issue before me.

[7] A review of applicable case law starts with **R. v. Docherty** (*Supra*). There, the Supreme Court of Canada considered whether then Section 666(1) of the **Criminal Code** is to be interpreted as an offence requiring its own *mens rea* or as an offence which automatically follows upon a conviction for any **Criminal Code** offence or other deliberate act which constitute a violation of the conditions of a probation order. Section 666(1) was the precursor to Section 733.1. Section 666(1)

should be noted as having the word "willfully" as part of the offence as opposed to the term "without reasonable excuse" as contained in the now 733.1.

[8] Justice Wilson in her decision in **Docherty** considered the Newfoundland Court of Appeal decision in **R. v. Stone** (1985), 22 C.C.C. (3d) 249. At paragraph 21, the Court stated as follows:

> 21. Steele J. proceeded from the view, expressed at p. 255, that the two terms, "keep the peace" and "be of good behaviour", impose "separate and distinct conditions though in certain circumstances may overlap". At page 256, he draws the following distinction:
>
> > When considering whether there has been a failure "to keep the peace", one is conscious of public opinion and its perception of peace and good order and what does or does not offend that nebulous standard. If the issue is an individual's good behaviour, the emphasis shifts to a more personal analysis of his conduct. A breach of an undertaking "to keep the peace" means a disruption or the upsetting of public order whereas a breach of a bond of "to be of good behaviour" means some act or activity by an individual that fails to meet the fanciful standard of conduct expected of all law-abiding and decent citizens. It is quite possible, as I have already said, that one can fail to be of good behaviour yet not commit a breach of the peace. It is probably a matter of degree. We are only concerned with the second aspect of the statutory condition, namely, "to be of good behaviour".
>
> 22. Steele J. goes on to say at p. 257 that a conviction for breach of a federal, provincial or municipal statute "may be -- perhaps usually is -- but not necessarily" a failure to be of good behaviour. Conversely, conduct which does not violate any statute may nevertheless breach the condition to keep the peace and be of good behaviour. The accused in that case was found not to have had the required intent for the underlying offence, i.e., the offence of fraudulently obtaining food. Nevertheless, his behaviour at the restaurant was found to fall short of "good behaviour". The stated case did not raise the issue of the requisite mens rea for wilful failure to comply with the probationary condition to "be of good behaviour", and Steele J. did not deal with it. By upholding the conviction under S. 666(1), however, he implicitly affirmed the trial judge's finding that the appellant had the requisite mens rea for that offence.

While the decision in **Docherty** mainly considered what was meant by "willfully", the paragraphs cited from **Stone** appear to accept that the concept of "keep the peace" is a separate one from that of to "be of good behaviour". That line of thinking pervades subsequent case law.

[9] A case which is factually similar to the matter before me is **R. v. Johnston** (*Supra*). In **Johnston**, the accused had followed another individual from a building out into the public where a fight ensued. The trial judge in that case determined that it was a voluntary fight between the two combatants. The accused was charged with failing to comply with his probation order, namely: "keep the peace and be of good behaviour". Justice Monnin's decision contained a review of **Stone** and **Docherty**, but only tangentially considered the question of the difference, if any, between "keeping the peace" and "being of good behaviour". At paragraph 4 of that decision, Justice Monnin stated as follows:

> 4. In dealing with the first ground of appeal, the appellant argues that for the offence to be complete, there must be a failure of both keeping the peace and being of good behaviour. In addition, the appellant argues that good behaviour is to be read as lawful behaviour because that is an objective standard while if the test was less than lawful behaviour, the test would of necessity become subjective and thereby not measurable in a precisely defined way.

[10] Justice Monnin spoke of there being failures of both "keeping the peace" and "being of good behaviour". He did not go on to consider what exactly that would mean. He did go on, however, to find that the consensual fight in **Johnston** was an activity such as to justify a conviction based on as he said, "at the very least, the appellant breached the public peace". His comments subsequent to that seem to state that it was on the first ground of "keeping the peace" as opposed to "being a good behaviour". He stated at paragraph 10:

> I do not have to deal with the concept of good behaviour because of my finding but, if I had, I think that I would be hard-pressed to state that a public fight, even though maybe consensual, can be considered as good behaviour. A consensual fight might not be an offence but it is clearly not a behaviour pattern for adults that is condoned or sanctioned in a community of people living together.

[11] In **R. v. S.S.** [1999] N.J. No. 230, the Newfoundland Court of Appeal reviewed the question of what is meant by "keeping the peace and being of good behaviour" in relation to breach of a probation order. The accused in that matter was charged under the **Young Offenders Act** with breach of probation when he had to be removed from his class at school due to disruptive behaviour. The accused was defiant of authority, disrespectful of rights of property, used foul language, and acted in such a manner that disturbed and disrupted the orderly operation of the classroom. S.S. had also engaged in a physical altercation with his teacher. The position of the defence in the matter was that in law, the scope of an

obligation to keep peace and be of good behaviour did not extend to non-criminal behaviour in the school.

[12] Justice Green in his decision stated as follows:

> 6. It is to be noted that the trial judge did not differentiate in his application of the obligation to keep the peace from that of being of good behaviour. It is clear that these are regarded as separate obligations and have a different (though overlapping) legal content. Because the trial judge purported to rely upon both obligations for the purposes of convicting the appellant, it is necessary to consider whether a conviction under either is supported by the facts as agreed.

[13] The Court of Appeal went on to state as follows:

> 10 Accordingly, it is necessary to consider the legal content of both separate obligations in order to determine whether the agreed facts fit either category.
>
> (b) Breach of the peace
>
> 11 In Frey v. Fedoruk, [1950] S.C.R. 517, Kerwin J. stated at p. 519:
>
> It may be difficult to define exhaustively what is a breach of the peace but, for present purposes, the statement in Clerk and Lindsell on Torts, (10th ed.) page 298, may be accepted:
>
> A breach of the peace takes place when either an actual assault is committed on an individual or public alarm or excitement is caused. Mere annoyance or insult to an individual stopping short of actual personal violence is not a breach of the peace. Thus a householder - apart from special police legislation - cannot give a man into custody for violently and persistently ringing his doorbell.
>
> Cartwright J., who wrote for the majority, did not purport to give a specific definition. He limited himself to expressing disagreement with language used by the majority in the Court of Appeal in that case. There ((1949), 95 C.C.C. 206 (BCCA)) O'Halloran J.A. had stated:
>
> ... breach of the peace has two significations; the narrow and common one applicable to riots, tumults and actual physical violence; and the other and wider one which goes so deeply into the roots of the Common Law, viz. any disturbance of the tranquillity of people, which if not punished, will naturally lead to physical reprisals, with wider and more aggravated disturbances of the "Kings peace".
>
> Cartwright J. disagreed with the majority in the Court of Appeal that the act of trespassing on private property and peering into a bedroom at night, causing one

of the occupants to chase the intruder off with a butcher knife, amounted to a breach of the peace or any criminal offence. He concluded at pp. 525-526; and 528-529:

> There is no suggestion in the evidence of any attempt on the part of the plaintiff to offer violence to anyone. A reasonable inference to be drawn from the facts ... is that the plaintiff had no intention of himself doing any violent act and hoped that he would not be discovered.
>
> When he was discovered he at once ran away. In my opinion, the mere fact that his presence at night in close proximity to the window would have the probable effect of frightening the inmate of the room does not make such conduct criminal at common law.
>
> While I agree with the view expressed by O'Halloran J.A. that such conduct, if discovered, would naturally frighten the inmates of the house and that it would tend to incite them to immediate violent action against the intruder, I am doubtful whether such action could be properly described as defensive. I would describe it rather as offensive and retributive. ... I do not think that it is safe to hold as a matter of law, that conduct, not otherwise criminal and not falling within any category of offences defined by the criminal law, becomes criminal because a natural and probable result thereof would be to provoke others to violent retributive action.
>
> ...
>
> In my view, the definition of a breach of the peace in Wharton's Law Lexicon, 14th ed., p. 143, ... "offences against the public which are either actual violations of the peace, or constructive violations, by tending to make others break it", is too wide if the concluding words "or constructive violations, by tending to make others break it" are intended to include conduct likely to produce violence only by way of retribution against the supposed offender.
>
> ...
>
> Once the expression "a breach of the Kings peace" is interpreted, and O'Halloran J.A. undoubtedly does interpret it, not to require as an essential ingredient anything in the nature of "riots, tumults, or actual physical violence" on the part of the offender, it would appear to become wide enough to include any conduct which in the view of the fact finding tribunal is so injurious to the public as to merit punishment. If, on the other hand, O'Halloran J.A. intended to give to the expression a more limited meaning so that it would include only conduct of a nature likely to lead to a breach of the peace in the narrower sense of which he speaks, the authorities referred to elsewhere in this judgment seem to me to show that this is not an offence known to the law.
>
> I am of opinion that the proposition implicit in the paragraph quoted above ought not to be accepted.

12 When Cartwright J.'s comments are read against the comments in the Court of Appeal, with which he disagreed, it appears that what he was concerned about was the possible extension of the notion of breach of the peace to situations where the act complained of was not violent or disturbing of public tranquillity and order but had the potential of provoking reprisals which were not merely defensive in nature but retributive in character. Viewed in this light, it can be said that his view of what would constitute a breach of the peace would not be substantially different from that of Kerwin J., namely, acts involving an assault or violence or other acts which cause public disturbance, alarm or excitement as a natural consequence. Cartwright J. would simply not extend the notion to violent reprisals which do not naturally result as defensive responses to the original acts but are the result of conscious decisions to exact retribution.

13 On either approach, it is clear that the notion of breach of the peace does not extend to any breach of the criminal law1; rather, the core notion of breach of the peace is a violent disruption or disturbance of public tranquillity, peace and order. The emphasis is not on the commission of a particular crime but on, in Steele J.'s words in Stone, "unacceptable and disorderly conduct that unduly disrupts and violates public peace and good order" (p. 255), or, in Trainor P.M.'s words in R. v. Barker (1967), 3 C.R.N.S. 58 (Y.T. Prov. CT.), "crimes and conduct actually disturbing or tending to disturb the peace and order" (p. 60).

14 These notions are reflected in the historical material as well. In The Countrey Justice (1655), Michael Dalton states at p. 212:

> For the peace (say they) is not broken without an affray committed, battery, assault, imprisoning or extremity of menacing.

15 Blackstone, in 4 Blk. Com. at p. 252 described the circumstances where recognizances for keeping the peace may be forfeited:

> ... by any actual violence, or even an assault, or menace, to the person who demanded it, if it be a special recognizance: or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book [ie. the riotous assembling of 12 persons or more and not dispersing upon proclamation; unlawful hunting by night or with painted faces; sending any letter without a name demanding money or other valuable thing or threatening to kill or fire the house of any person; pulling down or destroying any turnpike-gate, toll house or sluice or lock on a navigable river or a road; affrays; riots, routes and unlawful assemblies; tumultuous petitioning; forceable entry or detainer by violently taking or keeping possession, with menaces, force and arms, of lands and tenements without the authority of law; riding or going armed with dangerous or unusual weapons; spreading false news to make discord between the King and nobility; making false and pretended prophesies with intent to disturb the peace; engaging in any act that

> tends to provoke or incite others to break the peace, such as challenges to fight; and the making of libels by writings or pictures, the tendency of which is to breach the public peace by stirring up the objects of them to revenge and bloodshed]; or, by any private violence committed against any of His Majestys subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of heat and passion) unless they amount to a challenge to a fight.
>
> 16 The thrust of these descriptions is, again, the notion of disturbance of public tranquillity, peace and order, either by the commission of the act itself or the effect of such an act.

[14] The Court in **S.S.** went on to consider **R. v. D.R.** (*Supra*), a sister case decided by the Newfoundland Court of Appeal on the same date as **S.S.**. At paragraphs 22 and 23 of **S.S.** the Court said:

> 22 In D.R., this Court held that the concept of failure to "be of good behaviour" in the statutory conditions of a probation order is limited to non-compliance with legal obligations in federal, provincial or municipal statutes or regulatory provisions as well as with court orders specifically applicable to the offender, and does not extend to otherwise lawful conduct even though that conduct can be said to fall below some community standard expected of all peaceful citizens.
>
> 23 Where, however, a probationer commits a breach of the peace, thereby violating that aspect of the probation order, that, in most cases, will also amount to a failure to be of good behaviour. In that sense, the obligations can overlap, as Wilson J. in Docherty noted. In Barker, Trainor P.M. observed at p. 60:
>
> > ... a person who binds himself to a recognizance to keep the peace and be of good behaviour is making two separate promises as to his future conduct. Certainly, a person who commits a breach of the peace is guilty of failing to be of good behaviour, but conduct which amounts to lack of good behaviour need not go to the extent of being a breach of the peace.

[15] In **D.R.**, the Court considered an appeal by an accused from a conviction for breach of a probation order. The accused entered a plea of guilty to two offences of breach of probation. The first offence related to possession of non-prescription drugs and the second offence related to his running away late at night from a group home where he was residing as a ward of the director of child welfare. It was that offence related to the running away that found itself on appeal before the Newfoundland Court of Appeal. The Court of Appeal determined that a failure to

be of good behaviour was limited to noncompliance with legal obligations under federal, provincial and municipal statute or regulatory provisions, together with obligation in court orders. The concept does not extend to otherwise lawful conduct.

[16] The Newfoundland Court of Appeal considered the conflicting positions expressed in prior case law. The Court, as indicated above, concluded that the concept of failure to "be of good behaviour" in the statutory conditions in the probation order is limited to noncompliance with legal obligations in federal, provincial or municipal statute and regulatory provisions, as well as obligations in court orders specifically applicable to the accused. It does not, however, extend to otherwise lawful conduct if that conduct falls below some community standard expected of all peaceful citizens.

[17] Justice Green in **D. R.** engaged in extensive review of historical background to the provisions of keeping the peace and being of good behaviour which we now find in Section 733.1 of the **Criminal Code**. At the end of that analysis, he stated at paragraph 30:

> 30 Accordingly, insofar as the legal principles relating to forfeiture for breach of a condition to be of good behaviour in a recognizance entered into as a result of a binding over order may be relevant, I conclude from this review that, although a binding over order may be made on the basis of events that are not criminal, the tendency is to limit the subsequent forfeiture of a recognizance entered into as a result of such an order to situations where a breach of the peace or a breach of law has occurred. That certainly seems to have been Blackstone's view and is consistent with the notion underlying such orders, which is the prevention of future offences. The subsequent case law in England or Canada does not detract from this position. Furthermore, because the concept of breach of the peace does not encompass the full gamut of criminal offences, there remains a field of non-compliance with criminal or statutory law which can be encompassed by the notion of failure to be being of good behaviour.

[18] At the end of the day, Justice Green determined that the actions of the person in **D.R.** amounted to a failure to keep the peace. He went on to suggest that in examining the other aspect of "keeping the peace and being of good behaviour", the act of running away from a group home, did not constitute a statutory offence or breach of any Court order specifically applying to him. As a result, the accused was acquitted in that matter.

[19] In **R. v. Gosai** [2002] O.J. No. 359 (Ont. Ct. Jus.) Justice Durno considered an appeal by the accused from conviction for breach of probation. The accused who suffered mental health problems was on probation after being convicted of assaulting his wife. He gave his probation officer a letter addressed to his wife in which he advised that he would beat her. He was charged with uttering a threat to cause bodily harm to his wife, together with the breach of probation for failure to keep the peace and be of good behaviour. At trial the accused was acquitted of uttering a threat, but convicted of the breach of probation charge. In considering whether a threat to assault is a breach of the condition to keep the peace and be of good behaviour, the Court stated as follows:

> 17 Three factors must be taken into consideration in addressing alleged breaches of terms to keep the peace and be of good behaviour. First, a breach of recognizance is an offence requiring proof of mens rea: R. v. Legere (1995), 95 C.C.C. (3d) 555 (Ont. C.A.). I appreciate that Legere, supra, and other cases were decided when the offence included that the accused must have "wilfully breached" the order, and it is now worded "fail without reasonable excuse to comply with such order ...". However, the issue of lawful or reasonable excuse arises only after the Crown has proven beyond a reasonable doubt the elements of the offence, including the mens rea: R. v. Holmes (1988), 41 C.C.C. (3d) 497 (S.C.C.); R. v. Santeramo (1976), 32 C.C.C. (2d) 35 (Ont. C.A.).
>
> 18 Second, the phrase imports two separate conditions on the offender - keeping the peace and being of good behaviour: R. v. Docherty (1989), 51 C.C.C. (3d) 1 (S.C.C.); R. v. S.(S.) (1998), 138 C.C.C. (3d) 430 (Nfld. C.A.); R. v. Barker (1967), 3 C.R.N.S. 58 (Y.F. Mag. Ct.); R. v. Abbott (1940), 74 C.C.C. 318 (Alta. S.C.A.D.). In most cases, a breach of the peace will also amount to a failure to be of good behaviour: S.(S.), supra., R. v. R.(D.) (1999), 138 C.C.C. (3d) 405 (Nfld. C.A.).
>
> 19 Third, those on probation are entitled as a matter of law to know what conduct is forbidden by the term - where the line is drawn in the sand. As the Supreme Court of Canada noted in the Reference re: ss. 193 and 195.1 of the Criminal Code (1990), 56 C.C.C. (3d) 65, "... there can be no crime or punishment unless it is accordance with law that is certain, unambiguous and not retroactive".

[20] The reasoning in **Gasai** was also adopted and applied by Justice Selkirk of the Ontario Court of Justice in **R. v. Griffin** [2013] O.J. No. 6287. This was also the case in **R. v. Omeasoo** [2014] A.J. No. 401 (Alberta Prov. Ct.).

[21] A breach of the peace occurs where there is an actual assault, public alarm, or an excitement caused. A mere annoyance or insult to an individual, stopping short of actual personal violence, is not a breach of the peace. An essential

ingredient is something in the nature of a riot, tumult or actual violence. The core notion of a breach of the peace is a violent disruption or disturbance of the public tranquility, peace or order (See **Frey v. Fedoruk** [1950] S.C.J. No. 21 (S.C.C.)). It has also been described as "unacceptable conduct that unduly disrupts and violates public peace and good order" without any emphasis on any particular crime (See **R. v. Stone** (*Supra*) approved in **S.S.** (*Supra*)).

[22] There is a great deal to be said for the notion that a breach of the peace occurs where there is an actual assault, public alarm or excitement caused. The words of Justice Durno fits conceptually with the historical background to the words "keeping the peace" as they appear in the overviews contained in the cases cited previously.

[23] Judge Gorman of the Newfoundland Provincial Court gave some consideration to the words "keep the peace and be a good behaviour" in **R. v. L. T. W.** [2004] N. J. No. 260. In **L.T.W.**, the accused was charged with failing to comply with an undertaking to keep the peace and be of good behaviour. The accused had custody of a ten year old son. The son had wished to spend the night at his mother's house so he called the child protection office. This resulted in the police and a social worker attending at L.T.W.'s house. When officers entered into L.T.W,'s home, the son became very upset. L.T.W. shouted at them and attempted to interfere with an officer speaking to his son. He was arrested for obstructing a peace officer, but he was never charged with that offence. Judge Gorman held:

> KEEP THE PEACE
>
> 38 As pointed out earlier, the essence of this condition involves the maintaining of the Queen's peace. Thus, there must be evidence establishing a "disruption or disturbance of public tranquillity, peace and order." In this case, L.T.W. was disruptive in the sense that he obstructed the officers, however, this took place within the residence, it was of a short duration and to a very limited degree. Applying S.S. and D.R., I conclude that the Crown has failed to establish that L.T.W.'s actions constitute a breach of the peace. If similar conduct were to take place in a public area, a different conclusion might be warranted.
>
> BE OF GOOD BEHAVIOUR
>
> 39 As pointed out earlier, the essence of this condition involves, at the very least, "non-compliance with legal obligations" in statutes or regulatory provisions. If L.T.W. had been charged with obstructing a police officer in the execution of his or her duties, the evidence might support a conviction being entered. Obviously, this is a question which should not be answered in this case. However,

> it can be clearly stated that proving the commission of an offence with which the accused is not charged, during a section 145(3) trial, cannot be used to support an argument that the accused has, as a result, breached the condition requiring his or her good behaviour by the commission of an offence. To allow it to be so used would allow and require that a trial be conducted on the basis of an allegation never made.

[24] Inherent in Judge Gorman's decision is the recognition that the words keeping the peace can be viewed separately from those of being of good behaviour and that further, those factual nuances unique to case, such as place, will play into whether an accused has committed an offence under 733.1 of "failing to keep the peace and be of good behaviour" (See also **R. v. Osmond** [2011] N.J. No. 326 (Nfld.Prov.Ct.) also decided by Judge Gorman on the same issue).

[25] From the Nova Scotia Provincial Court, Judge Derrick in **R. v. Shea** [2010] N.S.J. No. 654 further considered Section 145(3) of the **Criminal Code** in relation to a fact situation where an accused was being observed by police in the Halifax area apparently as a person of interest. Those police who were watching the accused had stopped another vehicle with other people in it. The accused then advanced on the officers in a parking lot swearing and calling them rude names. The accused was acquitted of a charge of willful obstruction and further acquitted of the 145 charge. He was found not to have breached the condition of keeping the peace and being of good behaviour. Judge Derrick found that calling the police "fucking pigs", while offensive, did not amount to failing to "keep the peace and be of good behaviour". It should be noted that the incident occurred late at night in an empty parking lot. There was no violence by the accused exhibited. Judge Derrick reviewed some of the case law listed above and concluded her decision by saying "that offensive conduct like Mr. Shea's -- swearing aggressively while approaching police officers engaged in their duties -- could in certain circumstances tip into behaviour prohibited by the criminal law, but on the facts of this case it did not" (See also **R. v. Jefferson** (*Supra*) where Judge Batiot recognized the dual aspect of keeping the peace and being of good behaviour).

[26] What should also be remembered in relation to breaches of probation is that they are rooted in probation orders themselves. Courts must ask themselves in dealing with breaches such as we have had before me, "What was the original purpose of putting this person on probation?" In answer to that question, a major factor in the utilization of probation in sentencing is the rehabilitative nature of

such orders. As was stated in Sentencing Practical Approaches by TW Ferris Butterworths 2005:

> Fines and incarceration are obviously more punitively than rehabilitated fully oriented, although they seek to "educate", in some sense, through fear of deprivation of money and freedom. Probation can obviously have more of a rehabilitative component than either of them. Perhaps that is why some people argue that the prime purpose of probation is rehabilitation and, accordingly close, that any conditions that have a prime purpose of controlling the defendant's behaviour, or punishing him or her, are inappropriate or illegal.

CONCLUSION

[27] I find that the term "keep the peace and be of good behaviour" has two distinct components. To be of good behaviour is limited to noncompliance with legal obligations found within federal, provincial or municipal statutory and regulatory obligations. I note that not necessarily all infractions of statutory obligations will trigger a breach of good behaviour. Breaches related to keeping the peace concern behaviour that is violent and disturbing to the tranquility of the public.

[28] Here the accused engaged in public brawl that was of a clear violent action. It occurred in full public view causing obvious disturbance to those in the area. The accused failed in his obligation to keep the peace and in no way was he operating within the rehabilitative framework of his probation order. Accordingly, I find him guilty as charged.

Paul B. Scovil, JPC.