SUPREME COURT OF NOVA SCOTIA
Citation: *McIntosh v. Halifax Regional Municipality*, 2017 NSSC 326

Date: 20171115
Docket: Hfx. No. 462567
Registry: Halifax

Between:

Robyn Lorraine McIntosh

Appellant

v.

Halifax Regional Municipality

Respondent

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated December 19, 2017.

Judge: The Honourable Justice D. Timothy Gabriel

Heard: May 31, 2017

Counsel: Donald C. Murray, Q.C., for the Appellant
Jim Janson, for the Respondent

By the Court:

Introduction

[1] This is a summary conviction appeal of a decision of Angus A. MacIntyre, adjudicator and Justice of the Peace of the Provincial Court of Nova Scotia rendered on March 27, 2017. The appellant's driver's license had earlier been suspended pursuant to s. 230(1) of the *Motor Vehicle Act* after a conviction for driving without insurance. This occurred on June 8, 2015. Her license was not reinstated until April 20, 2016.

[2] In the meantime, on April 9, 2016, she was charged with the subject offence of driving a motor vehicle while her license was suspended, contrary to s. 287(2). She was convicted of this latter offence on March 27, 2017. She has appealed this latter conviction.

[3] The June 8, 2015 license suspension was effected by the operation of s. 205(1) of the *Motor Vehicle Act*, the relevant portions of which read as follows:

> 205 (1) The Registrar or, in his absence or incapacity, the Director of Highway Safety shall forthwith suspend the driver's license or privilege of obtaining a driver's license and owner's permit or permits of every person who has been convicted of or who has forfeited his bail after arrest on a charge of any of the following offences, namely:
>
> …
>
> (c) an offence against Section 230;
>
> [Emphasis added]

[4] There is no dispute before this court that the appellant drove while her license was suspended. The prohibited act was clearly established. Moreover, the learned adjudicator accepted that she had no actual knowledge of the suspension itself. The appeal relates to his handling of the defence of due diligence.

[5] On appeal, the appellant's central argument is that the adjudicator failed to consider the evidence respecting the due diligence defence – specifically, the fact that she did not receive notice of her suspension, and her overall arrangements for receiving her mail – against a background of reasonableness.

[6] In the Notice of Summary Conviction Appeal, these contentions are worded as such: (Record, Tab A, p. 2)

> 1. The justice of the peace failed to give effect to his factual finding that the appellant was not aware that her license had been suspended.
> 2. The justice of the peace failed to apply the appropriate burden of proof to the appellant in terms of creating a doubt about her guilt of the offence charged.
> 3. The justice of the peace interpreted the offence in s. 287(2) of the *Motor Vehicle Act* as an absolute liability offence rather than as a strict liability offence.

[7] First, I will review the adjudicator's decision itself, then I will have more to say as to what I consider the remaining issues (including the standard of review) to be.

The Decision

[8] The adjudicator commented at length upon the theme that it was Ms. McIntosh's responsibility to ensure that she received her mail. He considered the appellant's evidence that she was frequently out of town on employment related business, and that her mail would sometimes be delivered to her roommate (when she had one) or else to a business located in her building (Trial Transcript, Tab C Record, pp. 26 – 27).

[9] He noted that s. 205(1)of the *MVA* imposes suspension upon conviction under s. 230(1) by operation of law and reasoned:

> The other thing that's, that hasn't been brought up here, but there is the section, the section that's being invoked is because, being the suspension, was the result of a section of the **Motor Vehicle Act** that says if you're convicted under Section 230(1), then the Registrar shall suspend your license. So, again, the law says that. I haven't heard anybody say that, that ignorance of the law is a defence in this. And that section is there in the **Motor Vehicle Act** saying that's the case. (decision - transcript at p. 27)

[10] As to her lack of actual knowledge of the suspension:

> …there's two reasons why … why I think she could have become aware: One is as is if she knew the law. Obviously, she pleads ignorance of that, because she wasn't, didn't that anything evolved from the 230 suspension back in 2015. I don't know what inquires she made, etcetera. I know she went and arranged

> insurance, she changed her insurance for RBC over to her present provider. But she doesn't tell me what other inquires she made as to what repercussions there were in respect of that or how this, how this rolled out. That's one. And two is ought she to have received the letter from the Registry…, and I'd say yes. I mean, just because she's away, out of town…I think, as a responsible person, you have to make sure that your mail is being handled properly (decision – transcript at p. 28).
>
> [Emphasis added]

[11] The adjudicator continued (transcript, pp. 28 – 29):

> …I am satisfied that she was suspended when she was stopped by the police officer. I'm not satisfied that her testimony even…I do accept the truthfulness of it in this way, that she's telling me what the setup was, and I do accept that, to her knowledge, she wasn't aware. But ought she have been aware or…does it fall on the Registry of Motor Vehicles or…Canada Post or someone to make her aware?...I don't think that responsibility is there.
>
> I think the cases in respect to owners of motor vehicles receiving their mail and keeping their address current…would indicate that the responsibility is with the driver to ensure that they're up to date on their status and able to receive their mail.
>
> …I am satisfied the Crown has proven its case…
>
> [Emphasis added]

[12] Accordingly, the adjudicator concluded that he did "not believe that the evidence as provided by Ms. McIntosh gives her a defence to this particular charge…" (transcript at p. 29).

Positions of the Parties

[13] The appellant says the adjudicator failed to consider whether her lack of knowledge was her own fault. In effect, she argues that the adjudicator treated the offence as one of absolute, rather than strict liability denying her a due diligence defence (appellant's brief at paras. 11 – 14).

[14] The Crown, on the other hand, says that the adjudicator's reasons show that he was aware of due diligence and considered it. In particular, he "commented on the efforts of Ms. McIntosh to manage her mail", which he would not have done if he were treating the charge as an absolute liability offence. (Crown brief, paras. 17 and 23).

[15] The adjudicator (says the Crown) also discussed Ms. McIntosh's arrangements for receiving her mail and concluded that "as a reasonable person you have make sure that your mail is being handled properly" (Crown brief at para. 23). Frequent travel (the Crown continued) did not relieve her of this obligation nor did it impose any additional obligation on the registry or Canada Post (Crown brief, paras. 25 – 29).

[16] The appellant also says that it was an error to characterize her lack of knowledge of the suspension as an assertion of mistake of law. The Crown responds and says that the appellant's ignorance of the legal status of her license was relevant to the due diligence defence. The Crown says that the suspension was automatic and non-discretionary.

Issues

[17] The issues, restated, are as follows:

i. What is the appropriate standard of review in this case?

ii. Did the learned adjudicator commit an error of law by treating the offence with which the appellant was charged as one of absolute liability rather than strict liability, or by failing to apply an appropriate burden of proof to the appellant with respect to her due diligence defence?

iii. Were the findings of fact made by the learned adjudicator unreasonable or otherwise unsupportable on the evidence?

Law and Analysis

1. What is the appropriate standard of review of the learned adjudicator's decision?

Standard of Review

[18] In *R. v. Nickerson*, 1999 NSCA 168, Justice Cromwell described the standard to be applied by the Summary Conviction Appeal Court as follows:

> 6 The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent

> an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.
>
> [Emphasis added]

[19] Obviously, the standard of review for errors of law is correctness.

2. Did the learned adjudicator commit an error of law by treating the offence with which the appellant was charged as one of absolute rather than strict liability, or by failing to apply an appropriate burden of proof to the appellant with respect to her due diligence defence?

What are strict and absolute liability offences?

[20] In the well known case of *R. v. Sault Ste. Marie (City),* 85 D.L.R. (3d) 161, (SCC), (then) Chief Justice Dickson identified the distinction between strict and absolute liability offences. The subsequent case law has developed and considered these concepts further. We know, for example, that s. 287(2) of the *MVA* has been considered to be a strict liability offence (the parties have agreed as much). We also know that the appellant has admitted that the *actus reus* of the offence (the physical act of driving while her license was suspended) has been established.

[21] The offence under s. 287(2) of the *MVA* is one of strict liability. These type of offences were described in *Sault Ste. Marie (City), supra,* as a category of:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability…
>
> [Emphasis added]

[22] Whether the due diligence defence has been established by the accused is a question of fact: *R. v. Harris*, 1997 NSCA 203. Ignorance of the law cannot furnish a defence to an offence of strict liability or otherwise: *R. v. MacDougall* [1982] 2 SCR 605.

How has R. v. Sault Ste. Marie (City) been applied with respect to license suspensions under the MVA?

[23] In *R. v. Lowe*, [1991] 104 NSR 81, the accused's license was suspended due to a speeding conviction after an accumulation of demerit points. Notice of suspension was sent to the address on file with the Registry of Motor Vehicles, but was returned undelivered, as the accused had moved a year earlier. He was subsequently stopped for failing to wear a seatbelt, and he advised the police at that time that he believed his license had been suspended but he had not received notification. His evidence was that the officer inquired and informed him that his license had not been suspended but that he would receive a registered letter. He gave the officer his correct address. He continued to drive again while awaiting notification.

[24] Several months later, the respondent was stopped again and a computer search revealed the license suspension. He was acquitted at first instance and his acquittal was affirmed by the Summary Conviction Appeal Court judge. When the matter reached the Court of Appeal, Hallett J.A. held that the accused could not, in fact, make out a defence of due diligence in this context and allowed the Crown's appeal. He noted that the respondent had not notified the Registrar of his change of address as required by the *MVA*, and further:

> 14. To put it more succinctly, based on the cases to which Chief Justice Dickson referred, [in *Sault Ste. Marie*, supra] unlike an absolute liability offence, an accused may avoid conviction for a strict liability offence if he brings forward evidence to prove on a balance of probabilities that the violation was a result of no fault on his part.
>
> 15. The respondent testified at trial that he expected that his license would be suspended for six months after his third conviction for speeding in a two-year period. It is clear from a reading of the Act that a person who has accumulated sufficient points that he expects his license will be suspended nevertheless does not know when the suspension will take effect as the suspension requires an administrative act of the Registrar not sooner than thirty days after the conviction that increased the driver's point total to ten or more. Although there is no

> requirement in the Motor Vehicle Act that a driver whose license has been suspended be given notice of the suspension, as a matter of practice the Registrar sends out a registered letter to the driver at the address on file at the Registrar's office. This address will have been provided in all cases by the driver, either in his application for a license or his renewal or pursuant to Section 63(3) of the *Act*. In my opinion, although there is no requirement in the Act for the Registrar to give notice of a suspension, the principle of natural justice requires such a notice be given. Otherwise, the driver has no way of knowing when the suspension starts. The only thing a driver would know from a reading of the Act is that the suspension would not be made for at least thirty days after his conviction for the offence that put his point total up to ten.
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> [Emphasis added]

[25] In *R. v. Hill*, [1994] N.S.J. No. 201, the Crown appealed an acquittal under s. 287(2). The driver had agreed that loss of points underlying the suspension had been established, and that he had not made inquiries about the consequences. He said that he had not received the notice, which the evidence confirmed had been delivered to his parents' home, where he only lived sporadically. In allowing the summary conviction appeal and entering a conviction, Justice Nathanson said:

> 8 …I find that Peter Hill knew that he had been convicted of three offences, is deemed to know the law that his license would be suspended not less than 30 days after conviction for the third offence, knew that he was in danger of having his license suspended, knew that he did not make inquiries about the consequences of his convictions, and knew that he had done nothing to ascertain his status after the third conviction. When he was stopped, it was more than 30 days after he had accumulated 10 points. He assumed he had a license to drive. That is the equivalent of saying that he was ignorant of the law, which mandates suspension of a license after 30 days. Ignorance of the law cannot be the basis of a due diligence defence. Mr. Hill is deemed to know the law and has no right to assume that his license would not be suspended. In the light of his deemed knowledge of the law, it is not reasonable to mistakenly believe that his license would not be suspended.
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> 9 It is true that he knew that the Registrar of Motor Vehicles had his proper address. It is also true that he allowed his parents or sister-in-law to receive his mail at his parents' home And it is true that he returned to that home weekly or so from his girlfriend's residence, where he spent most of his time. Beyond that, he took no steps to avoid driving when he ought to have known that his license might be suspended. That was not due diligence.

> 10 I believe it was Hallett, J.A., who said that there is a duty imposed by common law for the Registrar of Motor Vehicles, in the absence of any provision in the *Motor Vehicle Act*, to notify a driver of suspension of a license. That means that there is a duty to send a notice. There is no duty imposed to ensure receipt of the notice by a driver whose license is being suspended; that is, natural justice does not require personal service. Notice by registered or certified mail, as is apparently the practice of the Registry of Motor Vehicles gives reasonable assurance of receipt. Here, it was received by a sister-in-law who is deemed to be the agent of the accused. The reasonable assurance was realized. The driver must bear the burden of his failure to receive the notice from the recipient when he was away from home for lengthy periods and only came home intermittently for brief periods. There is no evidence that he checked the mail on all the occasions that he intermittently returned home. He cannot be heard to say that he took all reasonable steps to receive notice of suspension and avoid being charged with the present offence.
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> [Emphasis added]

[26] In *R. v. Wile*, [2001] Carswell 448, the accused's driver's license was suspended due to an accumulation of points, but the letter of notification was returned undelivered (as was the case in *Lowe*, *supra).* The accused argued that he had not received the notice, and the evidence confirmed that it had been returned to the Registrar as undeliverable. There was no evidence of the circumstances that led the driver to not receive the letter. Justice Robertson indicated on the summary conviction appeal:

> 8 I find that, as what was set forth in *R. v. Hill, supra,* that there is a requirement of the driver to inform himself, respecting the status of his license. He was convicted of offences that have the effect of a accumulation of more than 10 points resulting an automatic suspension for a period of six months. In these circumstances, there is an onus on the person to inform himself of the status of his license. There is no evidence that the appellant made any inquiries or that he made any reasonable steps to avoid driving while suspended and therefore the fault is his that he is in violation of the *Motor Vehicle Act*. I find that he does not have the defence of due diligence open to him in these circumstances where he should have kept track of his convictions and determined the status of his driver's license. He failed to take these reasonable steps and accordingly he has not made out the defence of due diligence.
>
> [Emphasis added]

[27] Leave to appeal was denied in *R. v. Wile*, 2001 NSCA 183, on the basis that there had been no error of law committed by the SCAC Justice.

[28] In *R. v. Watters-Kimbrough,* 2003 NSSC 260, the accused maintained that she did not know that her license had been automatically suspended due to a conviction for driving without insurance. Her evidence was that she had kept her address current. She argued that the Registry of Motor Vehicles' four attempts to notify her were insufficient. MacDonald ACJ (as he then was, now CJNS) held that "…to establish a defence of due diligence the appellant should have at least made some effort to inquire as to the status of her license". He upheld her conviction for driving without insurance contrary to s. 287(2).

[29] As to the accused's attempt to distinguish *Wile, supra,* Justice MacDonald, noted at para. 10:

> 10 Counsel for the Appellant in argument before me, suggested that the Wile decision (and other cases) should be distinguished because in the case at Bar the suspension arose from a failure to have proper insurance which renders an automatic suspension. The facts in Wile reveal that while the suspension was automatic it arose from an accumulation of points. I cannot see any material distinction whether the suspension occurred through the accumulation of points or through a failure to have insurance. The fact of the matter is that where the suspension is automatic, the accused motorist must show that he or she made reasonable inquiries in order to substantiate the defence of due diligence. The Appellant failed to do so in the case at Bar.
>
> [Emphasis added]

[30] The accused also argued that the adjudicator (also Justice of the Peace, Angus MacIntyre, as in this case) had applied an absolute liability standard rather than one of strict liability. Justice MacDonald responded thus:

> 11 …Specifically, the Appellant's counsel referred to the…decision, first at page 31of the transcript where in passing Justice MacIntyre noted: And, I think that we are all deemed to know the law, and later at page 32: I think that she - that' she's deemed to know the law. These references, the Appellant argues, suggest that the Crown need only prove the physical act (*actus reus*). This, the Appellant contends, is the less onerous test for an absolute (as opposed to a strict) liability offence.
>
> 12 I disagree with the Appellant's submission in this regard. When one reviews the entire decision, it is clear to me that Justice MacIntyre was fully aware of the fact that this offence was a "strict" liability offence. He acknowledged this on at least two occasions as set out in the transcript. First at page 23 the learned Justice stated during argument: "Definitely it's a strict liability offence. I can tell you that. I'd agree with that". Further, at page 30 in the body of his decision the learned Justice noted: "But, on the whole, I guess what I'm saying is this, is that I think

> there was -- this is a strict liability offence, and I have no problem with that, Mr. Gilpin, and I would turn around and agree with you that it is and that it's open to a defence of due diligence..." The learned Justice was indeed aware of the fact that this was a strict liability offence, and he was prepared to consider the plea of due diligence. Simply put, the Appellant failed to establish this defence in the case at Bar.
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> [Emphasis added]

[31] *R. v. Alkhatib*, 2013 NSCA 91, was an application brought in Court of Appeal Chambers for an extension of time within which to file a notice of appeal from the dismissal of his summary conviction appeal for a conviction of driving while suspended. The adjudicator had rejected (at first instance) the driver's defence that he was not aware of the suspension. Justice Bryson dismissed the application, holding that the driver did not have a *bona fide* intention to appeal, did not provide a reasonable excuse for the delay and that there was no compelling or exceptional circumstances to support an extension. With respect to the latter, Justice Bryson observed at para. 15:

> 15 In my view, exceptional circumstances might exist in a case like this if the original Provincial Court decision, which the SCAC judge did not have an opportunity to consider on the merits, was apparently wrong in law. Mr. Alkhatib's defence at trial was that he was not aware that his licence had been suspended at the time that he was originally stopped and which resulted in his conviction. However, that argument was made by him to the adjudicator at trial and rejected. Mr. Alkhatib would know of the infractions that led to his suspension. He apparently did nothing to inform himself regarding the consequences of those infractions. There was a due diligence defence available to Mr. Alkhatib (*R. v. Wile*, 2001 NSCA 183), but on the record before this Court, there is no basis to suggest that the adjudicator was wrong to enter a conviction. Accordingly, that cannot constitute an exceptional circumstance that would warrant an extension of time in this case. Mr. Alkhatib suggests no other exceptional circumstance.
>
> [Emphasis added]

Why this case differs from most of the other authorities.

[32] The distinction between the case at bar and those that have been discussed in the previous authorities (except *Watters-Kimbrough, supra*) consists principally of the fact that under s. 205(1) the Registrar is obliged to "forthwith" suspend the license upon a conviction under s. 230(1) of the *MVA*.

[33] Recall that the suspension of Ms. McIntosh's license occurred as a result of her conviction under s. 230(1) on June 8, 2015. Based on the wording of s. 205(1), the suspension was to be "forthwith" rather than one which was to take place some time after the occurrence of the offence, or which required suspension after the driver had accumulated a sufficient number of demerit points.

[34] The law, as set forth in s. 205(1)(c) is unequivocal. The Registrar is to suspend the license "forthwith" when someone is convicted of driving without insurance. There is no provision requiring notice by the Registrar in order for it to take effect.

[35] That said, in *R. v. Prest,* 2011 NSSC 244, Justice Moir considered the defence of due diligence within the context of a s. 205(1) suspension. Like the present case, *Prest,* involved a suspension under s. 205 arising from an offence under s. 230 of the *MVA.* The evidence of the driver in *Prest* was that Crown counsel had told him at trial that the Crown would not seek a license suspension. The Court of Appeal in 2012 NSCA 45, reversed on the ground that instead of entering an acquittal on the basis of an officially induced error, the Summary Conviction Appeal Court judge should have ordered a new trial (*Prest, supra,* para. 29). However, Justice Moir's reasoning with respect to the substantive issues before him is nonetheless instructive.

[36] The question of whether s. 205 of the *MVA* (requiring *inter alia* that the Registrar suspend a license "forthwith" upon a conviction under s. 230) equated to a suspension "by operation of law", was considered. As Justice Moir noted:

> 55 The legislative scheme contains numerous provisions for suspensions. Mandatory suspensions involving the Registrar are a subset, albeit the largest subset. There is no central provision for mandatory suspensions and none are worded exactly the same. Therefore, the Legislature intended to treat these different kinds of mandatory suspension, differently…

[37] Justice Moir went on to consider the language of the suspension provisions of s. 278(1), which deals with mandatory suspensions as a result of, for example, certain *Criminal Code* infractions:

> 56 Section 278, which was at issue in *MacDougall*, provides for suspension in the strictest terms. Subsection 278(1) imposes an obligation on the Registrar arising when he receives a record of conviction for one of the listed offences. The obligation is without qualifications, "shall revoke effective the date of conviction".

> 57 Subsection 278(2) takes this a step further. The subsection additionally provides for suspension by operation of law "when a person is convicted of any of the crimes or offences mentioned in subsection (1)". Not content to only provide "the driver's licence is thereupon ... revoked", the Legislature added the words "and hereby", that is to leave not even the slightest doubt: "by this law it is revoked".
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> 58 The "thereupon and hereby revoked" is repeated in s. 278(3), which led to Justice Ritchie's comment at para. 15 of *MacDougall*: "It would be difficult to conceive of more clear or imperative language ...". The provision is similar to the British Columbia suspension provision at issue in Pontes. Both clearly suspend by operation of law.
>
> 59 None of the other mandatory suspension provisions use anything like the "thereupon and hereby revoked" device of s. 278(2) and (3).

[38] Unlike the situation with a s. 278 suspension, Moir J. reasoned that license suspension occurring under other sections such as s. 205 of the *MVA*, were:

> …triggered by an event that happens as a matter of fact, not law. What is more, the driver does not necessarily know of the fact…receipt by the Registrar of a certificate of judgment, receipt of a notice in writing of an accident, receipt of a request from the Director of Maintenance Enforcement, or the Registrar's tabulation of points. So, each seems to be subject to the comments made about the need for notice in *Lowe*.

[39] Justice Moir then dealt specifically with a s. 205 suspension at paras. 65 – 70:

> 65 Section 205 is unlike s. 278 because it contains no language suggesting that the Motor Vehicle Act does the suspending. Also, unlike s. 278 and like the other mandatory suspension provisions we discussed, s. 205 contains an escape from suspension. Further, the offences covered by s. 205 are less serious than those in s. 278. Ensuring financial responsibility appears to be the main purpose of s. 205, which compares with getting bad drivers off the road under s. 278.
>
> 66 Unlike the other mandatory suspension provisions except s. 278, this provision does not expressly rest the Registrar's obligation on the receipt of a document (or the tabulation of points). Taken literally, the conviction is the fact that triggers the Registrar's obligation.
>
> 67 Subsection 205(1) cannot be given such a literal interpretation. Express or not, the Registrar's obligation cannot arise until the Registrar is made aware of the conviction. In light of its context and purpose, s. 205(1) must be taken to mean

> that the Registrar is obligated to suspend when the Registrar is notified of the conviction, not when the conviction is entered.
>
> 68 As with s. 227, the Registrar is obligated to act with speed. Mr. Morrison referred me to authorities in which courts took "forthwith" to mean "immediately or without delay". The Oxford English Dictionary gives a similar statement of the word's sense. It is a nice, precise word.
>
> 69 The certificate introduced at trial shows that the Registrar does not, in fact, act "forthwith". And, the new evidence shows that he does more than to suspend. He offers reinstatement on proof of financial responsibility, which Mr. Prest had obtained, and the payment of a small administrative fee. These just highlight the factual nature of the s. 205 suspension.
>
> 70 Mr. Prest's suspension turned on two events. Someone had to report the conviction to the Registrar. And, the Registrar had to act as he is obligated to do. These are facts. The suspension did not occur by operation of law alone.
>
> [Emphasis added]

[40] As for the due diligence defence, Justice Moir nonetheless remarked at paras. 72 and 73:

> 72 It is a difficult defence to mount when the charge is driving while suspended. It is simply not available for a s. 278 conviction, unless the mistaken belief is that a conviction was not entered: MacDougall and the dissent in Pontes. A driver's failure to comply with obligations to support the notice system will undermine reasonable belief: Lowe.
>
> 73 Furthermore, on three occasions this court has recognized that reasonable belief may be undermined by a duty to inquire about one's licence after certain convictions, including driving without insurance. In *R. v. Hill*, [1994] N.S.J. No. 201 (S.C.), Justice Nathanson held that a driver convicted of point-accumulating offences had a duty to inquire after the status of his licence. Justice Robertson followed him in *R. v. Wile*, [2001] N.S.J. No. 316 (S.C.) affirmed [2001] N.S.J. No. 523 (C.A.). And, Associate Chief Justice MacDonald, as he was then, applied Wile to a suspension based on a driving without insurance conviction in *R. v. Watters-Kimbrough*, 2003 NSSC 260.
>
> [Emphasis added]

[41] As previously discussed, the Court of Appeal did not comment on that portion of Justice Moir's analysis reflected in paras. 69 and 70. In my respectful view, there is much force to the reasoning in *Prest, supra*.

[42] However, in the case at bar, it matters not whether that reasoning, or a plain reading of s. 205(1), which required a "forthwith suspension" of Ms. McIntosh's

license (when she was first conviction for driving without insurance), is adopted. The disposition of this appeal is the same either way. I will explain why.

[43] The wording of s. 205(1) apparently creates an obligation ("…shall forthwith suspend…") upon the Registrar to immediately suspend the drivers license of an individual like Ms. McIntosh upon a conviction for one of the offences listed in s. 205(1), such as s. 230 (driving without insurance). Given that s. 287(2) (driving without insurance) is a strict liability offence, by way of a defence she may assert a reasonable belief in a set of facts, which, if true, would render her actions innocent. (*R. v. City of Sault Ste. Marie, supra).*

[44] However, (and to repeat) it bears emphasis that the mistake must be one of fact, as opposed to one of law. In *R. v. Nurnber*, 1998 NSCA 181, the court was also dealing with a change of "driving while license suspended" contrary to s. 287(2) of the MVA. Justice Cromwell pointed out therein:

> With respect to the first issue, the appellant says that the defence of due diligence is available to this strict liability offence if the appellant reasonably believed in a mistaken set of facts which, if true, would render the act innocent. In my view, the decision of the Supreme Court of Canada in *R. v. MacDougall*, [1982] 2 S.C.R. 605 requires us to reject this argument. In that case, an automatic licence cancelation was reactivated upon the dismissal of Mr. MacDougall's appeal to the County Court. He was charged with driving while his license was canceled and defended on the basis that he believed he was entitled to drive. In addressing this issue, Ritchie, J., speaking for a unanimous Court which included Dickson, J., as he then was, said at page 612:
>
> ... I am unable to treat the respondent's mistake otherwise than as a mistake of law in relation to his right ... to drive after his appeal had been dismissed. This was a mistake of law which does not afford the respondent a defence...
>
> [Emphasis added]

[45] Justice Moir's reasoning in *Prest, supra,* yields the same result. Even if a "forthwith" suspension of the accused's license should not be given such a literal interpretation because it was dependant upon the Registrar's intervening receipt of notice of the appellant's conviction for driving without insurance, Ms. McIntosh was deemed to know the law and that a "forthwith" suspension of her license would be happening very, very quickly, even if not immediately.

[46] Therefore, the law (which Ms. McIntosh was deemed to know) was that her "forthwith suspension", would, at the very least, be prompt. Yet she did not establish that she had ever even inquired about it. This is absolutely antithetical to

either "reasonable belief in a mistaken set of facts" or due diligence. Her mistaken belief (on April 9, 2016 the day that she drove) that her license was not suspended (10 months after her conviction for driving without insurance) was simply not compatible (absent officially induced error) with a defence of due diligence in these circumstances.

The learned adjudicator did not apply an inappropriate burden of proof to the appellant

[47] Ms. McIntosh carried the onus of proof of due diligence on her part. Whether she had discharged this onus was for the learned adjudicator to determine. The appellant did not establish that she had inquired of the status of her license at all (as per *Watters-Kimbrough, Wile, Alkhatib* cases, *supra)* with the Registry of Motor Vehicles. Nor did she establish that the system that she had implemented (to deal with her mail during her absences from the country) was reasonable or otherwise compatible with her duty of due diligence.

[48] The adjudicator pointed to the complete absence of evidence of any inquiries made by the appellant in the aftermath of her conviction on June 8, 2015 under s. 230(1). This, on its own, was sufficient to fatally undermine the reasonableness of the appellant's asserted defence to the subsequent charge pursuant to s. 287(2).

[49] He also referred to the fact that the Registrar had sent out the Notice of Suspension to the appellant. Case law is clear that the Registrar bears no corresponding duty to ensure that she received it. Receipt of mail is one's own responsibility, a responsibility that is not diminished merely by frequent absences from the country. There was an evidentiary basis for the determinations that the adjudicator made in relation to this point. Having made these determinations, he correctly applied the effect of the decided case law in relation to them.

[50] This case law recognized that the appellant, having committed the *actus reus* (she drove while her licence was suspended) was required to prove on a balance of probabilities that "the violation was a result of no fault on [her] part (per Hallett, J.A., in *Lowe, supra,* at para. 14). The adjudicator was not satisfied that she had met this burden. I respectfully agree.

[51] In summary form, it was not reasonable for the appellant to be unaware of the suspension of her license (and her defence to the s. 287(2) charge fails) because:

i. section 205(1) of the *MVA* required the Registrar to "forthwith" suspend her license when she was convicted under s. 230 on June 8, 2015. She is deemed to be aware of this provision as a matter of law;

ii. in the face of her deemed knowledge of the "forthwith" suspension of her license, she provided no evidence of <u>any</u> efforts that she had made to even inquire about the status of her driver's license during the 10 months following her conviction for a serious *MVA* offence (driving without insurance); and

iii. on top of that, notice of suspension was actually sent to her, and her obligation to ensure that she receives her mail is not obviated by her frequent absences from the country.

[52] There is nothing in his stated reasons which enables me to conclude that the adjudicator applied the wrong standard of proof to the appellant's asserted defence.

3. Were the findings of fact made by the learned adjudicator unreasonable, or otherwise unsupportable on the evidence?

[53] I have, in effect, answered this question in the above portion of my reasons in relation to the second issue. The adjudicator's findings of fact were neither unreasonable or otherwise unsupported by the evidence.

Conclusion

[54] The appeal is dismissed.

Gabriel, J.

<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *MacIntosh v. Halifax (Regional Municipality)*, 2017 NSSC 326

Date: 20171115
Docket: Hfx. No. 462567

Registry: Halifax

Between:

Robyn Lorraine McIntosh

Appellant

v.

Halifax Regional Municipality

Respondent

ERRATUM

Judge: The Honourable Justice D. Timothy Gabriel

Heard: May 31, 2017

Counsel: Donald C. Murray, Q.C., for the Appellant
Jim Janson, for the Respondent

Erratum Date: December 19, 2017

Para. 35 reads: "…officially **re**duced error…" **should read:** "…officially **in**duced error…"

Throughout the entire decision change all "**MacIntosh**" to "**Mc**Intosh"