PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. MacBeth*, 2017 NSPC 46

Date: 2017-09-25
Docket: 3016981, 8004529, 3020488, 3020490, 8008485
Registry: Pictou

Between:

Her Majesty the Queen

v.

Gilbert Aaron MacBeth

SENTENCING DECISION

Judge:	The Honourable Judge Del W. Atwood
Heard:	25 September 2017 in Pictou, Nova Scotia
Charge:	Section 145, para. 253(1)(b) of the Criminal Code of Canada
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Stephen Robertson, Nova Scotia Legal Aid, for Gilbert Aaron MacBeth

By the Court:

[1] Over a short span of a little over two weeks, Gilbert Aaron MacBeth was stopped three times while driving with a prohibited blood-alcohol concentration in his body. Mr. MacBeth has pleaded guilty to three summary violations of para. 253(1)(b) of the *Criminal Code*. Mr. MacBeth's liberty is in jeopardy: he was convicted in 1987 and 1994 of alcohol-related driving crimes; prior to pleading, he was served by police with a notice of intention to seek greater penalty under s. 727 of the *Code*, which brings into effect mandatory-minimum jail sentences. In addition, Mr. MacBeth has pleaded guilty to two summary counts of breach of bail by consuming alcohol—one under sub-s. 145(5.1), the other under sub-s. 145(3).

[2] The prosecution seeks a total sentence of four to six months in prison for all counts. Defence counsel looks to have the court grant a curative discharge under sub-s. 255(5) of the *Code* for the para. 253(1)(b) counts; defence counsel did not make a recommendation in relation to the breaches.

[3] For the reasons that follow, I find Mr. MacBeth to have discharged the burden of proving that he is in need of curative treatment to address his consumption of alcohol; further, I find that his commitment to treatment is so unquestionably strong and his access to appropriate therapy sufficiently proximate

as to allow the court to conclude, in this exceptional case, that the granting of a curative discharge would not be contrary to the public interest. The court intends to impose fines for the breach charges.

Facts of the case

[4] Mr. MacBeth was pulled over by police three times. Each time, police collected forensic breath samples from him; each time, his measured blood-alcohol concentration (BAC) exceeded 80 milligrams of alcohol in 100 millilitres of blood. The dates and presumptive readings were:

- 15 July 2016 - 170 mg %
- 17 July 2016- 160 mg %;
- 31 July 2016 - 90 mg %.

[5] The evidence presented by the prosecution at the sentencing hearing in accordance with ss. 723-734 of the *Code* did not describe Mr. MacBeth as having driven erratically; he did not flee police; the first two times, he pulled over when commanded; on the third, he pulled into a driveway where police were already awaiting his return.

[6] The prosecution did not adduce evidence of traffic volumes, information which would allow the court to assess more precisely the risk Mr. MacBeth's conduct posed to the public; applying the principles set out in *R. v. Denny*, 2017 NSSC 127 at para. 28, I am not permitted draw inferences about this, regardless of the time of day when or location where a driving-related incident might have taken place.

[7] The first breach of bail arose the third time Mr. MacBeth got stopped for drinking and driving: he was on a form 11.1 undertaking for his first two para. 253(1)(b) charges; that undertaking included a condition not to drink. The second breach arose from police finding Mr. MacBeth under the influence of alcohol—but not behind the wheel of a car—after having been placed on a recognizance following his first breach.

General sentencing principles

[8] Sentencing must be regarded as a highly individualized process: *R. v. Ipeelee*, 2012 SCC 13 at para. 38.

[9] In *R. v. Lacasse*, 2015 SCC 64 at para. 12, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence. The magnitude of a sentence depends upon the seriousness of the

consequences of a crime and the moral blameworthiness of the individual offender. The Court recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of penal justice.

[10] In *Ipeelee*, *supra*, at para. 37, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation. Proportionality promotes justice for victims and seeks to ensure that the public will have confidence in the justice system.

[11] In determining a fit sentence, a sentencing court ought to consider any relevant aggravating or mitigating circumstances; that is prescribed by para. 718.2(a) of the *Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham*, 2013 SCC 15 at para 8; *R. v. Nasogaluak*, 2010 SCC 6 at para. 44.

[12] Assessing an offender's moral culpability is an extremely important function in determining any sentence. This is because a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, factors

which bear directly on moral blameworthiness; that fundamental principle is set out in s. 718.1 of the *Code*.

[13] In determining an appropriate sentence, the court is required to consider, pursuant to para. 718.2(b) of the *Code*, that a sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances. This is the principle of sentencing parity. Parity promotes the constitutional principle of equal justice, and allows rational decision makers who contemplate illegality to make intelligent risk assessments before they engage in law-breaking conduct.

[14] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances. These important principles of restraint are set out in paras. 718.2(d) and (e) of the *Code*.

[15] In *R. v. Gladue*, [1999] S.C.J. No. 19 at paras. 31-33 and 36, the Supreme Court of Canada stated that this statutory requirement—that sentencing courts consider all available sanctions other than imprisonment—was more than merely a codification of existing law; rather, the provision was to be seen as a remedy

whereby imprisonment was to be a sanction of last resort. It carries into effect the need to reduce Canada's over reliance on incarceration: *R. v. Proulx,* 2000 SCC 5 at paras. 16-17; *Gladue*, supra, at para. 57; *R. v. Dockerill,* NSSC 56 at paras. 53-55.

[16] Over reliance on incarceration may have the effect of fracturing families, jeopardising employment, interrupting therapeutic medical or mental-health treatment, and may lead to the long-term stigmatization and isolation of those who have been imprisoned. Its deleterious and enduring social cost may outweigh by far any short-term public-protection benefit it might be said to achieve.

[17] In sum, individualization and parity of sentences must be reconciled for a sentence to be proportionate; furthermore, the determination of a just and appropriate sentence is a highly individualized exercise that must go beyond a pure mathematical calculation. It involves a variety of factors that are difficult to define with precision: *R. v. Lacasse, supra*, at paras. 53-58.

Sentencing for driving with prohibited BAC

[18] The problem in this case is that sentencing Mr. MacBeth brings, yes, a mathematical calculation into play. This is because, as Mr. MacBeth was convicted previously of an over-.08 offence and a refusal offence—even though

the former was over twenty years ago, and the latter, almost thirty—he is subject to mandatory-minimum terms of imprisonment. Subsection 255(1) of the *Code* states:

> 255 (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
>
> (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
>
> . . . .
>
> (iii) for each subsequent offence, to imprisonment for not less than 120 days;
>
> (b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and
>
> (c) if the offence is punishable on summary conviction, to imprisonment for a term of not more than 18 months.

[19] Mr. MacBeth's prior record was admitted by defence counsel. He was sentenced on 27 April 1994 to a fine and a period of driving prohibition for an offence under what was then para. 253(b) of the *Code*. Mr. MacBeth was sentenced on 16 November 1987 to a fine for what was then an offence under sub-s. 238(5) of the *Code*. The prosecution identified this at the sentencing hearing as a "drinking-and-driving offence, essentially a 253(b) offence". This is not quite correct, but it's very easy to get tripped up on old section numbers from previous

revisions. In this case, the error is of no consequence. Sub-s. 238(5) of the *Code* as of the date of that earlier offence was the offence of refusal of a breath or bodily-substance demand under R.S.C. 1970, c. C-34. Refusal falls now under sub-s. 254(5) of the *Code*. In virtue of sub-s. 255(4) of the *Code*, a refusal conviction operates as a prior offence for the purposes of engaging the mandatory-minimum penalties prescribed by sub-paras. 255(1)(a)(i)-(iii) of the *Code*.

[20] While an arguable case might be made that the convoluted wording of para. 255(4)(c) of the *Code* evinces a Parliamentary intent to sunset prior convictions predating the in-force date of the 1985 revision of the *Code*, that argument was not advanced here, and defence counsel admitted the applicability of the greater-penalty provisions of sub-para. 255(1)(a)(iii) to Mr. MacBeth.

[21] Accordingly, Mr. MacBeth faces mandatory minimum sentences of 120 days for each of his para. 253(1)(b) charges.

[22] With this in mind, I would observe that the position taken by the prosecution—a total sentence of four to six months in prison for three counts of para. 253(1)(b) and two counts of s. 145—is very fair, and takes into account principles of totality and concurrency.

[23] Sub-section 727(1) of the *Code* states:

> 727 (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.

[24] Defence counsel admits receiving timely notice.

[25] Sub-section 255(5) offers an alternative to the mandatory jail sentence facing Mr. MacBeth:

> (5) 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.

[26] Mr. MacBeth has applied for a curative discharge.

[27] The prosecution has admitted the assertion by defence counsel that Mr. MacBeth is in need of curative treatment in relation to the consumption of alcohol. This admission means that the need-for-treatment criterion needs no further proof, as formal admissions are to be treated by the court as conclusive of the facts that have been acknowledged as true: *R. v. Castellani*, [1970] S.C.R. 310 at 317; *R. v. Curry* (1980), 38 N.S.R. (2d) 575 at para. 26 (N.S.C.A.); *R. v. Falconer*, 2016 NSCA 22 at para. 45.

[28] The court must determine next whether the granting of a curative discharge in this case would be contrary to the public interest. The burden of proof is upon Mr. MacBeth; the standard of proof is a balance of probabilities: *R. v. Beaulieu* (1980), 53 C.C.C. (2d) 342 at 344 (N.W.T.S.C.), followed by *R. v. Ashberry* (1989), 47 C.C.C. (3d) 138 (Ont. C.A.) at page 158, leave to appeal to S.C.C. refused, [1989] S.C.C.A. No. 136; *R. v. MacAulay*, 2012 NSPC 135 at para. 20.

[29] I must not confuse this with requiring proof that a discharge be in the public interest: *R. v. Sellars*, 2013 NSCA 129 at paras. 27-28. Requiring Mr. MacBeth to prove that a discharge would be in the public interest would place too high a burden upon him: *Sellars*, at para. 29.

[30] A decision to grant a discharge under sub-s. 255(5) must be based on medical or other evidence. This requires typically evidence from treating professionals regarding the availability of appropriate therapy and the likelihood of its effectiveness in preventing the discharge-applicant's relapse into drinking-and-driving re-offending: *R. v. MacNeil*, 2013 NSPC 125 at para. 46; *R. v. Ahenakew*, 2005 SKCA 93 at para. 47; *Beaulieu, supra,* at 345.

[31] It has been held consistently that a curative discharge ought to be regarded by sentencing courts as an exceptional sentencing option: *Ashberry, supra*, at 160.

[32] *Ashberry* has been regarded as the gold standard in setting the criteria for assessing curative-discharge applications. Those criteria were relied upon by the Nova Scotia Court of Appeal in *R. v. Lohnes*, 2007 NSCA 24:

> 37 In *Ashberry*, Justice Griffiths discussed the test to be applied in determining whether a conditional discharge with a treatment order was not contrary to the public interest commencing at page 161 (C.C.C.):
>
> > Among the considerations relevant to the question 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:
> >
> > (a) The circumstances of the offence and whether the offender was involved in an accident which caused death for serious bodily injury. The need to express social repudiation of an offence where the victim was killed or suffered serious bodily injury will generally militate against the discharge of the offender. Parliament has seen fit to expressly provide for more onerous sentences in those cases (s-ss. 255(2) and (3)).
> >
> > (b) The motivation of the offender as an indication of probable benefit from treatment. One can expect that a person facing a sentence of imprisonment may quite readily agree that he or she will take treatment for alcoholism and give up alcohol. The important question is the bona fides of the offender in giving such an undertaking. The efforts of the offender to obtain treatment before his or her conviction 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.
> >
> > (c) The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the program.
> >
> > (d) A probability that the course of treatment will be successful and that the offender will never again drive a motor vehicle while under the influence of alcohol.
> >
> > (e) The criminal record and, in particular, the alcohol-related driving record of the offender. Normally, where the offender has a previous record of alcohol-related driving offences there is a high risk of the offence being repeated and a greater need for a sentence emphasizing specific and general deterrence. The offender with a previous bad driving record will obviously have a higher burden of satisfying the court that his or her case

> is exceptional and that a discharge with curative treatment is appropriate and in the public interest.

[33] In *Lohnes*, the Court found that the sentencing judge had not erred in refusing a conditional discharge in a case of an offender with an appalling drinking-and-driving record far more serious, recent and continuing than Mr. MacBeth's.

The effect of alcohol or drug impaired driving upon public safety

[34] Courts have taken judicial notice consistently of the danger inherent in substance-impaired driving.

[35] In *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 16, Cory J. stated:

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

[36] *Lohnes, supra*, reiterated the peril over a decade later:

> 46 As stated by Justice Bateman in *R. v. Cromwell*, [2005] N.S.J. No. 428, 2005 NSCA 137, in most cases of drunk driving denunciation and general deterrence are the prominent objectives of sentencing. Although no one was injured as a result of the matters under appeal, the following passage from Cromwell bears repeating:
>
> > [28] Drunk driving is an offence demanding strong sanctions. In *R. v. MacLeod* (2004), 222 N.S.R. (2d) 56; [2004] N.S.J. No. 58 (Q.L.)(C.A.), the Crown appealed an 18 month conditional sentence for impaired driving causing bodily harm and leaving the scene of an accident. Cromwell J.A., writing for the Court, in allowing the appeal and

substituting a sentence of 18 months imprisonment for the driving offence and six months consecutive for leaving the scene, said:

[22] This and other courts have repeatedly said that denunciation and general deterrence are extremely weighty considerations in sentencing drunk driving and related offences: see for example, [citations omitted] I accept the point that generally incarceration should be used with restraint where the justification is general deterrence. However, I also accept the view of the Ontario Court of Appeal in *Biancofiore*, [1997] O.J. No. 3865 shared by the Supreme Court of Canada in *Proulx*, that offences such as this are more likely to be influenced by a general deterrent effect. As was said in *Biancofiore*, "... [T]he sentence for these crimes must bring home to other like-minded persons that drinking and driving offences will not be tolerated." (at para. 24) I would add that this is all the more important where, as here, the respondent's drunk driving caused serious physical injury to an innocent citizen and where, by fleeing the scene of the "accident," the offender has shown disregard for the victim's condition and disrespect for the law.

[29] The sentence must provide a clear message to the public that drinking and driving is a crime, not simply an error in judgment. Those who would maim or kill by driving their vehicles while impaired are as harmful to public safety as are other violent offenders. The proliferation of this crime and the risk that it will be seen by society as less socially abhorrent than other crimes heightens the need for a sentence in which both general deterrence and denunciation are prominent features. Referring again to *Biancofiore*, *supra*, per Rosenberg J.A.:

[26] The drinking and driving offences occupy a unique position in the criminal law. Unlike most other criminal offences, such as crimes of violence or crimes against property, the stigma attached to the drinking and driving offences is often not matched by the objective gravity of these crimes ...

[27] ... Section 718 directs that "the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society." As Ms. Gallin pointed out, it is too easy for otherwise law-abiding people to view what happened in this case as an "accident," an unfortunate consequence of an error in judgment, rather than the commission of a criminal offence. Sentencing courts should be careful to ensure that they do not bolster that view of serious drinking and driving offences.

[28] The pressing need to ensure that the drinking and driving offences not be destigmatized might not be met by a conditional sentence in this case. ...

> [30] Denunciation as a component of sentencing is intended to communicate society's collective condemnation of the offender's conduct (*R. v. M.(C.A.)*, [1996] 1 S.C.R. 500; [1996] S.C.J. No. 28 (Q.L.) (S.C.C.) per Lamer C.J.C. at para 81).

[37] Legal literature has framed this as an enduring problem. As summarised in R. Solomon, S. Pitel, B. Tinholt & R. Wulkan, "Predicting the Impact of Random Breath Testing on the Social Costs of Crashes, Police Resources, and Driver Inconvenience in Canada" (2011), C.L.Q. 438 at 438-9:

> Impairment-related crashes are the leading criminal cause of death in Canada, claiming almost twice as many lives per year as all categories of homicide combined. While impaired driving deaths fell sharply from the early 1980s until the late 1990s, little progress has been made in the interim. In fact, the number of impairment-related crash deaths and injuries in 2008, the latest year for which there are national data, are roughly comparable to the 2000 levels. Thus, despite the current sobriety checkpoint campaigns, countless awareness campaigns, various server-training programs, alternate transportation policies, progressive provincial and territorial legislation, and numerous *Criminal Code* amendments, impaired driving continues to be a serious problem in Canada.

[38] Public statistics bear this out, as impaired driving remains one of the leading criminal causes of death in Canada; in fact, Nova Scotia has the highest rate of impaired-driving infractions of all the Atlantic provinces: Samuel Perreault, *Juristat: Impaired Driving in Canada*, 2015 85-002-X (Ottawa: Statistics Canada, 2016) at 4-7.

[39] In *R. v. McVeigh*, (1985), 22 C.C.C. (3d) 145 at 150 (Ont.C.A.), MacKinnon A.C.J.O. gave voice to what were surely the concerns of many, particularly sentencing courts:

> In my view, the sentences for the so-called lesser offences in this field should be increased. The variations in the penalties imposed for drinking and driving are great and increasing sentences for offences at the "lower end" would emphasize that it is the conduct of the accused, not just the consequences, that is the criminality punished. If such an approach acts as a general deterrent then the possibilities of serious and tragic results from such driving are reduced. No one takes to the road after drinking with the thought that someone may be killed as a result of his drinking. The sentences should be such as to make it very much less attractive for the drinker to get behind the wheel of a car after drinking. The public should not have to wait until members of the public are killed before the courts' repudiation of the conduct that led to the killing is made clear. *It is trite to say that every drinking driver is a potential killer.*
>
> Members of the public when they exercise their lawful right to use the highways of this province should not live in the fear that they may meet with a driver whose faculties are impaired by alcohol. It is true that many of those convicted of these crimes have never been convicted of other crimes and have good work and family records. It can be said on behalf of all such people that a light sentence would be in their best interests and be the most effective form of rehabilitation. However, it is obvious that such an approach has not gone any length towards solving the problem. In my opinion, these are the very ones who could be deterred by the prospect of a substantial sentence for drinking and driving if caught. General deterrence in these cases should be the predominant concern, and such deterrence is not realized by over-emphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving. [Emphasis added]

[40] *McVeigh* continues to be followed widely. As recently as *Lacasse, supra*, at para. 73, the Supreme Court of Canada stated:

> [73] While it is true that the objectives of deterrence and denunciation apply in most cases, they are particularly relevant to offences that might be committed by ordinarily law-abiding people. It is such people, more than chronic offenders, who

> will be sensitive to harsh sentences. Impaired driving offences are an obvious example of this type of offence, as this Court noted in *Proulx*:
>
> > . . . dangerous driving and impaired driving may be offences for which harsh sentences plausibly provide general deterrence. These crimes are often committed by otherwise law-abiding persons, with good employment records and families. Arguably, such persons are the ones most likely to be deterred by the threat of severe penalties: see *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.), at p. 150; *R. v. Biancofiore* (1997), 119 C.C.C. (3d) 344 (Ont. C.A.), at paras. 18-24; *R. v. Blakeley* (1998), 40 O.R. (3d) 541 (C.A.), at pp. 542-43. [para. 129]

[41] But what does it mean to say that a drinking driver is a potential killer? If it was already trite to declare it so in 1985, should the effect of that characterisation not be re-examined and re-assessed thirty years later?

[42] If a substance-impaired person chooses to walk from Point A to Point B, that person might annoy many, but is likely to endanger none. However, make the pedestrian a motorist, and the risks skyrocket—not because of any alteration in mood, motivation or malevolence—but because of the fact that putting an impaired person in command of a moving piece of heavy machinery projects risks upon anyone or anything in that person's path.

[43] Kinetic energy is the energy of an object in motion; the heavier the object or the faster its velocity, the greater the energy. Transferred to another object, or, more pertinently, to a human body in the event of an inelastic collision, kinetic energy can be destructive and lethal.

[44] The transformative event, then—the thing that releases potentially deadly forces upon undefended and unsuspecting members of the public—is the act of the impaired person getting behind the wheel of a car.

[45] However, seen in this way, lots of motorists—even the unimpaired—might be regarded as potential killers. Courts deal with examples of this regularly: the driver who runs a light; who turns on a red without stopping (something that will be observed scores of times per hour at the corner of Provost and George in New Glasgow); who drives while sleep deprived; who juggles the cell phone, or the briefcase, or the drive-thru coffee; who drives consumed with worries; who burns past construction sites or emergency personnel at work.

[46] Also implicated are the misguided Good-Samaritan motorists who will gesture for pedestrians or other drivers to go against signals and signage at multi-lane intersections, forgetting that other vehicles are advancing on green.

[47] Although it has no bearing on this case, it is undoubtedly of interest to those involved in setting highway-traffic-related public policy that the Province of Ontario records almost as many roadway fatalities from distracted driving as from impaired driving: Road Safety Research Office, *Preliminary 2016 Ontario Road Safety Annual Report Selected Statistics*, online at:

http://www.mto.gov.on.ca/english/publications/pdfs/preliminary-2016-orsar-selected-statistics.pdf.

[48] And then there are the ones who speed.

[49] In *R. v. Kelly*, 2017 NSPC 45—a sentencing hearing in a dangerous-driving case—I imposed a jointly recommended fine upon a completely sober young motorist who rocketed through the serpentine section of the 104 near Marshy Hope at velocities that would get a wide-bodied aircraft airborne as he wove dangerously around other cars and into opposing traffic. This driver endangered life and limb on a scale such that Mr. MacBeth's wrongdoing pales in comparison.

[50] None of this is meant to minimise the perils of drinking and driving. Rather, the point I seek to make is that traffic safety is jeopardised by many hazards; reducing those hazards is a complex problem, not amenable easily to trite sloganism. Furthermore, the all-encompassing death-angel description offered in *McVeigh* does not seem to take into account the highly individualized exercise involved in imposing proportionate sentences. It seems that there is a superadded moral stigma—a notional scarlet letter "A" for alcoholism—that applies to drinking drivers that does not get assigned to unimpaired motorists whose driving might potentially be as lethal to the public; one is hard pressed to identify a

sentencing principle that would justify this. Ironically, it might be suggested that the drinking driver's risk is the more manageable one. Consider: In dealing with the drinking-prone driver who has made judgment-impaired and dangerous choices, it would seem that one immediately effective corrective measure would be removing or limiting access to the source of impairment through treatment and supervision. But if trying to manage a sober, rational and informed decision maker who chooses to drive dangerously, there is no external agent that can be taken away readily.

Personal circumstances of Mr. MacBeth

[51] As described in the presentence report prepared 14 December 2016, Mr. MacBeth endured a traumatic childhood; he has been diagnosed with PTSD and bipolar disorder. He began abusing alcohol at age 12 and felt he had become an alcoholic by age 14.

[52] Mr. MacBeth has recognized consistently the need for treatment of his alcohol dependency. He has been through detox over thirty-four times in his life.

[53] There have been very recent optimistic developments. The probation officer who prepared the 21 August 2017 PSR update received confirmation from Mr. Tom Blanchard, executive director at the Talbot House treatment centre, that Mr.

MacBeth was discharged from the residential-treatment program there on 17 February 2017. Mr. Blanchard described Mr. MacBeth as having made progress and showing determination. Talbot House put in place a follow-up plan for Mr. MacBeth that includes 12 step-meetings and sessions at the Pictou County Addiction Services office. Mr. Blanchard stated that Mr. MacBeth has been invited back to Talbot House to share his experiences with others in treatment.

[54] At the sentencing hearing, I heard from Tammy Lynn Dawn Boyce Kontuk, M.Sc., a licensed clinical psychologist; Ms. Kontuk was called by the defence, and was qualified—with the admission of the prosecution—to give opinion evidence in the field of addiction treatment and counselling, as well as in the field of rehabilitation in relation to alcohol addiction and drug addiction. Much of Ms. Kontuk's evidence was based on information told her by Mr. MacBeth, therapists who had dealt previously with Mr. MacBeth, and other collateral sources. I received this evidence in accordance with the hearsay exception authorised in sub-s. 723(5) of the *Code*. Further, Ms. Kontuk gathered and recorded Mr. MacBeth's history and progress in a manner quite customary for those engaged in the healing professions; consequently, I considered it reliable and trustworthy: Ontario, *Report of the Commission of Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ontario Ministry of the Attorney General, 2008) at 488.

[55] Ms. Kontuk began treating Mr. MacBeth in 2014 for alcohol addiction with a history of persistent traumatic childhood experience. Ms. Kontuk described in direct examination the frequency of her treatment of Mr. MacBeth:

> A. Ah, so I started to see Mr. MacBeth for assessment. The first session was July 2014, and then … 2014 … so, Mr. MacBeth came regularly during 2014, a couple of missed appointments, but that's certainly not unusual. And then there was a period of time … an extensive period of time in 2015 that Mr. MacBeth also came. And then that's all this record shows. And then Mr. MacBeth presented for treatment again to me in 2016. So, yes, he's been coming off and on since 2014 with …
>
> Q. Okay. And how about since this year, 2017? How was he for attendance?
>
> A. He has been coming regularly since February of 2017 when he was released … graduated from his recovery program from Talbot House. So, he's been coming regularly to see me since February of 2017.

[56] Ms. Kontuk found it remarkable that Mr. MacBeth—unlike those who might downplay the impact of their substance-abusive behaviour on others—accepted responsibility for his actions fully—and then some:

> Q. Okay. A lot of patients will deny the seriousness of their issues. What can you say about that with Aaron?
>
> A. If anything, Aaron exaggerates the seriousness and exaggerates his sense of responsibility. He certainly does not deny he is … he overtakes responsibility for his … for his shortcomings, and when he presented the first time, there was no court involvement. It was only to get better.
>
> Q. Okay. Some patients will minimize 'well, okay, maybe, but I can handle it'. What can you say about minimization as it relates to Aaron?
>
> A. He never minimizes. No, he always takes full responsibility. He does not minimize.

[57] Ms. Kontuk described Mr. MacBeth as a self-starter:

A. He's absolutely willing to accept. In fact, he exceeds my expectation in taking control of his own treatment and going forth into the community to both seek supports and to attain access to healthy outlets such as gym memberships and A.A. meetings. He does a lot of self-directed work.

[58] Ms. Kontuk described Mr. MacBeth's triggers:

Q. What is it that drives him to drink?

A. Hopelessness, shame and guilt.

Q. And what's the origin of the feeling of shame or the feeling of guilt.

A. Feelings of shame and guilt are often associated with folks who have undergone a history of maladaptive childhood experiences. When an experience in the present day activates a belief system that results in a feeling of shame of guilt, it's not unusual for feelings that have been stored for a long time since childhood to become overwhelming. When children undergo states of abuse, they do not learn to regulate their own emotional states, and those same emotional states can be activated as an adult through adverse life experiences.

[59] Ms. Kontuk elaborated upon family-related sources of stress faced by Mr. MacBeth:

Q. Okay. I'm going to ask you about another source of potential stress for Aaron. You understand that he's a single parent raising his teenage son, X?

A. Mmhmm. Absolutely. So, when he gets in … when X gets into trouble, Aaron becomes very dysregulated, or, at least, has in the past. We've been working on that.

Q. Okay. Alright, so has he told you that X has had his troubles with the law, as well as troubles in school?

A. That's right.

Q. Okay. And do you see any connection between those events and Mr. Aaron MacBeth resorting to alcohol if …

A. Absolutely, yes. Ruminating on shame and guilt regarding his parenting to X is one of his biggest triggers, if not, the biggest trigger.

[60] Ms. Kontuk believed that it was this one, specific pressure point that led to Mr. MacBeth's collapse in July and August 2016:

> Q. Okay. Ms. Kontuk, the reason Aaron's here now is because of three breathalyzers in the space of about two and a half weeks over the summer of 2016, specifically, July of 2016. What do you recall, and if you need to refer to your progress notes for that period of time, please do so. What do you recall was going on in Aaron's life around that time that may be exceptional, or, maybe not? I'm asking you from your … from your notes in counselling Aaron, what was going on in his life at that … that time?
>
> A. Well, in talking with Aaron …
>
> Q. Yes.
>
> A. … he indicated that X was getting into a quite a bit of trouble and the police were coming to his door quite regularly last summer. And, I have indicated in my notes that he feels quite helpless and unable to deal with X's behaviour which led him to feel like a failure, as a parent, which led to feelings of hopelessness.

[61] Later, Ms. Kontuk described the therapeutic method she has applied in treating Mr. MacBeth:

> A. Since 2014, we've been using a type of cognitive behavioural therapy called the 'community reinforcement approach', which is an evidence-based therapy for the treatment of addictive disorders. Since his analysis often indicated that internal emotional states, triggered by life events, were often the triggers that precipitated use, we shifted our focus recently to the treatment of his underlying complex relational post-traumatic stress disorder.

[62] Ms. Kontuk drilled down into the nuts and bolts of her treatment of Ms. MacBeth:

> Before July, '16, we focussed primarily addiction treatment has been primarily focussed on behavioural patterns. So, identifying your triggers, and then avoiding external triggers. So, your people, places, things, situations that when you're in

> them remind you of drinking, so you focus … focus on avoiding those situations. And then our internal triggers, that's where it gets a bit trickier with treatment. That's where we have to go into deeper psychotherapy mode to help with internal triggers. So, that's helping people to navigate negative emotional states that are overwhelming. There are different therapeutic modalities depending on the emotional trigger that is present. Then, we also help people to identify the positives that they're getting out of their use so that we can learn to redirect those needs to more adaptive ways of coping. And then we also have people identify their own consequences for use, and they provide motivation to … they speak to the motivation of the person to keep working. So, before July, '16, we primarily focussed on behaviour, and we were focussing on rumination as a behaviour. So, for example, we were focussing on where do you ruminate; what part of the house; what tend … what do you tend to be doing when you start this negative spiral of thinking that leads to these feelings, and then, let's work on interrupting that pattern. So, treatment focussed on interrupting rumination. After July, '16, in … over the past year, I've received some … more extensive training myself on the treatment of trauma, and, especially, the treatment of complex trauma in just January and March of 2017. So, we've been focussing our efforts since February on the treatment of the feelings of shame and guilt and processing those childhood experiences with the theory being that when the childhood experiences are processed psychologically using these methods, you can remember past events without them derailing your thinking, and you can maintain behavioural control because of the emotional charge of those events is no longer present.

[63] Ms. Kontuk observed that this therapy seemed to help Mr. MacBeth, as he was able to overcome a crisis involving his son which occurred in April 2017 without relapsing into alcohol abuse.

[64] Ms. Kontuk described the only-recent availability of therapy she felt was indicated in a case such as Mr. MacBeth's:

> Q. Alright, and if Aaron is successful this afternoon, what would your going-forward treatment plan be for Aaron for both of these internal triggers. X … his more generalized sense of failure as a parent, and the third one being the memory of childhood trauma in the past. What would … what do you plan to do going forward for Aaron as your patient?

A. So, I will continue in the safety and stabilization phase. We're probably in about the first third of that work. And on a go-forward basis, when I felt that Aaron had achieved an adequate level of being able to tolerate emotion, because that's what safety and stabilization is about, being able to tolerate the physical sensation and the emotional sensations of those strong emotions without reverting to behaviour, when I felt that that was achieved, I would move into the second phase of work which would be to actively process Aaron's trauma memories. So, that would involve eliciting history from birth to now; categorizing his memories into generic categories that we use – physical abuse, sexual abuse, emotional abuse, abandonment, humiliation. For example … I'm just giving some examples. And then we would take the earliest of those memories and process them using a technique called 'EMDR', 'eye movement desensitization and reprocessing therapy', which is an evidence-based therapy for the type of trauma that Aaron has, which I recently have completed my training in in March of 2017.

. . . .

So, when we treat trauma, this has just been a recent … there's just been some recent training of therapists in the Nova Scotia Health Authority in how to treat childhood trauma. Up until now, there hasn't been a lot of treatment resources. We've been mostly using cognitive behavioural therapy which is not … does not have an evidence base for the type of depression and complex trauma that Aaron has. Aaron has something called 'persistent depression disorder'. It used to be known as 'dysthymia', and the approaches that we have had at our disposal 'til this point, about the past year, or so, have not equipped us to treat the type of depression that Aaron has in an evidence-based way. So, we haven't had the tools. So, I've recently gone to receive extra training in complex trauma, which is the type of childhood trauma that Aaron has, which is different from, say, an event-related trauma that someone would have if they've had a car accident or one assault. That's called a single-event trauma.

Q. Yes.

A. So, Aaron's trauma is a bit different. It's chronic over a long period of time. So, that type of treatment is in three phases. The first phase is stabilization. And that phase can take as long as it needs to, but it's often … often stabilization takes anywhere from three to four months in simpler cases to up to a year on more complex cases, and that is where people learn to tolerate the intense emotions that will be required for their trauma processing work. The second phase of treatment is where specific memories are elicited and processed using specific protocol techniques. And the third phase is a reintegration in to quote-unquote "normal" living, where the meaning of their trauma has changed, and has given them a sense of peace so that they cannot only survive but thrive and grow.

Q. And this is the treatment and strategies that you're trying to implement with Aaron?

A. Yes. We're still in …

Q. … as he deals with his … his past childhood memories?

A. We're still in the safety and stabilization phase.

Q. Yes.

A. And Aaron is showing much progress. He's been able to stabilize himself and achieve months of sobriety.

[65] Ms. Kontuk elaborated on complex-trauma training and its recent availability in this area:

> A. Okay, up until now, I've said to Aaron it's like you've had diabetes and you've gone to the heart clinic. And, so just recently, I was … I was the recipient, and I'm the only one in my clinic that has been trained in the EMDR approach, which is an evidence-based treatment for the type of trauma and depression that Aaron has. So, before January of 2017, that was not available to him. So, even though he has been seeking treatment, mental health treatment tends to be the luck of the draw, who you get for your therapist and what their particular experience is. So, up until January, he did not have access to the type of treatment that he needed. Going forward, and, of course, I cannot predict the future, but with my opinion being based on the evidence that I've seen so far, the biggest barrier to folks receiving good treatment is often secondary gain, that they gain … there are gains to be had by staying ill, lack of motivation, blaming on others, not being able to take personal responsibility. Aaron doesn't show any of those things. He has engaged in treatment. He has gone above and beyond the homework that I've given him to access what is at his disposal in the community in terms of keeping him sober. He has actively put the skills that I've taught him into place and successfully navigated several situations which could have resulted in quite a relapse. So, I've seen evidence of behavioural change in Aaron, as well as engaged motivation to both arrive and stay at treatment, and also to complete the tasks and the learning that I've set out for him.

[66] Ms. Kontuk was candid and transparent about Mr. MacBeth's recent relapse history:

> Q. Okay. Now, Ms. Kontuk, the issue of relapses. I'll ask you, has he … in the time that you've been treating him, and let's maybe focus specifically since his criminal difficulties in July, what can you tell the court about if … have they

happened? Has he reported any to you and maybe provide the court with a little more information on that subject, the subject of relapses?

A. Okay. Since his court difficulties in July, he came to me in October with a relapse which we processed and … let me see, that was … I'm sorry, in September, he had a relapse.

Q. In September?

A. And he came to me and we did an analysis and made a plan. And then we have an analysis of a relapse in October he had an incident where there was a relapse as well. We conducted a routine analysis of that incident, at which time he was seeking more intensive treatment. He came to me seeking more intensive treatment at that time. So, at that time, he sought treatment and a referral to Talbot House or a long-term program in New Brunswick. So, his homework was to call both programs. So, I did not facilitate these referrals. I gave that homework back to him to do because I do not believe in working harder than my clients, and he went ahead independently and facilitated that referral for himself to the long-term facility at Talbot House. And, he got out of Talbot House on February 24th. He did have in, between February and March, I have in my notes, that he did have a relapse. He did have a lapse, and we call that a 'lapse' and not a 'relapse', because a 'relapse' is a full-fledged return to all addictive behaviour over a protracted period of time. A 'lapse' is something that we refer to as a 'slip'. It's a short-term return to use in which the person quickly realizes what they've done. They use it as a learning experience and they get their behaviour back on track. And, in my note, I have that he relapsed … that he stopped drinking. He got back to his meetings and he got back on track. And the trigger to that relapse was distress about the welfare of his son, if he was sent to jail.

Q. So, Aaron was saying, 'If I go to jail, who's going to look after X.?"

A. Who's going to look after X., and that was very distressing to him. He had a relapse but then he got back on track and that is the session that I began giving … I gave him information on the type of trauma treatment that we might try, and he … and I recommended to him that he commence attendance at our Wednesday early recovery … we have a 14-week intensive support program for folks in early recovery every Wednesday and according to the attendance record, he has been attending that regularly, and it has been reported to me by the therapist that run that group that Aaron is not only engaged in his own recovery, but actively provides inspiration to others.

[67] It was Ms. Kontuk's opinion that Mr. MacBeth would continue to apply himself to his treatment most fully:

Q. … as to Aaron's ability to succeed going forward and is there anything unique that you can offer him that he may not have experienced before that might increase his odds of success, going forward?

A. Okay, up until now, I've said to Aaron it's like you've had diabetes and you've gone to the heart clinic. And, so just recently, I was … I was the recipient, and I'm the only one in my clinic that has been trained in the EMDR approach, which is an evidence-based treatment for the type of trauma and depression that Aaron has. So, before January of 2017, that was not available to him. So, even though he has been seeking treatment, mental health treatment tends to be the luck of the draw, who you get for your therapist and what their particular experience is. So, up until January, he did not have access to the type of treatment that he needed. Going forward, and, of course, I cannot predict the future, but with my opinion being based on the evidence that I've seen so far, the biggest barrier to folks receiving good treatment is often secondary gain, that they gain … there are gains to be had by staying ill, lack of motivation, blaming on others, not being able to take personal responsibility. Aaron doesn't show any of those things. He has engaged in treatment. He has gone above and beyond the homework that I've given him to access what is at his disposal in the community in terms of keeping him sober. He has actively put the skills that I've taught him into place and successfully navigated several situations which could have resulted in quite a relapse. So, I've seen evidence of behavioural change in Aaron, as well as engaged motivation to both arrive and stay at treatment, and also to complete the tasks and the learning that I've set out for him.

Q. Okay. And, if we … if we say that Aaron is successful today, and he is … he does go home this evening after court, what would your continued plan of care be for Aaron?

A. I would continue to recommend that Aaron attend our weekly two-hour intensive treatment program through addiction services and mental health, and I would also recommend … and that would be for ongoing support around addiction skills. And then, I would continue with the deeper therapeutic work of stabilization of his trauma responses. And then I would continue with the processing of his trauma memories using an EMDR approach.

Q. Okay, and how receptive …

A. And I would …

Q. … has he been to that up to this point?

A. Very receptive.

[68] The prosecution conducted a thoughtful and thorough cross-examination of Ms. Kontuk which identified some areas of concern, particularly with respect to collaborative treatment of Mr. MacBeth's condition:

> Q. So, in answer to the question have you referred out Mr. MacBeth for a second opinion, the answer is …
>
> A. I'm not sure if Mr. MacBeth has been referred to psychiatry for medication review. It's possible in this thick file that through the past, he has been referred.
>
> Q. Have you ever done it?
>
> A. I do not recall in all of our treatment, if I've ever made a psychiatry referral. I would have to refer to my notes to see if I have. I refer so many people. I can't say off the top of my head. Um …
>
> Q. Have you … are … in preparing for today's court appearance, you would have had some review of the file, would that be correct?
>
> A. Yes.
>
> Q. You would have reviewed your progress notes and those types of things?
>
> A. Mmhmm.
>
> Q. In your review of the file, do you recall having reviewed a consulting opinion from any other psychologist or psychiatrist?
>
> A. … see what I can see here. Okay. No.
>
> Q. Okay, do you think that might be worthy of exploration?
>
> A. It may be when his addiction is stabilized. It may be … psychiatry generally does not see folks when they're in active addiction because they need to tease out which symptomology is responsible from a primary mood disorder in which may responsible … which symptoms may be being caused by either intoxication or a protracted withdrawal from a substance. So, we generally don't refer to psychiatry for treatment until we've had a stabilization phase of the substance.

[69] The prosecution homed in on whether aversion therapy might be indicated in Mr. MacBeth's case:

Q. Are you familiar with the term 'aversion therapy'?

A. I am.

Q. And would you agree with me that Antabuse is effectively a form of aversion therapy?

A. Yes.

Q. And would you agree with me that basically Antabuse is a substance that you ingest that reacts with ethyl alcohol that you consume and makes you violently ill.

A. Mmhmm, yes, I would agree with that.

Q. Alright, was that ever explored with Mr. MacBeth?

A. It was. On one of his detox admissions, I see a note by one of the nurses that says he's interested in Antabuse, and that is certainly an option that we could explore together. I don't recall what is … but that was not followed through on. We have a shortage of medical availability to many of our addiction clients.

[70] The prosecution elicited additional details on Mr. MacBeth's lapse history:

Q. While in response to a number of questions by Mr. Robertson, there have been a number of lapses or relapses where that Mr. MacBeth has consumed alcohol again?

A. Yes.

Q. And that would be … and you talked about that it was September and October that there were relapses. That was September and October of 2016?

A. Yes.

Q. Okay. Since September, October of 2016, are you aware of any other relapses that have occurred?

A. Only the lapse that happened, I believe, in March.

Q. February, March of '17.

A. Of '17, yes.

Q. Right, now, that information was based on self-report by Mr. MacBeth, correct?

A. Yes.

[71] A pre-sentence report update prepared after the court heard Ms. Kontuk's evidence on 1 June 2017 informs me that Ms. Kontuk will be on leave until December 2017 when she is expected to resume treating Mr. MacBeth. Until then, Mr. MacBeth will have access to conventional public-mental-health services, similar to those delivered to him prior to Ms. Kontuk's involvement.

[72] I found Ms. Kontuk's evidence highly influential. Although she might be said to have an interest in the outcome of this case, it is an interest that is focussed more—and properly so—on the wellness of her client through appropriate and effective treatment than on securing a particular legal outcome. I am mindful that, in assessing the evidence of an expert—even one whose qualifications have been admitted by the parties—the court retains a gatekeeping role in invigilating against the reception of evidence that might be partial or biased: *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at paras. 46-50; and *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16 at para. 106. I repeat: I find that Ms. Kontuk's interest is not in advocating for a particular sentencing outcome, but in ensuring that the court might be made aware of the appropriate treatment choices available to Mr. MacBeth and his willingness to go along with them. As was stated in *White Burgess* at para. 50, the existence of a prior professional relationship between a proposed expert witness and a party will

not bar reception into evidence of an opinion offered by that witness, provided that the witness demonstrate the ability to fulfil the primary duty of providing the court with fair, non-partisan and objective assistance. Ms. Kontuk's thorough understanding of Mr. MacBeth's history, his triggers, his lapse history and his amenability to treatment, coupled with her professional ability to assess Mr. MacBeth's therapeutic needs and deliver to him appropriate mental-health services, all satisfy me amply that Ms. Kontuk testified in fulfilment of that duty to the court of providing fair and objective opinion evidence. My conclusion is based on these observations:

- Ms. Kontuk's evidence covered material relevant to an assessment of Mr. MacBeth's treatment needs, and the likelihood of that treatment having a therapeutic effect: *R. v. Gibson*, 2008 SCC 16 at para. 17.

- This evidence was necessary as it dealt with addictions-treatment issues outside the court's experience and knowledge: *R. v. Mohan*, [1994] S.C.J. No. 36 at para. 22.

- Ms. Kontuk's qualifications in the addictions field were admitted by counsel: *White Burgess* at para. 48.

- Ms. Kontuk's evidence disclosed in detail her professional relationship with Mr. MacBeth; she described her understanding of Mr. MacBeth's history, and summarised her sources of information; she acknowledged the existence of risk factors that might lead to Mr. MacBeth's lapsing into risk-laden behavior; she acknowledged limitations in her consultation with other professionals; she presented her evidence in a manner which was lucid and readily comprehended by the court: *R. v. Sheriffe*, 2015 ONCA 880 at para. 106; leave to appeal refused, [2016] S.C.C.A. No. 299.

[73] I accept Ms. Kontuk's opinion that there exists readily available treatment for Mr. MacBeth, that Mr. MacBeth has accepted that treatment ardently, and that the prognosis for Mr. MacBeth remaining alcohol free is good.

[74] However, these factual findings do not decide the ultimate issue of whether the court ought to grant the extraordinary sentence of a curative discharge. The expert does not become the court's proxy: *Keresturi v. Keresturi*, 2017 ONCA 162 at para. 7.

[75] Primarily, would a discharge be contrary to the public interest? In deciding that question, I turn to the factors identified as pertinent in *Ashberry*, *supra*.

Ashberry analysis

The circumstances of the offence and whether the person to be sentenced was involved in an accident which caused death for serious bodily injury

[76] No one was injured as a result of Mr. MacBeth's infractions. As admitted in the prosecution brief of 7 September 2017 "there was no reported pattern of egregious driving". I would situate the risk to the public at the lesser end of the range of risks prevalent in drinking-and-driving cases. Mr. MacBeth drove on three occasions with prohibited BAC levels—once engaging the aggravating-circumstances provision of s. 255.1 of the Code, and a second time coming very close to it; however, these offences were committed over a short span of two weeks, and, based on Ms. Kontuk's evidence, seemed to have been triggered by a singular family crisis, so that they might be seen as a continuing offence.

The motivation of the person to be sentenced as an indication of probable benefit from treatment

[77] As observed in *Ashberry*, one can expect that a person facing a sentence of imprisonment might agree quite readily that he or she will take treatment for alcoholism and give up alcohol if it means avoiding jail. The important question is

the good faith of the person to be sentenced in giving such an undertaking. Is the professed commitment to treatment real, or is it a con?

[78] In my view, Mr. MacBeth's commitment to treatment is beyond doubt: Ms. Kontuk's evidence and the pre-sentence reports satisfy me that Mr. MacBeth has been unrelenting in seeking help; he has accomplished extended periods of sobriety, and his dedication to his present program shows that his resolve is not flagging. Yes, part of Mr. MacBeth's motivation to soldier on might be the desire to stay out of jail; however, I do not regard motivation as a binary factor. Motivation not to be imprisoned can go hand in hand with motivation to achieve wellness and stay out of trouble. Even if Mr. MacBeth might be seen as being moved by the prospect of jail, is that not the deterrent effect of the criminal law working as it should?

[79] Further, Mr. MacBeth's history demonstrates amply that he is no recent convert to counselling. I am mindful that alcohol dependency is a serious disease which is difficult for many to overcome. I believe that it would be a simplism to evaluate treatment of it as either achieving success or collapsing in failure. A treatment that makes things better, even if only temporarily, is therapeutic. This is what is meant by "remission". A commitment to treatment does not require hermitic life choices, sequestering oneself from tempting influences. Mr. MacBeth

will continue to encounter stresses in his life, and he will be presented with opportunities to drink that will require him to make hard calls. In the past, stressors have overwhelmed him, and his has coped poorly. But he remains committed to doing better; it is more than just a wish or a New-Year's resolution: Mr. MacBeth has a plan, he is following it, he has a good support system in place, and the prognosis for his improvement is favourable. He appears to have landed a good job, and wants to keep it. Employment provides security and will promote a sense of self worth. These will help tamp down Mr. MacBeth's triggering stressors.

[80] Mr. MacBeth presents a risk that is manageable in the community.

The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the program

[81] Ms. Kontuk is willing to continue to work with Mr. MacBeth. That Ms. Kontuk will be away until December 2017 should not bar Mr. MacBeth's eligibility for a community-based sentence. This is a public-health staffing issue that is beyond Mr. MacBeth's control; and, in any event, during the brief period of time remaining that Ms. Kontuk will be away from her practice, Mr. MacBeth will be able to access group sessions, as has done in the past. He has been invited to return to Talbot House, as a mentor to others in need. Mr. MacBeth has responded

well to the specialised form of treatment offered by Ms. Kontuk. Mr. MacBeth continues to be committed to treatment, and this commitment is reflected in Mr. MacBeth remaining out of conflict with the law. He has complied with stringent terms of bail since 29 August 2016.

The probability that the course of treatment will be successful and that the person to be sentenced will never again drive a motor vehicle while under the influence of alcohol

[82] Except when judging the dead or the permanently comatose, it is pretty much impossible to make exact predictions of someone's future conduct. Still, given the twenty- and thirty-year remoteness of Mr. MacBeth's drinking-and-driving record, given his commitment to appropriate counselling, and given his bail compliance, I find Mr. MacBeth's risk of reoffending to be low.

The criminal record and, in particular, the alcohol-related driving record of the person to be sentenced

[83] Mr. MacBeth's record is remote. Yes, he is before the court for sentencing for three drinking-and-driving offences, which is in itself exceptional; but these offences occurred over a brief time span, and, as I found earlier, arose from a singular family-crisis triggering event. Mr. MacBeth is in at least as good a position as the successful applicant in *R. v. MacArthur*, 2009 NSPC 61, who returned to court and got his third curative discharge.

Conclusion

[84] In my view, an assessment of the *Ashberry* factors evident in this case makes applicable what the Ontario Court of Appeal stated in wrapping up its judgment:

> 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.* [Emphasis added]

[85] I find that the granting of a curative discharge to Mr. MacBeth would not be contrary to the public interest, and the court orders that Mr. MacBeth be discharged conditionally upon curative conditions in a three-year probation order, beginning immediately. This will be applicable to the para. 253(1)(b) offences, case nos. 3016981, 8004259 and 3020488. There will be $100.00 victim-surcharge amounts assessed for each case due by 25 September 2018. In relation to case number 3016981, there will be a two-year driving prohibition; in relation to case number case number 8004259, there will be a two-year driving prohibition to be served consecutively to the first order in accordance with sub-s. 259(2.1) of the *Code*; in relation to case number 3020488, there will be a two-year driving prohibition, to be served consecutively to the first two orders. The court makes no order in relation

to interlock eligibility; the court will leave the determination of that likely moot issue up to the registrar of motor vehicles.

[86] In relation to each of the breach-of-bail counts, case nos. 8008485 and 3020490, there will be $500.00 fines for each count, and victim surcharges of $150.00 for each count, due by 25 September 2018.

[87] Had I found Mr. MacBeth not to have discharged the burden of proving the legality of a discharge in this case, I would have imposed sentences totaling four to six months, as had been recommended by the prosecution. As I stated earlier in my judgment, that recommendation was eminently reasonable, and took into account quite evidently the principles of totality, concurrency and restraint.

[88] The court is indebted to counsel for the high level of preparation and excellent advocacy displayed in the litigation of this case.

JPC