NOVA SCOTIA COURT OF APPEAL
Citation: R. v. McCormick, 2012 NSCA 58

Date: 20120531
Docket: CAC 393239
Registry: Halifax

Between:

Daren Wayne McCormick

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Application Heard:	May 24, 2012, in Halifax, Nova Scotia, In Chambers Supplementary Written Submissions - May 30, 2012
Oral Decision:	May 31, 2012
Written Decision:	June 4, 2012
Held:	Application for bail pending appeal is dismissed
Counsel:	Stanley W. MacDonald, Q.C., for the appellant Jennifer A. MacLellan, for the respondent
Revised decision:	The text in paragraph 18 on page 6 of the original decision has been corrected June 5, 2012 and replaces the previously distributed decision

Decision: (Orally)

INTRODUCTION

[1] On February 22, 2012, Mr. McCormick's jury trial ended. He was convicted of uttering a threat on March 31, 2011 to kill police officers, and four firearm offences arising out of his arrest on April 1, 2011. Further details of these offences will be set out later. Mr. McCormick was sentenced on April 12, 2012 to just over three years incarceration in a federal penitentiary.

[2] Mr. McCormick appeals from conviction and seeks leave to appeal from the sentence imposed. He asks that I grant him bail pending determination of his appeal.

[3] Section 679 of the *Criminal Code* permits a judge of a court of appeal to release an appellant pending determination of his or her appeal. The relevant provisions of this section are:

> **679.(1)** A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,
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> > (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
> >
> > ...
> >
> > (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.
> >
> > ...
>
> **(3)** In the case of an appeal referred to in paragraph (1)(*a*) or (*c*), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
>
> > (a) the appeal or application for leave to appeal is not frivolous;

> (b) he will surrender himself into custody in accordance with the terms of the order; and
>
> (c) his detention is not necessary in the public interest.

[4] To secure release, the appellant must establish on a balance of probabilities all three enumerated requirements: that is the appeal is not frivolous; he will surrender himself into custody in accordance with the terms of an order; and his detention is not necessary in the public interest. There is no real dispute between the appellant and the Crown as to the appropriate legal principles than inform these statutory criteria. Rather, they differ as to how they should be applied to the circumstances of Mr. McCormick and the offences for which he stands convicted.

FACTS

[5] Mr. McCormick did not have a lawyer at trial. Some time after being sentenced, Stanley W. MacDonald Q.C., was retained to represent Mr. McCormick.

[6] I heard Mr. McCormick's application on May 24, 2012. In support of his application, McCormick tendered his affidavit sworn May 16, 2012, his notice of appeal of the same date, a transcript of the sentence hearing, his presentence report, pre-hearing brief and draft order.

[7] The Crown cross-examined Mr. McCormick and his proposed surety. Mr. MacDonald subsequently provided a copy of the trial judge's charge to the jury. In his decision on sentence, the trial judge made reference to a lengthy notarized statement sworn by Mr. McCormick and evidence he had heard on what he said was a fairly extensive stay application brought by Mr. McCormick post conviction. Neither counsel had a copy of the notarized statement nor any information regarding the stay application. Ms. MacLellan volunteered to try to locate a copy of the notarized statement.

[8] On May 28, 2012 I was notified that the Prothonotary from the Amherst courthouse had delivered the Supreme Court file to the Registrar of this Court. I have reviewed the file, including the exhibits. There is a notarized document entitled "Notice of Understanding and Intent and Claim of Right" sworn July 28, 2010 by Daren Wayne of the Family McCormick. It was marked as an exhibit in a

voir dire (VD #1) tendered on February 20, 2012, and as an exhibit (A-5) tendered on the appellant's stay application of March 12 to March 14, 2012. On May 29, 2012 Ms. MacLellan forwarded to me a further notarized statement of the appellant of April 10, 2012 that appears to have been filed by the appellant with the Amherst Prothonotary on that date. Mr. MacDonald and Ms. MacLellan filed further submissions on May 30, 2012.

[9] From all of these materials, the following emerges. Mr. McCormick is 46 years of age but has no dependents. He has accumulated a fairly extensive record. He was convicted in 1987 of driving with a blood alcohol concentration exceeding 80 mg. of alcohol in 100 ml. of blood and fined. Also in Manitoba, in 1989, he was sentenced to 12 months in jail for an offence under s. 390 of the *Code*, which was at that time, wilfully setting fire to anything likely to cause anything listed in s. 389 to catch fire. Mr. McCormick testified he thought what he had done was set fire to some paper in a basement. There is a significant gap in his record.

[10] It recommences when he was sentenced in Nova Scotia on November 12, 2002 on offences of careless storage of a firearm (s. 86(1)) and unlawful production of marijuana under s. 7 of the *Controlled Drugs and Substances Act*, for which he received a total sentence of one year to served by way of a conditional sentence order.

[11] On November 22, 2004 he was sentenced to some 73 offences under the *Income Tax Act*, ranging from tax evasion to providing false receipts over the time frame of 1997 to 2001. Fines were imposed on each of these counts plus concurrent conditional sentences of 12 months. Mr. McCormick breached his conditional sentence order by virtue of the commission of a number of offences. On July 5, 2005 his conditional sentence was collapsed, requiring him to serve 138 days. He was also sentenced on that day on charges of careless use of a firearm contrary to s. 86(1) of the *Criminal Code*, unlawful production of marijuana contrary to s. 7 of the *Controlled Drugs and Substances Act*, both offences having been committed on May 26, 2005, and a further charge under s. 7 of the *Controlled Drugs and Substances Act* committed on June 30, 2005. For these offences he received a total sentence of two years incarceration consecutive in a federal penitentiary. There was also prohibition order made under s. 109 of the *Criminal Code* prohibiting Mr. McCormick from possession of any firearm until July 7, 2015.

[12] With respect to the current offences, it was a jury of Mr. McCormick's peers that convicted him. Hence, we are without reasons. But the circumstances of the five offences under appeal can be gleaned from the uncontested comments by the Crown at the sentence hearing and the sentencing decision of the Honourable Justice Gerald R. P. Moir.

[13] It appears that on March 31, 2011 Cst. Heycott was taken aside by the appellant in the Amherst courthouse. The appellant told Cst. Heycott that he was trained in quick draw and could out draw police officers. He told Cst. Heycott that he would consider putting a pistol in his pants to go to the grocery store. The officer cautioned the appellant. The appellant mentioned past issues with the police and told Cst. Heycott that if a police cruiser even pulled into his yard, he would kill the car and kill the officers. He challenged the officer to write that down and he would sign it. Again Cst. Haycott cautioned the appellant that should not be saying things like that. Mr. McCormick went on to tell the officer that he had a firearm dating from the 1840s and boasted that it could bore a hole in anything at 85 yards.

[14] As a result, the police decided to arrest Mr. McCormick. The police found Mr. McCormick the next day. He was a passenger in a motor vehicle in the downtown area of Amherst. When Mr. McCormick was arrested the police found a loaded .44 caliber revolver in a holster strapped to his hip. The weapon had no safety. Charges were laid as a result of the possession of that weapon and, following a search of his residence, various other firearm related charges were laid. Of these latter charges, Mr. McCormick was acquitted.

[15] Mr. McCormick was initially remanded pending trial. For reasons that are not entirely clear, the Crown consented on a bail review application in Supreme Court for Mr. McCormick to be released on a recognizance with one surety in the amount of $50,000. Terms of that recognizance imposed a form of very strict house arrest and included a provision mandating his cooperation in random searches of his home, outbuildings or vehicles for weapons, but no more than three times per month. Various amendments or variations to those terms were sought and obtained but they were of a minor nature. The Crown does not suggest that Mr. McCormick did not fully comply with the strict terms of that recognizance.

[16] After conviction on February 22, 2012, despite the apparent seriousness nature of these offences, the Crown did not seek to have Mr. McCormick remanded

pending sentence. Justice Moir ordered the preparation of a presentence report for a sentence hearing of April 12, 2012. Mr. McCormick also appeared before Justice Moir March 12-14, 2012 for the presentation of an application to have Justice Moir stay the proceedings. I will refer to some of the documentation presented by Mr. McCormick on that application later.

[17] In his sentence decision, Justice Moir summarized the offences as follows:

> Mr. McCormick is to be sentenced today for a series of five convictions; firstly, that he made a threat to kill police officers on March 31, 2011, contrary to Section 264.1(1)(a), which carries a five year maximum. Secondly, that he carried a revolver for a purpose dangerous to the public peace on April the 1st, 2011, contrary to Section 88(1) of the **Criminal Code**, which carries a ten year maximum. Thirdly, that he possessed a revolver when prohibited by order from possessing firearms, contrary to Section 117.01(1), which carries a maximum penalty of ten years. Fourthly, that he possessed a loaded, restricted firearm when not licensed, contrary to Section 95(1)(a) of the **Criminal Code**. That offence carries a minimum penalty, not a maximum but a minimum penalty, of five or three years, depending on the number of convictions. Fifthly, that he carried the firearm in a careless manner, contrary to Section 86 of the **Criminal Code**.

[18] Justice Moir accepted that Mr. McCormick is not a drug dealer and has no part in the organized drug trade. He acknowledged some of the favourable comments made by friends and family of Mr. McCormick at the stay application and in his presentence report, which Justice Moir said coincided with his own experiences – that is Mr. McCormick was good humoured and gentlemanly. Nonetheless, Justice Moir viewed Mr. McCormick's conduct as a serious threat to the public. He said:

> Mr. McCormick is a greater threat to the assurance of freedom from civilians carrying guns than is the common drug dealer who carries a gun because of the violence of his trade, or the common gang member who carries a gun because he is given to violence. Mr. McCormick is a greater threat to our assurance of peacefulness precisely because he is an ordinary man on the street or an ordinary customer at the grocery store.
>
> A few references to the great volume of evidence will make the point. The most poignant evidence in this case is a series of plywood squares, each blasted with a bullet. Mr. McCormick was carrying a loaded revolver and a holster under his long coat when the police searched him. The revolver was modeled on an antique from the United States in the 19th century and when the

> revolver was tested, it proved to be lethal. One must bear in mind that this is the situation and that this is the dangerous piece of equipment Mr. McCormick carried that day when one considers Mr. McCormick's assertions about handguns.

[19] Justice Moir explained what those assertions were. He said:

> In evidence is a lengthy, notarized statement sworn by Mr. McCormick. According to the doctrines of Freeman-on-the-Land, publication of such a document magically frees one from the **Criminal Code**, including the gun laws. In this document, Mr. McCormick asserts his right to bear arms. On the day before the seizure, when he made the threat to shoot police officers who might come into his driveway, Mr. McCormick described at length his beliefs in his right to carry a loaded handgun. He even said that he could have a gun when he went grocery shopping, and he explained his skill at quickly drawing a holstered revolver. At trial Mr. McCormick asserted not only his right to bear arms, contrary to the **Criminal Code**, but also his self-serving misinterpretation of various provisions in the **Code** to the effect that his particular handgun, in his particular circumstances, does not violate the gun laws.

[20] In Justice Moir's view, even if he was not required to pose a minimum sentence of three years for possession of the restricted firearm, contrary to s. 95(1)(a) of the *Criminal Code*, he would have announced a sentence in that range in any event. He imposed concurrent sentences of one year incarceration on the other firearm related offences. With respect to the offence of uttering threats to kill police officers he said:

> I would impose a very substantial period of incarceration for the threat against police officers, generally, a threat that was backed up by means and ideological support.

He declined to impose such a substantial period of incarceration due to the principle of totality set out in s. 718.2(c) of the *Criminal Code*.

[21] The beliefs espoused by Mr. McCormick at trial, during his application for stay of proceedings, and at the sentence hearing, are based on his claimed status as a "Freeman-on-the-land". His claim to this status is set out in his notarized statement of July 28, 2010. In this statement, he declares a number of things, including that the authorities are permanently estopped from bringing charges against him and asserts his right to travel on the highways without licence,

registration or insurance and to free and unencumbered possession and use of arms and firearms for protection of property, family and friends, and that he may possess, at his discretion, arms and firearms free of statutes and regulations. He also asserts or claims the right to convene a proper "court de jure" to address any potentially criminal actions of any peace officer or justice system participant who interferes with what he says is his properly claimed and established rights and freedoms.

[22] When cross-examined before me on May 24, 2012, Mr. McCormick maintained that he still believes in the Freeman-on-the-land principles. Nonetheless, he provided assurances during his testimony that he had not breached the recognizance, nor would he breach a new recognizance. He offered two reasons. The first is that he viewed the recognizance as a kind of contract which he would not violate. The second is he would not do anything to put his mother's land or property at risk, and he knew such would be the case as she would be a surety on that recognizance.

[23] With this background I return to the three criteria.

THE APPEAL IS NOT FRIVOLOUS

[24] This requirement is usually said not to be difficult to meet. Although it engages a consideration of the merits of the appeal, the appellant need only show that the appeal is not frivolous. The merits of the appeal are also relevant in considering the issue of "public interest" under s-s. 3(c). Gary T. Trotter (now Mr. Justice Trotter) in *The Law of Bail in Canada*, 3rd ed. (Toronto: Carswell, 2010) referred to the requirement under s-s.3(a) as follows (p. 10-14):

> While expressed in a variety of ways, the courts have generally defined paragraph (3)(a) in a manner that is very easy for an applicant to satisfy. The applicant need only show that the appeal is "arguable," "not doomed to failure," "of some substance," "might succeed" . . . or one that "would not necessarily fail." ...

[25] The grounds of appeal advanced by Mr. MacDonald on behalf of the appellant are:

> (1) The trial Judge erred by failing to instruct the jury on the definition of "antique firearm" and its potential application to the firearms charges.

(2) The trial Judge erred in his instructions to the jury regarding expert opinion evidence.

(3) The trial Judge erred in his instructions to the jury regarding the element of "restricted firearm" in Count # 4 of the Indictment by failing to assist the jury, beyond simply reading the applicable **Criminal Code** sections.

(4) The trial Judge erred in his instructions to the jury on the elements of possession of a weapon for a purpose dangerous to the public peace by:

(a) failing to instruct the jury that the element of "possession" and the element of "dangerous to the public peace" must meet in order to convict; and

(b) failing to instruct the jury on the meaning of "dangerous to the public peace".

(5) The trial Judge erred in his instructions to the jury by giving conflicting instructions on the elements of the offence of uttering threats.

(6) The trial Judge erred in imposing sentence by failing to consider the constitutionality of the minimum sentence prescribed by Section 95(2)(a)(i) of the **Criminal Code.**

[26] The Crown concedes that the appeal has not been launched for an improper purpose and, in light of what it says is the very low threshold under s-s. 3(a), the appeal was not frivolous.

WILL THE APPELLANT SURRENDER INTO CUSTODY

[27] The Crown argues that the appellant has no real ties to Nova Scotia. He has lived in every province in Canada, with the exception of Newfoundland. He still has friends and connections in those other provinces. He has breached a conditional sentence order in the past. The appellant has voiced his beliefs throughout the proceedings that he does not recognize the authority of Courts generally and the *Criminal Code* and other statutes do not apply to him. Mr. McCormick has no driver's licence, credit cards, passport or other identification.

[28] On the other hand, Mr. MacDonald ably argues:

- Mr. McCormick has always appeared in court

- Mr. McCormick complied fully with the very strict terms of a recognizance from July 2011 to the date of his sentence on April 12, 2012

- Mr. McCormick testified credibly about the close relationship with his mother and would never do anything to jeopardize her home and property

- despite holding the same “Freeman-on-the-land” beliefs, Mr. McCormick complied with the previous recognizance

- Mr. McCormick has the opportunity to resume gainful employment with his sister in what has been a dormant business since his arrest in April 2011

[29] I share the Crown's concerns about the considerable risk that Mr. McCormick would not surrender himself into custody. I listened and observed Mr. McCormick and his mother testify. I would be inclined to accept his assurances given during his testimony as genuinely held at the time he testified that he would surrender himself into custody when required. I am still troubled by the existence of his ardent beliefs, repeatedly espoused by him and his friends and associates, that the laws of Canada have somehow been suspended and do not apply to him.

[30] However, even if I was satisfied that Mr. McCormick would indeed surrender himself into custody, I still need to be satisfied that his detention is not necessary in the public interest under s. 679(3)(c). I turn to this requirement.

DETENTION IS NOT NECESSARY IN THE PUBLIC INTEREST

[31] Whether detention is not “necessary in the public interest” poses many difficult questions. What is meant by the ‘public interest’? How is it to be measured, and when can it be said denial of bail is necessary as opposed to unnecessary?

[32] Mr. McCormick is no longer presumed to be innocent of the charges of uttering death threats against police officers and possessing a loaded restricted handgun while travelling in a motor vehicle in downtown Amherst while prohibited from possessing any firearm. The jury found the charges to be proved beyond a reasonable doubt. But if Mr. McCormick is not granted bail pending appeal he will continue serving his sentence. It will be some months before this court can even hear his appeal from conviction and sentence, let alone release reasons. If error is eventually found to have occurred at trial, it creates the risk that he may have been needlessly deprived of his liberty.

[33] The competing interests at play in assessing public interest has been the subject of considerable judicial comment. In Nova Scotia it is accepted that a judge must be concerned about a number of factors in assessing "public interest", chiefly in terms of public safety, in the sense of what is the likelihood of the appellant committing further offences or posing a danger to himself of others if released. But also, what would be the potential impact on the public's perception of the administration of justice if the appellant was required to remain in custody or is released.

[34] A judge hearing an application for bail pending appeal must balance a number of factors. The need to carry out this exercise was described by Cromwell J.A., as he then was in *R. v. Ryan*, 2004 NSCA 105:

> [21] I agree with former Chief Justice McEachern when he wrote in **R. v. Nugyen** (1997), 119 C.C.C. (3d) 269 (B.C.C.A. Chambers) at paras. 15 - 16 that the public interest requirement in s. 679(3)(c) means that the court should consider an application for bail with the public in mind. He went on to add that doing so may mean different things in difference contexts:
>
> > In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them. [Emphasis in original]
>
> [22] I also think it important to remember in applying the public interest criterion that it must not become a means by which public hostility or clammer is

> used to deny release to otherwise deserving applicants: see Gary Trotter, *The Law of Bail in Canada*, 2nd ed. (Carswell, 1999) at p. 390.
>
> [23] Underlying the law relating to release pending appeal are the twin principles of reviewability of convictions and the enforceability of a judgment until it has been reversed or set aside. These principles tend to conflict and must be balanced in the public interest. As Arbour, J.A. (as she then was) pointed out in **R. v. Farinacci** (1993), 86 C.C.C. (3d) 32 at 48:
>
> > Public confidence in the administration of justice requires that judgments be enforced. ... On the other hand, public confidence in the administration of justice requires that judgments be reviewed and errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake.
> >
> > [24] Justice Arbour then went on to discuss how these two competing principles may be balanced in the public interest:
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> > > Ideally judgments should be reviewed before they have been enforced. When this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is largely what the public interest requires to be considered in the determination of entitlement to bail pending appeal.

See also: *R. v. Barry*, 2004 NSCA 126 ; *R. v. Cox*, 2009 NSCA 15; *R. v. MacIntosh*, 2010 NSCA 77; *R. v. Janes*, 2011 NSCA 10; and most recently, *R. v. MacDonald*, 2011 NSCA 46.

[35] MacEachern C.J.B.C. in *R. v. Nguyen* (1997), 119 C.C.C. (3d) 269 reviewed a number of authorities and concluded:

> [18] ...The principle that seems to emerge is that the law favours release unless there is some factor or factors that would cause "ordinary reasonable, fair-minded members of society" (per O'Grady at 4), or persons informed about the philosophy of the legislative provisions, Charter values and the actual circumstances of the case (per R. v. K.K. at 54), to believe that detention is necessary to maintain public confidence in the administration of justice.

[36] In my opinion, the factors that should be considered in carrying out this analysis are the circumstances of the offence, as far as they are known, the circumstances of the offender, the seriousness of the offence, and the degree to which the public can feel protected by appropriate terms of release and the apparent strength of the grounds of appeal and hence the risk of possibly unwarranted deprivation of liberty should release not be granted.

[37] Mr. McCormick has been convicted of a number of offences before. I recognize that none involve a failure to appear, but he has previously breached a conditional sentence order – not once but twice. The first on May 26, 2005. The second time on June 30, 2005. He was sentenced for these on July 5, 2005. He has a record for an arson-related offence for which he received 12 months in jail. That offence is dated. He also has two prior convictions dealing with firearms. One for careless storage, the other careless use. Despite the references to Mr. McCormick's good humour and gentlemanly manner in court, the comments by the probation officer in the presentence report speak to the appellant's open acknowledgment of anger toward the court system and lack of respect for the administration of justice. Perhaps that is somewhat of a given, in light of his present ardent adherence to the principles of being a Freeman-on-the-land.

[38] I earlier set out the circumstances of the current offences. Mr. McCormick knowingly made threats to kill police officers and bragged about his prowess at "quick draw" and owning a powerful handgun. The very next day he was arrested with such a handgun strapped to his hip, in a car in downtown Amherst. It was loaded. He knew he was prohibited from possessing any firearm.

[39] Mr. McCormick was assisted at his trial and subsequent appearances by friends and acquaintances who apparently also share his Freeman-on-the-land beliefs. Mr. McCormick did not testify at his trial. He called no evidence. He acknowledged during his testimony before me he knew he had the right to do so. At the sentence hearing before Justice Moir Mr. McCormick offered the following:

> Okay. Now on page seven [of the PSR], "Uttering death threats to police office**[sic]**, Cst. Heycott of the RCMP." He got on the stand. He testified he's never felt threatened by me. "The defendant does not accept responsibility." Well, if other officers feel threatened by rumours, hearsay and gossip, that's not up to me.

[40] The jury obviously accepted Cst. Heycott's evidence. The appellant did not deny the substance of it at trial, nor during his sentence hearing. During his testimony before me on May 24, 2012, McCormick admitted he "did utter a threat." He explained the police had created the problem with him when they had broken into his father's home and interrogated his father for two hours when he was ill. The threats he says were uttered in 2005 when he was on parole, not on March 31, 2011. He offered there had been a big mistake at his trial. He was not well during his trial and was unable to secure the attendance of certain witnesses to substantiate the much earlier date of his threat.

[41] With respect to the various firearm offences, he explained to Justice Moir at the sentence hearing that he did not have a weapon in his possession for a dangerous purpose; and that the handgun was an antique firearm – hence, exempt from the relevant prohibitions set out in the *Criminal Code*.

[42] At trial the Crown called a firearm expert, George Bent. While I do not have a transcript of his evidence, Exhibit #22 adduced at trial demonstrates that Mr. Bent is a qualified Firearms Analyst for the purposes of s. 117.13 of the *Criminal Code*. This section permits a certificate from such an analyst to be adduced into evidence as to the results of his or her analysis of any weapon or similar object. Exhibit #23 is a Certificate of Analysis from George Bent with respect to the .44 calibre revolver seized from the appellant on April 1, 2011. Mr. Bent certified that the revolver is not only a firearm, but also a handgun and a restricted weapon. While I do not at this admittedly preliminary stage pre-judge the ultimate outcome of this appeal, I can say the appellant has submitted no materials on this application demonstrating any real substance to his complaints of error by the trial judge.

[43] In my opinion, public respect for the administration of justice would be seriously eroded to order Mr. McCormick's released after having been convicted of uttering death threats against police officers, and within 24 hours to be found with a loaded, very powerful restricted handgun strapped to his hip, and who still proclaims his Freeman-on-the-land beliefs that the laws of Canada simply do not apply to govern his conduct. The third criteria has not been satisfied. Despite Mr. MacDonald's able efforts and submissions, the application is dismissed.