IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Matheson, 2007 NSPC 43

Date: August 1, 2007
Docket: 1663890
Registry: Halifax

Between:

Her Majesty the Queen

v.

Shawna Marie Matheson

DECISION

Judge:	The Honourable Judge Anne S. Derrick
Heard:	July 24, 2007, Sydney Provincial Court
Oral decision:	August 1, 2007, Sydney Provincial Court
Charges:	*Controlled Drugs and Substances Act*, section 5(1)
Counsel:	David Iannetti - Crown Attorney Patricia Fricker - Defence Counsel

By the Court:

[1] On June 6, 2007, Shawna Matheson pleaded guilty to a single count of trafficking in cannabis marijuana contrary to section 5 (1) of the *Controlled Drugs and Substances Act.* A Pre-Sentence Report was ordered and Ms. Matheson's sentencing hearing was conducted on July 24, 2007. I reserved my decision on sentencing until today, August 1, 2007.

[2] Ms. Matheson had been arrested and charged on June 8, 2006, for selling a gram of cannabis to an undercover police officer. According to the facts recited at sentencing, police targeted individuals including Ms. Matheson as part of a drug sting operation entitled "Summer Solstice". On June 4, 2006, an undercover officer went to Ms. Matheson's home and asked to purchase marijuana. The officer was told to "come back on Thursday" (June 8), which she did, and at that time, Ms. Matheson sold her a single gram of cannabis marijuana for $10.

[3] Ms. Matheson was 33 years old at the time of the offence and enrolled in a Practical Nursing Program at the Nova Scotia Community College Marconi Campus. She finished that program on November 29, 2006. On January 10, 2007, Ms. Matheson wrote her Canadian Practical Nursing Registration Examinations and passed them successfully. She is now eligible for registration as a Licensed Practical Nurse in Nova Scotia. The application process requires her to produce a recent criminal record check within the four week period prior to being licensed. Evidence was

provided at Ms. Matheson's sentencing in the form of a letter from Carolyn Toomey, Academic Chair at the Nova Scotia Community College School of Health and Human Sciences advising that Ms. Matheson will not be able to obtain a Practical Nursing license while having a criminal record. Ms. Toomey states: "Should Ms. Matheson receive a conditional discharge the probability is that she would be denied registration until the time of absolute discharge."

[4] The Crown's position on sentencing in Ms. Matheson's case is relatively simple. In the Crown's submission, the nature of the offence requires that she receive a custodial sentence, although given her status as a first offender, a short conditional sentence of three months would be appropriate. The Defence position is that this is a rare case where, notwithstanding that the offence is trafficking, a conditional discharge would be appropriate. The Defence argues that the case satisfies the requirements of section 730 of the *Criminal Code* that it would be in Ms. Matheson's best interests and not contrary to the public interest to order a discharge. The Crown asserts that the paramount consideration in drug trafficking cases is general deterrence and states that a conditional discharge for Ms. Matheson would be contrary to the public interest because it would not send the right message. The Crown argues the right message for drug trafficking cases must be that a custodial sentence will be the penalty and that this message is particularly important in a region where drugs are a problem. The Crown notes the drug sale was made from Ms. Matheson's residence and that "someone was able to come to the door and purchase marijuana." The Crown concedes that specific deterrence of Ms. Matheson is not an issue here and that the emphasis in the Crown's submissions is on the deterrence of others.

[5] Section 10 of the *Controlled Drugs and Substances Act* sets out the purpose of sentencing under that *Act*. It states as follows in section 10(1):

> Without restricting the generality of the *Criminal Code*, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.

[6] Section 10(2) of the *Controlled Drugs and Substances Act* identifies a series of aggravating factors the sentencing judge is mandated to take into account. The Crown concedes that none of the aggravating factors are present in this case. No weapons were involved, the drug sale did not take place at or near a school or public place frequented by persons under 18, nor was the sale to a person under 18, no one under 18 was involved to facilitate the sale and Ms. Matheson has no previous record for a drug offence. The fact of the sale having been effected from a residence is not listed as an aggravating factor.

[7] Under the *Controlled Drugs and Substances Act*, the maximum sentence for Ms. Matheson's offence, trafficking in cannabis marijuana less than 3 kilograms, is five years less a day. There is nothing in the *Controlled Drugs and Substances Act* or *Criminal Code* to preclude the granting of a conditional discharge for the offence of trafficking one gram of cannabis marijuana.

[8] The purpose and principles of sentencing in the *Criminal Code* also apply to this sentencing. Parliament has articulated the fundamental purpose and principles of sentencing in sections 718 and 718.1 of the *Criminal Code*.

> 718. [Purpose] 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 by imposing just sanctions that have one or more of the following objectives:
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> (a) to denounce unlawful conduct;
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> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[9] Section 718.2 recites the other sentencing principles that the sentencing court is mandated to take into consideration, which for the purposes of this case are:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender...
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
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> ...
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
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> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders...

[10] Sentencing has been explicitly recognized as an individualized process. *(R. v. C.A.M. (1996), 105 C.C.C. (3d) 327 (S.C.C.)* It is a process requiring an examination of the facts of the offence and the circumstances of the offender and an assessment and weighing of the relevant sentencing principles to arrive at a fit and proper disposition. The courts have long rejected a "cookie-cutter" approach to sentencing. This was reinforced in the 1996 amendments to the *Criminal Code* which are reflected in the provisions I have recited above.

[11] In addition to information made available to me concerning Ms. Matheson's nursing studies, a Pre-Sentence Report was prepared. The consensus of Crown and Defence is that it is a positive report. It discloses that Ms. Matheson's life has not been

easy. She has had to overcome the disadvantages of a difficult family life with an alcoholic father and having to witness physical, verbal and emotional abuse. At age 16 her trust and physical integrity were violated by a trusted friend and prominent member of the community. She moved away as a result of harassment by friends of the perpetrator and abandoned her plan to pursue a career in the military. She married early at 20 and has two teenage sons from that relationship. She was able to regain custody of her older son, now 15, after he was placed in foster care in Ontario while living with his father. Ms. Matheson's younger son, aged 13, continues to live with Ms. Matheson's ex-husband.

[12] She has emerged from her experiences without a dependency on drugs or alcohol and has managed to re-direct her aspirations in a positive direction. She enjoys a close and supportive relationship with her mother who describes Ms. Matheson as a "loving, caring person." Both Ms. Matheson's husband and a friend spoke of Ms. Matheson's kind and decent nature.

[13] Ms. Matheson has been in a relationship with her husband, Robert Matheson, for six years. They married three years ago and now have a four month old daughter. They plan to have more children. Mr. Matheson is on Social Assistance Disability due to a fused disc and money has to be managed carefully in their household. Mr. Matheson has a criminal record.

[14] Kim Somerton, who attended community college with Ms. Matheson, described Ms. Matheson for the Pre-Sentence Report in glowing terms. She commented on how

determined Ms. Matheson was to complete the nursing program and noted that she had been very supportive of her classmates, attending their graduation even though she was not able to finish with them because of personal difficulties that held her back until the following year. Ms. Somerton reported that Ms. Matheson was a hard worker who learned very quickly and was "really good with patients", particularly the elderly.

[15] Neither Ms. Matheson's mother nor Ms. Somerton could explain Ms. Matheson's involvement in the offence. Ms. Somerton observed that Ms. Matheson appeared to be " a gullible person" which, in her view, perhaps contributed to her involvement. Ms. Matheson herself said she can be too trusting. Mr. Matheson, who reportedly "feels sick" over the whole incident, told the author of the Pre-Sentence Report that his wife had believed the arresting officer was a friend of his.

[16] Ms. Matheson has said in the Pre-Sentence Report that she takes full responsibility for the offence and acknowledges her lack of judgement. She emphasized that she will not become involved in such an offence again and plans to "stick to nursing."

[17] Ms. Matheson has shown a determined effort to better her circumstances. Having left school at 16, she took upgrading courses and completed her Grade 12 eight years later while living in Ontario. Given the ages of her older boys, she must have done this while they were small, requiring additional effort and initiative. She aspires to continue her education towards qualifying as a Registered Nurse.

[18] Section 730(1) of the *Criminal Code* requires me to determine, in considering whether a conditional discharge is an appropriate disposition, whether the discharge would be in the offender's best interests and not contrary to the public interest. On the first branch of the analysis, the evidence before me establishes that a criminal record will stop Ms. Matheson's career ambitions dead in their tracks. She simply cannot get a license as a Practical Nurse with a criminal record. Her hard won achievements would have to be re-cast in another mold other than nursing. Furthermore, there would seem to be no issue with Ms. Matheson's personal suitability for a conditional discharge. She is of good character, with no prior criminal record. She has not been in further conflict with the law since being charged and fully complied with the conditions of her release undertaking. She demonstrates qualities of hard work and determination and contributes positively to her family. She is poised to work in a career that demands service and commitment to others. However, even such positive factors would be unlikely to outweigh, in a sentencing assessment, a serious involvement as a drug trafficker such that a custodial sentence could be avoided.

[19] It remains important in sentencing for drug offences to accurately characterize the nature of the offence. This was recently noted by our Court of Appeal in *R. v. Jones, [2003] N.S.J. No. 146* with reference to *R. v. Fifield (1978), 25 N.S.R. (2d) 407* of the same court. In *Jones* at paragraph 8, the Court observed that sentencing for possession for the purpose of trafficking has been influenced in Nova Scotia Court of Appeal decisions over the past 25 years by "the quantity of drugs involved and the function or position of the offender in the drug operation." Underscoring that *Fifield*

continues to represent good law on the issue, the classic statement in *Fifield* was reiterated:

> The quantity [of the drug] is important in helping to show the quality of the act or the probable category of trafficker - the isolated accomodator of a friend, the petty retailer, the large retailer or small wholesaler, or the big-time operator. The categories respectively have broad or overlapping ranges of sentence into which the individual offender must be appropriately placed, depending on his age, background, criminal record, and all surrounding circumstances.

[20] I note that in one of the cases relied on here by the Crown, *R. v. Collette, [1999] N.S.J. No. 190*, the Court of Appeal referred to *Fifield* and categorized Mr. Collette, found in possession of 10 kilograms of cannabis resin, as "clearly in the category of wholesaler or large retailer." (paragraph 17) Mr. Collette, who received a conditional sentence of two years less a day following his guilty plea to possession for the purpose of trafficking, had his sentence raised on appeal to three years in jail. The Crown appeal succeeded on the basis that the sentencing judge had failed to consider in any depth "the need for deterrence, both general and specific, as well as the need for protection of the public when dealing with a drug offence involving such a large quantity of drugs." (paragraph 16)

[21] In Ms. Matheson's case, the amount of cannabis marijuana involved was one gram. No proof was made of Ms. Matheson's sale being part of a larger drug operation. She was not approached for a petty sale and then asked if she could procure a significantly larger amount. (See for example, *R. v. Ferguson (1988), 84 N.S.R. (2d) 255 (N.S.S.C., App. Div.)* Nor was she asked if she could continue to supply smaller

amounts as in *R. v. Hartnett, [1991] N.S.J. No. 399 (N.S.S.C., App. Div.)* She sold one gram of cannabis marijuana for ten dollars. The trafficking charge laid against her was solely with respect to this single transaction. I do not place any weight on the untested statement in the Pre-Sentence Report from a constable with the Cape Breton Regional Police Service that Ms. Matheson and her husband are both very well known to the Drug Section of the Service: in oral submissions the Crown said it was unaware of Ms. Matheson being investigated for any other drug matters and the Defence properly pointed out that there are no other matters pending before the courts and objected to the police officer's statement in the Pre-sentence Report. It would be inappropriate for me, in categorizing the type of offence, and sentencing for it, to consider anything other than the trafficking charge to which Ms. Matheson has pleaded guilty. I note that "illegal but uncharged conduct" cannot operate as an aggravating factor in sentencing. *(R. v. Dawe, [2002] N.S.J. No. 504 (N.S.C.A.))* The Crown has the burden of proving beyond a reasonable doubt, the existence of any aggravating fact that is disputed. [*(Section 724(3)(e), Criminal Code*]

[22] Using the *Fifield* analysis and on the facts before me, Ms. Matheson's actions most closely resemble, of all the categories, the "isolated accomodator of a friend." Mr. Matheson's remark that his wife thought the undercover officer was a friend of his is suggestive of an accommodation by Ms. Matheson. No other reasons has been advanced for the offence, which has been described by Ms. Matheson and her counsel as an error in judgment. I conclude therefore that there is nothing about the character of the transaction for which Ms. Matheson was charged that disqualifies her from consideration for a conditional discharge.

[23] Having satisfied myself that Ms. Matheson is not disqualified as a candidate for a discharge and has established that it would be in her best interests to have one imposed, I must turn to the question of whether it would be contrary to the public interest to grant a discharge, and examine the issue of general deterrence, the pivot of the Crown's submissions on sentencing.

[24] The Crown bases its sentencing submissions on the proposition that a consistent message must be sent in trafficking cases that the offence will attract a custodial sentence. The Crown indicates that judges in the Sydney area have been imposing custodial sentences for trafficking. I was reminded that drugs are a serious problem in Cape Breton and I am aware, in this vein, as is mostly everyone who follows the news, of the terrible harm that dangerous and addictive drugs such as OxyContin and crack cocaine have caused in the communities in this region. The Crown says that, for trafficking, at the very least, a short conditional sentence is required to satisfy the primary objective, in drug trafficking cases, of general deterrence.

[25] I have some difficulties with the Crown's submission and have taken the opportunity, in reserving my decision on sentencing, to consider it carefully. While courts have repeatedly stated that deterrence and denunciation need to be emphasized in drug cases, I am not satisfied that this reduces sentencing of all drug trafficking cases to a simple calculus of how much custodial time is warranted and whether it should be a conditional sentence or not. I believe more is required of the sentencing court and the Crown's submissions raise the following issues for me in this case:

> The effectiveness of general deterrence particularly in a case such as this;

> The underlying proposition that drug trafficking cases necessarily attract a custodial sentence even though Parliament has not established a mandatory minimum sentence;

> The implication that the public interest is only concerned with deterrence and no other social values.

The Effectiveness of General Deterrence

[26] The Crown's submission that the right message needs to be sent by the sentence in this case essentially encapsulates what is intended by the concept of general deterrence. General deterrence supposes that others, with similiar inclinations to the offender will be deterred, once they learn about the sentence, from committing a comparable offence. A sentence emphasizing general deterrence is intended to "deter those of like-mind who may be lured into the [drug] business with the hope of easy gain." *(R. v. Butler, [1987] N.S.J. No. 237 (N.S.S.C., App. Div.)* The purpose of general deterrence is to "discourage potential offenders from becoming actual offenders." It has been referred to as the "punishment of the offender for what others might do." *(R . v. McGinn (1989), 49 C.C.C. (3d) 137 (Sask. C.A.))* Judges, such as Vancise, J.A. in dissent in *McGinn*, have expressed serious reservations about the effectiveness of general deterrence. Vancise, J.A. did so with the following comments at page 157:

> Contending that longer sentences, for example, six months, would have a greater deterrent effect than a shorter sentence, for example one month, is to contend that: (1) the public will know of the sentence (a dubious proposition); (2) the potential offender will perceive the likelihood of apprehension (a more dubious proposition); and (3) the potential offender knowing he will likely be apprehended would commit the offence for the lower penalty of one month but not for the higher penalty of six months. Viewed in this way it is small wonder that an upward variation in sentences appears to have no effect on the crime rate.

[27] The degree of publicity a case receives has also been remarked upon as relevant to the deterrent value of the sentence. Nunn, J. in *R. v. Clarke, [1990] N.S.J. No. 427 (N.S.S.C.)* observed about Mr. Clarke's case: "If it receives no publicity then there is no general deterrence, other than the several people who may be in court at the time the sentence is given."

[28] Let me make it clear that it is not my intention, in this case, to attempt a comprehensive examination of the effectiveness of general deterrence. However it is appropriate I think to consider what general deterrence represents in the context of a particular case and whether it deserves the centrality it is accorded in cases where the facts and circumstances are different. As I previously noted, Ms. Matheson is on the bottom rung of the *Fifield* categorization and it is material for me to thoughtfully examine the message that should be sent by the sentence I impose here. Furthermore, I should note that Parliament has not decreed that a conditional discharge is incompatible with the objective of general deterrence: it is only offences with a mandatory minimum sentence or punishable by imprisonment for fourteen years or life that are statutorily excluded from the discharge provisions.

[29] Returning for a moment to the issue of publicity and general deterrence, I will note that in Ms. Matheson's case there has been a single Cape Breton Post story about her first court appearance, publishing her name and address. There was no coverage of her guilty plea on June 6, 2007 or her appearance for sentencing on July 24, 2007. To the extent that there is some publicity, generated by this decision, or even of Ms. Matheson's first appearance, and awareness of that by the general public, this in itself can have a deterrent aspect. *(R. v. Meneses (1976), 25 C.C.C.(2d) 115 (Ont. C.A.))*

Is a Custodial Sentence Mandated for Drug Trafficking Cases?

[30] My earlier comments in this decision about the nature of this offence and Ms. Matheson's involvement illustrate my view that each case must be judged on its own merits and, where Parliament has established no mandatory minimum sentence, all available sentences should be considered. This is particularly necessary in light of sections 718. 2 (d) and (e) of the *Criminal Code* that mandate offenders shall not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and oblige courts to consider all available sanctions other than imprisonment, that are reasonable in the circumstances. It is therefore not obligatory that a custodial sentence, even in the nature of a conditional sentence, be imposed in drug trafficking cases and I reject the suggestion that drug trafficking can never qualify for a non-custodial disposition. A review of the case law suggests that such sentences are rare but even conditional discharges are not unheard of. *(R. v. Hogan, [2003] B.C.J. No 3196 (B.C. Prov. Ct.)* In addition, as precedents, cases decided before the *Criminal Code* sentencing amendments in 1996 must be "read with great care and awareness of the

sentencing principles which now apply, particularly those applying to incarceration as a last resort and the focus upon individualized sentencing." *(R. v. Nicoll, [2005] N.S.J. No. 194 at paragraph 26 (N.S. Prov.Ct.))* Such pre-1996 cases include the Nova Scotia Supreme Court, Appeal Division decisions in *R. v. Butler, [1987] N.S.J. No. 237; R. v. O'Toole, [1992] N.S.J. No. 164; and R. v. Ferguson, [1988] N.S.J. No. 194*, all mentioned by the Crown and all dealing with offenders and circumstances much different from this case.

[31] Comments in *Fifield* continue to have resonance on this issue of crafting appropriate sentences in drug trafficking cases, and I refer to the Appeal Court's admonition to judges to: "... constantly remind ourselves that sentencing to be an effective social instrument must be flexible and imaginative." *(Page 3, QL version)* The *Fifield* court went on to refer approvingly to the comments of MacDonald, J.A. in *R. v. Stuart, [1975] N.S.J. No. 351*: "...The sensitive and difficult task of sentencing requires individual appraisal of the rehabilitative and deterrent aspects of each case without any slavish following of precedents."

[32] The Crown's recommendation that Ms. Matheson receive a custodial sentence because, as the Crown has said, this is what the Crown always seeks in drug trafficking cases and this is what local judges impose, risks encouraging "a slavish following of precedent" or at least, a slavish adherence to a norm that applies to a very different character of offence and offender.

The Public Interest

[33] The primary purpose of sentencing is the protection of the public and, in drug trafficking cases, it is the principles of general and specific deterrence that have been relied upon to achieve this purpose. But I have to consider whether the public interest that sentencing must serve and that a conditional discharge must not undermine demands attention be paid only to the principle of general deterrence. Cacchione, J. in *R. v. J.F.C., [2006] N.S.J. No. 37 (N.S.S.C.)* upholding a conditional discharge for assault causing bodily harm and knowingly uttering a threat to cause death construed the public interest more broadly, stating at paragraph 33 of his decision:

> The words " contrary to the public interest" contained in section 730 (1) of the *Criminal Code* do not equate solely with the deterrence of the offender or of others. The public interest concept is broad enough to encompass a factor such as the impact of having a family put on social assistance as the result of the offender losing his employment because of a criminal conviction and the effect of that on the social fabric of that family.

[34] There is a public interest in the offender's rehabilitation as Cacchione, J. observed in *J.F.C.* and as Abella, J.A. (as she then was) noted in *R. v. Kerr, [2001] O.J. No. 5085 (Ont. C.A.)* Abella, J.A. was also mindful of the message that a sentence sends, holding at paragraph 17 of *Kerr* that:

> ...to under-emphasize rehabilitation in this case, would, on the other hand, send the unwarranted signal that courts will sacrifice evidence of considerable rehabilitative progress on the altar of general deterrence.

[35] Abella, J.A. went on in paragraph 18 to acknowledge the public interest being best served by a sentence "...most conducive to eliminating the risk of re-offending.

And that, in turn, argues for a sentence that both acknowledges and facilitates the ongoing rehabilitation of the [offender.]"

[36] In Ms. Matheson's case, rehabilitation is well advanced and has been ongoing since her arrest with her continuing to pursue her nursing studies in the period after she was charged. She is now a new mother again and is also raising her teenaged son. She has expressed remorse and regret for her offence and a determination to be law-abiding.

[37] Parliament has established that one of the fundamental purposes of sentencing is to contribute to respect for the law by imposing just sanctions. This is reflected in both the *Criminal Code* and *Controlled Drugs and Substances Act* sentencing provisions. Unduly harsh or oppressive sentences that fail to acknowledge the unique circumstances and facts of a case will not be seen as fair or rational. The Crown here seeks a three month conditional sentence for the sale of a single gram of cannabis marijuana for ten dollars. A three month conditional sentence was deemed fit and proper in *R. v. McGrath, [2004] N.J. No. 11 (Nfld. and L. Prov. Ct.),* where a search of Ms. McGrath's home revealed her to be in possession of two pounds of cannabis marijuana and one pound of cannabis resin and drug trafficking paraphernalia - glass vials, score sheets and some sets of scales. Ms. McGrath was a 32 year old single mother subsisting on social assistance with two young children. In *R. v. Quilty, [1997] N.J. No. 253*, the Newfoundland Court of Appeal upheld three month conditional sentences for a mother, father and son who had been engaged for four months in a small scale cannabis resin trafficking operation from their home to supplement their

welfare income. On the facts established in this sentencing, Ms. Matheson's offence did not involve anything resembling a drug trafficking operation. It is a principle of sentencing set out in section 718.1 of the *Criminal Code* that a sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Only then can the public be satisfied that the offender "deserved" the punishment she received and feel confidence in the fairness and rationality of the system. *(R. v. C.A.M., supra, at page 348)* It is my view that the *McGrath* and *Quilty* decisions illustrate that a three month conditional sentence for the single sale of $10 worth of cannabis marijuana by Ms. Matheson cannot be regarded as fair or rational.

[38] I want to make a final comment about the two cases I have cited from Newfoundland and Labrador. The Crown, reacting to reliance by the Defence on some cases from British Columbia, stated during oral submissions that British Columbia cases do not provide useful guidance to courts in Cape Breton. Without taking a position on this assertion, I will note that there are undeniable parallels between the social and economic conditions in Newfoundland/Labrador and this region.

[39] On July 30, the Crown forwarded by fax the Alberta Provincial Court decision of *R. v. Shaheen 2005 ABPC 93*. In *Shaheen*, the Court declined to grant a discharge to Mr. Shaheen for a *Customs Act* violation of failing to truthfully disclose six and one-half kilograms of flavoured pipe tobacco that he was bringing into Canada from the United States. Mr. Shaheen, a Canadian citizen, submitted that a criminal conviction for the offence "might" result in United States' immigration authorities denying him entry, although he had been unable to obtain confirmation of this from United States'

immigration officials. Fradsham, P.C.J. not only held that Mr. Shaheen's representations about the impact of a criminal record constituted an insufficient factual foundation for the discharge application, he concluded that United States immigration officers had the right to know Mr. Shaheen had committed an offence under the *Customs Act* as such information could be relevant to border officials determining who should be permitted entry into the U.S. On this basis, Judge Fradsham determined that a discharge was contrary to the public interest.

[40] I find the *Shaheen* decision to be distinguishable on its facts and its reasoning from Ms. Matheson's case. Ms. Matheson has established through evidence, as I have already discussed, that she will experience a specific prejudicial effect if a criminal conviction is recorded against her. I have further concluded that the *Shaheen* case, which engaged entirely different considerations on the issue of the public interest, does not influence my analysis of the public interest aspects of Ms. Matheson's case.

[41] I am satisfied, after a careful weighing and balancing of the principles of sentencing including sections 718.1 and 718.2 (d) and (e) of the *Criminal Code* and section 10(1) of the *Controlled Drugs and Substance Act*, and the facts and circumstances in this case, that I am not required to impose a custodial sentence, in the form of a conditional sentence, on Ms. Matheson. I do not accept that I must prioritize, in the circumstances of this case, general deterrence, narrowly construed, to the exclusion of other considerations. The devastating effect of a criminal record on Ms. Matheson's career aspirations, the effect of my declining to grant a conditional discharge, cannot be regarded as in the public interest. Mr. Matheson is disabled and

cannot work. Ms. Matheson will be supporting the family or they will continue to be on social assistance. This was a consideration for Cacchione, J. in *J. F.C.* where actual physical violence had been involved. I think it would be contrary to the public interest in this case to impose a penalty that will thwart Ms. Matheson's ability to be gainfully employed in a profession where she can make a valuable contribution to her community and her family.

[42] I also do not accept that general deterrence is only achieved through the imposition of a custodial sentence: in the ordering of a conditional discharge in this case, to the extent anyone becomes aware of it, there is a measure of general deterrence commensurate with the nature of the offence. Ms. Matheson cannot obtain her nursing license until the discharge is made absolute so there will continue to be consequences she will have to bear as a result of her poor judgement. I doubt that she thought about it at the time but with that ten dollar transaction she risked losing what she has worked so hard to achieve. That can serve as a cautionary message to others.

[43] I am satisfied on the basis of what I have said above that it is in Ms. Matheson's best interests and not contrary to the public interest to grant a conditional discharge of one year with the following conditions:

> To keep the peace and be of good behaviour;
>
> Attend at court as and when directed to do so;
>
> Inform the court of any change to name, address, employment or occupation;

> Report to Probation Services in Glace Bay by 4 p.m. on August 2 and thereafter as directed by them;
>
> Not to take, consume or possess drugs except in accordance with a physician's prescription or a medical authorization;
>
> Attend for any counselling, programs or treatment as directed by probation services;
>
> Perform 50 hours of community service work by the end of the probationary term.

[44] Provided these conditions are satisfied, the discharge will be made absolute at the end of the 12 month period.

Judge Anne S. Derrick

Judge of the Provincial Court