PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Cummings*, 2021 NSPC 28

Date: 20210428
Docket: 8370571
Registry: Dartmouth, Nova Scotia

Between:

Her Majesty the Queen

v.

Marie Cummings

DECISION ON SECTION 12 CHARTER APPLICATION

Judge: The Honourable Judge Jean M. Whalen

Heard: March 28, 2021

Decision: April 28, 2021

Charge: Section 320.14(1)(b) of the **Criminal Code**

Counsel: Michelle MacDonald, Crown Attorney
Christine Cooper, Defence Attorney

By the Court:

I Facts/Introduction

[1] On July 3rd, 2019 RCMP received a call from an A.C. reporting a single vehicle motor vehicle accident at the intersection of Main Road and Shore Road in Dartmouth, Nova Scotia. The vehicle was described as a silver Accent bearing NS license plate FVY 021.

[2] At 19:34 hours another witness reported that the female driver in the accident appeared impaired. At 19:45 hours Cst. Stevens arrived on scene. He observed a female driver identified as Marie Cummings sitting on the curb crying with her head between her knees. She would not respond to questions and there was a strong smell of alcohol coming from her breath. Cst. Stevens also observed that the vehicle was facing south against the traffic sign in the median with extensive front end damage.

[3] Cst. Stevens detained Ms. Cummings for impaired driving at 19:46 hours. She was escorted to the police vehicle and was slightly unsteady on her feet and swayed when walking. She was crying "sorry".

[4] Cst. Stevens spoke with witnesses on scene, some of whom had witnessed the accident. The witnesses indicated that Ms. Cummings' vehicle had proceeded quickly around the corner towards Shore Road before striking the sign in the median.

[5] At 19:54 Cst. Stevens administered the roadside approved screening device which registered a "fail". Ms. Cummings was arrested, chartered, and cautioned in

relation to driving while impaired. She indicated she did not wish to speak to a lawyer. A breath demand was made, she agreed to provide a sample.

[6] Ms. Cummings was transported back to the Cole Harbour detachment to provide samples of her breath. At 20:48 an attempt at a first sample was insufficient. At 20:49 a second attempt was also insufficient. At 20:50 a third attempt also resulted in an insufficient sample. Ms. Cummings indicted she "was physically unable to provide a sample, I am not refusing". At 20:51 Ms. Cummings provided her first sample which yielded a reading of 210mg%. At 21:12 for the first attempt of the second reading Ms. Cummings provided an insufficient sample. At 21:14 a successful second sample provided a reading of 210mg%.

[7] Ms. Cummings was charged under impaired driving provisions of section 320.14(1)(a) & s. 320.14(1)(b) of the **Criminal Code**.

[8] The Crown proceed summarily. Ms. Cummings pled guilty to the offence under section 320.14(1)(b) on March 1, 2021. This court imposed a driving prohibition on the Defendant that day for a period of one year.

[9] The issue for the Court to decide is what is a fit and proper sentence for the offence in light of the sentencing regime mandated by Parliament and the personal circumstances of the Defendant.

Aggravating Factors

[10] Both readings were 210 mg%.

[11] There was a motor vehicle accident at 7:34 pm with others in the area.

Mitigating Factors

[12] The Defendant does not have a criminal record.

[13] There was a change of plea to guilty on the day of trial.

[14] Ms. Cummings is remorseful for her actions.

II The Law

[15] Effective December 18, 2018, Parliament brought in new sentencing requirements for charges under section 320.14(1)(b) of the **Criminal Code**.

[16] Section 320.14(1) is a hybrid offence and in this case the Crown proceeded summarily, as earlier indicated.

Section 320.19(1) states:

> Everyone who commits an offence under section 320.14(1)…

> (b) an offence punishable on summary conviction is liable to a fine of not more than $5,000.00 or to imprisonment of not more that two years less a day or to both and to a minimum punishment of
>
> (i) for a first offence, a fine of $1,000…

Section 320.19(3) further mandates:

> Everyone who commits an offence under s. 320.14(1)(b) is liable, for a first offence, to
>
> (b) a fine not less than $2,000 if the person's blood alcohol concentration is equal to or exceeds 160 mg of alcohol in 100 mL of blood.

[17] The evidence before the Court is that this current offence is an offence under s. 320.14 and its predecessor legislation.

[18] Since the Defendant had an alcohol/blood ratio of at least 210 mg, the mandatory minimum penalty is a fine of $2,000.00.

[19] Under the provision of s. 320.23 of the **Criminal Code**, if both the Prosecutor and Defendant agree, sentencing can be postponed, and an order of driving prohibition imposed. If the Defendant successfully completes a provincially approved treatment program then something other than the mandatory minimum punishment can be ordered by the Court, including a further driving prohibition, but

in no case can a discharge be granted to the Defendant, pursuant to s. 730 of the **Criminal Code.** As of this date, the Province of Nova Scotia has not set up an approved treatment program for a Defendant to participate in.

[20] Accordingly, the minimum penalty the Defendant faces under the current regime is a fine in the amount of $2,000.00.

[21] In this instance, the Crown is seeking a fine be imposed of $2,500.00 to reflect the high readings and accident, and a one-year period of probation supervision with conditions.

[22] Defence counsel is requesting that the Defendant receive a conditional discharge with the provision for probation supervision, and conditions.

[23] The imposition of a fine results in the Defendant receiving a criminal record. If a discharge were ordered by the Court, a conviction would not be recorded.

[24] The Defendant argues that the inability of a court to impose a discharge for a first offender for an impaired charge in general, and in the particular circumstances of the Defendant, amounts to a violation of section 12 of the *Charter of Rights and Freedoms.*

> "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[25] The onus is on the Defendant-Applicant to establish that there has been a violation of their rights under section 12 of the *Charter*.

[26] In *R v Tebay*, 2020 NSPC 43, Judge Sherar at paragraphs 17 to 29 set out the Court's authority:

> *[17] What is the authority of a judge of the Provincial Court in regards to a s. 12 Charter application? In R. v. Lloyd, 2016 SCC 13, the Supreme Court of Canada decided that a Provincial Court has the power to "consider the constitutional validity of the challenged sentencing provision in the course of making his decision on the case before him." [18] However, the court is not required to do so if it decides that the mandatory minimum is a fit and proper sentence for the offender before the court. At paragraphs 18 and 19 of Lloyd, Chief Justice McLachlin (as she was then) speaking for the court:*
>
> *[18] To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as*

a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.

[19] The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the Constitution Act, 1982. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.

[20] Counsel here referred to two cases under the previous penalty provisions for impaired driving offences which considered the applicability of s. 12 of the Charter.

[21] In R. v. Luke, 2019 ONCJ 514, in the case of a young female Aboriginal firsttime offender, the Court concluded that the minimum sentence was contrary to s. 12 in that circumstance.

[22] Later, in R. v. Sabattis, 2020 ONCJ 242, another Court considered the circumstances of a young female first-time Aboriginal offender and came to the conclusion that the mandatory minimum sentence was not a grossly disproportional sentence for that offender or others in reasonably foreseeable fact situations.

[23] What is the test that the Applicant must meet to be successful?

[24] In R. v. E.J.B., 2018 ABCA 239, concluded it will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the Charter.

[25] Once again in Lloyd, supra: To be considered grossly disproportionate the sentence must be more than merely excessive. The sentence must be so excessive as to outrage standards of decency and disproportionate to the extent that Canadians would find the punishment abhorrent or intolerable.

[26] Further, the Supreme Court of Canada in R. v. Latimer, 2001 SCC 1 at paragraphs 76 and 77 applied Justice Cory's reasoning in

Steele v. Mountain Institution: 76 ... It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the Charter. The test for determining whether a sentence is disproportionately long is very properly 2020 NSPC 43 (CanLII)Page 8 stringent and demanding. A lesser test would tend to trivialize the Charter. [Emphasis added.] 77 In emphasizing the deferential standard for the s. 12 review, this Court has repeatedly adopted the following passage from R. v. Guiller (1985), 48 C.R. (3d) 226 (Ont. Dist. Ct.), at p. 238, per Borins Dist. Ct. J. (cited at Smith, supra, at p. 1070; Luxton, supra, at p. 725; Goltz, supra, at p. 502): It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

[27] With the foregoing in mind, the Court must first consider what is a fit and proper sentence for the accused, mindful also of the principles of sentencing outlined in s. 718 and s. 718.2 of the Criminal Code, emphasis being placed upon:

[28] Section 718.2(b): "A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."

[29] While the Canadian public may not be shocked if a Defendant was sentenced to pay a fine for an impaired driving offence, would they reasonably be appalled if this Defendant was so punished?

What is a Fit and Proper Sentence?

[27] As I stated in *R v Donovan*, 2013 NSPC 83, at paragraph 14:

> *[14] Ruby, 6th Ed. at para 2.1 states:*
>
> *It is a basic theory of punishment that the sentence imposed bear a direct relationship to the offence committed. It must be a fit sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserves the punishment received and feel confidence and fairness in the rationality of the system. To be just, the sentence imposed must also be commensurate with the moral blameworthiness of the offender. A sentence that is not just and appropriate produces only disrespect for the law. These common-law principles have been codified in sections 718, 718.1 and 718.2 of the Criminal Code.*
>
> *[15] Parliament has codified a number of other important values to help sentencing judges give effect to the fundamental principles of proportionality. The articulated principles however, are general in form, and moreover they provide no mechanism for resolving the inevitable conflicts that arise between these various principles in individual cases. Sentencing judges are simply told to weigh and balance the competing principles and fashion an appropriate sentence.*
>
> *[16] In crafting the appropriate sentence the Court must have regard to the factors set out in the Code as well as the nature of the offence committed and the personal circumstances of the offender. According to the Supreme Court of Canada, the appropriate sentence will also depend on the circumstances of the community in which the offence took place.*
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> *"It must be remembered that in many offences there are varying degrees of guilty and it remains the function of the sentencing process to adjust the punishment of each individual offender accordingly.*

The appropriate sentence for the specific offender and the offence is there fore determined, having regard to the compendium of aggravating and mitigating factors present in the case. It is the weight attached to the aggravating and mitigating factors which shape and determine the sentence imposed and this is an individual process. In each case the court must impose a fit sentence for this offence in this community.

The nature and gravity of the offence is properly the central factor in sentencing. It is and must be the first rule that prompts the court. The concern behind this consideration is that there should be a just proportion between the offence committed and the sentence imposed. Our basic notion of fairness demands that every sentence be primarily and essentially appropriate to the offence committed having regard to the nature of the crime and the particular circumstances in which it was committed."

Sentencing, Ruby, 6th Ed.

[17]Other common law principles of sentencing must also be appropriately applied. In the end, the punishment must be proportionate to the moral blameworthiness of the offender. The public must be satisfied that the offender deserved the punishment received and must feel a confidence and fairness and rationality of the sentence. This principle of proportionality is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may be imposed only on those who possess a moral culpable state of mind. The cardinal principle is that the punishment shall fit the crime.

[18] s. 718.2(e) of the Criminal Code requires a judge to consider all available sanctions that are reasonable. That is jail, probation, fine or some combination.

[19] s. 718.2(a) now entrenches the common-law by requiring judges to increase or reduce a sentence by taking into account aggravating or mitigating circumstances relevant to the offence or the offender…

Circumstances of Ms. Cummings

[28] Ms. Cummings was born in the UK, her circumstances were laid out in the Pre-Sentence Report dated February 9, 2021:

> *The subject, Marie Lielle Cummings, age 43, reported she is one of two children born to Neil Cummings, age 71, and Val Cummings, age 65. She informed her father is a retired finance officer, and her mother is employed in an administration role with the local Government in England. The subject spoke of her parents marrying in 1974, noting they have enjoyed a mixed relationship. She described her mother as a "dry alcoholic", adding she exhibits traits of an alcoholic but does not currently consume alcohol. Ms. Cummings noted this affected her parents' relationship, as there was verbal and emotional abuse. The subject disclosed she has one sister, age 41, who also resides in England and is currently a bank manager. She explained she and her sister have not had contact since 2013, and she also does not speak with her mother, due to past family conflict. Ms. Cummings revealed she maintains a civil relationship with her father, as they speak every few weeks. She implied she has always had strained relationships with her parents, offering, "I never felt I was enough for my parents."*
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> *…*
>
> *The subject reported she is currently single. She advised she was previously married from 1995-2007, noting the relationship ended in 2003. She advised the couple share three children together, ages 19, 23 and 24. She disclosed having "not great" relationships with her children, who reside in the U.S.A. or England. She pointed to her husband as the main contributor to the strained relationships with her children, as she cited he has caused tension over the years. Ms. Cummings described her eight-year relationship with her ex-husband as violent, noting she was the victim of strangulations and beatings, depending on his mood. She recalled sustaining injuries to her ear bone, including bruising, scratches and bleeding. The subject commented on constantly being on edge when she was with her ex-husband. She noted although police were involved, her ex-husband was never charged, as "I never pushed forward. He was just a*

violent, controlling man." Ms. Cummings advised after they separated, things continued to worsen, as she cited her husband did not want to lose control. She mentioned her ex-husband would use the children to get to her, including in 2013, after their daughter visited him, and he refused to let her return. The subject commented on her ex-husband wanting full custody of their daughter, so he could give her up for adoption to Child Protection Services; however, he was not successful. Ms. Cummings revealed her own family did not support her during the challenging times, despite knowing of the domestic violence. She recalled her family recommending she work on her behaviour and not tear the family apart by separating. The subject reported these events greatly contributed to the current strain between herself and her mother and sister.

...

The subject reported at age 16, she completed her General Certificate of Secondary Education (G.C.S.E.), which she indicated is equivalent to Grade 11 in Canada. After finishing school, she informed she would work for several years, before starting night school at age 24. In 2003, Ms. Cummings informed she attended university full-time and started an Ambulance Service Paramedic program in 2006. Upon completion of the program, she would take a program aimed at teaching pre-hospital medicine. The subject commented on school always being a positive in her life, and she displayed good attendance, earned good grades, and was not the victim of bullying.

...

Ms. Cummings reported she is currently employed by a home and auto insurance company. She added she has been employed for three years with the company and is constantly receiving new training for her job. Previously, the subject spoke of roles in health care, as a teacher or facilitator, including First Aid training. Other work experience has involved in-house care and finance. Ms. Cummings spoke of having past volunteer work with Alcoholics Anonymous and, depending on the Court outcome, will determine her future employment plans.

…

Ms. Cummings mentioned having had past surgery for a physical ailment, which currently has no impact on her life. She also denied being on any medication at the current time. With respect to her mental health, Ms. Cummings spoke of a diagnosis of Post-Traumatic Stress Disorder (P.T.S.D.), which she attributes to her past of domestic violence and her career as a paramedic. She cited having flashbacks, hyper-nervousness, vigilance and anxiety, as some of the symptoms she experiences. In addition, the subject commented on a history of depression and anxiety, which has been a "longstanding" issue, and was previously treated with medication. Ms. Cummings revealed in December 2018, she had two suicide attempts by overdose, which required periods of hospitalization. In addition, she had several other attempts of suicide in the past. The subject spoke of joining a P.T.S.D. group in the fall of 2019, which she currently attends, via Zoom meetings. As well, she noted she had one-on-one counselling with Coverdale Court work Services in 2019. Regarding the issue of substance use, Ms. Cummings commented on experimenting with alcohol at a young age, although she did not identify it as a concern. At the age of 17, she noted she would attend social functions and consume alcohol but still felt it was consistent with her peers. The subject did imply when drinking alcohol, it was always "to blackout every single time". Ms. Cummings mentioned although she was never a daily drinker, it was medication and her escape from reality. She disclosed she has had past success in refraining from alcohol, including ten years of sobriety, until a bad relapse. She advised in the past, she had reached out to her family doctor for support; however, at the time, there was no detox or programming for such. She spoke of being connected to Alcoholics Anonymous since 2002 and noted she remains involved in their programming. Ms. Cummings stated she has been sober since July 2019 and has never had concerns with illicit drugs or gambling. The subject remarked she enjoys staying active and is part of a local hiking group, adding she also attends the gym frequently.

…

> *The subject, Marie Lielle Cummings, was interviewed for this report at the Bedford office of Nova Scotia Correctional Services. She was polite, mannerly and cooperative with the interview process, and she appeared forthright, when answering questions asked of her regarding past and current situations.*

[29] Defence counsel submitted a Mental Health Treatment Report dated February 18, 2021, and it states the following:

> *Marie Cummings self-referred to mental health counselling through Coverdale Court works Society in November 2019. Due to stress surrounding an upcoming court hearing in Dartmouth, Nova Scotia, Ms. Cummings was matched with this writer - a volunteer mental health counsellor at the Coverdale office, Halifax location. Ms. Cummings reports receiving psychotherapy; but Ms. Cummings was not receiving psychological services at the time of her offence; and, Ms. Cummings had been active in her alcohol addiction prior to driving under the influence of alcohol when the offence occurred. Since that time, Ms. Cummings has put a treatment plan in place.*
>
> *…*
>
> *Ms. Cummings admits she is an alcoholic. She explained how she became an alcoholic in her early twenties and stopped drinking at age 25 with the help of AA. Ms. Cummings then pursued educational and family goals. Ms. Cummings earned a BA in Education and worked as a parametric before immigrating to Canada. After separating from her husband, Ms. Cummings came to Canada with her youngest daughter. In November 2018, Ms. Cummings ex-husband abducted their daughter and took the 16-year-old back to the UK without consulting Ms. Cummings. Ms. Cummings presented as devastated when retelling the story of her daughter being taken back to the UK. Shortly after the second abduction, Ms. Cummings attempted suicide on 2 occasions in December 2018, and was hospitalized. Following the second abduction, Ms. Cummings was*

unable to get legal resolve due to the age of the child. Ms. Cummings had fallen away from regular AA attendance. Ms. Cummings was devastated when her daughter sent an email saying she didn't want to talk to Ms. Cummings again, as her daughter blamed Ms. Cummings for the chaos in the teen's life. It was at this time when Marie began to drink.

Current Functioning

Ms. Cummings has been open to treatment and goal setting since the beginning of therapy. She has consistently arrived at all therapy appointments on time. Ms. Cummings was very quiet in the initial stages of therapy. She would avoid eye contact and become tearful when talking about her 16-year-old daughter that had been abducted by the teen's father (returning her daughter to the UK for a second time). Ms. Cummings describes her ex-husband's motive as "to hurt me" and appeared to carry excessive shame and guilt over her daughter. When asked her feelings about the accident itself, Ms. Cummings responded without hesitation "I'm just glad I didn't hurt anyone else" before talking about her own experience. This demonstrates Ms. Cummings' capacity for empathy and accountability as she has said "I did it, I can't take it back, I can only try to go on." Ms. Cummings shows sound comprehension of radical acceptance and accountability with regard to her actions. Ms. Cummings has shown no pattern of blaming others for her actions; however, she has grown to identify her feelings that were not validated during her upbringing.

…

Ms. Cummings has continued regular AA attendance, individual therapy (CBT/narrative) and PTSD meetings every Wednesday evening since the spring of 2020. She has remained sober since the date of the accident and her feelings of anxiety and depression have gone down on the dayto-day; but Ms. Cummings does experience stress over her legal case. She experiences fear over returning to the UK because she feels assured her ex-husband will hurt her. As the court date comes closer, Ms. Cummings has shown anxiety within the normal range of circumstance. Ms. Cummings does smoke

cigarettes and does not report use of other substances. Marie had attended Wellness Court in Dartmouth on November 14, 2019 and on February 27, 2020. Ms. Cummings was later denied the option to qualify for Wellness Court, due to a sudden change in mental health court options for DUI offences.

…

Marie finds that AA works for her as treatment for alcoholism; exercise for mindfulness and destressing; and, occupational enjoyment to increase positive mood and hopefulness. Marie is motivated to attend therapy and continue her self-care and sobriety maintenance routines. She is employed and with a BA level education and good employment history. Ms. Cummings has been identified as one of the top employees at her workplace, although Ms. Cummings's employer does encourage Ms. Cummings to take time off more often. Ms. Cummings had hoped to have the opportunity to be licensed in the future as a paramedic in Canada. Ms. Cummings no longer believes a high stress job is a possibility for her. Ms. Cummings has come to terms with her PTSD and domestic abuse vulnerabilities and is becoming more encouraged to read and learn about her mental health. Ms. Cummings shared at the last session "I'm 42 and just figuring this out!" referring to how the lack of validation in her household "made her feel" like she was the cause of the abuse she endured. Ms. Cummings has been able to express feelings of healthy anger as she learns healthy coping and life skill alternatives.

…

Ms. Cummings meets the criteria of Alcohol Use Disorder that was likely exasperated by her PTSD-related response of the failure to fulfill a major role obligation at home (APA, 2013). At the time of the offence, MS. Cummings had lost contact with her daughter post abduction and was unable to fulfill her role as a mother. Ms. Cummings has recently had positive contact with her daughter and is focused on being her best for their new mother-daughter relationship. Ms. Cummings agrees that trauma in her romantic relationships and immediate family are vulnerability factors for her

> *drinking. Ms. Cummings describes her 'push' to drink as "not being able to take it anymore" from overwhelming sadness and feeling of hopelessness. In Ms. Cummings case, Alcohol Use Disorder relapsed and/or has been maintained by feelings of despair and hopelessness and does not appear to include a "craving" feeling.*
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> *…*
>
> *Ms. Cummings has endured significant domestic abuse and trauma. Ms. Cummings also spent years working as a Paramedic First Responder while in the UK. Ms. Cummings has remained single since the beginning of therapy. Incidents during childhood, narcissistic influence and a dangerously physically abusive marriage partner have all impacted the way Ms. Cummings views herself and the world.*
>
> *…*
>
> *Moving forward, Ms. Cummings would benefit from further CBT/narrative trauma-focused therapy, on a bi-weekly basis, for 6 months to address life balance (work and leisure), domestic violence (signs and symptoms), and relapse/risk factors for possible onset of increased sadness and hopelessness. Ms. Cummings has a relapse prevention plan in place with her AA sponsor and has had no desire to drink since her offence. I would challenge Ms. Cummings to give herself rest and time off work.*

Letters of Reference

[30] There were numerous letters of reference and testimony from three civilian witness, members of AA and the Defendant's employer.

[31] J. T. stated:

> *She works hard on a daily basis to maintain her sobriety, as well as her spiritual, mental and physical health.*

[32] K. F. stated:

> *I admire and respect her diligent effort to combat the disease.*

[33] D. G.:

> *She has taken the drinking and driving charge very seriously and with great remorse.*

[34] A. C.:

> *I believe in Marie… she is doing well.*

[35] M. B.:

> *She has… a great sense of commitment to whatever she puts her mind to, be it her recovery in sobriety or her physical fitness training.*

[36] S. W.:

> *Marie has had many difficulties and hardship in her life and has had many mistakes… she is hard working, extremely motivated…*

[37] E. L.:

> *She is earnest in maintaining her sobriety and is working very hard toward solid sobriety everyday. She has changed her circle of friends to those that are sober in AA and keeps in touch everyday. She is doing all the things that are suggested in the AA Program for a successful, sober, and happy life.*

[38] K. B.:

> *I can honestly say without a doubt that I believe that Marie will continue her journey on this path and will continue to grow and be a positive influence in my life.*

[39] A. C.:

> *She works an excellent program, along with her sponsor.*

[40] C. M:

> *…She is active in her group and she practices the principles of sobriety in her every move and activity… she has reached out and received outside help where necessary for mental health concerns and has participated actively in PTSD recovery group… Marie's recovery encompasses every aspect of her life.*

Immigration Issues

[41] Judge Sherer stated in *R v Tebay* at paragraph 35:

> *[35] Under the provisions of the Criminal Code as recently revised, the offence before the court is a "hybrid" offence and the Crown had the option to proceed by way of indictment.*
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> *[36] If the Crown had proceeded by indictment, section 320.19(1) provides: Every person who commits an offence under subsection 320.14(1) or s. 320.15(1) is guilty of*
>
> *(a) an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of*
>
> *(i) for a first offence, a fine of $1,000*

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days

[42] Defence counsel points out that:

27. Section 36(1)(a) of the Immigration and Refugee Protection Act states: A permanent resident … is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed …

28. While the Crown has proceeded summarily in Ms. Cumming's case, the Immigration and Refugee Protection Act deems all hybrid offences to be indictable for the purpose of this analysis. Section 36(3) of the Immigration and Refugee Protection Act states: The following provisions govern subsections (1) and (2): [a] an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily …

29. As section 320.19(1) of the Criminal Code allows for a possible sentence of ten years imprisonment, a charge of having an unlawful blood alcohol concentration within two hours of driving now falls under the umbrella of 'serious criminality' under the Immigration and Refugee Protection Act.

30. A criminal record of conviction for such offences, even for first-time offenders, renders then inadmissible on grounds of serious criminality and subject to deportation from Canada

[43] Defence counsel, through witness Scott McGirr, has shown that a Canada Border Services officer can prepare an inadmissibility report following news of the entering of a conviction by the Court against Ms. Cummings. The Immigration and Refugee Board can make a finding that Ms. Cummings is criminally inadmissible to Canada resulting in a removal or deportation order. That order can be appealed to the Immigration Appeal Division if the appellant had originally received a sentence of six months' imprisonment or less. In this case the Crown is seeking a fine and probation and not incarceration. The Immigration Appeal Division can grant or reject the appeal and has the authority to stay the order of deportation.

[44] As Judge Sherar states in *R v Tebay* beginning at paragraph 39:

> *[39] Basically, there must be a conviction entered for the process to start. The entering of an absolute or conditional discharge under the provisions of s. 730(1) of the Criminal Code does not constitute a conviction. Section 730(1) states:*
>
> *Conditional and absolute discharge – Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).*
>
> *[40] In this case there is a minimal sentence and on the face of the legislation a discharge is not available for the Court to impose. Thus, the Defendant is seeking a constitutional exemption under the*

provisions of s. 12 of the Charter of Rights and Freedoms so that he could receive a discharge by way of sentence.

[41] In R. v. Lacasse, 2015 SCC 64, the Supreme Court of Canada commented on the sentencing of impaired driving case, at paragraph 3:

The credibility of the criminal justice system in the eyes of the public depends on the fitness of sentences imposed on offenders. A sentence that is unfit, whether because it is too harsh or too lenient, could cause the public to question the credibility of the system in light of its objectives.

[42] At paragraph 7:

The increase in the minimum and maximum sentences for impaired driving offences shows that Parliament wanted such offences to be punished more harshly. Despite countless awareness campaigns conducted over the years, impaired driving offences still cause more deaths than any other offences in Canada: House of Commons Standing Committee on Justice and Human Rights Ending Alcohol-Impaired Driving: A Common Approach (2009) at p. 5.

[43] At paragraph 73, the Court quoted their earlier decision in R. v. Proulx, 2000 SCC 5:

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.

[44] At paragraph 7 of Lacasse, supra:

As I mentioned in the introduction courts from various parts of the country have adhered to the principle that the objectives of deterrence and denunciation must be emphasized in imposing sentences for this type of offence.

[45] Despite the necessary emphasis on deterrence and denunciation, is the situation facing the Defendant, the possibility of deportation if a conviction is entered against him, not only harsh but cruel and unusual?

[46] Can the Defendant's unusual but not unique position of being a permanent resident accused of a crime under s. 320.14(1)(b) be considered in arriving at a fit and proper sentence?

[47] The answer to the latter question is a decided yes.

[45] Judge Sherar continues at paragraph 48:

[48] In R. v. Pham, 2013 SCC 15, the Defendant was convicted of offences relating to the cultivation and possession of marijuana for the purposes of trafficking. The accused was an immigrant who had not at the time become a Canadian citizen. The sentencing judge was aware of the Defendant's immigration status at the time of sentencing and received a two-year sentence. At the Supreme Court of Canada the sentence was varied to two years less a day wherein the Defendant was then able to statutorily appeal his deportation order. The Supreme Court of Canada determined that collateral consequences such as deportation were to be taken into account if this was appropriate to proportionality and sentencing goals.

[49] At paragraph 11 of Pham, Chief Justice Wagner wrote:

[11] In light of these principles, the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They may be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(a) of the Criminal Code). Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718(d) of the Criminal Code). Thus, when two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offenders, the most suitable one may be the one that better contributes to the offender's rehabilitation.

[12] However, the weight to be given to collateral consequences varies from case to case and should be determined having regard to the type and seriousness of the offence. Professor Manson explains this as follows: As a result of the commission of an offence, the offender may suffer physical, emotional, social, or financial consequences. While not punishment in the true sense of pains or burdens imposed by the state after a finding of guilt, they are often considered in mitigation. . . . The mitigating effect of indirect consequences must be considered in relation both to future re-integration and to the nature of the

offence. Burdens and hardships flowing from a conviction are relevant if they make the rehabilitative path harder to travel. Here, one can include loss of financial or social support. People lose jobs; families are disrupted; sources of assistance disappear. Notwithstanding a need for denunciation, indirect consequences which arise from stigmatization cannot be isolated from the sentencing matrix if they will have bearing on the offender's ability to live productively in the community. The mitigation will depend on weighing these obstacles against the degree of denunciation appropriate to the offence. [Emphasis added.] (The Law of Sentencing (2001), at pp. 136-37)

[13] Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.

[14] The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[15] The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.

[16] These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a de facto if not a de jure special range of sentencing options where deportation is a risk. …

[20] Accordingly, the sentencing judge is not compelled in all circumstances to adjust a sentence in order to avoid the impact of collateral immigration consequences on the offender. It remains open to the judge to conclude that even a minimal reduction, i.e. from two years' imprisonment to two years less a day, would render the sentence inappropriate for the particular offence and the particular offender. Collateral immigration consequences are but one relevant factor amongst many others related to the nature and the gravity of the offence, the degree of responsibility of the offender and the offender's personal circumstances. many others related to the nature and the gravity of the offence, the degree of responsibility of the offender and the offender's personal circumstances.

[50] In light of the foregoing it appears to be clear that a sentencing court can consider immigration consequences for the Defendant as

a result of the sentence intended to be imposed. Those consequences cannot dictate or override what an otherwise fit and proper sentence ought to be.

[51] Parliament has the exclusive authority to determine what a sentence can be under the provisions of the Criminal Code. In its wisdom the legislature has determined that impaired driving or care or control of a conveyance is a serious matter requiring serious sentences to deter potential law breakers. The current scheme for sentencing these types of offences in limited circumstances permits a court to direct a Defendant to participate in a rehabilitation program, and after such successful conclusion, permit the court to impose something other than the mandatory minimum penalty.

[52] Under section 320.23(1) the prior curative discharge provisions of then s. 255(1) of the Criminal Code were repealed and the following substituted:

Section 320.23(2):

If the offender successfully completes the treatment program, the court is not required to impose the section 320.19 or to make a prohibition under section 320.24, but it shall not direct a discharge under section 730.

[53] Parliament has spoken quite clearly on the matter that it does not want a discharge available in the sentencing of impaired drivers.

[54] The courts still have the residual authority to review legislation to determine if it passes constitutional muster. Courts also have the obligation to fashion a fit and proper sentence mindful, in each case, of the particular offence and the particular offender. Courts can consider, where appropriate, how collateral consequences can become manifest depending on the sentence imposed on the particular offender.

[46] In this case, Ms. Cummings is a middle-aged woman who is a permanent resident of Canada. She pled guilty to a s. 320.14(1)(b) of the **Criminal Code**. Her

readings where 210 %. That is almost two and a half times the legal limit. Fortunately, her actions did not result in injury or death of anyone, but her car struck a sign in the median and her car sustained extreme front-end damage.

[47] On the date in question, she was upset with having to clean-out her daughter's room, and in the evening she decided to go for a walk "at a location she had to drive to", and this is when the accident occurred.

[48] The Defendant showed remorse for her actions and has participated in treatment programming for "alcohol use disorder". This is her first driving related offence.

[49] The entering of a mandatory minimum penalty, of a fine, would result in a criminal record for her. That record could result in a review of her permanent resident status and possibly lead to deportation, though such an order would be reviewable upon appeal.

[50] A criminal record is a permanent record which has significant repercussions for any person. In a summary proceeding such as this, someone who has received a criminal record can apply to the Parole Board of Canada to have the record suspended five yeas after the completion of all obligations and components of the sentence imposed by the court.

[51] In light of the legislation scheme for the punishment of impaired driver and those drivers who have blood alcohol ratio in excess of the legal allowable limit and in light of the particular circumstances of this offence and the personal circumstances of Ms. Cummings, it is the conclusion of the Court that the Court ought to impose a penalty in excess of the mandatory minimum. In these circumstances even if a conditional discharge were available its imposition would not be in the public interest. Ms. Cummings has demonstrated that she has participated in treatment programming and need not be further supervised by the court. A driving prohibition of one year has already been imposed.

[52] A fit and proper sentence in this case is the imposition of a fine in the amount of $2500.00. Time to pay, April 30, 2022. Waive the victim fine surcharge. Five years after the fine is paid the Defendant can apply for a record of suspension of her resulting criminal record.

[53] To quote Judge Sherar in *R v Tebay* at paragraph 60:

> *[60] Perhaps it is obiter to this decision, but while I have some sympathy for [Mr. Tebay's] situation I would echo the court in R. v. Sabattis, 2020 ONCJ 242, at paragraph 142:*
>
> *While the imposition of the mandatory minimum sentence, resulting in a conviction being entered, may be harsh or even excessive, I have no hesitance in finding that it is not grossly disproportionate on the facts of this case.*

[61] And further at paragraph 142:

To be considered "grossly disproportionate", the sentence must be more than merely excessive. A fine, a driving prohibition, and a criminal conviction for an impaired driver who endangers the lives of others, does not outrage standards of decency and is not so disproportionate that Canadians would find the punishment abhorrent or intolerable, even in circumstances such as these where there are significant mitigating personal circumstances. The mandatory minimum sentence in 255(1)(a)(i) does not go far beyond what is necessary to protect the public, to express moral condemnation, and to discourage others from engaging in such conduct. The conduct poses a real risk of harm to the public. The mandatory minimum sentence on the facts of this case is not grossly disproportionate.

Jean M. Whalen, JPC.