

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. Boudreau, 2007 NSSC 264

**Date:** 20070830

**Docket:** CRS 274919

**Registry:** Sydney

**Between:**

Her Majesty the Queen

v.

Brian Vincent Boudreau

**Judge:**

The Honourable Justice Walter R.E. Goodfellow

**Heard:**

August 30, 2007, in Sydney, Nova Scotia

**Written Decision:**

September 7, 2007 (*oral decision August 30, 2007*)

**Counsel:**

Andre Arseneau, for the Crown

David R. Campbell, Q.C., for the Defence

**By the Court:**

[1] This hearing deals with the allegation that Brian Vincent Boudreau did breach the conditional sentence order I sentenced him to on Tuesday, August 21, 2007. I start my decision by commending Mr. Campbell, Mr. Boudreau's Counsel, for the yeoman effort he advanced on behalf of his client.

[2] The onus on the Crown was confirmed by our Court of Appeal in a decision dated December 6, 2005 in **R. v. LeBorgne** [2005] N.S.J. 493; 2005 NSCA156, as proof on a balance of probabilities. I would only add that if it were proof beyond a reasonable doubt, even applying *R. v. W.(D)*, there would be no doubt, and in fact, in the circumstances before me, a certainty that Mr. Boudreau breached the conditional sentence provision which is set out in the order: "(b) You shall confine yourself at all times to your place of residence, except when absence is employment related." The conditions of the conditional order were acknowledged by Mr. Boudreau.

[3] **The Law:** I refer to the Nova Scotia Court of Appeal decision **R. v. LeBorgne**, and in that decision, Cromwell J.A. at paragraph 11 set out the general principles:

“The purpose of conditional sentences is to keep people out of jail who do not need to be there. But to ensure that offenders abide by the conditions on which they are allowed to remain in the community, Parliament has established a "relatively simple and expeditious procedure" for dealing with alleged breaches of those conditions .... As Rosenberg, J.A. pointed out in that case:

... Parliament intended that committal to prison be a real threat both to indicate to the offender the seriousness of violation ... and to reassure the community. ...

[4] Our Court of Appeal also dealt with the issue in **R. v. Starratt** [2007] N.S.J.

No. 59; 2007 NSCA 21, per Hamilton J.A. paragraph 24:

“The starting point for any court called upon to consider an application for termination of a conditional sentence is **R. v. Proulx**, [2000] 1 S.C.R. 61, 2000 SCC 5, 140 C.C.C. (3d) 449, and particularly the following at para. 39:

‘More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help to ensure that the offender complies with the conditions imposed: see **R. v. Brady** (1998), 121 C.C.C. (3d) 504 (Alta. C.A.); **J. v. Roberts**, ‘*Conditional Sentencing: Sword of Damocles or Pandora's Box?*’ (1997), 2 Can. Crim. L. Rev. 183. It also assists in distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe.’”

[5] Now that decision was February 14 of this year.

[6] I dealt with this issue in **R. v. Nimchuk** [2002] N.S.J. No. 545; 2002 NSSC 285, in paragraph 5 I refer to the sentencing options on breach of conditional sentence.

“The sentencing options available to the court are set out in s. 742.6 (9) of the Criminal Code, above, and the Crown seeks an Order terminating the conditional sentence and directing that Mr. Nimchuk be committed to custody until the expiration of the balance of his conditional sentence.”

[7] The Supreme Court of Canada gave direction in **R. v. Proulx**, and I cite it from (2000), 140 C.C.C. (3d) 449, Lamer, C.J.C. states at p. 472-473, paras. 38 and 39:

“[38] The punitive nature of the conditional sentence should also inform the treatment of breaches of conditions. As I have already discussed, the maximum penalty for breach of probation is potentially more severe than that for breach of a conditional sentence. In practice, however, breaches of conditional sentences may be punished more severely than breaches of probation. Without commenting on the constitutionality of these provisions, I note that breaches of conditional sentence need only be proved on a balance of probabilities, pursuant to s. 742.6(9), whereas breaches of probation must be proved beyond a reasonable doubt.

[39] More importantly, where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail. This constant threat of incarceration will help ensure that the offender complies with the conditions imposed: see **R. v. Brady** (1998), 121 C.C.C. (3d) 504 (Alta. C.A.); J.V. Roberts, *Conditional Sentencing: Sword of Damocles or Pandora's Box?* (1997), 2 Can. Crim. L. Rev. 183. It also assists in” distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe.

[8] At paragraph 11 in **Nimchuk** (supra) I said this:

“... the principle is vital; namely, that the presumption that one who breaches a conditional sentence should serve the entire balance of the conditional sentence is important to maintain the credibility necessary for conditional sentences. A conditional sentence is, by its very nature, an opportunity for the offender to avoid incarceration and all the consequences of incarceration by agreeing to abide strictly to a number of terms, including the statutory condition to keep the peace and be of good behaviour. Breaches can take many forms, including those that provide reasonable excuse, an obvious one where an individual has to be hospitalized in an emergency, and others on a scale would be minor; i.e., a late reporting in, compared to in this case, a commission first of a break and enter and now on the balance of probabilities, a robbery. I readily recognize that the Criminal Code does not direct paramountcy to any one option available to the court on breach of a conditional sentence. A conditional sentence is expressly conditional upon the offender living up to his undertaking to abide by the statutory conditions and any other conditions imposed, the totality of which presents the offender with an opportunity to avoid incarceration. The court must view every breach of a conditional sentence as being serious and depending on the totality of the circumstances, the options contained in s. 742.6(9) are available with the presumption being in favour of s. 742.6(9)(d) to terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.

[9] This case is about the enforcement of the conditions that apply to a conditional sentence. No one can fail to understand the clear straightforward meaning of the word “conditional” - it is based upon compliance with conditions.

[10] In my earlier decision, which I have just cited, Nimchuk (supra), I just wanted to repeat the first part of paragraph 11.

“... the principle is vital; namely, that the presumption that one who breaches a conditional sentence should serve the entire balance of the conditional sentence is important to maintain the credibility necessary for conditional sentences.”

[11] Mr. Boudreau, before I finalize the sentence, you have an opportunity to address the court, do you wish to say anything sir?

**Mr. Boudreau:** Yes My Lord I done ... I know I did wrong and thought the safety of my daughter was at risk and that's why I think my actions were as the result of being concerned about her safety and the safety of others. That's all I can say, My Lord.

[12] Thank you, Mr. Boudreau. The defence mounted by Mr. Boudreau is one of justification of reasonableness, of being absent without any intent to break his undertaking to the Court. I agree with his Counsel that any onus upon him is on the balance of probabilities. He outlined his difficult situation and the disastrous consequences if he were called upon to serve any period of incarceration let alone the 355 days remaining on his conditional sentence.

[13] His evidence raised the issue of his credibility and even applying the test in R. v. W(D) that if his evidence was reasonably capable of belief would amount to reasonable doubt and further on the totality of the evidence if his evidence raises any doubt, it would be in his favour. I have no doubt whatsoever that Mr. Boudreau knew the conditions of his conditional sentence and the crown has established a breach of the residence requirement to a standard of certainty.

[14] This matter is a tragedy for Mr. Boudreau and his family. It was to avoid the consequences of incarceration that he was given a conditional sentence in the first place. His excuse for breaching the house confinement provision is totally without credibility. Wherever in his evidence it is conflict with Valery Dolhanty, the conditional order supervisor, I accept and prefer without reservation her evidence.

[15] One would have to be naive in the extreme to buy Mr. Boudreau's evidence that "it was not until he saw the police car outside the residence that it when it hit me, I shouldn't have been here". His going upstairs, which he first indicated he wasn't sure, that explanation is pure nonsense. It was clearly and utterly to avoid detection because he knew he shouldn't be outside of his residence. His failure to use a taxi as transportation of Ms. MacDonald cannot be believed as his explanation "I wasn't thinking straight". Mr. Boudreau's apology to the Court saying his breach was not deliberate rang hollow. My conclusion is total satisfaction that Mr. Boudreau clearly understood that he could not, and I refer again to the Order itself, paragraph (b) where he was confined to his residence except in relation to employment.

[16] In my view, he knew he was in breach of the Order. He gambled and lost. Mr. Boudreau, in my view, had complete disregard for the courts and the benefit of the conditional sentence by a willful, deliberate, calculated breach literally 72 hours after being given a conditional sentence. As I said before, the message must be given that a breach of a conditional sentence unjustifiably is a serious matter and will likely result in the imposition of Section 742.6(9)(d). Accordingly, your address for the balance of the year, namely 355 days, shall be the Cape Breton Correctional Centre or such institution as the authorities deem appropriate. I terminate the conditional order under 742.6(9)(d) and sentence you to imprison for the balance of your conditional sentence, namely 355 days.

J.