SUPREME COURT OF YUKON

Citation: *R.* v. *Blanchard*, 2009 YKSC 03

Date: 20090123
S.C. No. 04-01532
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

ROBERT RICHARD BLANCHARD

Before: Mr. Justice R.S. Veale

Appearances:

Jennifer Grandy — For the Crown
Malcolm Campbell — For the Defence

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Blanchard was granted a curative discharge on February 6, 2006, for a period of three years pursuant to s. 255(5) of the *Criminal Code*. The Crown now applies to revoke the curative discharge under s. 730(4) which, if granted, permits the Court to impose any sentence that could have been imposed when the offender was found guilty of impaired driving under s. 253(a) of the *Criminal Code*. At the time of the 2006 sentencing, the Crown had also given the offender notice of its intention to seek greater

punishment, which would have required a minimum sentence of 90 days imprisonment for Mr. Blanchard.

[2] The precise issue to be addressed is when and what breaches of a curative discharge necessitate its revocation. The curative discharge provision of the *Criminal Code* has only been proclaimed in Prince Edward Island, New Brunswick, Manitoba, Saskatchewan, Alberta, Northwest Territories, Yukon and Nova Scotia. There are a number of case precedents considering the factors relevant to imposing a curative discharge, but few precedents on the considerations for revoking the curative discharge. The essence of the curative discharge is that the offender is motivated to change his alcohol- or drug-dependent lifestyle, and the thinking is that it is better to have him on restrictive conditions learning to cope with his addiction in society as opposed to a long jail sentence where no motivation or treatment takes place and the offender is released to re-offend. For those who may consider the curative discharge an easy way to stay out of jail, in my experience there are few who apply, because many addicted offenders prefer to serve their time without addressing their addiction.

BACKGROUND

[3] Mr. Blanchard is a 45-year-old alcoholic with ten prior drinking and driving offences between 1980 and 2002. In 1980, he was convicted of driving with more than 80 milligrams of alcohol and fined $50.00. In 1986, he was convicted of driving with more than 80 milligrams of alcohol in 100 millilitres of blood, and sentenced to 30 days. Again in 1986, he was convicted of failing to provide a breath sample and sentenced to 30 days and prohibited from driving for one year. In 1990, he was convicted of refusing to provide a breath sample and sentenced to six months in jail and prohibited from

driving for two years. In 1992, he was convicted of driving with more than 80 milligrams of alcohol and sentenced to four months plus a two-year driving prohibition. In 1993, he was convicted of driving with more than 80 milligrams of alcohol and sentenced to six months. In 1995, he was convicted of driving with more than 80 milligrams of alcohol and sentenced to six months imprisonment. In 1999, he was convicted of driving with more than 80 milligrams of alcohol and sentenced to 90 days intermittent, probation of nine months and prohibited from driving for five years. In 2002, he was convicted again and given a 90-day intermittent sentence, probation of nine months and prohibited from driving for five years. His final conviction for impaired driving was the current offence which took place on September 29, 2003. He was found guilty in 2005 and given a curative discharge on February 6, 2006.

[4] He also has five offences between 1992 and 2002 for driving while disqualified because of his impaired driving convictions.

[5] The circumstances of the most recent offence, which took place on September 29, 2003, are set out in *R.* v. *Blanchard*, 2005 YKSC 10.

[6] To summarize that incident, Mr. Blanchard was drinking alcohol and drove a truck from the equipment yard to a worksite in Pelly Crossing, thereby committing the offences of driving while prohibited and while disqualified.

[7] The driving offences occurred over the course of several hours. On one occasion the equipment manager observed Mr. Blanchard's condition and took the keys for the truck away from him.

[8] However, Mr. Blanchard found another truck with keys in it and his erratic driving continued. As he was driving across a bridge, he struck a young school girl on her

bicycle and knocked her into a guardrail. Fortunately, she only suffered minor injuries. Mr. Blanchard was arrested and had a reading of 270 milligrams of alcohol in 100 millilitres of blood several hours after the accident.

THE CURATIVE DISCHARGE

[9] The reasons for granting Mr. Blanchard a curative discharge are found at *R.* v. *Blanchard*, 2006 YKSC 35.

[10] Mr. Blanchard took a residential alcohol treatment program in Kitwanga, British Columbia, after the September 29, 2003 offence. This led to a period of sobriety. He had a relapse in November 2004, but following a further 28-day residential treatment program, he remained sober until his curative discharge on February 6, 2006.

[11] Assessing the suitability of an offender for a curative discharge is a difficult process in itself. Dr. De La Mare is a Whitehorse physician with a great deal of experience in treating alcoholics. He will not consider a patient for a curative discharge unless he is able to assess the offender in the community, as he is of the view that sobriety in custody does not permit a realistic assessment of an offender. The practice in this jurisdiction is, in appropriate cases, to adjourn sentencing to permit a proper evaluation of the offender subject to the requirement of s. 720 of the *Criminal Code.* I released Mr. Blanchard under the very restrictive conditions found in *R.* v. *Blanchard*, 2005 YKSC 22, to permit a realistic assessment of him.

[12] Dr. De La Mare made a diagnosis of alcoholism, and blood tests administered in March 2005, August 2005 and January 2006 showed no evidence of relapse. Mr. Blanchard appeared for 17 office visits with Dr. De La Mare. Dr. De La Mare testified that Mr. Blanchard had an 80% chance of remaining alcohol free over the next two

years and indicated that he was prepared to work with him. Shayne King, Mr. Blanchard's probation officer, was less optimistic but felt there was a reasonable chance for success if a conditional sentence could be given with the curative discharge, as a conditional sentence has the advantage of providing immediate intervention for breaches. Mr. King also advised that Mr. Blanchard was present for all 20 curfew checks at his residence.

[13] Mr. Blanchard's entire treatment team, including an addictions counsellor, supported a curative discharge, but they all agreed that continued employment was an essential ingredient.

[14] I granted a curative discharge under a period of probation for three years for Mr. Blanchard's impaired driving conviction. The conditions included a curfew, blood tests, treatment and weekly attendances with Alcoholics Anonymous. Mr. Blanchard was also given a conditional sentence of 15 months for his dangerous driving conviction. This conditional sentence contained the same conditions as the curative discharge, and ran concurrently.

THE REVOCATION APPLICATION

[15] Mr. Blanchard breached his conditional sentence on April 20, 2006, by being outside his residence just after 11:00 p.m. in breach of his curfew between 9:00 p.m. and 7:00 a.m. daily. Both counsel recommended that no action be taken under s. 742.6(9)(a) because it was an isolated event and Mr. Blanchard had been in custody from April 27 to May 4, 2006.

[16] On February 2, 2007, Mr. Blanchard tested positive for THC and opiates contrary to the conditional sentence order. His conditional sentence order was suspended for 21 days of incarceration.

[17] On April 18, 2007, Mr. Blanchard was again in breach of his curfew, and his conditional sentence was collapsed. His curative discharge continues until February 6, 2009.

[18] The offences that have led to the revocation application began on October 23, 2007, when Mr. Blanchard was charged with offences contrary to s. 733.1(1) of the *Criminal Code* for failing to abide by his curfew and failing to abstain from alcohol. He was also charged with failing to abide by his curfew on February 3, 2008, failing to take counselling as directed on January 29, 2008, and failing to report to probation between January 21, 2008, and February 19, 2008. He was further charged with failing to report to his probation officer on April 3, 2008. Mr. Blanchard's counsel indicated that he was last employed in December, 2007.

[19] Adding to the list, Mr. Blanchard was charged with failing to submit to blood testing between November 9, 2007, and April 14, 2008. He missed six appointments with his doctor. On June 8, 2008, he tested positive for the consumption of alcohol. On June 9, 2008, he tested positive for the consumption of cocaine.

[20] Mr. Blanchard was taken into custody on June 11, 2008, and sentenced globally on August 22, 2008, on a total of five counts, to four months time served concurrent, and 30 days time served consecutive.

[21] The application for revocation of Mr. Blanchard's curative discharge is based upon the offences commencing in October, 2007 and continuing through June, 2008.

PROBATION REPORT

[22] Mr. King testified that Mr. Blanchard began his curative discharge by making reasonable efforts to live a pro-social lifestyle, in that he was abiding by the law and was a productive member of society. He reported that Mr. Blanchard had previously led a rather unproductive lifestyle where alcohol was the predominant influence. Except for the one slip in 2004 before he was granted the curative discharge, he had demonstrated an ability to remain sober, maintain employment, and take counselling. Mr. King, although not a trained addiction counsellor, recognized that treating an addict is often not a straightforward progression to permanent sobriety. There will be progress with occasional slips and a return to drinking, followed by renewed commitment to sobriety. This pattern certainly described Mr. Blanchard's circumstances. His first year was positive yet resulted in three slips that were breached under the conditional sentence until it was finally collapsed in May 2007.

[23] Since October 23, 2007, Mr. King describes Mr. Blanchard's performance as poor and gradually deteriorating as time went by. The frequency and length of the periods when Mr. Blanchard was not abiding by his curative discharge increased. Mr. King stated that in effect, Mr. Blanchard was not abiding by the curative discharge at all, and had been out of contact with his office.

[24] Following Mr. Blanchard's release from jail in August, 2008, matters did not improve. Things came to a head in September and October, 2008, when Mr. Blanchard was again drinking heavily. He went into detoxification for 4 – 5 days, became

stabilized, and resumed Alcoholics Anonymous counselling. However, a curfew check indicated that Mr. Blanchard was drinking again. On October 31, 2008, Mr. Blanchard came into the probation office visibly sick after a 4 – 5 day drinking spree. He checked into detoxification until November 5 or 6, 2008. Since that time, to the date of the hearing on December 17, 2008, Mr. Blanchard has been sober and in compliance with his curative discharge conditions. Mr. King is confident that Mr. Blanchard has committed to sobriety for the last month and a half. I conclude from Mr. King's evidence that but for the last six weeks before the hearing, the curative discharge was, in effect, not functioning.

[25] According to Mr. King, part of the problem for Mr. Blanchard is that he resisted the Alcoholics Anonymous philosophy and sponsorship. He has apparently recently taken the White Bison program which has the objective of bringing together the Alcoholics Anonymous philosophy of 12 steps and First Nation healing. No evidence was presented from the person in charge of the program, but it seems Mr. Blanchard has now embraced the Alcoholics Anonymous philosophy and sponsorship.

[26] Mr. King's view of the revocation issue is that he doesn't believe Mr. Blanchard will be successful in a community disposition requiring abstention from alcohol. He admitted that he would love to be proven wrong. He testified that Mr. Blanchard is currently unemployed, but Mr. King feels that he is in the infancy of sobriety and needs to attend the daily Alcoholics Anonymous group and focus on sobriety and his disease. In fact, although a job opportunity did become available in his home community, it was not a good fit because of the lack of community support and the potential for Mr.

Blanchard to fall back into his old habits that led to the September 29, 2003 drinking and driving incident.

[27] Mr. King testified that despite his pessimism about Mr. Blanchard's ability to remain sober, he has no information that he has driven a vehicle during his curative discharge and he would be prepared to continue to working with him.

MEDICAL REPORT

[28] Dr. De La Mare has known Mr. Blanchard as a patient for four years. He described Mr. Blanchard as having a serious alcoholism problem, indicated by a 270-milligram breathalyser reading. However, Mr. Blanchard took his recovery seriously. His employment has been an asset. He described Mr. Blanchard as an alcoholic who thought he could return to controlled social drinking and resolve his problems on his own. He said that Mr. Blanchard has been candid and genuinely does not understand why he cannot deal with his alcoholism on his own. Dr. De La Mare is satisfied that Mr. Blanchard is again making a sincere attempt to control a serious disease. But, he has to learn that social drinking is not an option.

[29] Dr. De La Mare is prepared to continue working with Mr. Blanchard, who he described as coping well with the death of his common-law spouse during the curative discharge. Mr. Blanchard had been separated from his common-law spouse, who remained in Pelly Crossing after his drinking and driving incident of September 29, 2003. He also has an 18-year-old daughter.

[30] Dr. De La Mare testified that in his experience, jail terms of three months can be useful to detoxify alcoholics, but longer jail terms are destructive because they take the offender out of the community and contribute to family breakdown and financial

problems. He gives this opinion from a perspective of ten years as a physician at the Whitehorse Correction Centre, specializing in alcohol addiction.

[31] Dr. De La Mare does not believe that Mr. Blanchard has been drinking and driving, but he acknowledges that it is a serious concern for the safety of the public and for that reason, he favours the imposition of short, three month jail terms to control Mr. Blanchard when he relapses. Dr. De La Mare is still optimistic that Mr. Blanchard has an 80% chance of succeeding to become alcohol-free. He testified that continued employment is still critical for that successful outcome, as a job provides confidence and improved self-esteem.

[32] No further evidence was presented and Mr. Blanchard did not give evidence himself. No evidence was led about his employment history or future prospects except for the reference to a job in Pelly Crossing. His counsel indicated that he had not been employed since December 2007.

THE LAW OF CURATIVE DISCHARGE

[33] A curative discharge may be imposed under s. 255(5) of the *Criminal Code*:

> (5) Notwithstanding subsection 730(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 730 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs.

[34] Before making this order, the Court must be satisfied “that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest.” The reference to “notwithstanding subsection

730(1)" permits a court to impose a curative discharge where a minimum punishment is prescribed.

[35] In *R.* v. *Beaulieu* (1980), 53 C.C.C. (2d) 342 (N.W.T.S.C.), one of the first cases to consider a curative discharge, Justice Tallis decided a judge must be satisfied on a "balance of probabilities" that the offender is in need of curative treatment and that a discharge is not contrary to the public interest. This case established the principle that a lengthy record does not disentitle a person to the benefit of the curative discharge provision, so long as the evidence established that treatment was available, and that the person was well-motivated and had a good chance of overcoming his alcoholism.

[36] This case is also significant as it was an appeal from a Territorial Court sentence of eight months and a prohibition of driving for two years. The accused had been convicted of 14 impaired driving or other driving offences involving the use of alcohol between 1969 and 1980.

[37] While Tallis J. considered that he needed to be satisfied on a balance of probabilities, there is jurisprudence questioning the appropriateness of applying the civil or criminal standard of proof in matters where the statute requires a balancing of factors such as, here, curative treatment and the public interest.

[38] In *R.* v. *M.(S.H.)* (1989), 50 C.C.C. (3d) 503 (S.C.C.). Justice McLachlin, as she then was, considered the *Young Offenders Act* provisions s.16(1) and (2), which permitted the transfer of a youth to adult court "if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court." She stated at para. 26 that the question was whether the judge was "satisfied, after weighing and balancing all the

considerations, that the young person should be transferred to ordinary court". She concluded that it was not helpful or appropriate to require a civil or criminal standard of proof before answering this question.

[39] Justice McLachlin's approach was followed in *R.* v. *A.O.*, 2007 ONCA 144, where the court refused to require the Crown to prove beyond a reasonable doubt that an adult sentence should be imposed on a young person under s. 72(1)(b) of the *Youth Criminal Justice Act*, S. C. 2002, c.1.

[40] In that *Act*, s. 72(2) places the onus of "satisfying" the court on the Crown. The Ontario Court of Appeal, following *R.* v. *M.(S.H.)*, cited above, concluded the "onus of satisfying" was not a "very heavy onus" requiring proof beyond a reasonable doubt. The court stated as follows in paragraph 34:

> Section 72(1)(b) requires the youth justice court to weigh and balance the enumerated factors and then to decide whether a youth sentence is sufficiently long to hold a young person accountable for his or her offending behaviour. That type of evaluative decision - making an informed judgment - does not lend itself to proof beyond a reasonable doubt. As McLachlin J. explained in R. v. M.(S.H.), supra, the court is not being asked to make findings of fact about past events nor to make a determination of whether a crime has been committed, which are the types of decisions for which proof beyond a reasonable doubt is normally required.

[41] However, there are other sections of the *Criminal Code* such as s. 742.1, the conditional sentence section, that do not specifically place an onus on either party. In *R.* v. *Proulx*, 2000 SCC 5, the Supreme Court placed no onus on either the Crown or the accused to establish that the offender should or should not receive a conditional sentence (para. 120), but said that the judge should take all the evidence into consideration and exercise discretion. The Court also stated at para. 122 that:

> The sentencing judge can take into account the submissions and evidence presented by counsel (s. 723), but is in no way bound by them in the decision as to the sentence. Having said this, in practice, it will generally be the offender who is best situated to convince the judge that a conditional sentence is indeed appropriate. Therefore, it would be in the offender's best interests to establish those elements militating in favour of a conditional sentence: see Ursel, supra, at pp. 264-65; R. v. Fleet (1997), 120 C.C.C. (3d) 457 (Ont. C.A.), at para. 26. For instance, the offender should inform the judge of his or her remorse, willingness to repair and acknowledgment of responsibility, and propose a plan of rehabilitation. The offender could also convince the judge that he or she would not endanger the safety of the community if appropriate conditions were imposed. It would be to the great benefit of the offender to make submissions in this regard. I would also note the importance of the role of the supervision officer in informing the judge on these issues. (my emphasis)

[42] A similar approach has been taken in dangerous offender applications in *R.* v. *Wormell*, 2005 BCCA 328, and followed in *R.* v. *F.E.D.*, 2007 ONCA 246. In those cases, the courts took the view that it is not appropriate to approach the question of the risk an offender presents in the community from the perspective of who bears the burden of proof. As stated in *R.* v. *F.E.D.* at para. 50:

> … This is not an issue that requires either party to satisfy a burden of proof; rather, it is an issue for the sentencing judge concerning whether to exercise his or her discretion based on the whole of the evidence adduced. …

[43] I conclude that s. 255(5) does not place a specific onus upon the offender or the Crown to establish that a curative discharge would or would not be contrary to the public interest. Nevertheless, the offender should present medical evidence confirming his addiction, acknowledge responsibility and propose a plan of rehabilitation supported by professionals involved in his proposed treatment. However, both the Crown and the

defence may adduce evidence and address the issue of not being contrary to the public interest.

[44] Some of the factors that are considered in determining whether a curative discharge is not contrary to the public interest have been expressed in *R.* v. *Ashberry,* (1999) 47 C.C.C. (3d) 138 (Ont.CA); *R.* v. *Beaulieu*, cited above; *R.* v. *Storr,* (1995) 33 Alta. L.R. (3d) 163 (C.A.); *R* v. *Moses*, [1995] Y.J. No. 56 (T.C.). They are conveniently summarized at para. 50 of *R.* v. *R.S.C.*, 2006 YKTC 19, as follows:

- length of record for drinking and driving offences;
- whether the accused is motivated to deal with his alcoholism;
- whether there was an accident, whether someone was hurt, and if so, how badly;
- whether the accused has demonstrated an ability to deal effectively with his addictions;
- that it is unlikely that the accused will ever drive a vehicle under the influence of alcohol again;
- whether the need for a denunciatory sentence overrides the suitability of a discharge on the facts of the case;
- the mode of life, character and personality of the offender;
- the attitude of the offender after the commission of the offence;
- whether the accused was under a driving prohibition at the time of the offence; and
- whether the accused had received the benefit of a prior curative discharge and his performance pursuant to that order.

The list is not exhaustive and includes all relevant matter matters that relate to the particular offender and the public interest.

THE REVOCATION APPLICATION

[45] The Crown has applied for a revocation of Mr. Blanchard's curative discharge under s. 730(4) of the *Criminal Code*, which states:

> (4) Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged. (my emphasis)

[46] The reference to s. 732.2(5) is an alternative procedure where the Crown can apply to revoke a probation order made under s. 731(1)(a), which does not apply in the case at bar.

[47] The revocation, like the imposition of a curative discharge, is discretionary and the court may revoke the discharge, convict the offender of the original offence and impose any sentence that could have been imposed at the time of the discharge.

[48] Section 730(4) does not set out the conditions that must be met before revoking a curative discharge. The revocation provision is a general one that applies to all probation orders and is not specifically drafted to address curative discharges. It seems appropriate to refer to the same principle of not being contrary to public interest in assessing whether a revocation should be granted. The curative discharge can therefore be reviewed at any time that the person discharged is convicted of an offence, including a breach, to ensure that the discharge is not contrary to public interest. Thus

the Crown has an onus to satisfy the court that an offence or offences have occurred. Having met that condition precedent, either party may bring evidence concerning whether the judge should exercise the discretion to revoke the curative discharge or not. No party is under a burden of proof to establish what is in the public interest but rather the judge should consider all the evidence to determine whether the curative discharge should be revoked.

[49] The practice in this jurisdiction is to differentiate between isolated slips, such as drinking in breach of an abstain clause, and the continued breaching of a curative discharge, which suggests that the fundamental condition of a curative discharge not being contrary to the public interest no longer exists. In my view, new substantive offences clearly raise the issue of whether the curative discharge continues to be in the public interest.

[50] In *R.* v. *Arthur Frank Joe*, 2008 YKTC 89, Chief Judge Ruddy revoked a curative discharge where the offender was convicted of five breaches and one substantive offence in a two-year period. In addition, the offender had disappeared, which rendered the curative discharge both ineffective and non-existent. While stating that the precondition of being convicted of offence had been met, she added at para. 9:

> … However, revocation is discretionary and is not something that should be done lightly, recognizing that in addressing significant alcohol addictions, relapse is both expected and accepted. Persons who undertake to address alcohol issues can and should be given chances to continue on that path following relapse.

[51] Thus, while some relapse may be tolerated where rehabilitation is the objective, in my view at least, the public interest and public safety must always be the foremost consideration, particularly where there is a history of drinking and driving offences.

[52] The case of *R.* v. *(Larry) Joe*, 2008 YKTC 65, seems to me to establish exceptional circumstances for refusing to revoke a curative discharge. Mr. Joe had an extensive record and 12 convictions for drinking and driving offences between 1968 and 1999. After six years without driving offences, he was again charged with impaired driving in December, 2005. This triggered Mr. Joe to begin an alcohol treatment program, followed by treatment and liver testing by a doctor. He voluntarily surrendered himself into custody on February 27, 2007, and Chief Judge Ruddy gave him a curative discharge in March 2007. He was subject to a driving prohibition and ordered to abstain from the possession or consumption of alcohol. On January 17, 2008, he was charged with driving with 160 milligrams of alcohol in 100 millilitres of blood.

[53] Mr. Joe had open alcohol in the vehicle and was noted to weave into the other lane and onto the shoulder. He pled guilty.

[54] The Crown applied to revoke the curative discharge. The sentence hearing was set for June 5, 2008, to allow Mr. Joe to make further efforts to apply for another curative discharge.

[55] After hearing extensive evidence from a psychologist who related Mr. Joe's alcoholism directly to residential school abuse, a clinical psychologist, his treating physician, his probation officer (who supported a revocation), his common-law spouse, his brother-in-law, and support for continued treatment from the Northern Tutchone Council, Chief Judge Ruddy was satisfied that the drinking and driving offence of January 17, 2008 was "an isolated occurrence of consumption and that Mr. Joe is otherwise performing well and managing his sobriety on his curative discharge." She imposed a conditional sentence of 18 months on his new drinking and driving offence,

and refused to grant the second curative discharge requested by the defence. In addition, she exercised her discretion not to revoke the original curative discharge. Thus, the exercise of discretion, while based on the same facts, may lead to a different result under an application for a curative discharge under s. 255(5) and the revocation of an existing curative discharge.

[56] It is worth noting that curative discharges are often combined with conditional sentences because the conditional sentence provides an avenue for immediate response to a breach. With a conditional sentence condition, the court must simply be satisfied that a breach has occurred on the balance of probabilities without reasonable excuse, the proof of which lies on the offender. This gives recourse to a quick and effective procedure to detoxify a person on a curative discharge and is much more effective than the revocation procedure for a curative discharges which requires charges and convictions, which will in the normal course be time-consuming.

[57] The courts in this jurisdiction have recognized the advantage of combining a conditional sentence with a curative discharge to ensure that the public interest is better served in situations of granting curative discharges to offenders with a history of drinking and driving offences. See *R.* v. *R.S.C.*, 2006 YKTC 19; *R.* v. *Larry Joe*, cited above; and *R.* v. *Blanchard*, 2006 YKSC 35. The threat of jail may have a marginal deterrent effect but it does permit the detoxification of the offender while continuing the curative treatment, if the motivation to stay sober remains.

DISPOSITION OF THIS APPLICATION TO REVOKE

[58] The conditions that existed when a curative discharge was granted to Mr. Blanchard have changed. In February 2006, he had a long stretch of sobriety

confirmed by blood tests. He was present for all 20 curfew checks. He was employed, had the support of an addictions counsellor, and was attending Alcoholic Anonymous.

[59] He began to breach his conditional sentence in April 2006 with a minor curfew breach resulting in being in custody from April 27 to May 4, 2006. He did not breach again until February 2, 2007, with testing positive for THC and opiate, a more serious breach for which he served 21 days in jail. He breached his curfew on April 17, 2007, and served 19 days in jail.

[60] As noted earlier, the offences on which this revocation application is based began on October 23, 2007, when Mr. Blanchard was charged with failing to abide by his curfew and failing to abstain. He was charged with failing to take counselling as directed on January 29, 2008, failing to abide by his curfew on February 3, 2008, and failing to report to his probation officer between January 21 and February 19, 2008. He was charged with failing to report to his probation officer on April 23, 2008. He was charged with failing to submit to blood testing between November 9, 2007, and April 14, 2008, missing six appointments with his doctor. On June 8, 2008, he tested positive for consumption of alcohol and on June 9, 2008, he tested positive for the consumption of cocaine.

[61] He was taken into custody on June 11, 2008, and remained in custody until August 22, 2008, when he was given a global sentence on a total of five counts to four months time served concurrent and 30 days time served consecutive. He served a total of 73 days.

[62] Unfortunately, his drinking continued and he was not breached but was checked in for detoxification for 5 or 6 days. He has been sober since that time.

[63] The Crown submits that this is a case where the offender began the curative discharge with approximately one and a half years of sobriety with one exception. He then began to deteriorate with three incidents dealt with under the Conditional Sentence in the second year of the curative discharge. Despite the short jail sentences during the conditional sentence, the Crown submits that in the third year of the conditional discharge, Mr. Blanchard has had long periods of no contact with his doctor and probation officer and sporadic employment. The Crown submits that his performance over the past year and a half is marked by continued breaches with commitment to sobriety for shorter and shorter periods, and little curative treatment. The Crown submits that the public views the curative discharge as a radical option and has little tolerance where it is consistently breached. In the event that the curative discharge is revoked, the Crown advised that it gave notice at trial of an intention to seek greater punishment thereby requiring a minimum of 90 days incarceration. The Crown submits two to two and one half years is the appropriate range of sentence.

[64] Mr. Blanchard's counsel distinguishes between drinking, and drinking and driving, and submits that while Mr. Blanchard may have breached his conditions and had bouts of drinking, the curative discharge has been a success because Mr. Blanchard has not been drinking and driving for six years, the longest period in his adult life. He submits that his recent commitment to sobriety is a positive development and the curative discharge should be allowed to run its course with the treating professionals who remain committed to working with Mr. Blanchard. He submits that the appropriate approach to a curative discharge should be that it is a series of steps involving falling down and then recommitting to sobriety. If the curative discharge is revoked, counsel

submits that the sentence should take into consideration the approximate five years Mr. Blanchard has been under recognizance or a curative discharge as well as the 18 months served conditionally on account of the same September, 2003 offence.

[65] In my view, the conditions that led to the granting of the curative discharge have been substantially non-existent for the past year. Mr. Blanchard has committed a continuous series of breaches, as opposed to isolated slips. His breaches also indicate other drug use. Dr. De La Mare reiterated the great importance that employment would play in Mr. Blanchard's successful treatment. He has been unemployed most of 2008 and although an employment opportunity is available in Pelly Crossing, he has presented no plan to indicate that he could return to that community. At the same time, his early success in Whitehorse at the time of his curative discharge in February 2006 has been substantially eroded. Mr. Blanchard's original commitment to sobriety and curative treatment has deteriorated seriously in the past year; characterized by a long period of incarceration followed by heavy drinking bouts finally brought under control. It is a long stretch to suggest that his curative discharge has been successful when there has been a breakdown in the treatment process as a result of Mr. Blanchard's breaches and incarceration.

[66] To be fair to Mr. Blanchard, he has recommitted to sobriety recently and he has not committed a new substantive drinking and driving offence. But a curative discharge must, to be in the public interest, be complied with, excepting some isolated slips. While Mr. Blanchard's non-compliance cannot be compared to Arthur Joe's disappearance in *R. v. Arthur Frank Joe*, the effect of his breaches has been a breakdown of the essential

conditions of reporting and being treated as ordered. These conditions are essential to protect the public interest. In my view, the curative discharge has not been a success.

[67] The fact that Mr. Blanchard's curative discharge would expire in the normal course on February 6, 2009, would arguably support the natural expiry without revocation. But the reality is that the curative discharge has not been functioning since December 2007, and has been subject to repeated breaches culminating with serious drinking episodes in the Fall of 2008. In addition, his employment, which was crucial to the original curative discharge, no longer exists. No evidence was led to explain the lack of employment and I infer that his drinking was certainly a factor. He did not present any employment prospects except for possible employment in Pelly Crossing with no evidence of a plan, community support or treatment. This prospect was not considered viable by his probation officer.

[68] I conclude that Mr. Blanchard's curative discharge should be revoked, as it has not been complied with for the better part of a year and is no longer in the public interest.

SENTENCE ON REVOCATION

[69] I interpret the revocation section as being discretionary both as to whether revocation is required and to the sentence that is appropriate. Mr. Blanchard has been under a recognizance or probation order for a period of approximately five years. His breaches have occurred in the latter half of the probation order. He has been sentenced to 18 months served in the community from offences arising out of the same original incident.

[70] His long record of drinking and driving offences is an aggravating factor. The fact that he caused minor injury to a child is also aggravating.

[71] He should not be punished for his failure to live up to the conditions of his curative discharge as he has already been sentenced for those breaches.

[72] I am not of the view that a long jail sentence will benefit Mr. Blanchard or be in the public interest. His criminal behaviour arises from an addiction to alcohol and he alone must conclude that drinking alcohol is not an option for him.

[73] The appropriate sentence, in all circumstances, is to incarcerate Mr. Blanchard for 90 days in jail to be followed by probation for a period of two years. This period of probation is required to supervise and assist Mr. Blanchard when released from jail. The conditions are:

1. Keep the peace and be of good behaviour;
2. Report to the Court when required to do so by the Court;
3. Notify the Court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change in employment or occupation;
4. To remain in the Yukon unless you have the written permission of your probation officer to leave;
5. To report to your probation officer within 48 hours of your release and thereafter in the manner directed by your probation officer;

6. Abstain absolutely from the purchase, possession or consumption of alcohol or other intoxicating substances and non-prescribed drugs;
7. Not to attend at or near any establishment whose primary purpose is the sale of alcohol;
8. Take and complete such alcohol assessments, treatment and counselling as your probation officer may direct, including attendance at residential treatment facilities;
9. Not drive or operate any vehicle in any place.

[74] I confirm that Mr. Blanchard has already been prohibited from driving for a period of 10 years following the termination of his conditional sentence order.

Veale J.