Toronto Region
CITATION: *R. v. Daybutch*, 2016 ONCJ 595
DATE: 2016·10·04

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

ERICA STACEY DAYBUTCH

Before Justice L. Feldman
Heard on July 23, September 24, October 8, November 3, 2015, February 5, April 4, 2016
Reasons for Judgment released on October 4, 2016

L. Eplett ..... for the Crown
S. Ford ..... for the accused Erica Stacey Daybutch

FELDMAN J.:

Introduction

[1] These are reasons for sentence following guilty pleas by Erica Daybutch, a First Nations woman, to several drinking and driving offences, as well as to other criminal charges. Ms. Daybutch has struggled to address her profound alcoholism. In the ordinary course, she would be subject to conviction and minimum sentences for the commission of these offences.

[2] The focus of this proceeding is whether curative discharges are warranted on findings of guilt on one count of Operation Impaired and one of Impaired Care or Control. This sentencing option was added to the *Criminal Code* in 1985, subject to a request by individual provincial governments to the federal Justice Minister that it be proclaimed in force. To date, there has been no such request by Ontario, unlike in six other provinces and the two territories.

[3] Earlier in these same proceedings, at 2015 ONCJ 302, 325 C.C.C. (3d) 568, I found that in failing to make this request, the Ontario government was in violation of the equality rights of Indigenous people in this province. I was of the view that in holding to this policy,

the government has rendered judges unable to fulfill their statutory obligation set out in *Code* s. 718.*2*(e) and, as made clear by the Supreme Court of Canada in its instruction to judges in *R. v. Gladue*, [1999] 1 S.C.R. 688, to give effect to that section's remedial purpose by exercising restraint and considering restorative options in the sentencing process *with particular attention to the circumstances of aboriginal offenders*. I also found that this violation was not saved by s. 1 and that the circumstances were exceptional to the degree that the authorities provided me the discretion to impose a disposition outside the mandatory minimum sentence set out in s. 253.

[4] In the result, I concluded that in the sentencing portion I should take a remedial approach under s. 24(1) of the *Charter* and consider the appropriateness of curative discharges for the defendant on the s. 253 charges and whether it was in the public interest.

The Guilty Pleas

[5] On April 20, 2012, Ms. Daybutch entered guilty pleas to Operation Impaired and Refuse Breath Sample. The facts are that in the morning of June 16, 2011, the defendant drove her 7-year old daughter and 9-year old niece to a MacDonald's restaurant on Kingston Rd. in Scarborough where she ordered some food. In her intoxicated state, she took umbrage at something her server said. She began to yell and swear and became aggressive. The police were called. She fled with the children.

[6] In the course of driving away, Ms. Daybutch struck the back of a vehicle stopped at a red light on Kingston Rd. The driver of that car was 5-months pregnant, but fortunately suffered no injury. The defendant continued on for some distance before pulling into a parking lot. There, the police found her slouched over the driving wheel, while the children were outside unsupervised looking at the damage to the front bumper.

[7] The arresting officer noted slurred speech, bloodshot eyes and the odour of alcohol on the defendant's breath. She began to yell and swear at him. The officer arrested her for Impaired Care or Control. At the police station she refused to provide a breath sample, swore repeatedly and at one point slammed her fists on the desk.

[8] Following the plea, I heard submissions on the defendant's s. 15 *Charter* application. In the event I found a violation of her equality rights, she asked that as a remedy I grant her a curative discharge as part of a restorative sentence under s. 255(5) and in consideration of the unique circumstances of Aboriginal offenders.

The Second Set of Charges

[9] While on bail for the original charges, Ms. Daybutch was arrested in Sudbury on August 7, 2012 for Impaired Care or Control. On Jan. 21, 2014, in the course of submissions at this proceeding, the defendant entered a guilty plea. Mr. Ford asked that the *Charter* application include the new charge.

[10] In this case, Ms. Daybutch was seen driving erratically. She then drove to an LCBO outlet where she purchased 11 cans of beer. She was seen by police to leave the store and

walk to her car while staggering slightly. She threw the beers into the back seat of her vehicle and sat in the driver's seat. Prior to arresting her, the officer noted that she had red and watery eyes and her breath smelled of alcohol. She gave a false name. She later provided breath readings of 226 and 220 milligrams.

[11] Ms. Daybutch also entered guilty pleas to five counts of Fail to Comply and one of Obstruct Police. One term of release had been to abstain from the consumption of alcohol. The defendant also entered a guilty plea to an additional Breach of Recognizance charge that required she not be in Sudbury except while at school or in the company of a surety and that she abstain from the consumption of alcohol.

The Defendant's Criminal Record is as follows:

2013.03.08 Sudbury, Ontario	(1) Mischief under (adult) CC 430(4) (2) FTC Recognizance (adult) CC145(3)	(1-2) POG-Conditional Discharge with 12 months probation Offence dates: (1-2) 2012.11.28
2013.08.14 Sudbury, Ontario	(1) FTC Probation Order (adult) CC 733.1.(1) (2) Criminal harassment – Repeatedly Follow (adult) CC 254(2)(a) (3) Theft Under (adult) CC 334(b) (4) FTC Recognizance (adult) CC 145(3) (5) Possession Schedule 1 Substance CDSA 4(1) (6) FTC Recognizance (adult) CC145(3) (7) FTC Recognizance (adult) CC 145(3) (8) FTC Recognizance (adult) CC 145(3) (9) FTC Probation Order (adult) CC 733.1(1)	(1-6) Custody 38 days intermittent (concurrent +12 months probation concurrent + sec 109 weapons prohibition 10 years + DNA (7-9) Conditional sentence order (6 months consecutive to intermittent sentence being served +DNA) Offence Dates: (1-4) 2013.04.11-12 (5-6) 2013.04.24 (7-9) 2013.07.25
2015.08.06 Sudbury, Ontario	(1) FTC Probation Order (adult) CC 733.1(1) (2) FTC Probation Order (adult) CC 733.1(1) (3) Assault (adult) CC 266 (4) FTC Probation Order (adult) CC 733.1(1)	(1-2) Custody 30 days intermittent (concurrent + probation to cover sentence concurrent) (3) Conditional sentence order (5 months consecutive to intermittent sentence + 12 months probation + DNA) (4) Custody 30 days intermittent (consecutive + probation to cover sentence consecutively) Offence Dates: (1-3) 2013.11.02 (4) 2015.08.17
2015.09.10 Sudbury, Ontario	(1) Obstruct peace officer (adult) CC 129(a) (2) FTC Recognizance (adult) CC145(3) (3) FTC Recognizance (adult) CC145(3)	(1-4) Custody 30 days concurrent to sentence being served) Offence Dates: (1-4) 2015.08.17

	(4) FTC Probation Order (adult) CC 733.1(1)	

[12] I incorporate below portions of my earlier judgment that discuss the personal circumstances of the defendant, the contents of both a Pre-Sentence and *Gladue Report* and the opinion evidence of a clinical psychologist, all of which were directed to the *Charter* issues, but that also bear on sentence.

Circumstances of the Offender

[13] Ms. Daybutch's background is detailed in *Pre-Sentence* and *Gladue Reports*. She was 31 years of age at the time of the offences. She was born into a family with a history of substance abuse. Her grandparents attended residential school. Her mother, Beverly, was raised outside her home because of her parents' alcoholism.

[14] Her mother was also a victim of spousal abuse and raised Erica alone on the Mississauga First Nation Reserve from the time she was three. Erica briefly attended a Catholic school nearby in Blind River where one of her teachers physically abused her.

[15] Because her mother struggled with alcohol, Erica was left with her grandmother who raised her. When her grandmother died, it was Erica who found her body. She was only seven. Erica returned to live with her mother. She remains close to her stepfather whom she describes as "full out in his addictions".

[16] Beverly moved her family to Sudbury and obtained employment. To her credit, Erica has always held down jobs, including on the reserve at a women's shelter and literacy centre, as well as off-reserve as a labourer with Public Works and as a cashier at several retail stores.

[17] Erica began drinking in her teens. On one occasion, she was poisoned by alcohol and went into a coma. At age 17, she attempted suicide while heavily intoxicated and likely depressed.

[18] Erica came out as gay in 1999 and struggled for acceptance in her family. She began a relationship in 2003 that lasted for 6 years during which she drank less. She became very ill in 2004 and almost died. She graduated with a diploma in Corrections from Cambrian College in 2006. She attended university at Laurentian that year and gave birth to a daughter. In 2007, she obtained part-time work for Revenue Canada.

[19] Erica's relationship ended in 2009. She raised her daughter as a single mother but began to abuse alcohol, drinking every day. She was arrested on the first set of charges in June 2011, after which she made plans to enter into the Iris Women's Addiction and Recovery Centre.

[20] Erica was prescribed medication for anxiety and suffered an overdose that in combination with alcohol put her once again in a coma that caused her brain damage leading to

cognitive change. This affected her ability to learn or work. In the circumstances, in December 2012, she arranged for her former partner, Ashley, to take over care of her daughter, Tatiana. Ashley has applied for full custody.

[21] Erica entered the Iris Women's Addictions and Recovery Centre for 5 weeks commencing in January 2013. She completed the alcohol portion but did not follow through on treatment for sexual abuse that she suffered both as a youth and as an adult while under the influence of alcohol. She has more recently worked with a native drug and alcohol counsellor at the Addictions Services Initiative. She attends Alcoholics Anonymous at least once a week. She has strong family support.

The Gladue Context

The *Gladue Report*

[22] This report, prepared by C. Jennifer Bolton, M.A., of Aboriginal Legal Services of Toronto, is discussed in more detail in the *Charter* reasons. Ms. Bolton reviewed the defendant's personal circumstances. She was of the opinion it was likely that many of the challenges Erica faces in her life are directly attributable to the intergenerational effects of her family's experiences at residential school.

[23] Ms. Bolton explained that the basic premise of the residential school system was to eradicate all traces of Aboriginal culture and assimilate First Nations people into mainstream society by focusing on its most vulnerable members, the children. This history records a pattern of excessive disciplinary practices, in addition to the widespread physical, emotional and sexual abuse of the children. They were separated from their families, isolated from their communities and lost their culture and language.

[24] The negative impact of this intergenerational trauma was profound. The children lost the nurture of family, community and tradition. Ms. Bolton referred to the literature in detailing this breakdown that led to, among other harm, addictive and self-destructive behaviour.

[25] The evidence supports the conclusion that there is a direct link between the Indigenous people judges see in court having, among other problems or disorders, addictive or substance abuse issues, and their having been raised by parents or grandparents traumatized by residential schools and disadvantaged by centuries of discriminatory government policies.

The *Evidence of Dr. Brenda Restoule*

[26] Dr. Restoule is a clinical psychologist. Her testimony is, as well, set out in greater detail in the earlier reasons. She counsels individuals of mostly Ojibway descent where addiction attaches to 30-90% of her patients at various times. She is co-chair of *Comprehensive Mental Wellness Framework for First Nations* that is used by Indigenous people and government agencies and that is built upon the framework developed for the *National Native Alcohol and Drug Abuse Program* [*NNADAP*] of which she is also a member and that focuses on addiction issues.

[27] Dr. Restoule, whose qualifications were accepted by the Crown, has specialized knowledge in alcohol abuse, alcohol abuse in Indigenous communities in Canada and culturally-based treatment for alcohol abuse.

[28] Dr. Restoule has not met the defendant. But in reinforcing Ms. Bolton's analysis, she explained that there is a unique historical context to an understanding of the addictive behaviours of Aboriginal people. She says that such behaviour is rooted in their experience of colonialism and the government's assimilationist policies, exploitation and discrimination, all of which continue to impact the health, social life and economic prospects of generations of Indigenous persons.

[29] She, too, described the impact of residential school as profound, separating children from family and ensuring that parental and community values, traditions and beliefs were not passed on. Language was lost, as was spiritual connection. Many children suffered physical, sexual or psychological abuse. On the return to their communities they did not fit in. Too many parents and relatives lost their purpose.

[30] Dr. Restoule explained that for many individuals alcohol was and is a way of coping, of "numbing" the effects of loss and displacement engendered over generations of residential school. This often took the form of binge drinking.

[31] She says that in the literature and in her clinical experience, alcohol dependence or addiction and depression were often companion disorders, as were anxiety and post-traumatic stress disorder. One disorder will often bring on another. Alcohol has remained the coping mechanism for dealing with other traumas.

[32] One of the most damaging aspects of the residential school experience on survivors has been their resulting incapacity to develop healthy parenting values and practices with which to help their own children during their developmental stages. Dr. Restoule explained that in this way the traumas are transmitted onto the next generation and the negative patterns, including alcohol dependence, continue. She said that to view an individual's life story, it is necessary to determine how residential trauma has impacted the family and to understand that person's capacity for resiliency.

[33] In my view, the evidence supports the strong inference that Ms. Daybutch suffers from at minimum alcohol dependence concurrently with depression that is at least in part related to the intergenerational trauma of residential school experienced by her grandparents and mother that was manifested in their own abuse of alcohol and blighted lives. She is in need of treatment.

Gladue Principles

[34] Amendments in 1996 to the sentencing regime set out in *The Fundamental Purpose and Principles of Sentencing* in the then new *Part XX111* of the *Criminal Code* gave emphasis to proportionality and restraint and provided broad discretion to judges in what was intended to be a highly individualized process. The concept of restorative justice, of healing the offender was the focus of subsections 718 (d) (e) and (f). Of note, the element of re-

straint, *with particular attention to the circumstances* of *Aboriginal offenders*, was codified in s. 718.2 (e).

[35] In *Gladue*, the Supreme Court gave force to these provisions. The court instructed judges to approach the sentencing of Aboriginal persons differently by giving emphasis to the "remedial purpose" of s. 718.2(e). The court was to consider "the unique systemic or background factors" of the offender and the appropriate sanctions in relation to which imprisonment was to be viewed as a less suitable and useful sanction.

[36] The Supreme Court, in para. 61, viewed the purpose of this section as a response to the "acute problem of the disproportionate incarceration of Aboriginal peoples in Canada" arising in part from the widespread racism that for Indigenous people has "translated into systemic discrimination in the criminal justice system".

[37] It made clear that this approach did not lead to "reverse discrimination" in relation to non-Aboriginals, but rather in taking into account the unique circumstances of Indigenous persons, a sentencing judge was treating that person fairly by considering his or her differences.

[38] By implication, the court viewed the application of this remedial section as applying to Aboriginal offenders nationally as part of a distinct group whose unique background circumstances warranted consideration of restraint and restorative alternatives in the sentencing process.

[39] More recently, in *R. v. Ipeelee*, 2012 SCC 13, Lebel J. described the *Gladue* direction to judges as a statutory duty. Importantly, he made clear that judges were to take judicial notice of the unique circumstances of Aboriginal offenders that bear on the sentencing process. He said, at para. 60:

> To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples…

[40] It is my view that the use of the curative discharge where warranted for Aboriginal offenders would permit sentencing judges to act in a *Charter*-compliant manner and in accordance with the direction of the Supreme Court of Canada.

Curative Discharge* and *the Ashberry Guidelines

[41] The curative discharge provision was written into the *Code* in the *Criminal Law Amendment Act*, 1974-75-76 (Can.), c. 93.

[42] It is mirrored in the present s. 255(5) which reads:

> …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.

[43] Initially in Ontario, the Court of Appeal held that impaired drivers were within a class of persons whose equality rights under the *Charter* were infringed by failure of the provincial government to have this subsection proclaimed: *R. v. Hamilton* (1986), 30 C.C.C. (3d) 257. Dubin J.A., as he then was, held that as a remedy the sentencing court was to consider in each individual case whether the granting of a curative discharge was appropriate and not contrary to the public interest.

[44] This decision was overturned by the same court in *R. v. Alton*, (1989) 53 C.C.C. (3d) 252, where Zuber J.A. followed then more recent authority from the Supreme Court that the criminal law need not apply equally throughout the country and that, in addition, impaired drivers in Ontario were not "a discrete and insular minority whose interests warranted s. 15 protection": *R. v. Turpin*, (1989) 48 C.C.C. (3d) 8 (S.C.C.), at p. 35-6.

[45] Just prior to *Alton*, in *R. v. Ashberry*, (1989) 47 C.C.C. (3d) 138 (Ont. C.A.), Griffiths J.A. set out guidelines to be considered in the granting of curative discharges. In a touch of irony, these guidelines, of no force in Ontario since *Alton*, are routinely relied upon by courts in other provinces where this provision has been proclaimed.

[46] The *Ashberry* guidelines in brief include the following:

(a) The circumstances and gravity of the offence;

(b) The motivation of the offender as an indication of probable benefit from treatment;

(c) The availability and calibre of the proposed facilities for treatment and the ability of the participant to complete the program;

(d) A probability that the course of treatment will be successful and that the offender will never again drive a motor vehicle while under the influence of alcohol; and

(e) The criminal record and, in particular, the alcohol-related driving record of the offender.

[47] In *Ashberry*, the court described these guidelines as "among the considerations relevant…". This was interpreted in *R. v. Ahenakew*, 2005 SKCA 93 (CanLII), a case involving an impaired Aboriginal driver, to mean that this list is not exclusive. In *Ahenakew,* Bayda C.J.S. went on to say, at para. 47: "Nor is the list to be treated as if each consideration had critical relevance in each case or as if each consideration were a necessary ingredient of one of the two statutory criteria. In effect, the considerations are a useful set of guidelines, but in the end, each case must be judged on its own merits".

[48] I agree with this interpretation. An evolving and progressive understanding of treatment permits a more realistic and workable application of the *Ashberry* factors in the

case of each individual offender. It is important here where intensive culturally-based holistic treatment is described in the testimony of Carol Hopkins, MSW, an academic and social worker of native background with extensive clinical experience, as crucial to the probable success of treatment in rehabilitating the health of the offender. This is particularly so given the unique background circumstances of Aboriginal offenders and his or burden of persuasion on sentence with regard to the curative discharge. I will refer to her evidence later on in these reasons.

[49] As Chief Justice Bayda noted, the *Ahenakew* approach was encouraged early on in *R. v. Beaulieu*, (1980) 53 C.C.C. (2d) 342, (NWT. S.C.), where Tallis J., said, at p. 346: "…the public interest may best be served by curative treatment as long as proper safeguards are imposed. Each case must be judged on its own merits. If rehabilitation is accomplished, then the public will be protected in the future".

[50] *Ahenakew* is important in a number of ways, not least in recognizing that in relation to Aboriginal offenders bearing the real life burden and scars of intergenerational discrimination, often leading to addictive behaviour, treatment that is culturally appropriate and intensive, not time limited, and supported in the community is the best protection for the public going forward.

[51] As well, in considering the probability of treatment success, the *Ahenakew* court was prepared to rely on the evidence of a certified addictions counsellor and a First Nations individual with no formal training but decades of experience in counselling alcohol addicted individuals using an "Aboriginal Model" with an emphasis on spirituality, healing, holistic programming and community support.

[52] Bayda C.J. considered this "other evidence" to have value in the manner described in *R. v. Soosay*, 2001 ABCA 287 (CanLII), as "similar in kind and quality to 'medical evidence', that is, given by an expert qualified to give opinion evidence regarding the accused's illness, motivation and responsiveness to curative treatment". As examples, the court suggested that a medical doctor, psychologist or counsellor with training and experience treating alcoholics were qualified to give such evidence.

[53] I am persuaded by the opinion evidence at the sentencing proceeding before this court that Chief Justice Bayda's progressive view of treatment of Indigenous persons in the service of meaningful rehabilitation is one to be accepted in a manner that follows the court's direction in *Gladue* where the public interest in road safety is at issue.

[54] The *Ashberry* factors were considered more recently in *R. v. Fineday*, 2013 SKPC 68 (Can LII), where the defendant was an Aboriginal man of 43 years who had experienced residential school and been subject to physical and sexual abuse. He attempted suicide. He had a serious and long-standing addiction to alcohol.

[55] Mr. Fineday had numerous prior drinking and driving convictions that raised concern he was a risk for future offending. His motivation was questionable. The evidence did not satisfy the court that there was a satisfactory treatment plan, nor that he had an estab-

lished therapeutic relationship in the community that would hold the line on his descent into abuse of alcohol and misbehaviour. That is not this case.

[56] Similarly, in *R. v. TD*, 2013 ABPC 204 (CanLII), the Aboriginal defendant had a lengthy history of alcohol and drug abuse. The court had concern about her motivation. There was no plan in place to prevent relapse. There was no evidence that a careful assessment had been made by a person experienced in treating alcoholism, leaving the court unable to conclude she had a reasonable chance of overcoming her addiction. It was held that a curative discharge would be contrary to the public interest.

[57] The evidence is more favourable for the defendant in the case before this court. The testimony of Carol Hopkins about the calibre and availability of treatment assists me in assessing the offender's rehabilitative potential and her suitability for curative discharge. Importantly, in explaining the results of more recent empirical research in the treatment of First Nations people for addictions and mental health issues, she has assisted this court in its approach to the question of the probability of treatment success in a more realistic and fair manner.

The Evidence of Carol Hopkins

[58] The Crown accepts Ms. Hopkin's expertise with regard to issues of addiction and substance abuse by Indigenous peoples and best practices for treatment of these diseases. Her academic and professional accomplishments are impressive.

[59] Ms. Hopkins is a Master of Social Work and has a Fourth Degree Midewiwin (Ojibway), Way of the Heart, from the Anishanabe Medicine Society for which she has been involved since 1991 in ongoing hours of professional development, equivalent to a Phd. in the western academic system. She has been granted the right to practice by the Elders of that society.

[60] Ms. Hopkins has many years of experience in clinical social work. She was the executive director of a youth treatment centre for 13 years during which she developed a best practices regime. Since 2009, Ms. Hopkins has been the executive director of Thunderbird Partnership, an umbrella organization for the National Native Drug and Alcohol Abuse Program for adults begun 41 years ago and the National Native Youth Solvent Abuse Program started in 1995. This umbrella group was expanded in 2000 to include a national organization that advocated for the right to include Indigenous knowledge and culture to address substance abuse. She has been active at the national level in linking treatment of addiction and mental health to achieve wellness.

[61] Ms. Hopkins is often a guest lecturer at both national and international conferences, as well as at universities and colleges, sometimes in partnership with Health Canada, with regard to addiction and mental health issues among Aboriginal people. She also speaks to cultural competency and a systems approach as part of developing national policy for treatment of Aboriginals. She was given an Award of Excellence by the Deputy Minister of Health for having developed a mental wellness framework for First Nations people.

[62] Ms. Hopkins has written a number of academic publications on substance abuse and mental health and the related effects of intergenerational trauma on Indigenous people of colonialism, discrimination and residential school. At this proceeding, she produced one recent such publication, *Treatment to Address Alcohol Addiction Among First Nations People in Canada*, that provides insight into the restrictive nature of items (iii) and (iv) of the *Ashberry* guidelines and advances a more realistic and empirical-based approach to the probability of treatment success when a court is considering the granting of a curative discharge.

[63] For reference, the guidelines addressed include: (iii) the availability and calibre of the proposed treatment facilities and of the ability of the offender to complete the program; and (iv) the probability of success of the offender and the likelihood that he or she will never again drive while under the influence of alcohol. These are core guidelines.

[64] In the publication and in her testimony, Ms. Hopkins sets out research persuading me that accredited intensive culturally-based treatment available to this defendant will probably lead to her rehabilitation that in the real world is relative rather than absolute. As well, the empirical data indicates that given the unique background circumstances of Indigenous people success cannot realistically be achieved in one treatment session, but rather requires multiple episodes of treatment to ensure at least probable success.

[65] More specifically, and of particular relevance here, in her paper, Ms. Hopkins says that research makes clear that the expectation of abstinence after one episode of treatment is unrealistic. Rather, the more culturally appropriate expectation given the impact of intergenerational trauma as the underlying cause of addictions for First Nations people is that "the layers of trauma cannot be fully addressed in one episode of treatment". She writes: "…multiple episodes of treatment must be recognized as a continuum of healing that addresses inter-generational trauma from residential schools, multi-experiences of adverse events in childhood that continues into adulthood and poverty as issues underpinning addictions among First Nations in Canada."

[66] From this, she says that in her view it follows that the fact clients return to treatment "is an indication of their strength and determination to pursue wellness rather than an indication of failure of treatment or failure of the client to apply treatment gains in their life outside of a treatment centre". Statistics point to the profile of an Indigenous person in their 30s with addictions returning to treatment 5 times.

[67] This research is compelling and derives from a history of the development of NNADAP in its addiction and mental health treatment regimes. NNADAP is national in scope, with 49 alcohol and drug abuse treatment programs and more than 550 community-based prevention programs. It makes use of the context of cultural trauma for Aboriginals to establish a more immediate relationship as between client and service provider.

[68] The calibre of this program is enhanced by a continuing process of national accreditation that measures the quality of health care services on the basis of standards of excellence. It has developed indicators monitored to demonstrate outcomes. In fact, in 2012, 85% of NNADAP treatment centres were accredited by Health Canada in contrast to 62% of

mainstream treatment centres across Canada. It is of note that only 25% of mainstream Ontario treatment centres have been similarly accredited. In Canada, at least for Indigenous people, this program appears to be the gold standard for treatment of addictions and mental health issues.

[69] Data over the past 16 years regarding treatment of First Nations people in NNADAP programs indicates that 51% of clients abuse alcohol, 34% have alcohol and narcotics dependencies and 30% enter treatment with a confirmed mental health diagnosis. As of 2012, 75% of clients completed the program and, significantly, 95% self-report less use post-treatment, while 90% felt they had gained more control over their lives. In this regard, there is increased recognition through experience and research that Indigenous knowledge and cultural practices in treatment and post-care are important to wellness.

[70] Ms. Hopkins reminds us that intergenerational trauma for Indigenous people and the profound nature of addiction requires a realistic approach to the meaning of success. She views treatment success as defined only by less substance abuse and less negative social behaviours. I accept the common sense basis of this assertion. It is relevant to an application of the *Ashberry* guidelines in this case where it is the defendant's burden to satisfy the court that her treatment will probably be successful.

[71] I am mindful that these guidelines were written at a time when the granting of a curative discharge was considered exceptional and that in Ontario, given the province's failure to proclaim, there has been no opportunity for sentencing courts in the course of weighing the probability of success to interpret these guidelines in a more contemporary manner to incorporate restorative principles, to consider the merit and promise of NNADAP treatment and to become more realistic about the complexities of rehabilitation for Aboriginals grappling with addiction.

[72] During submissions, I was advised that Ms. Daybutch is undergoing treatment in Ontario at the Blind River treatment facility. Ms. Hopkins testified that this facility has been accredited, having met standards of excellence recognized by both the federal and provincial governments. Its program views an Indigenous cultural environment as a necessary component in the process of healing from intergenerational trauma and addictions.

Is the Granting of a Curative Discharge in the Public Interest?

[73] An assessment of the evidence satisfies me that Ms. Daybutch is in need of treatment for alcohol dependence and depression. Her family life was marked by the intergenerational trauma of residential school. She abused alcohol at an early age. She suffered an alcohol-induced coma. She attempted suicide.

[74] Erica came out as gay, entered a relationship and gave birth to a child. When the relationship ended and she lived alone as a single mother she began to abuse alcohol every day. She was arrested on the first set of drinking and driving charges. She sought treatment.

[75] Ms Daybutch was charged again just over a year later with related offences, in addition to a number of other charges alleging breaches of her terms of release for, among other

infractions, continuing to consume alcohol. She overdosed on anxiety medication that in combination with alcohol put her in another coma from which she sustained brain damage leading to cognitive change. She chose to transfer care of her daughter to her former partner.

[76] The defendant's criminal record indicates that she was charged with a number of offences during a discrete period of time from 2011-2014, during which it can be inferred her behaviour was at least in part fuelled by alcohol dependence and depression. Her multiple alcohol-related charges reinforce the conclusion that she was in need of treatment.

[77] Beginning in January 2013, Ms. Daybutch completed 5 weeks of treatment for alcoholism at Iris Women's Addictions and Recovery Centre. Prior to entry into the Blind River facility, she was working with a native drug and alcohol counsellor. She was attending Alcoholics Anonymous at least once a week.

[78] I will make reference below to the *Ashberry* guidelines when considering whether a curative discharge for Ms. Daybutch is in the public interest. With regard to the first guideline, it is a logical inference that where the circumstances of the offences are particularly aggravating and the consequences grave the reasonable person would question whether the granting of a curative discharge would be in the public interest. Here, the aggravating circumstances that include driving in an intoxicated state with young children in her car are apparent in the evidence and are made more troubling by the subsequent charges.

[79] While these circumstances reflect the potential risk of impaired driving, they are not so serious as to disqualify the defendant from consideration for this sentencing option. Rather, they serve in this case to highlight the fact of the unravelling of a life during a distinct period from among other stresses, intergenerational trauma, alcohol abuse and mental health issues that indicate a clear need for intensive treatment, the probable success of which is in the public interest.

[80] As well, I am satisfied on the evidence that Ms. Daybutch is well-motivated given her history to undertake and complete treatment. She has maintained employment and pursued education in order to improve her prospects. She has sought treatment for addiction and depression. She has continued counselling. She recently entered her most intensive treatment to date at a NNADAP facility that emphasizes relapse prevention. Her rehabilitative prospects are enhanced in my view by her resilience and the capacity for hard work she has shown in her life despite her many challenges.

[81] Ms. Hopkin's testimony about the NNADAP treatment regime is impressive and encouraging. The program is based on decades of experience and research that continues and permits this national organization to maintain standards of excellence second to none. It uniquely relies on cultural knowledge and traditions to enhance treatment and maintenance post-care. As noted earlier, it is my view that the defendant has the will and capacity to succeed in her course of treatment.

[82] Importantly, Ms. Hopkins persuades me in her analysis of the data that in weighing probability of success, in particular for Indigenous persons bearing the effects of intergenera-

tional trauma, a successful course of treatment contemplates relapse and multiple episodes of treatment on a continuum of healing and that the will of the individual to return to treatment is a predictor of a return to health over the long term.

[83] I accept that this substantive and progressive approach is more realistic in attaching present-day meaning to probability of success in individual cases. Relapse is part of that process so that the notion the accused will never drive again while under the influence of alcohol implies an element of certainty, but is unknowable and is inconsistent with probable success as contemplated in a NNADAP course of treatment. Rather, the focus of the court should be on the probable success of the individual to sustain a course of healing and behavioural change brought about by intensive treatment and after-care that will in my view enhance public safety and that is in the public interest. This was the progressive view of Tallis J. in *Beaulieu*.

[84] The Crown submits that the defendant should be incarcerated, but I have determined on this evidence that I should take a remedial approach on sentence. I am satisfied that Ms. Daybutch is an appropriate candidate for curative discharge. She has shown a determination to overcome significant challenges throughout her life. She sought treatment after a particularly difficult period when she amassed a number of convictions linked to her addictions and depression. She has the support of family.

[85] On the evidence, I infer she is committed to treatment on a continuing basis and that her course of treatment at Blind River will likely be successful. I am satisfied it is in the public interest that on her findings of guilt for one count of Operation Impaired and one of Impaired Care or Control she be discharged. She will, in addition, be placed on probation for two years on terms to be reviewed with counsel. I will also receive submissions on appropriate dispositions for the remaining findings of guilt.

Released: October 4, 2016

Signed: "Justice L. Feldman"