CANADA
PROVINCE OF NOVA SCOTIA
COUNTY OF INVERNESS **C. P.H. NO. 03732**

IN THE COUNTY COURT FOR DISTRICT NUMBER SIX

BETWEEN:

ARNOLD JOHN KINNEY

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

L.W. Scaravelli, Esq, for the Appellant
Richard J. MacKinnon, Esq., for the Respondent

1993: January 26, MacLellan, J.C.C.:

This is an appeal from the conviction of the Appellant on a charge that he:

> "at or near Mulgrave, in the County of Guysborough, Province of Nova Scotia, on or about the 6th day of July, 1991 did, while his ability to operate a motor vehicle was impaired by alcohol or a drug, have the care

> or control of a motor vehicle, contrary to Section 253(a) of the Criminal Code of Canada."

The Appellant was convicted by His Honour Judge John D. Embree, of the Provincial Court sitting at Port Hawkesbury on the 22nd day of June, 1992.

The facts as disclosed in the evidence presented at trial indicate that on July 6th, 1991, at 11:35 p.m. while on routine patrol, Constable Jill Osmond of the Royal Canadian Mounted Police in Port Hawkesbury was flagged down by a motorist. She was in the Port Hastings area and the motorist indicated to her that he had observed a beige automobile with the license plate number BVP 537 and that it was being driven in an erratic manner.

Later at 11:49 p.m. Constable Osmond was heading into Mulgrave when she noticed a beige Oldsmobile parked just off the highway. This vehicle had the same license number as given to her by the motorist and therefore she stopped her vehicle and approached it. She found the accused in the vehicle and he was the lone occupant. Her evidence is that the accused was lying on the front seat with his feet towards the driver's side and his head towards the passenger's side. According to her he appeared to be sleeping. The accused was wearing shorts and a T-shirt without any socks or shoes. At that time Constable Osmond also found the keys to the vehicle and tried them in the ignition. They fit the ignition of the vehicle.

At that point, because of symptoms of impairment which she noted, she asked the accused to come back to the police vehicle where he was subsequently given an

A.L.E.R.T. test and later a breathalyzer demand. Her evidence is that she observed a strong smell of alcohol coming from the accused's breath and that he staggered and his speech was quite slurred.

The accused was charged with refusal of the breathalyzer along with being in care or control of a vehicle while impaired. He was acquitted of the charge of refusal and found guilty by Judge Embree on the charge of having the care or control of a vehicle while impaired.

The Notice of Appeal filed by the Appellant alleged:

> "1. That the learned trial Judge erred in law in failing to properly instruct himself with respect to the law as it relates to care and control in Section 253(a) of the **Criminal Code.**"

At the Hearing of this Appeal, Counsel for the Appellant contended that the Trial Judge misinterpreted the case law on the issue of care or control. He also contended that if the case law was properly applied, the Appellant should have been found Not Guilty.

Both parties agree that the law on the issue of care or control is set out in the two leading cases of **R v. Ford** (1982), 65 C.C.C. (2d) at 392 and **R v. Toews** (1985) 20 D.L.R. (4th) 758.

The Trial Judge in his decision said:

> "On the first count of impaired driving, I agree with Mr. Scaravelli that there is no evidence before me or certainly...I don't know that I'll go that far - but there's insufficient

evidence before me to link Mr. Kinney to being the driver of the vehicle that was observed by Mr. Gaudet and Mr. Anderson. He probably was. There is certainly a circumstantial case that he was, but it's possible that it could have been somebody else and so the evidence of whether Mr. Kinney had care and control of the vehicle has to hinge on the circumstances as testified to by Const. Osmond when she came across the vehicle.

The individual is lying down...Mr. Kinney is lying down on the front seat with his feet on the driver's side and his head on the passenger side. The keys are on the seat and the Constable comes across the vehicle. And in fact, the keys are the keys to this vehicle because the Constable tried them. (Just give me one minute, Counsel.)

The accused here was not in the seat occupied by the driver such as would trigger the presumption of care and control. The Court then has to look at all the circumstances and determine, on all of the evidence, whether it's been proven beyond a reasonable doubt that he did have care and control of the vehicle. The...and the Court considers the laws stated by the Supreme Court of Canada in both the Ford Decision and the Toze (sp.?) Decision about the elements of care and control. The...and the Court is convinced in the circumstances here that an individual lying in the front seat with the keys to the vehicle parked alongside of a highway, as this vehicle was, is in care and control. And not to state a general rule, I find as a fact in this case that based on the evidence of Const. Osmond that Mr. Kinney was in care and control. I think I'd have to be concerned with a course of conduct that would involve the risk of the vehicle being put in motion and I believe that Mr. Kinney was in such a position. I think that can be the case whether or not the vehicle was...was started or not.

I consider that his...that the evidence

> of the Constable is such that...or both Constables is such as to convince me beyond a reasonable doubt that Mr. Kinney's ability to operate a motor vehicle was impaired by alcohol and that was not seriously contested by Defence counsel, but whether it was or it wasn't, that doesn't reduce the onus and I'm convinced that his ability was...was impaired, both by virtue of his conduct and the observations of the officer."

In **R v. Ford** (1982), 65 C.C.C. (2d) 392, the Supreme Court of Canada found the accused to be in care or control of his vehicle in circumstances where he was found in his car parked in a field next to a highway.

The evidence disclosed that the accused was sitting behind the wheel and there was a number of other people in the vehicle. He had been in and out of the vehicle a number of times prior to being found by the police officer and also turned the motor of his vehicle on and off a number of times. There was also evidence that the accused had made arrangements with a friend for her to drive his vehicle when the party which they were attending was over.

At trial, the Trial Judge held that the presumption of care or control under Section 258(1)(a) did not apply because he accepted the accused's evidence that he did not enter the vehicle with the intention of setting it in motion. However, he found that the accused was in care or control of the vehicle and found him Guilty of doing so while he was impaired.

On Appeal to the Supreme Court of Canada the conviction was confirmed. Ritchie, J. said: (p. 398)

> "In the present case the appellant was found to be the owner of the motor vehicle in question and to have been in and out of it numerous times during the course of the evening, and there was also evidence that he turned the engine on and off a number of times in order to use the heater. These are all additional factors tending to establish care or control so that under the particular circumstances of this case rebuttal of the presumption created by s. 237(1)(a) is far from conclusive on the issue of the guilt or innocence of the appellant.
>
> Nor, in my opinion, is it necessary for the Crown to prove an intent to set the vehicle in motion in order to procure a conviction on a charge under s. 236(1) of having care or control of a motor vehicle, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 mg. of alcohol in 100 ml of blood. Care or control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent."

In **R v. Toews** (1985), 20 D.L.R. (4th) 758, the Supreme Court of Canada revisited the issue of care or control. There, the accused was found asleep in the front seat of his truck which was located on private property. He was lying on the front seat with his head by the passenger side door and his lower body encased in a sleeping-bag extending under the steering-wheel. The ignition key was in the ignition but the truck was not running. The accused testified that he had left a party sometime prior to being found by the police

officer and that he had entered the vehicle to lie down and await his friend. He said that he had no intention of driving the vehicle when he entered it.

The Court found that the accused was not in care or control of the vehicle. McIntyre, J. said: (p. 764)

> "There are, of course, other authorities dealing with the question. The cases cited, however, illustrate the point and lead to the conclusion that acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. Each case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely."

In **R v. Blair** (1988), 82 N.S.R. (2d) 76, the Nova Scotia Supreme Court Appeal Division in a decision dealing with the issue of care or control applied the principles set out in **Ford** and **Toews** and confirmed a Trial Judge's decision finding the accused guilty of the offence of care or control while impaired.

In the **Blair** case, the accused was approached by a police officer who had come upon an accident scene. He was outside the vehicle and was asked if he was the driver of the vehicle which had been involved in the accident. He responded that he was and that the vehicle belonged to him. He was given a breathalyzer demand and tested. He was found to be over the legal limit. At issue on the appeal was whether there was a proper basis on which the Trial Judge could find that the accused

was in care or control of the vehicle at the time he was given the demand. The Court reviewed a number of cases on the issue, including **Ford** and **Toews** and Macdonald, J.A. said: (p. 80)

> "Counsel for the appellant contended that Judge Hall erred in saying the **Price** case broadened the definition of care or control as set forth by the Supreme Court of Canada. I do not agree. In effect all Judge Hall said was that based on the authorities to which he referred, care or control is not limited to "acts involving the use of the car, its fittings or equipment", but is broader and may include circumstances such as a person being in "the immediate presence of a motor vehicle with the means of controlling it or setting it in motion". As already noted Mr. Justice Limerick in the **Price** case said the care or control could be established by showing that the accused was in the immediate presence of a motor vehicle with the means of controlling it or setting it in motion. That concept to my mind is not dissimilar from the statement of MacIntyre, J., in **Toews** that acts of care and control can be "Some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous.".
>
> In the present case the appellant's "course of conduct associated with the vehicle" was the uncontradicted evidence that he said he was the driver and the unchallenged evidence that he referred to the station wagon as his."

Later at page 81 he continued:

> "In the present case it is my opinion that

> Judge Hall did not err in law in starting (sic) what he considered the meaning to be of the words care or control as subscribed to them by the courts. In addition there was in my opinion ample evidence to support the finding of the courts below that the appellant had the care or control of the station wagon at the material time."

On the issue of the role of an Appeal Court in dealing with a finding by a Trial Judge that an accused is in care or control of a vehicle he said: (p. 79)

> "The second and third grounds of appeal may conveniently be considered together. With respect to them it must be remembered that a finding of care or control being one of fact cannot be reassessed by this court unless there was no evidence to support it or unless the trial judge erred in interpreting the meaning of the phrase "care or control" in the context of then s. 236 of the **Criminal Code.**"

It is contended by Counsel for the Appellant that the Trial Judge misapplied the **Ford** and **Toews** case and that this case is very much on all fours with the **Toews** factual situation. Here, as in **Toews**, the presumption was not available to the Crown and in each case the keys to the vehicle were available to the accused. Both accused were found inside the vehicle sleeping. He also points out that there was no clear evidence that the vehicle belonged to the accused.

The Crown on the other hand take the position that in the **Toews** case the Trial Judge was aware from the evidence of the accused himself that he had no intention

to drive the vehicle and was simply using it as a place to sleep. This was supported by the fact that he was in a sleeping-bag.

It would appear from the decision of the Trial Judge that he found the accused to be in care or control because:

1. He was in the front seat of the vehicle.
2. The keys to the vehicle were at his disposal.
3. The vehicle was parked alongside a highway.

He therefore ruled that there was a risk that the vehicle could be put in motion.

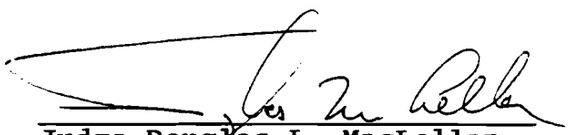
In **Toews** the Court referred to a number of cases which it suggested would be of assistance in deciding if a person was in care or control of a vehicle. Reference was made to **R v. Thomson** (1940), 75 C.C.C. 141, where Baxter, C.J. said: (p. 143)

> " "Control" does not need definition. The man who is in a car and has within his reach the means of operating it is in control of it."

I find that here the Trial Judge was justified in coming to the conclusion that the accused was in care or control of the vehicle. He was aware that this vehicle had recently been driven on the highway and he was aware that the accused was found alone in the vehicle. The

evidence was that the vehicle was parked close to the highway and that the keys to the vehicle were at the disposal of the accused.

I hold that the finding of fact made by the Trial Judge was supported by the evidence and I therefore dismiss the appeal.



Judge Douglas L. MacLellan
County Court Judge
District Number Six