PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacKinnon, 2010 NSPC 31

Date: April 15, 2010
Docket: 2070069, 2070070
Registry: New Glasgow

Between:

Her Majesty the Queen

v.

Jason Alexander MacKinnon

Judge:	The Honourable Theodore K. Tax
Heard:	September 23, 2009, January 7, 2010
Oral Decision:	February 18, 2010
Charges:	Section 253(1)(a) and Section 253(1)(b) **Criminal Code of Canada**
Counsel:	T. William Gorman, for the Crown J. Gregory MacDonald, for the Defence

By the Court:

The Charge:

[1] Jason Alexander MacKinnon is charged with having care and control of a motor vehicle while his ability to operate the motor vehicle was impaired by alcohol contrary to Section 253(1)(a) and (b) of the **Criminal Code.**

The Issue:

[2] The sole issue in this case is whether or not the accused was at the material times in care and control of his motor vehicle. The Crown relies on the presumption of care and control in Section 258(1)(a) of the **Code** and the Defence maintains that they established credible and reliable evidence which would rebut that presumption.

The Facts:

[3] The facts of this case are not in dispute.

[4] Jason McKinnon and Ms. Casey MacPherson have lived together in a common-law relationship since 2007. In July, 2009 they were living together at 81 Diamond Street in Trenton, Nova Scotia.

[5] Although they normally leave their house door unlocked, on July 6, 2009, as a result of a domestic dispute earlier in the day, Ms. MacPherson locked Mr. MacKinnon out of the house when he returned home at about 2 AM. At that time,

she told him that she refused to let him in the house. When Ms MacPherson left for work around 6 am on July 6, 2009, she locked the doors to the house, however, she was concerned Mr. MacKinnon would kick in the door to gain access to the house, since he did not have a key to the residence. As a result, she called the police to talk to or remove Mr. MacKinnon because she was afraid that he would kick in the door to their house and cause some damage, once she left for work.

[6] Just before leaving for work on July 6, 2009, Ms. MacPherson realized that Mr. MacKinnon had spent the evening in his truck on their driveway. She gathered some of Mr. MacKinnon's clothes, prescription medications and some of the garbage that he had left in the house while partying with his friends on July 4- 5, 2009 (bottles and cans of beer) and threw them in Mr. MacKinnon's truck where he had slept after their verbal altercation at about 2 AM that morning.

[7] Most importantly, for the purposes of this case, Ms. MacPherson stated in Court that she took the keys to Mr. MacKinnon's truck which had been locked in the house, and threw them in the truck just before she left for work shortly before 6 AM on July 6th, 2009.

[8] Mr. McKinnon's truck was parked in the driveway of 81 Diamond Street and when the police arrived just after 6 AM on July 6, 2009, Mr. MacKinnon was asleep in the driver's seat of the truck, the engine was running and the lights of the

truck were on. The truck, a Ford F150, is a supercab vehicle with seating behind the driver and passenger seats. Mr. MacKinnon was sleeping in the driver's seat, which he had folded back at about a 45° angle. The police officers agreed that a person could not really drive the truck with the seat reclined back in that position.

[9] When police officers tapped on the window, Mr. MacKinnon woke up and rolled the window down - there was a strong odor of alcohol and Mr. MacKinnon was unsteady on his feet as he was escorted back to the police car after being advised that he was under arrest for being in care and control of a motor vehicle while exhibiting indicia that his ability to drive a car was impaired by alcohol.

[10] Police officers made no observations regarding whether the emergency brake was engaged, but they did observe beer bottles and cans located inside the cab and one can just outside the driver's door – 2 full bottles of beer were on the passenger side of the truck, and ½ full bottle in the passenger side console and ½ full can of beer behind driver's seat on the floor.

[11] Officers said that there were clothes in the truck and they thought it might be a change of clothes for work - shirt, pants and a kit bag.

[12] Officers also noted that Mr. MacKinnon had a strong smell of alcohol from his mouth, was slightly unsteady on his feet as he walked back to the police car and his eyes were bloodshot and glossy. Officers believed he was impaired by

alcohol and breathalyzer readings at 6:32 a.m. and at 6:50 a.m. were 130 mg of alcohol and 120 mg of alcohol in 100 millilitres of blood.

[13] At the time of his arrest, Mr. McKinnon told the officers that he had been out at the Thistle Bar until it's 2 AM closing time, and on his return to 81 Diamond Street, his girlfriend (Ms. Casey MacPherson) had locked him out of the house. Rather than fight with her, he went to sleep in his truck which had been unlocked. Mr. MacKinnon also said that he did not get in the truck to drive it anywhere but rather that he used it as a place to sleep and that is why the seat was reclined right back. However, he did have the engine running because he was cold. At the time, Mr. MacKinnon was arrested, he was wearing shorts and a T-shirt.

[14] The Defence called Ms. Kathleen (Casey) MacPherson who said that Mr. MacKinnon had been partying with friends at their house on July 4 and 5, 2009. When she returned from work on the afternoon of July 5, 2009, Mr. MacKinnon was not at home and the house was a mess. She kept trying to call Mr. MacKinnon on his cellphone to come back to the house and clean up the mess that he had left. She said that he did not return her calls and that he had apparently decided to stay out with his friends. She was furious with him and decided to lock him out of the house.

[15] In addition, when Ms. MacPherson returned from work at 3 PM on July 5, 2009, she parked her car behind Mr. MacKinnon's truck in their driveway. She confirmed that Mr. MacKinnon did not drive his truck anywhere on July 4 - 6, 2009 - as the party was at their house or he was with friends who had driven him to other locations. Apart from a short period when she went out while Mr. MacKinnon was also out, Ms. MacPherson stated that when she was not at work, her car was parked behind his truck in their driveway at 81 Diamond Street, Trenton, Nova Scotia.

[16] On Monday, July 6, 2009, Ms. MacPherson said that she left for work at about 5:45 AM and just before leaving - she locked the house and took out some of Mr. MacKinnon's clothes, his prescription medications and also threw some of the garbage (beer bottles and cans left in the house by Mr. MacKinnon and his friends) into his truck. She threw these articles in his truck after opening the passenger door.

[17] Ms. MacPherson also said that she woke Mr. MacKinnon up when she threw these articles in his truck and that she also threw him the keys to the truck which had been kept in a drawer in their kitchen. Because she was leaving for work and she had locked him out of the house, she was worried that since Mr. MacKinnon did not have a key to the house, he might kick in the door to get in the

house. As a result, she phoned the police in order to remove him from the area to prevent him from damaging their house.

[18] Mr. David Fanning also testified for the Defence. He is a friend of Mr. MacKinnon who had been with him on July 5th, 2009. He was the designated driver who drove Mr. MacKinnon to the Thistle Pub around 6 PM, after he and Mr. McKinnon had spent some time at another friend's house that afternoon. Mr. MacKinnon drank several bottles of beer over the course of the evening and Mr. Fanning dropped him off at 81 Diamond Street around 2 AM on July 6, 2009, and then drove home.

[19] Mr. MacKinnon's evidence was that he had no intention to drive his truck and that he had not moved the truck from it's parking place at 81 Diamond Street at any time from July 4 - 6, 2009. He knew he was in trouble with his girlfriend over partying with his friends and leaving a mess in the house when Ms. MacPherson got home from work. However, he was surprised that Ms. MacPherson had locked him out of their house when he returned home and was dropped off by Mr. Fanning around 2 AM on July 6, 2009.

[20] He did not have his truck keys until Ms. MacPherson threw them in the truck's cab shortly before 6 AM on July 6, 2009 when she left for work. He started the truck at that time because he was cold and he testified that the police

arrived within minutes. He did not drink any beer in the truck and again, he stated that he had no intention to drive anywhere as his plan was to pick the lock on a door of the house and go in the house after his girlfriend went to work. In that way, he could avoid a fight with her and he could then go to sleep in his own bed.

[21] Mr. McKinnon acknowledged that the emergency brake on the truck was not engaged because the driveway is fairly flat with only a small grade.

Analysis:

[22] As there is no evidence that Jason MacKinnon actually drove his Ford F150 truck anywhere on July 5 - 6, 2009, at or near 81 Diamond Street, Trenton, Nova Scotia, both the Crown and the Defence acknowledge that the outcome of this case depends on whether the Defence has rebutted the presumption contained in Section 258(1)(a) of the **Criminal Code** on a balance of probabilities. The Crown's evidence established, and the Defence does not take issue with, the fact that the accused occupied the seat ordinarily occupied by the person who operates a motor vehicle and therefore he would be deemed to have care and control of the vehicle unless he can establish that he did not occupy that seat or position for the purpose of setting the vehicle in motion.

[23] Both counsel referred the Court to the decision of Warner J. In **R. V. Ellis** 2008 NSSC 178, where that court reviewed the NSCA decision in **R. V.**

Lockerby, 1999 NSCA 12 and subsequent cases in several other Provincial Courts of Appeal.

[24] At paragraph 6 of the **Ellis** decision, supra, Mr. Justice Warner said that **Lockerby** has been held to mean that "care and control" is proven whenever an accused:

> (a) is impaired
>
> (b) has the keys to the vehicle, and
>
> (c) has the present ability to make the vehicle respond to his or her wishes.

[25] In **Ellis**, Warner J. goes on to note, however, that post-**Lockerby** decisions of other courts of appeal have "consistently required a higher level or history of interaction with the vehicle to find care or control".

[26] The leading cases from the Supreme Court of Canada on the issue of care and control of a motor vehicle while impaired are **R** v. **Ford** (1982), 65 CCC (2d) 392; **R** v. **Toews** [1985] 2 SCR 119; **R** v **Whyte** (1988), 42 CCC (3d) 97; and **R** v **Penno** (1990), 59 CCC (3d) 344. In those cases, the Supreme Court of Canada established that the *mens rea* for having care and control of a motor vehicle is the intent to assume care and control after the voluntary consumption of alcohol or a drug. The *actus reus* is the assumption of care and control when the alcohol or drug has impaired the ability to drive. The Crown may establish care or control

without proof of any intention to drive on the part of the accused if the accused has engaged in some acts which involve the use of the car, it's fittings or equipment **AND** the act or series of acts involved an element of risk of putting the vehicle in motion, even if unintentionally and thereby create a danger.

[27] The **Penno** case made it clear, however, that the law does not punish an accused for his or her mere presence in the seat normally occupied by the driver of a vehicle. I believe that **Toews** also stands for the proposition that when a person's use of a vehicle involves **no** risk of putting it in motion so that it could be dangerous, the accused person should be acquitted as the *actus reus* would not present.

[28] Ultimately, the Supreme Court of Canada has said in **Ford** and **Toews** that each case will depend on it's own facts and circumstances and while many factors could be considered, it is almost impossible to establish and exhaustive list of acts which could qualify as acts of care and control.

[29] In **Ellis**, Warner J. looked at the facts of the case based on the stated innocent intention of the accused to occupy the driver's seat for a purpose other than setting the car in motion and then did the further analysis of the risk that an individual, who had decided not to drive, would change his mind and eventually do so.

[30] Several cases have highlighted the point that in assessing risk, the Court's assessment should **not** be based solely on conjecture or speculation that the accused will change his or her mind. If it were simply the possibility of changing his or her mind that determines criminal liability in cases of this nature, this would essentially be an absolute liability offence. In my view, before a conviction may be entered, the Crown should be required to prove the risk of danger factor and change of mind element beyond a reasonable doubt on the basis of evidence established to substantiate that risk. In the final analysis, this requires the Court to do a careful analysis of the facts and circumstances in the assessing factors of risk that the accused will change his/her mind and drive or unintentionally set the vehicle in motion thereby creating a danger to himself or others on public highways.

[31] In **Lockerby**, the Nova Scotia Court of Appeal "assumed without deciding" the point that the risk of setting a vehicle in motion was an essential element of the offence. At paragraph 13 of **Lockerby**, the Nova Scotia Court of Appeal determined that the trial judge had made a clear finding that such a risk existed in that case.

[32] At paragraph 16 of the **Ellis** decision, Warner J. concluded, after a review of several Court of Appeal decisions, that

> **"a review of <u>all</u> background circumstances to give context to the assessment of risk is a prerequisite; to speculate or conjecture that <u>all</u> impaired drivers could change their mind is not enough. This <u>case specific background must provide the reasons</u> for a finding of care or control."** (Emphasis is mine.)

[33] From my review of **<u>Ellis</u>**, **<u>Lockerby</u>** and other cases, if the risk of danger is an element of the offence, then the Crown is required to prove all essential elements beyond a reasonable doubt. While the Supreme Court of Canada has not specifically stated that risk of danger is an essential element and the Nova Scotia Court of Appeal in **<u>Lockerby</u>** assumed that it was without specifically deciding the issue, I find that the appellate jurisprudence subsequent to the **<u>Lockerby</u>** supports that position. Therefore, I conclude that the risk of danger is an essential element of this offence where the accused is in care or control of a motor vehicle in circumstances <u>other</u> than when the accused is putting the vehicle in motion.

[34] As a result, a trier of fact must direct their mind to the possibility of risk of danger based on the facts of the case and <u>not</u> speculation, conjecture or hindsight. The assessment of the risk and the potential for danger can be analyzed by carefully reviewing and considering several factors gleaned from prior cases.

[35] Several factors and the presumption in Section 258(1)(a) of the **<u>Code</u>** all point to the fact that Mr. MacKinnon was in care or control of his motor vehicle because he had engaged in acts which involved the use of the car and it's fittings

or equipment. In particular, when he was awakened by the police officers at about 6:00 AM on July 6, 2009, he had possession of the keys. The keys were in the ignition and the engine was on. The lights, probably daytime running lights were on, the heater was on and the motor vehicle was in "park" but the emergency brake was not engaged.

[36] However, in assessing what I have determined to be an essential element, that is, the risk of danger from the motor vehicle being put in motion, there are several other factors from which I have concluded there is no factual basis to find that there was a real risk that the accused would change his mind and put the vehicle in motion. In particular, Mr. MacKinnon was seated in the driver's seat, but the seat was reclined fully, at least at a 45° angle and not in a position where a person could drive a motor vehicle. The F150 truck was not on a public roadway but rather in the driveway of his own residence. While there was evidence that Mr. McKinnon had been drinking for a significant period of time at his house and at a local bar with his friends, but there was no evidence whatsoever that he had moved his truck at any time that weekend. There is also the fact that his girlfriend's car had been parked behind his truck in the driveway during the evening of July 5 - 6, 2009, and that she left for work only a few minutes before the police arrived. In fact, Mr. MacKinnon did not even have the keys to his truck

until Ms. MacPherson threw them into the truck around 5:45 AM or approximately 15 - 20 minutes before the police arrived at 81 Diamond Street in Trenton, Nova Scotia.

[37] The evidence established that Mr. MacKinnon arrived home, having been dropped off by a friend at about 2 AM and given the discourse between himself and his girlfriend, he chose not to engage in a verbal altercation with her, but rather to seek refuge from the elements and sleep in his truck which was unlocked and parked on the driveway to their home. I find that Mr. MacKinnon's stated intention - the use of the truck as a temporary shelter was entirely consistent with all of the circumstances of the case as well as his stated intention which he expressed to the police officers shortly after 6 am on July 6, 2009. Moreover, I find that Mr. McKinnon's stated intention to use his truck as a temporary shelter was supported, in all respects, by the evidence adduced at this trial.

[38] There is no doubt that Mr. MacKinnon had the keys to his truck in his possession and they were in the ignition to his truck with the engine on, for a very short period of time, approximately 15 minutes - while the truck was parked in his own driveway. However, I find that there is no evidence that he had driven to that location while impaired and, in fact, being at home, I find also that it was highly unlikely that he would decide to change his mind in that short period of time after

several hours of sleep and then drive elsewhere. For all of these reasons, I find that the risk of danger from Mr. MacKinnon putting his truck in motion was not a real one and in these circumstances that risk or the possibility of danger of putting the truck in motion would be based on pure speculation and conjecture and not on a careful, reasonable and objective analysis of established facts and the circumstances of the case.

[39] While the facts of this case are somewhat unique, in conducting my own research on the legal issues raised here, I reviewed two cases which were strikingly similar on their facts to the case at bar. In **R** v **Groves**, [2003] A.J. No. 153 (Alberta Provincial Court) and **R** v **Pezzolla** [1989] B.C.J. No. 2096 (British Columbia County Court), both of the accused, who admitted that their ability to drive a motor vehicle was impaired by alcohol when observed by the police, were at their own house parked on their driveway or at the curb in front of their house. Both of the accused had slept in their car to avoid the wrath of their wives with whom there had been a disagreement earlier in the day. In **Pezzolla**, the keys to the car were in the ignition, but the engine was not running. The headlights were on, but they were very dim and police found the accused asleep in the driver's seat, slumped up against the steering wheel. In the **Groves** case, the accused was found asleep in the driver's seat, in a sitting position behind the steering wheel

with the keys in the ignition and the engine was running.

[40] In both **Groves** and in the **Pezzolla** case, the courts concluded that the risk of danger of putting the vehicle in motion was quite low since the accused had abandoned any further use of the motor vehicle as a motor vehicle, other than for use as a temporary shelter or bedroom "until it was clear to enter his home to avoid the wrath of his wife". (See page 4 of Decision in **Pezzolla**). In those cases, the courts held that the accused had "abandoned" any further use of their vehicle as a motor vehicle and resorted to it as a temporary shelter or bedroom with no intent to use it as a motor vehicle when he woke.

[41] In my opinion, the unique facts of this case do not lead me to conclude that it is a so-called "classic" change of mind case. In this case, I find that Mr. MacKinnon did not, at any material time, have the intention to nor did he actually drive his motor vehicle anywhere. It is therefore not a question of abandoning an intention to drive a motor vehicle but rather, it is clear from all the uncontraverted evidence that he resorted to his motor vehicle to use it as a temporary shelter or bedroom with no intention to make any use of it as a motor vehicle when he woke up. He was at his own home and his stated intention was to go into his residence after his common-law partner left for work and then go to sleep in his own bed in the house. I find Mr. MacKinnon's stated intention was consistent with all the

facts and circumstances of this case.

Conclusion:

[42] In conclusion, I find that Mr. MacKinnon has rebutted the presumption contained in Section 258(1)(a) of the **Code**, on a balance of probabilities per **R** v **Whyte** (1988), 42 CCC (3d) 97 Supreme Court of Canada. I also find that he established on a balance of probabilities, that he did not occupy the driver's seat for the purpose of setting the vehicle in motion.

[43] While the Crown established that the accused had engaged in some acts involving the use of the motor vehicle, it's fittings or equipment which might establish *de facto* care or control of the motor vehicle, I have also concluded that the Crown must establish as an essential element a risk of danger from change of mind or intentionally or unintentionally setting the motor vehicle in motion. Based upon the facts and circumstances of this case, I am not convinced that the Crown has established the element of risk necessary to support a finding of care or control of a motor vehicle while impaired by alcohol contrary to either Section 253(1)(a) or 253(1)(b) of the **Code**.

[44] Since care or control is a required element of each of the two alleged offences and I have reasonable doubt related to that element, I find Mr. MacKinnon not guilty of both charges.