IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Benoit, 2011 NSPC 111

Date: 2011/07/04
Docket: 1980316
Registry: Antigonish

Between:

Her Majesty the Queen

v.

Charles Alexander Benoit

DECISION

Judge:	The Honourable Judge John D. Embree
Oral Decision:	July 4, 2011, in Antigonish, Nova Scotia
Written decision:	March 12, 2012
Charges:	That on or about the 13 day of November, A.D. 2008, at or near Monastery, Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle, contrary to Section 253(a) of the Criminal Code. And furthermore at the same time and place did, having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor vehicle, contrary to Section 253(b) of the Criminal Code.
Counsel:	James Giacomantonio, for the Crown Stanley MacDonald, QC, for the Defence

Embree, J.P.C. (Orally):

[1] Charles Alexander Benoit is charged that:

> "... on or about the 13th ... of November, 2008, at or near Monastery, Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did operate a motor vehicle contrary to section 253(a) of the Criminal Code.
>
> And furthermore at the same time and place did,
>
> having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor vehicle contrary to section 253(b) of the Criminal Code."

[2] The Crown bears the burden of proving all of the elements of each of those offences beyond a reasonable doubt. The Crown is not seeking a conviction here on the 253(a) charge.

[3] The Court heard from numerous witnesses at the trial. The Crown called as witnesses Cst. O'Dell, Cst. Reid, Cst. Denis and Paul Smith. The Crown tendered Exhibit C-1, which was a Certificate of a Qualified Technician.

[4] The Court heard evidence on a *voir dire* on a **Charter** application brought by the defendant. That application ultimately did not proceed and that *voir dire* evidence is not trial evidence.

[5] The defendant presented evidence in the form of certain agreed facts. As part of those facts the defendant tendered Exhibit D-1, which is a statement of certain rules and penalties put in place by Alva Construction, the defendant's employer in November, 2008.

[6] I have considered all the evidence here. I'm not going to repeat or summarize what each witness said, but I will state some overall factual conclusions. I will also make some comments about how I view the witnesses' testimony presented at this trial.

[7] Cst. Peter O'Dell was the first witness for the Crown. He is an RCMP constable who was stationed in Newfoundland and was on leave. He was driving to North Sydney to catch the ferry to Newfoundland when he became involved in the circumstances surrounding these charges. I accept the testimony of Cst. O'Dell. In my view, he was testifying honestly and to the best of his recollection as to what he

saw and did. If he couldn't remember or couldn't be sure of certain details, he said so. In my view, he was fair in the delivery of his evidence, he was credible, and I find his testimony reliable.

[8] I also found Cst. Reid and Cst. Denis to be credible witnesses. In my view, they were also testifying honestly and gave their evidence in a straightforward fashion. I accept the evidence given by each of them.

[9] I cannot say the same about the testimony of Paul Smith. Mr. Smith knows the defendant and was working with him and travelling with him on the day in question. Some aspects of Mr. Smith's testimony I am prepared to accept. Evidence he gave about who he worked for, where he was on November 13th, 2008, and that he was with the defendant is reliable. In other words, those things that were well known to others, were non-controversial or were so obvious that they were basically impossible to deny, he was prepared to admit. Aside from those, he tried his best to paint a picture of relevant events that put the defendant in the best light possible.

[10] Mr. Smith's testimony was biased in favour of the defendant. In particular I do not accept anything in his testimony about the alcohol he says he and the defendant

consumed and the timing of that consumption. The obvious purpose of that testimony was to try to assist the defendant and provide an explanation of the defendant's alcohol consumption that was less incriminating than was actually the case. Mr. Smith was not a credible witness. I reject much of his testimony.

[11] The following is a statement of the facts as I find them. The defendant and Paul Smith were working for Alva Construction in Big Pond, Cape Breton, on November 13th, 2008. They left the work site late in the afternoon and travelled west back toward Antigonish. They were in a company half-ton truck. The defendant was driving.

[12] Cst. O'Dell was travelling east along the Trans Canada Highway. Just east of Monastery, he noticed cars pulling off to the side of the highway. As he drove up he saw what turned out to be the truck which the defendant had been driving. It was down in the ditch. There was steam or smoke coming from the front end of the vehicle. Cst. O'Dell concluded that this accident scene was fairly fresh.

[13] Cst. O'Dell observed two persons associated with the truck. One was older, who was the defendant. One was younger, who was Mr. Smith. As he was slowing down, but still driving, Cst. O'Dell saw the person I know to be the defendant leaning

into the truck through the driver's door. Cst. O'Dell slowed his vehicle, which was also a truck, turned around on the highway and went back to where the truck in the ditch was.

[14] Cst. O'Dell described seeing the younger person, who was Mr. Smith, with a white plastic bag in his hand. Mr. Smith threw the bag in the direction of the woods or toward the front of the truck and he thought it landed in water. Cst. O'Dell wasn't sure if he saw this as he initially drove by or after he turned his vehicle and came back.

[15] At some point shortly thereafter, Cst. O'Dell walked down into the ditch. He said the bag he had seen contained Keith's beer cans. He couldn't tell if the cans were full or empty. A can was stuck to the inside of the bag. He remembered the Keith's logo. After Cst. Reid's arrival, he saw this same bag. It was a grocery bag floating in water a short distance from the truck in the ditch. Cst. Reid said inside the bag were empty cans of Alexander Keith's beer. He believed there were four cans. He did not retrieve them.

[16] Cst. O'Dell had a conversation with the defendant at the scene. He asked the defendant if anyone was hurt and the defendant told him nobody was hurt. Cst. O'Dell asked the defendant if there was anyone else involved and he replied, no, that it was just the two of them, which I take to mean himself and Mr. Smith. The defendant also told Cst. O'Dell that he was just driving down the road and ended up in the ditch; he wasn't sure what happened.

[17] During the conversation with the defendant Cst. O'Dell detected the odour of alcohol or liquor. That smell was coming from the defendant. Cst. O'Dell did not specify what part of the person of the defendant the smell was coming from. He said that when he was talking to Mr. Benoit, Cst. O'Dell got the smell of liquor. Cst. O'Dell also said he observed that the defendant's eyes were glossy. As part of the conversation Cst. O'Dell had with the defendant, the defendant asked him if he could pull the defendant's truck back onto the road with his truck. Cst. O'Dell told the defendant no and advised the defendant that he would have to get a tow company involved to remove the vehicle. Cst. O'Dell said that the other person, who was Mr. Smith, kept a distance away from him and he thought that was peculiar.

[18] Cst. O'Dell left the immediate area and drove a few hundred yards down the road in his vehicle and parked. He called RCMP Telecoms and requested the assistance of RCMP members. Cst. O'Dell then waited for RCMP officers to arrive. He estimated 15 to 20 minutes went by. Cst. O'Dell saw a police car coming and he then returned to the scene of the truck in the ditch and spoke to Cst. Reid.

[19] Cst. O'Dell had estimated that he came upon the scene initially at approximately 7:30 p.m. He said he had stayed at the scene two to three minutes before he drove down the highway, parked and called Telecoms. He said he waited from approximately 7:30 'til 7:50 for an RCMP officer to arrive. Those times are not far off. I accept the call time and response time given by Cst. Reid. He got the call about this incident at about 7:27 p.m. That would mean Cst. O'Dell's call was made a minute or two before that and his arrival at the scene would have been three to four minutes before that again. Thus Cst. O'Dell would have first observed the truck in the ditch about 7:22 p.m.

[20] Mr. Smith described how the truck ended up in the ditch. I will comment more about that in a moment. However, regarding timing, Mr. Smith was asked how long it was between the truck going in the ditch and the conversation between the

defendant and a person who approached them, who turned out to be Cst. O'Dell. Mr. Smith was unable or unwilling to be very precise about that. He said, it wasn't that long. He also said it was somewhere in the range of ten to 20 minutes. That is one portion of Mr. Smith's testimony that could reasonably be correct. It is an estimate that is consistent with Cst. O'Dell's observations and appraisal of the scene. That would place the time of the truck going into the ditch in the range of 7:00 to 7:10 p.m. approximately.

[21] Cst. Reid arrived on scene in response to Cst. O'Dell's call at approximately 7:43 p.m. When Cst. O'Dell approached Cst. Reid, the defendant and Mr. Smith were no longer at or around the pickup truck in the ditch. They were gone. Cst. O'Dell explained to Cst. Reid what had happened, what he observed and about the conversation he had had with the defendant.

[22] Within a minute or two of returning to the scene Cst. O'Dell noticed a tow truck coming down the highway. The tow truck approached and Cst. O'Dell saw the defendant in the front seat. Mr. Smith, although Cst. O'Dell didn't know his name, was also in the tow truck. The defendant, Mr. Smith and the tow truck driver got out of the tow truck. Cst. O'Dell identified the defendant and Mr. Smith to Cst. Reid and

Cst. Reid spoke to the defendant. Cst. Reid described the tow truck as being right behind him as he was pulling up on the scene. It arrived seconds after Cst. Reid.

[23] Cst. Reid asked the defendant what had happened. The defendant identified himself as the driver of the truck in the ditch. He said that he and Mr. Smith had been working and that they were on their way home from Cape Breton. The defendant said he had stopped the truck on the shoulder of the road so they could urinate. He forgot to put the truck in park and it had rolled down into the ditch. Cst. Reid detected a faint odour of liquor coming from the defendant. He turned the defendant over to Cst. Denis to obtain relevant information such as his driver's license. Cst. Reid gave Cst. Denis a brief explanation of what had been told to him.

[24] Cst. Denis had arrived at the scene at approximately 7:48 p.m. Cst. Denis took the defendant to the police SUV. While the defendant was speaking to Cst. Denis, Cst. Denis smelled liquor coming from the defendant's breath. Cst. Denis read a roadside screening device demand to the defendant at 7:59 p.m. The defendant then provided samples of breath. The first was not a suitable sample. The second produced a fail result. Cst. Reid returned to this police vehicle as Cst. Denis was

preparing to read the screening device demand. Cst. Reid observed a strong odour of liquor coming from the police vehicle.

[25] Cst. Reid then returned and assisted the tow truck driver in removing the truck from the ditch. Cst. Denis arrested the defendant and read him his 10(b) rights at 8:03 p.m. Cst. Denis then read a Section 254(3) breath demand at 8:05. Cst. Denis drove with the defendant to the Antigonish RCMP detachment. They arrived at 8:46 p.m. The defendant spoke to two different lawyers between 8:47 and 9:06 p.m. At 9:08 p.m. he was turned over to Cst. MacPherson, a qualified technician.

[26] Cst. Reid remained at the scene in Monastery to assist with traffic control while the truck was removed from the ditch. He remained there until the truck was removed from the ditch.

[27] Cst. Reid later returned to the Antigonish detachment. At 10:30 p.m. he served the defendant with a true copy of the Certificate of a Qualified Technician (Datamaster). That certificate is before the Court as Exhibit C-1. It shows that two samples of breath were properly obtained from the defendant at 9:11 and 9:34 p.m. respectively. The analysis of those samples show the defendant's blood alcohol level

to be 110 milligrams of alcohol in 100 millilitres of blood from the first sample and 100 milligrams of alcohol in 100 millilitres of blood from the second sample. The defendant was released by Cst. Reid on a Promise to Appear.

[28] Included in the agreed facts presented to the Court was that on November 13th, 2008, the truck in question that was in the ditch was towed by Morrow's Towing to Alva Construction's compound in Antigonish. That compound contains a garage where trucks and equipment are maintained by Alva Construction's mechanics.

[29] Before leaving this discussion of the evidence, I want to make some additional comments. I have already expressed some views about the testimony of Paul Smith. Mr. Smith gave a similar version of how the truck ended up in the ditch to that given by the defendant to Cst. Reid. He said the defendant was driving and pulled over to the side of the road because he needed to urinate. Mr. Smith said he needed to do that too so they both got out of the truck. His opinion was that the defendant must have left the truck transmission in drive because the truck rolled into the ditch. Mr. Smith tried to hold it back but couldn't and it gently rolled into the ditch. Mr. Smith denied that either he or the defendant were drinking alcohol leading up to this.

[30] Mr. Smith described their encounter with Cst. O'Dell, although he didn't know who this person was. He said that the defendant had asked Cst. O'Dell if Cst. O'Dell could tow him up and the reply was that he couldn't. Mr. Smith went on to describe that a car stopped with people in it that the defendant knew. The defendant and Mr. Smith left in that vehicle and went to Morrow's Garage. Mr. Smith said that the defendant went across the road from the garage to the store that was there and went to the liquor outlet. He came back with a bag of beer. Mr. Smith testified that both he and the defendant drank beer. Mr. Smith said he had three or four, but then said he wasn't sure how many he had. Mr. Smith said Terry Morrow was there and was going to take one tow truck but then had to wait for another tow truck to get back. Mr. Smith said he and the defendant drank beer while they waited.

[31] Mr. Smith was asked to describe how much time went by from their encounter with Cst. O'Dell until coming back to their truck with the tow truck. He described the timing as follows. Ten to 15 minutes more at the scene 'til I got a drive. The drive to the garage, five minutes. Figuring out what to do, waiting at the garage, deciding to get beer, going to get the beer, waiting for Terry Morrow he said was 30 to 40 minutes. After that 30 to 40 minutes, they waited some more for another bigger tow truck. He suggested 20 to 30 minutes more. Then he, the defendant, and Terry

Morrow drove in a tow truck back to the truck in the ditch, another five minutes. That's a total time frame of 80 to 105 minutes.

[32] Now I recognize that Mr. Smith was fairly imprecise, these were estimates, frequently coupled with the comment, "I'm not sure." The point of that testimony was to provide a sufficient window of opportunity to make it look like both the defendant and Mr. Smith had consumed a quantity of beer after the truck had gone in the ditch. In fact, the amount of time that passed from the end of Cst. O'Dell's encounter with the defendant 'til the defendant and Mr. Smith returned in the tow truck could reasonably be estimated at 20 minutes, namely, 7:25 to 7:45 p.m.

[33] When I consider these factors, a) the defendant and Mr. Smith were still at the scene of their truck when Cst. O'Dell left them; b) they still needed to meet whomever did drive them and leave the scene; c) that some time was necessary to drive to the garage and back, about ten minutes if Mr. Smith is at least close on that estimate, then that doesn't leave much time at Morrow's Garage. Basically, it leaves just enough time to explain what happened and where and make arrangements for the services of the tow truck.

[34] There is the obvious, logical shortcoming here that anyone driving and having their vehicle go off the road would then go and drink beer while waiting to get their vehicle towed out; that's just not a logical thing to do. That is compounded here because the defendant is on his way home from work and is driving a company vehicle. But of course, beyond that, the time line portrayed by Mr. Smith here did not exist. There was no time to buy beer and drink beer while securing the services of the tow truck. That didn't happen.

[35] Cst. O'Dell did not say that he smelled liquor from the breath of the defendant. He just said that smell was coming from the defendant. But I am satisfied that that smell was coming from the defendant for the same reason that Cst. Reid and Cst. Denis detected it coming from the defendant. It was coming from the defendant for the same reason his breath sample resulted in a fail on the screening device test and the same reason his blood alcohol level was 110 and 100 on the Datamaster test. That reason, of course, is that the defendant had already been consuming alcohol when the company truck went in the ditch and he then encountered Cst. O'Dell.

[36] I don't accept Mr. Smith's assertion that no alcohol had been consumed by the defendant or himself leading up to the truck going into the ditch. Rather, I conclude

that all the alcohol consumed by the defendant on this occasion was consumed by him before the truck went in the ditch. Mr. Smith actually tried to dispose of evidence that there had been beer in the vehicle when he threw the bag of Keith's beer cans away from the truck.

[37] That brings me to how the truck did get into the ditch. The defendant gave two conflicting stories of how that happened to two different people at the scene within 30 minutes. There's no reliable basis for me to determine whether he was just driving down the road and ended up in the ditch, as he told Cst. O'Dell, or whether he pulled off the road, got out, and the truck rolled into the ditch, as he told Cst. Reid. Given the circumstances under which the former was communicated, it does have a degree of credence.

[38] Initially the rolling into the ditch scenario would seem unlikely. However, that is in the context of a sober driver. The possibility that it could happen becomes stronger when one considers that the driver here was under the influence of alcohol. Pulling a vehicle over to the side of the Trans Canada Highway, getting out and urinating may be more readily considered as a viable option by someone who's been drinking alcohol. Being unattentive enough to jump out of the vehicle while it is still

in drive is also more likely to occur if the driver has been consuming alcohol. So, either of the two scenarios the defendant presented to explain the truck ending up in the ditch is possible.

[39] The fact that Mr. Smith testified that the vehicle rolled into the ditch after they both got out does not make that version any more credible in my opinion. Ultimately, it will not impact the result here, whether the defendant drove directly off the road into the ditch or drove off the road onto the shoulder, got out and then the truck rolled into the ditch.

[40] I now will move on and discuss the law that relates to the charges and the facts before me. The Crown is not seeking a conviction on the 253(a) count here. In the Crown's view, "there is limited evidence of impairment." The defendant did not make submissions on that count. I do not quarrel with the Crown's assessment of the evidence. Applying the law as set out by the Supreme Court of Canada's judgment in **R. v. Stellato**, [1994] 2 S.C.R. 478, I am not satisfied beyond a reasonable doubt that the defendant's ability to operate a motor vehicle was impaired by alcohol at any of the relevant times here. The most that can be said is that there's some evidence that it might have been. Therefore, he is found not guilty on the 253(a) count.

[41] In considering the count under Section 253(b), I first refer to Section 258(1)(c) of the **Criminal Code**, the application of which has among its prerequisites that samples of breath taken pursuant to a 254(3) demand be taken as soon as practicable after the time when the offence was alleged to have been committed and in the case of the first sample not later than two hours after that time. The evidence before me does not support a conclusion that the defendant was operating the truck in question within two hours of the time the first breath sample was taken from him, namely, 9:11 p.m. It is possible that he was and possible, indeed probable, that he wasn't. Thus, the Crown cannot rely on the presumption in Section 258(1)(c) to prove the defendant's blood alcohol level exceeded the legal limit at the time he last operated the truck.

[42] Having care or control of a motor vehicle with an illegally high blood alcohol level is also an offence under Section 253(b). The defendant is charged that he did operate a motor vehicle at the relevant time in the 253(b) count. However, having care or control of a motor vehicle with an illegally high blood alcohol level is an included offence in a charge alleging operation of a motor vehicle in the same circumstances. I cite **R. v. Drolet**, [1990] 2 S.C.R. 1107, affirming the Quebec Court

of Appeal at (1988), 14 M.V.R. (2d) 50, and **R. v. Morton** (1975), 29 C.C.C. (2d) 518 (N.S.S.C.A.D.), to name two relevant authorities. Therefore, the Crown can still achieve the benefit of the presumption in Section 258(1)(c) here if it can establish, along with all the other requirements of that section, that the defendant was in care or control of the truck here at any time within two hours preceding 9:11 p.m.

[43] The principal issue in this case and the main subject of submissions is the element of care or control. The leading authorities on the interpretation of what constitutes care or control are the Supreme Court of Canada judgments in **R. v. Ford**, [1982] 1 S.C.R. 231, and **R. v. Toews**, [1985] 2 S.C.R. 119. I refer to the oft cited portion of Mr. Justice Ritchie's majority judgment in **Ford** where he says at pages 248-249:

> "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 milligrams of alcohol in 100 millilitres 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."

[44] I also quote from **Toews** at paragraphs 9 and 10 where Justice McIntyre says:

"As I have noted earlier, the offence of having care or control of a motor vehicle while the ability to drive is impaired by alcohol or a drug is a separate offence from driving while the ability is impaired. It may be committed whether the vehicle is in motion or not. This leaves the Court with the question: What will constitute having care or control short of driving the vehicle? It is, I suggest, impossible to set down an exhaustive list of acts which could qualify as acts of care or control, but courts have provided illustrations which are of assistance. In R. v. Thomson (1940), 75 C.C.C. 141 (N.S.C.A.), Baxter C.J. said, at pp. 143-44:

> I have had some difficulty in construing this expression but have come to the conclusion that "care" is intended to cover such a case as an intoxicated driver placing his vehicle, without applying the brakes, in such a situation that it may run away and occasion danger to the public. It is probably intended to cover the possible omission, because of intoxication, of such acts of care as would or might occasion harm, such acts, in short, as would render any person liable in damages for negligence. "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."

[45] Mr. Justice McIntyre continues:

"In the Nova Scotia County Court His Honour Judge Pottier said in R. v. Henley, [1963] 3 C.C.C. 360, at p. 366, in a case similar to this one:

> It appears from the above cases that the word "care" implies at least physical possession of the motor vehicle with an element of control. A person in the motor vehicle may have the care thereof. The word care is generally used in jurisprudence in the sense of attention, heed, vigilance as opposed to carelessness, negligence, heedlessness. These uses are involved in the cases of duties and liabilities of motor vehicle operators, carriers, bailees, professional persons, etc., and turn largely on the question of negligence.
>
> The word "care" may also mean custody, charge, safe keeping, preservation, oversight or attention. Where it is used in this

> sense it becomes a relative term and is of broad comprehension. One has to look at the provision of its use and determine its physical sense from that standpoint."

[46] Mr. Justice McIntyre then continues:

> "In R. v. Price (1978), 40 C.C.C. (2d) 378 (N.B.C.A.), Limerick J.A., speaking for the Court, at pp. 383-84, said:
>
> > The word "care" is defined in The Oxford English Dictionary as "having in charge or protection". "Control" on the other hand is defined as "the fact of controlling or of checking and directing action" also as "the function or power of directing and regulating; domination, command, sway" ... The mischief sought to be prohibited by the section as expressed by the wording is that an intoxicated person who is in the immediate presence of a motor vehicle with the means of controlling it or setting it in motion is or may be a danger to the public. Even if he has no immediate intention of setting it in motion he can at any instant determine to do so, because his judgment may be so impaired that he cannot foresee the possible consequences of his actions."

[47] Again, Justice McIntyre carries on:

> "This Court has recently considered the question in Ford v. The Queen, [1982] 1 S.C.R. 231. Ritchie J., speaking for the majority, said at p. 249:
>
> > 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."

[48] My quotation from Justice McIntyre ends with these words from paragraph 10:

> "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."

[49] The *mens rea* for the offence before me is the intent to assume care or control of a motor vehicle after the voluntary consumption of alcohol. The *actus reus* is the act of assuming care or control when the voluntary consumption of alcohol has resulted in a blood alcohol level over 80 milligrams of alcohol in 100 millilitres of blood.

[50] Many of the decided cases regarding care or control involve circumstances where a defendant is found seated in the driver's seat. There are other cases where the defendant is not occupying that position at the relevant time for determining care or control, and this is one of those cases.

[51] Counsel have filed briefs and made thorough submissions on the care or control issue. Subsequent to **Ford** and **Toews** there are many authorities, both from Nova

Scotia and other Provinces, that have referred to and applied the law as set out in those two decisions. In Nova Scotia some of those authorities would be: **R. v. Lockerby** (1999), 180 N.S.R. (2d) 115 (N.S.C.A.); **R. v. Miller** (1995), 137 N.S.R. (2d) 313 (N.S.C.A.); **R. v. Legrow**, [2007] N.S.J. No. 258 (N.S.C.A.); **R. v. Blair** (1988), 82 N.S.R. (2d) 76 (N.S.C.A.); **R. v. Smith**, [2005] N.S.J. No. 307 (N.S.S.C.); **R. v. Ellis**, [2008] N.S.J. No. 254 (N.S.S.C.).

[52] Court of Appeal judgments from other provinces that have addressed care or control somewhat recently include: **R. v. Wren** (2000), 144 C.C.C. (3d) 347 (Ont. C.A.); **R. v. Burbella** (2002), 167 C.C.C. (3d) 495 (Man. C.A.); **R. v. Decker** (2002), 162 C.C.C. (3d) 503 (N.L.C.A.); **R. v. Shuparski** (2003), 173 C.C.C. (3d) 97 (Sask. C.A.); **R. v. Ogrodnick**, [2007] A.J. No. 514 (Alta. C.A.); **R. v. Mallery** (2008), 231 C.C.C. (3d) 203 (N.B.C.A.). In **Legrow, Wren, Decker, Shuparski** and **Ogrodnick** leave to appeal to the Supreme Court of Canada was sought and denied.

[53] Mr. Justice Chipman speaking for the Nova Scotia Court of Appeal in **Miller** stated at Page 317:

> "Although each case will depend on its own facts, the element of being in such control of the car [so] as to be at risk of setting it in motion is the basis of the criminal liability."

[54] Mr. Justice Warner of the Nova Scotia Supreme Court in both **Smith** and **Ellis** reviews the law surrounding care or control. At paragraph 17 in **Smith**, he states that, in cases where the presumption in Section 258(1)(a) is not operative, such as here, establishing care or control involves proof of three elements:

> "(a) acts involving the use of the vehicle, its fittings or equipment, or a course of conduct associated with the vehicle; (b) an element of risk of setting the vehicle in motion whether intentionally or unintentionally; and (c) an element of dangerousness arising from the risk of setting the vehicle in motion."

[55] Mr. Justice Warner also says in **Smith**, paragraph 25, that:

> "A key element of the actus reus ... is an assessment of the risk that the vehicle may ... be put in motion."

[56] He goes on to say in paragraph 29:

> "... each trial court is required to assess the sequence of events that led up to the time of discovery, and the circumstances existing at the time of discovery, to assess the risk that the driver may, while impaired or with a BAC over 80, set the vehicle in motion and thereby cause danger."

[57] Mr. Justice Cromwell, speaking for our Court of Appeal in **Lockerby**, assumes, without deciding, that risk of setting the vehicle in motion is an essential element of an offence under Section 253(b). See paragraph 13 in **Lockerby**.

[58] While Mr. Justice Warner's decisions in **Smith** and **Ellis** could be seen as expanding the analysis of what is required to constitute care or control compared with some statements made by our Court of Appeal on this subject, I do not consider that **Smith** and **Ellis** are inconsistent with anything our Court of Appeal has said when referring to the **Ford** and **Toews** judgments.

[59] Consequently, in the context of the case before me, part of my assessment of care or control will involve a determination of whether the defendant engaged in some course of conduct associated with this truck after it ended up in the ditch which would involve a risk of putting the truck in motion so that it could become dangerous. This is the same conclusion reached by some other courts when they have determined that a "risk of danger" is an element of a 253(b) offence in circumstances such as those before me.

[60] The position of the defendant here, briefly put, is that the evidence here does not prove the defendant was in care or control. The defendant says while he may have had custody of the truck in question, the facts here do not demonstrate any more than that, and that that is insufficient. The defendant submits that the necessary risk of danger has not been shown to be present.

[61] The Crown asserts that it has shown that the defendant was in care or control at the relevant time and that there was a risk of danger. I keep in mind that the Crown does not need to prove that the defendant had an intention to drive to establish that the defendant was in care or control.

[62] Also, as stated in **Smith**, I am to consider all the circumstances. So these are the most relevant circumstances here:

1) Regardless of which version of how this truck ended up in the ditch is correct, the defendant had driven his employer's truck to that location and there is no evidence that he did not continue to possess the keys to the truck.

2) The point where the vehicle went in the ditch was not at or near the defendant's destination. Mr. Smith stated they had been travelling to Antigonish. Cst. Reid took approximately 16 minutes to travel from

Antigonish. Cst. Denis stated the trip to Antigonish detachment would take 25 to 30 minutes.

3) Approximately ten to 20 minutes after the truck went into the ditch the defendant encountered Cst. O'Dell and asked Cst. O'Dell if Cst. O'Dell could pull the defendant's truck back onto the road with his truck.

4) Very shortly after Cst. O'Dell declined to do that the defendant found someone to give him a ride to a garage where he could and did arrange for a tow truck.

5) The defendant arrived back at the scene of the truck in the ditch in the company of a tow truck driver with the tow truck. The process of leaving and returning with the tow truck took approximately 20 minutes.

6) There is no evidence that this pickup truck was damaged or not operable as a result of ending up in the ditch.

[63] It is an agreed fact that on November 13th, 2008, the pickup truck in the ditch was towed by Morrow's Towing to the Alva Construction compound in Antigonish.

[64] The defendant argues that there is no evidence the defendant had an opportunity to instruct the tow truck driver what to do with the truck after the defendant arrived

back at the scene. He submits that it is logical for the Court to infer that it was the defendant's intention that the truck be taken to his employer's compound and, presumably, that he had already expressed that intention to the tow truck driver because that's where he did take the tow truck.

[65] I cannot and do not draw that suggested inference of the defendant's intent. There is no evidence of why the pickup truck in the ditch ended up back at the Alva Construction compound. There is no evidence of what the defendant may have told the tow truck driver.

[66] The only inference which I do draw and the permissible limit of that inference is that the defendant obtained the services of the tow truck to tow the pickup truck out of the ditch. That much of an intention by the defendant is clear.

[67] The evidence shows it to be just as likely, if not more likely, that the pickup ended up at the Alva Construction compound as a result of directions from Cst. Reid. He was the one who assisted the tow truck driver and remained at the scene after the defendant was taken to Antigonish by Cst. Denis. He was the last person in a position

to make such a decision. I just point that out as a possibility. However, to be clear, the evidence does not permit me to draw that inference either.

[68] I am satisfied there was a risk of danger here. There was a risk that once this truck had been towed out of the ditch the defendant would drive it or attempt to drive it, and if that happened it would become dangerous.

[69] I am not convinced that the state of the law now is that I need to determine the risk of danger to be a “real risk” or any such similar phraseology. However, in this case, I would have no hesitation in saying it was a “real risk”.

[70] The defendant had already demonstrated his willingness to drive after consuming the alcohol that he had. The defendant had showed his intention to put his vehicle back in a position where it could be driven when he asked Cst. O’Dell to pull his truck back onto the road. At that point, based on what would have been apparent to the defendant, the police were not involved. There was also no other presently apparent means for the defendant to return to Antigonish. At that point, which would have been approximately between 7:22 and 7:25 p.m., the defendant was in care or control of the pickup truck in the ditch. He was in potential legal jeopardy if

discovered by police and he faced serious potential consequences regarding his employment based on D-1. It was in his best interests not to be discovered in this situation. He wanted to extricate himself from the situation as soon as possible. He secured a tow truck and returned to the truck in the ditch with as much speed as was likely possible in the circumstances.

[71] The defendant continued to be in care or control of the pickup in the ditch when he approached and arrived at the scene in the tow truck. That care or control would have continued but for the presence of the RCMP. His care or control became affected when the police made contact with him at the scene. His ability to control the vehicle and what happened to himself began to decline when he was given the roadside screening device demand and ceased when he was arrested. He had arrived back at the scene at approximately 7:44 p.m.

[72] While not identical to what occurred here, there are relevant similarities to the circumstances here in the following cases: **R. v. MacMillan**, [2005] O.J. No. 1905 (Ont. C.A.); **R. v. Wilfred**, [2004] O.J. No. 258 (Ont. C.A.); **R. v. Capone**, [2010] O.J. No. 1173 (Ont. S.C.J.).

[73] The Crown is entitled to the benefit of the presumption in Section 258(1)(c). The first sample of breath taken from the defendant was taken within two hours of when the offence here was committed. The offence here was committed when the defendant was in care or control of the company pickup truck at the time he was in conversation with Cst. O'Dell and at the time he accompanied the tow truck to the scene. I would say the only time he might not be considered in care or control of the pickup truck between the time when the truck entered the ditch and his contact with Cst. Reid is the 20 minutes when he left the scene and went to Morrow's Garage. His desire to extricate the pickup from the ditch was ongoing.

[74] Cst. O'Dell testified that numerous vehicles were stopping at the side of the highway. The defendant was in a position to have made the same request to any of them that he made to Cst. O'Dell.

[75] Exhibit C-1 is in evidence and all of the prerequisites to allow the Crown's reliance on Section 258(1)(c) are met. The Crown is also entitled to the benefit of Section 258(1)(g) of the **Criminal Code**. The Crown has proven all of the elements of the included offence of care or control here contrary to Section 253(b) of the **Criminal Code** and I find the defendant guilty of that offence.

DATED at Antigonish, Province of Nova Scotia, on the 12th day of March, 2012.

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John D. Embree
Judge of the Provincial Court of Nova Scotia