PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Dunham, 2012 NSPC 83

Date: [20120604]
Docket: 2270855
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

David Dunham

Judge: The Honourable Judge Theodore K. Tax

Heard: January 30 and March 9, 2012 in Halifax, Nova Scotia

Oral Decision: June 4, 2012

Written decision: October 2, 2012

Charge: That on or about the 29th day of December, 2010 at, or near Sackville, Nova Scotia, did have the care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the Criminal Code.

AND FURTHER that he at the same time and place aforesaid, did unlawfully have the care or control of a motor vehicle having consumed alcohol in such a quanity that the concentration thereof in his blood exceeded 80 milligrams of 100 millilitres of blood, contrary to Section 253(1)(b) of the Criminal Code.

Counsel: James Giacomantonio, for the Crown
Lyle Howe, for the Defence

By the Court:

INTRODUCTION:

[1] Mr. David Dunham was charged with having care or control of a motor vehicle while his ability to operate that vehicle was impaired by alcohol and the "over 80" charge on December 29, 2010, at Sackville, Nova Scotia, contrary to subsections 253(1)(a) and 253(1)(b) of the **Criminal Code**. The Crown proceeded by way of Summary Conviction.

[2] At the outset of the trial, the Crown Attorney and Defence Counsel read into the record an Agreed Statement of Facts and Admissions. In that agreement made under section 655 of the Criminal Code, counsel have agreed that the identification of Mr. Dunham as the accused person, the jurisdiction, date and time of this incident are not an issue. Counsel also agreed that Mr. Dunham did occupy the driver's seat of his vehicle when Constable Landry approached his vehicle, the vehicle's engine was running and that Mr. Dunham had consumed alcohol prior to occupying the driver's seat. Counsel also agreed that Mr. Dunham provided suitable samples of his breath for analysis and the results of that analysis showed that he had a blood-alcohol concentration of 190 milligrams of alcohol in 100 millimeters of blood.

[3] The issue to determine is whether the Crown has established, beyond a reasonable doubt, that Mr. Dunham was in "care or control" of his motor vehicle by virtue of the statutory presumption in section 258(1)(a) of the Criminal Code, or if that presumption was rebutted by the Defence, whether he was in de facto or actual care or control of his motor vehicle at all material times.

POSITIONS OF THE PARTIES:

[4] It is the position of the Crown that Mr. Dunham was intoxicated by alcohol and in care or control of his motor vehicle, when the police found him sleeping in the driver's seat of his truck in the parking lot near the Royal Canadian Legion building located in Lower Sackville, Nova Scotia. Based upon the agreed facts, the Crown relies upon the statutory presumption of "care or control" in section 258(1)(a) of the Criminal Code and submits that Mr. Dunham has not rebutted that presumption. Therefore, the Crown submits that Mr. Dunham should be found guilty as charged.

[5] In the alternative, if the Court concludes that the Defence has rebutted the statutory presumption of "care or control," then the Crown submits that they have established, beyond a reasonable doubt, that Mr. Dunham had de facto or actual "care or control" of his motor vehicle. The Crown submits that Mr. Dunham

should be found guilty as his acts of "care or control" of the motor vehicle involved a risk of putting it in motion and endangering public safety.

[6] Defence Counsel submits that Mr. Dunham did not enter his truck for the purpose of setting it in motion; he only intended to use it as a temporary shelter while he slept off the effects of his alcohol consumption. Counsel concedes that the statutory presumption of "care or control" arises because Mr. Dunham was located by the police officer in the seat normally occupied by the driver. However, it is the position of the Defence that they have rebutted that presumption and the Crown did not establish, beyond a reasonable doubt, that Mr. Dunham was in de facto or actual "care or control" of his motor vehicle on the evening of December 29, 2010. Defence Counsel submits that his client should be found not guilty of both charges.

TRIAL EVIDENCE:

[7] Constable Frederick Landry stated that, at about 9:00 p.m. on December 29, 2010, he was on patrol in Sackville, Nova Scotia when a "concerned citizen" made a gesture to him to pull over and stop. Constable Landry spoke with the citizen who did not identify himself and learned that a person had just left the nearby Royal Canadian Legion building and got into a blue pickup truck in the parking

lot. The citizen advised the officer that he believed the person was intoxicated, had a bottle of liquor in the console of the truck and was about to drive away.

[8] Constable Landry was approximately 1 kilometer from the Royal Canadian Legion building located at 45 Sackville Cross Road, in Sackville, Nova Scotia. He drove to the Legion building, and upon arrival, he noticed that there was a large parking lot with about 10 cars parked near the Legion building. At the far end of the parking lot, he saw one vehicle with no other cars around it. The lights of that vehicle were on and he noted that its engine was running because he saw "smoke" coming from the exhaust of the truck. Constable Landry parked his police car behind the truck and approached that vehicle around 9:23 p.m. At that time, he noted that the temperature was -1°C. As he approached the driver's side of the four-door pickup truck, he saw a white male, with white hair and a white beard asleep in the driver's seat. The driver's seat was fully reclined, with the seatback touching the back bench seat of the truck.

[9] Constable Landry knocked on the driver's side window and the man, who he later identified as Mr. David Dunham, woke up. Mr. Dunham had a "confused look" when Constable Landry asked him to roll down the window. Mr. Dunham straightened up the seatback and opened the window. At that point, Constable Landry noticed that Mr. Dunham's eyes were bloodshot and watery and that there

was an odor of alcohol from his breath. Constable Landry also noticed that there was a bottle of rum in the cab of the vehicle and an open Pepsi bottle that had a strong smell of alcohol.

[10] At this point, Constable Landry formed the opinion that he had reasonable grounds to believe that Mr. Dunham was in care or control of his motor vehicle while his ability to operate that vehicle was impaired by alcohol. At about 9:30 PM, he arrested Mr. Dunham, provided him with his police and Charter cautions, informed him of his right to contact a lawyer or Legal Aid duty counsel and read the breath demand verbatim from a card. Mr. Dunham confirmed that he understood his rights and said that he did not wish to call a lawyer.

[11] On cross examination, Constable Landry confirmed that when he knocked on the driver's side window, Mr. Dunham appeared to be sleeping. Constable Landry was not sure whether the driver's seat was reclined to the point where it was touching the back seat, but agreed with Defence counsel that the seat was reclined more than a regular driving position. After Constable Landry asked Mr. Dunham to exit the vehicle, he confirmed that Mr. Dunham was steady on his feet and walked normally.

[12] Constable Brock Boucher arrived at the Legion parking lot and he searched Mr. Dunham's truck. He located an empty 750 milliliter bottle of rum in the

exterior box of the truck and found an empty 50 milliliter bottle of rum and a 710 milliliter bottle of Pepsi in the driver's side door panel of the truck. In the back seat of the truck, he located a 1.14 liter bottle of rum with about three quarters of the bottle's contents remaining and a receipt for a 1.14 liter bottle of rum which had been purchased that day.

[13] Mr. Dunham was taken to the Sackville detachment of the RCMP where he provided two suitable samples of his breath for analysis. The first sample taken at 10:17 p.m. on December 29, 2010, was analyzed at 200 milligrams of alcohol in 100 millimeters of blood. A second sample taken at 10:36 p.m. was analyzed at 190 milligrams of alcohol in 100 millimeters of blood. The Crown relies on the lower of those two readings.

[14] Mr. David Dunham testified that he is now 62 years old and has resided at 408 Kennedy Court, in Sackville, Nova Scotia for the last two years. He has been married for approximately 44 years. On December 29, 2010, he had gone to the Legion in Lower Sackville, Nova Scotia, and after drinking there for several hours, he decided to leave around 8:30 p.m.. He called his wife and asked her to come and get him, but she refused to do so and told him not to bother coming home that evening. Mr. Dunham decided to go out to his truck and sleep there

until the morning or until he "felt" that he was "fit to drive" and then he would drive home.

[15] Mr. Dunham also thought about getting a cab to drive him home or going to the residence where his brother and sister lived in Sackville. However, he said that his brother and sister are 78 and 79 years of age respectively and he decided that he did not want to go their residence "in that condition."

[16] Mr. Dunham had never previously slept overnight in his vehicle. He stated that he owned a 2003 Dodge half ton pickup, quad cab with four doors , front and back seats. He got into his vehicle between 8:30 and 8:45 p.m., and lifted the steering wheel towards the dash and reclined the driver's seat back as far as possible. Mr. Dunham estimates that the seat was at a 45° angle and that he could not reach the steering wheel or the gear shift (located on the steering column) while seated back with the driver's seat in that position.

[17] The 2003 Dodge pickup truck was equipped with an automatic transmission and in order to put the vehicle in motion, Mr. Dunham said that he would have to raise the seatback up and move it forward in order to reach the steering wheel, gear shift and pedals. He would also have to put his foot on the brake in order to put the truck into gear. Mr. Dunham provided photos of the truck which he took

on the morning of December 30, 2010, prior to moving his vehicle in order to show the interior of his vehicle and where it was parked in the parking lot. Mr. Dunham stated that after he went to his truck, he fell asleep for about two hours, but woke up because he was getting cold. Then, he started the truck's engine and turned on the heater to keep warm. He fell back asleep until he was awakened by the RCMP officer. Once again, he stated that he had no intention to put his truck in motion.

[18] On cross examination, Mr. Dunham estimated that he got into his truck between 8:30 and 8:45 p.m. and that the police officer arrived around 10 p.m.. When it was suggested that his estimates of time were inaccurate because of the timing of the two breath tests, Mr. Dunham conceded that he did not know exactly what time the RCMP officer came to his vehicle. When reminded of the times of the breath tests, Mr. Dunham stated that he probably called his wife around 7:30 to 7:45 p.m. and then went to sleep.

[19] Mr. Dunham reiterated that his plan was to stay in his truck during the evening and that is why he reclined the driver's seat. On cross examination, he confirmed that his plan was to sleep off the effects of the alcohol and that one option was to drive his vehicle "if I felt I was sober enough to drive" and that the other options were to call his wife and see if she would come to get him or to call a

cab to take him home. Mr. Dunham also agreed that he would not have any way of knowing when he was sober enough to drive and agreed that he would probably go by "feel."

[20] Mr. Dunham also confirmed that his truck had an automatic transmission, and that the emergency brake was not on. He also agreed that there was nothing preventing him from driving the vehicle as it was already turned on and if he wanted to move the truck, he could have.

[21] Mr. Dunham also agreed with the Crown Attorney's suggestion that he was "very intoxicated" and he confirmed that he drank most of the rum that he had purchased that day and that he had mixed some rum and Pepsi Cola in the bottle which he had with him in the cab of the truck.

ANALYSIS:

[22] At the outset of the trial, an Agreed Statement of Facts and Admissions was read into the record. Counsel agreed that there was no dispute with respect to the issues of jurisdiction, date and time of this incident, the validity of the breath demand made by Constable Landry or the results of the breathalyzer analysis which established that Mr. Dunham had, at all relevant times, a blood alcohol concentration of 190 milligrams of alcohol in 100 milliliters of blood. Therefore,

in order to determine the issue is whether Mr. Dunham was in "care or control" of his motor vehicle at all relevant times, the following questions should be addressed:

1) Did the Crown establish that Mr. Dunham was in care or control of his motor vehicle by virtue of the statutory presumption found in section 258(1)(a) of the **Criminal Code**?

2) If so, did the Defence, on a balance of probabilities, rebut that statutory presumption of care or control of his motor vehicle?

3) If the Court concludes that the Defence rebutted the statutory presumption, then, did the Crown establish, beyond a reasonable doubt, that Mr. Dunham was in de facto or actual care or control of his vehicle?

Essential Elements for "Care or Control" of a Motor Vehicle:

[23] The leading cases from the Supreme Court of Canada on the issue of "care or control" of a motor vehicle while impaired are **R. v. Ford** (1982), 65 CCC (2nd) 392; **R. v. Toews**, [1985] 2 SCR 119; **R. v. Whyte** (1988), 42 CCC (3rd) 97; and **R. v. Penno** (1990), 59 CCC (3rd) 344. In those cases, the Supreme Court of Canada established that the mens rea for having "care or control" of a motor vehicle is the intent to assume care or control, after the voluntary consumption of alcohol or a drug. The actus reus is the assumption of 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 involved the use of the car, its fittings and equipment and the act or series of acts involved an element of risk of putting the vehicle in motion, even if unintentionally, and thereby creating a danger.

[24] Since "care or control" of a motor vehicle is a separate offence from driving or operating a motor vehicle while impaired, **Toews,** supra, at page 123, makes it clear that proof of an intention to drive or to set the vehicle in motion is not an essential element of "care or control." However, the accused's intention is relevant because it may contribute to or exclude the requisite mens rea.

[25] The **Penno** case, supra, 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. Ultimately, in **Ford** and **Toews**, the Supreme Court of Canada stated that each case will depend on its own facts and circumstances and while many factors could be considered, it is almost impossible to establish an exhaustive list of acts which could qualify as acts of "care or control."

[26] In **R. v. Szymanski**, 2009 CanLii 45328 (Ont. S.C.J.) Durno J. stated at paragraph 29:

> “that the Crown has three routes by which it may establish that an accused person had "care or control" of a motor vehicle. Those three routes are:

> 1) Where there is evidence of the accused's driving because the offence of impaired operation is included in a charge of care or control. **R. v. Coultis** (1982), 66 CCC (3rd) 385 (Ont. C. A.);
>
> 2) If evidence establishes that the accused "occupied the seat or position ordinarily occupied by a person who operates a motor vehicle," then the Crown may rely upon the statutory presumption of care or control found in s. 258(1)(a) of the **Criminal Code**. The presumption was found to violate section 7 of the **Charter of Rights and Freedoms**, but was saved by section 1 because the accused could rebut the presumption. Therefore, it could not be said that proof of occupancy of the driver's seat leads inexorably to the conclusion that the essential element of care or control exists. **R. v. Whyte** 1988 CanLII 47 (SCC), [1988] 2 S.C.R. 3 at p. 19;
>
> 3) If the evidence establishes that the accused person had de facto or actual care or control of the motor vehicle which involves the risk of danger as an essential element."

[27] In this case, there was no evidence before the court in relation to Mr. Dunham's driving of his motor vehicle prior to his contact with Constable Landry in the parking lot adjacent to the Royal Canadian Legion building in Sackville, Nova Scotia. For that reason, the Crown relies on the statutory presumption in section 258(1)(a) of the **Criminal Code**, and if that presumption has been rebutted on a balance of probabilities by the Defence, then the Crown submits that they

have established that Mr. Dunham had de facto or actual care or control of his motor vehicle which involved the risk of danger if he had moved his vehicle.

Did the evidence establish the statutory presumption of care or control of the motor vehicle pursuant to section 258(1)(a) of the Code?

The statutory presumption contained in Section 258(1) of the **Criminal Code** provides, in part, as follows:

> 258(1) In any proceedings under section 255(1) in respect of an offence committed under section 253…
> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle…, the accused shall be deemed to have had the care or control of the vehicle,.., unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle… in motion…

[28] I find that the evidence established that when Constable Landry approached Mr. Dunham's truck, the police officer found Mr. Dunham, apparently sleeping, in the driver's seat of his motor vehicle. In these circumstances, the Crown may rely upon the presumption found in section 258(1)(a) of the **Code** that Mr. Dunham was in "care or control" of his motor vehicle at all material times, unless the Defence establishes, on a balance of probabilities, that Mr. Dunham did not occupy the driver's seat for the purpose of setting his motor vehicle in motion.

Did the Defence Rebut the Presumption in Section 258(1)(a) of the Code?

[29] In the **Whyte** case, supra, Chief Justice Dickson stated at page 115:

> " the purpose of the presumption was that Parliament wished to discourage intoxicated people from even placing themselves in a position where they could set a vehicle in motion, while at the same time providing a way for a person to avoid liability when there was a reason for entering the vehicle other than to set it in motion."

The Supreme Court of Canada found that this presumption infringed the guarantee of the presumption of innocence in section 11(d) of the **Charter**, but held that the provision was saved by section 1.

[30] In order to rebut the presumption contained in section 258(1)(a) of the **Code**, an accused must establish the absence of an intention to set the vehicle in motion on a balance of probabilities: see **Whyte**, supra, at page 108.

[31] I find that Mr. Dunham testified in a straightforward and credible manner when he indicated that he got into his truck after leaving the Legion to sleep there for the evening. Mr. Dunham stated that his wife was angry with him and she did not want him to come home in an inebriated state. The evidence also established that Mr. Dunham had considered calling a cab to take him home or to go to the residence of his older brother and sister. However, Mr. Dunham decided that he

would not go residence of his older sister and brother, because he did not wish to disturb them at that hour "in that condition".

[32] I accept Mr. Dunham's evidence that when he got into his truck after leaving the Legion, he reclined the driver's seat back at about a 45° angle and initially fell asleep without the engine running or the heater operating in the vehicle. However, I found that his evidence in several areas was not precise and that he was unable to recall and relate specific details as to when he called his wife to come and get him, when he left the Legion and got into his truck or how long he actually slept in the vehicle. In fact, Mr. Dunham acknowledged during cross examination that he had a "fuzzy head" and that his recollection of the times when events occurred was affected by the amount of alcohol that he had consumed during the day, that evening and while he was seated in his truck.

[33] However, I do accept Mr. Dunham's evidence that his intention when he initially entered his vehicle was to use it as a temporary shelter for the evening. In these circumstances, I find that the Defence established on a balance of probabilities that Mr. Dunham did not initially occupy the driver's seat with an intention of setting his motor vehicle in motion. As such, I find that the Defence rebutted the statutory presumption found in section 258(1)(a) of the **Code,** and that

the Crown may not rely on this evidentiary aid to establish that Mr. Dunham had "care or control" of his motor vehicle at all relevant times.

Did the Crown Establish that Mr. Dunham had de facto or actual "care or control" of his Motor Vehicle?

[34] Having concluded that the statutory presumption was rebutted by the Defence, the Crown may still attempt to establish that Mr. Dunham had de facto or actual "care or control" of his motor vehicle at all material times. Based upon the actus reus and mens rea for this offence as defined by the Supreme Court of Canada, it is evident that the Crown may establish care or control without proof of any intention to drive on the part of the accused: see **Ford**, supra, at page 399.

[35] As mentioned previously, the Supreme Court of Canada has stated in **Toews**, supra, at paragraph 10, 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."

McIntyre J. went on to note that each case will depend on its own facts and circumstances as the acts of care or control may vary widely.

[36] In **R. v. Lockerby**, 1999 NSCA 122, Justice Cromwell (as he then was) held in paragraph 15 that;

> " the accused had "care or control" of his motor vehicle and had committed an offence under section 253(b) of the **Criminal Code** because:
>
> (1) he had possession of the keys to the vehicle;
> (2) he had used the keys to operate some of the controls of the motor vehicle, and as such, he was in charge of the motor vehicle;
> (3) although he had stated that he did not intend to set the vehicle in motion, he was in the position and had the present ability to make the vehicle do what he wanted to do; and
> (4) he had more than the legal limit of alcohol in his blood. "

[35] In **Lockerby**, supra, at paragraph 13, the Nova Scotia Court of Appeal, "assumed without deciding" that risk of setting the vehicle in motion is an essential element of the offence of having "care or control" of a motor vehicle while the accused's ability is impaired by alcohol or drug.

[37] Since **Lockerby**, there have been many appellate and trial decisions which have determined that a finding of the risk of danger is an essential element of the offence in all cases where the section 258(1)(a) **Code** presumption does not apply. See, for example: **R. v. Mallery**, 2008 NBCA 72 at paragraph 4; **R. v. Pelletier**, [2000] O.J. No. 848 (Ont. C.A.) at paragraphs 6-7; **R. v. Wren** (2000), 144 CCC

(3rd) 374(Ont. C.A) at 380; **R. v. Ruest**, 2009 ONCA 841 (CanLii) at paragraphs 14-17; **R. v. Szymanski**, 2009 CanLii 45328 (Ont. S.C.) at paragraphs 90-94; and **R. v. Ellis**, 2008 NSSC 178 at paragraphs 38 and 41.

[38] In **R. v. MacKinnon**, 2010 NSPC 31, I had the occasion to review those and other authorities, in a case which involved a somewhat similar factual situation. In that case and in this one, I have concluded that the risk of danger from the motor vehicle being put in motion, either intentionally or unintentionally, by an accused person whose ability to operate a motor vehicle is impaired by alcohol, is an essential element of this offence.

[39] Furthermore, I also conclude that the Court's assessment of whether the Crown has established a risk of danger, should not be based upon conjecture or mere speculation of the risk that an person accused would change his or her mind and set the vehicle in motion. If a finding of guilt was based solely on the possibility of a risk that an accused might change his or her mind and set the vehicle in motion 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 establish that the accused was in "care or control" of his or her vehicle and there was or could have been a real risk of danger to themselves or public safety.

[40] In my view, the issue of whether a real risk arises should be based upon the case-specific evidence introduced during the trial and be determined by reviewing the proven facts and any logical or reasonable inferences which may be drawn from those proven facts. In the final analysis, whether that real risk arises on the specific facts of the case will most likely be determined by applying circumstantial evidence.

[41] In **R. v. Szymanski**, supra, at paragraph 93, Justice Durno reviewed an extensive number of cases, primarily from the Ontario Court of Appeal, in order to prepare a non-exhaustive list which illustrates factors that Courts have relied upon in determining if the real risk of danger arises in "change of mind" cases. Those factors include:

> (a) The level of impairment of the accused person;
> (b) Whether the keys were in the ignition or readily available to be placed in the ignition;
> (c) Whether the vehicle was running;
> (d) The location of the vehicle, whether it was on the side of a major highway or in a parking lot;
> (e) Whether the accused had reached his or her destination or if they were still required to travel to their destination;
> (f) The accused's disposition and attitude;
> (g) Whether the accused drove the vehicle to the location of the drinking;
> (h) Whether the accused started driving after drinking and pulled over to "sleep it off" or started out using the vehicle for purposes other than driving. If the accused

> drove while impaired, it might show both continuing care or control, bad judgment regarding fitness to drive and willingness to break the law;
> (I) Whether the accused had a plan to get home that did not involve driving while he or she was impaired or not over the legal limit;
> (j) Whether the accused had a stated intention to resume driving, although, it is noted that evidence that the accused would not drive until he or she was sober only went to weight;
> (k) Whether the accused was seated in the driver's seat, regardless of the applicability of the presumption;
> (l) Whether the accused was wearing his or her seat belt;
> (m) Whether the accused failed to take advantage of alternate means of leaving the scene; and
> (n) Whether the accused had a cell phone with which to make other arrangements and failed to do so.

[42] Based upon the time line established by Constable Landry from the information supplied by the "concerned citizen," when the officer met with that citizen and then arrived at the Legion, I find that Mr. Dunham probably entered his truck between 8:30 p.m and 8:45 p.m. In addition, I find that Mr. Dunham's evidence also established that he continued drinking alcohol in the truck and then fell asleep. From these facts, it is reasonable to infer that within a few minutes after falling asleep, Mr. Dunham became cold due to the outside temperature being -1° Celsius that night. At that point in time, I find that he woke up, decided to put the key in the ignition and turned on the vehicle but left the gearshift in "Park" in order to operate the heater and then, he fell asleep again.

[43] I find that Constable Landry's evidence established the cold temperature that evening and supported Mr. Dunham's statements with respect to his use of the equipment in his vehicle, in particular, that the key was in the ignition, the engine was running with the heater on and the position of the driver's seat at a 45° angle when the police officer woke him up. I also find that the police officer's evidence established that he approached Mr. Dunham's vehicle and woke him up at 9:23 p.m. on December 29, 2010. Based upon the evidence which I have accepted in terms of when the "concerned citizen" saw Mr. Dunham leave the Legion and get in his truck and the time when Constable Landry woke him up, I find that it is reasonable to infer that Mr. Dunham had only slept in his truck for a very brief period of time.

[44] In this case, there is no evidence as to when Mr. Dunham arrived at the Legion and parked his vehicle in the adjacent parking lot. I find that the evidence did establish that Mr. Dunham's truck was parked at one end of a relatively large public parking lot adjacent to the Legion building. The evidence of Constable Landry and Mr. Dunham also confirmed that he parked his truck in an area where there were no other cars in the immediate vicinity.

[45] Although Mr. Dunham acknowledged that he had consumed a significant quantity of alcohol at the Legion over a period of several hours, there was no

specific evidence or an estimate of the amount of alcohol that he had consumed that day. I find that it is reasonable to infer from Mr. Dunham's evidence and the fact that the police located both empty and partially filled bottles of alcohol (rum) inside the cab of his truck that Mr. Dunham did not only go to his truck to seek a temporary shelter, but he also continued to consume alcohol while seated in his truck. I also find that all of this evidence is entirely consistent with Mr. Dunham's breathalyzer readings which were almost 2.5 times the legal limit and support an inference of a significant level of impairment.

[46] In terms of the location and use of the keys to the vehicle, I find that the evidence established that Mr. Dunham had the key to his vehicle in his possession when he sought shelter in his truck. Furthermore, I find that a short time after he entered the truck for that purpose, he became cold and decided to place the key in the ignition and turn on the engine of his vehicle. There is no doubt that when Constable Landry located Mr. Dunham in his truck, the engine was running and I accept Mr. Dunham's evidence that the heater was on. I also find that the evidence established that the truck was parked on a clear, flat paved surface with the steering wheel raised, that the gearshift of the truck's automatic transmission which is located on the steering column was placed in the "Park" position, the headlights were on, but the emergency brake was not engaged.

[47] Looking at all of these factors taken together, I conclude that the Crown established the actus reus of the offence as I have no doubt that Mr. Dunham had "care or control" of his motor vehicle by having possession of the key to his truck and then using that key to engage in acts which involved the use of the car, its fittings and equipment. He was seated in the driver's seat, with the key in the ignition and the engine running with the vehicle's automatic transmission in the "Park" position without the emergency brake engaged. I find that there is no dispute in the evidence and I conclude that Mr. Dunham had the means readily available to him to set the vehicle in motion. In addition, I find that, in these circumstances, there were no physical or other impediments and that it would not have taken much effort for Mr. Dunham to raise the seat back up, possibly lower the steering wheel, put his foot on the brake, place the car in gear and set his vehicle in motion.

[48] I find that the evidence established that Mr. Dunham had driven his truck to the Legion and parked it in the adjacent parking lot. After leaving the Legion, I have found that Mr. Dunham's initial plan was to sleep in the truck, but he had not developed any alternate plan to get to his intended destination (his own house), which did not involve driving while he was or might have been over the legal limit. I find that the evidence established that Mr. Dunham had ruled out the

possibility of leaving his truck where it was parked and taking a cab to either his own house or his sibling's house that evening. Furthermore, I find that the evidence established that Mr. Dunham had a stated intention to resume driving when he "felt" he was sober enough to do so.

[49] In these circumstances, I find that Mr. Dunham had not abandoned an intention to drive his vehicle home, but rather, he had simply postponed that immediate intention until he "felt" he was sober enough to drive. On cross examination, Mr. Dunham agreed that he would not have had any way of knowing himself when he was sober enough to drive and agreed that he would probably go by how he "felt". In terms of these facts, I agree with the remarks made by the Ontario Court of Appeal in a very similar factual situation in **R. v. Pilon**, [1998] O.J. No. 4755, at paragraph 19 that "at its best, as far as the appellant was concerned, this showed that he did intend to drive the car if, in his subjective and potentially impaired opinion, he had "slept it off."

[50] Looking at the totality of the facts and circumstances present in this case, I find that Mr. Dunham's plan was to sleep for a period of time and then he would drive his vehicle either to his own home in Sackville, Nova Scotia or some other location until he resolved any outstanding issues with his wife. As a result, I find that, on December 29, 2010, Mr. Dunham had merely delayed the decision to drive

and that his plan was to "change his mind" and drive at some point in time, with the unknown factors being when, where he would go and whether his ability to operate his motor vehicle would still be impaired by his voluntary consumption of alcohol. I find that in leaving those decisions to Mr. Dunham's subjective and potentially impaired assessment as to his level of impairment, there was a real risk that he would misjudge his level of impairment and drive his truck while in that condition, and that he would therefore pose a real risk to himself and public safety.

[51] In his submissions, Defence Counsel relied upon my decision in the **MacKinnon** case, supra, where I found that the accused had rebutted the statutory presumption and was not in de facto or actual care or control of his vehicle because the Crown had not established that there was a real risk of danger in all of the circumstances of that case. However, I find that the following facts illustrate the significant factual distinctions found in this case, which were not present in the MacKinnon case:

a) Mr. Dunham had driven his truck to the Legion that day knowing that he would be drinking alcohol there for several hours, and that he would have to make some other arrangements to get home without driving his vehicle while his ability to do so was impaired by alcohol;

b) He continued to drink alcohol while seated in his truck after he had entered it to seek shelter for the evening;

c) He had not reached his final destination, when he entered his truck; he was in a public parking lot, an unspecified distance from his own house, without any physical impediments preventing him from setting his vehicle in motion;

d) Mr. Dunham had the keys to his truck in his possession when he entered the vehicle to seek shelter and he used the key to start the engine and operate the heating system, shortly after he entered his vehicle;

e) Mr. Dunham had merely delayed his plan to drive his truck to his house until he "felt" that he was sober enough to do so. Mr. MacKinnon, on the other hand, had not planned to drive anywhere as he was parked on the driveway of his house and he had not moved that vehicle in days.

[52] I find that there was a real risk that Mr. Dunham would put his vehicle in motion, because he had made a series of poor decisions that day and since I have found that he had only postponed his intention to drive after having consumed a significant quantity of alcohol, I find that it reasonable to infer that Mr. Dunham would probably misjudge his level of the impairment and drive away while his condition continued to pose a risk of danger.

[53] I am satisfied beyond reasonable doubt that Mr. Dunham had assumed care or control of his motor vehicle after having voluntarily consumed a significant amount of alcohol which impaired his ability to operate a motor vehicle. Furthermore, I find that he acted in a manner which demonstrated that he had used the car, its fittings and equipment and had engaged in a course of conduct which involved a real risk of setting his vehicle in motion. I find that the Crown established, beyond a reasonable doubt, that Mr. Dunham had de facto or actual care or control of his vehicle and that he had the requisite mens rea in that he had intended to assume care or control of his motor vehicle after voluntarily consuming a significant quantity of alcohol.

CONCLUSION:

[54] In conclusion, I am satisfied beyond a reasonable doubt that the Crown has established all of the essential elements of the offence of having care or control of a motor vehicle after having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded 80 milligrams of alcohol in 100 milliliters of blood, contrary to section 253(1)(b) of the **Criminal Code**, and I find Mr. Dunham guilty of committing that offence. With respect to the charge contrary

to section 253(1)(a) of the **Criminal Code**, I hereby order that there be a conditional stay of that charge.