**<u>PROVINCIAL COURT OF NOVA SCOTIA</u>**
**Cite as: R. v. Mullins, 2012 NSPC 119**

**Date:** 20121105
**Docket:** 2420917
2420918
**Registry:** Amherst

**Between:**

Her Majesty the Queen

v.

Ryan Alexander Mullins

**Judge:** The Honourable Judge Paul B. Scovil

**Heard:** 11 September 2012, in Amherst, Nova Scotia

**Oral decision:** 5 November 2012

**Written release of oral decision:** 8 January 2013

**Charge:** THAT HE on or about the 3rd day of February A.D. 2012 at, or near Amherst, Nova Scotia, did while his ability to operate a motor vehicle was impaired by alcohol did have the care or control of a motor vehicle contrary to section 253(1)(a) of the Criminal Code;

AND FURTHERMORE on or about the 3rd day of February 2012 at, or near Amherst, Nova Scotia 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 have care or control of a motor vehicle contrary to section 253(1)(b) of the Criminal Code.

**Counsel:** Ms. Catherine Hirbour, for the crown
Mr. Robert Hagell, for the defence

**By the Court**:

[1] Anyone who has watched the movie "Groundhog Day" starring Bill Murray would have an appreciation of trials involving impaired driving which appear before the courts. It is the same arguments over and over again. Given that Canadian criminal law first incorporated the offence of driving while impaired by alcohol in 1925 one would think the law would have been settled. In relation to the main issue in this matter, whether risk of setting a vehicle in motion is an essential element of Section 253(1)(a) and (b), the law continues to be the subject of much judicial consideration. The Supreme Court of Canada has however very recently clarified matters in this area to a great extent.

[2] The facts against Mr. Mullins in this case are that the accused was found behind the wheel of his vehicle, keys in the ignition, engine running and lights being flicked on and off. The accused also states that he never intended to set the vehicle in motion. He was later determined to have alcohol readings of .190 and .180 milligrams of alcohol in one hundred millilitres of blood. What's a judge to do with these facts, section 258(1)(a) and a myriad of cases that cloud, confuse and illuminate the law?

[3] Mr. Mullins additionally raised at trial an issue related to the completion of a checklist kept by the operator of the intoxilizer when conducting the breath test in this matter. Each checklist contains a box to be checked and noted regarding the ambient room temperature at the time of each breath test. The standard alcohol solution which acts as a comparator to a breath sample is required to be within a certain temperature range. On cross examination it was revealed that the first test had a recorded room temperature of 34 degrees Celsuis. This falls within the proper parameters for the test. The second test had a recorded temperature of 340 degrees Celsuis. The accused argues that such a temperature on the check sheet should prove fatal to the prosecution. The Court takes judicial notice that a room at a temperature of 340 degrees would prove fatal to everything in the room, breath tech, accused and all living creatures. The accused argues a temperature of 340 degrees would therefore likely invalidate the test and should cast doubt on the certificate of analysis. More importantly, the defence argues that the inaccuracy of the check sheet causes doubt to be cast on the entire process relating to the breath tests.

[4] Dealing first with the argument concerning the ambient room temperature noted on the technician's check sheet. Constable David Hirtle, in addition to being the arresting officer, was also the breath technician in this matter as well. On cross examination regarding the two temperature variations contained on his checklist, he testified that the recorded temperature of 340 degrees was a typographical error on his part and that he had neglected to place a decimal point between 34 and 0. Constable Hirtle testified that the temperature of the room at that time for both tests was 34 degrees Celsius. I accept that explanation. The certificate of analysis produced was in compliance with the requirements under section 258 of the *Criminal Code* and the certificate completed set out the samples were taken by an approved instrument that was ascertained by Constable Hirtle to be in proper working order. I therefore find that the instrument was indeed in proper operation and I admit the certificate of analysis into evidence.

[5] In relation to the question of care and control, the facts in this case are similar to many which raise the issue of there being a risk of danger in the accused setting the vehicle in motion in those early hours of February 3, 2012. Here Constable David Hirtle of the Amherst Police Department was patrolling the downtown area of Amherst, Nova Scotia in a marked police vehicle. At about 2:15 a.m. the officer patrolled at the Teazer's Pub in downtown Amherst. He noted one individual behind the steering wheel of a vehicle in the parking lot with the engine of the vehicle running. Constable Hirtle returned five minutes later and noted the driver of the vehicle to be slumped over the wheel with the engine still running. The officer pulled in behind the vehicle to check on the occupant. As he pulled the police vehicle in behind the vehicle later identified as belonging to the accused, the officer noted the accused's vehicle lights go on then off.

[6] The officer approached the vehicle and tapped on the window. The accused rolled down the window and said he was waiting for a cab. The accused exhibited a large number of signs of impairment. The officer testified that he had no doubt that the accused's ability to operate a motor vehicle was impaired by alcohol. The crown entered as an exhibit the video taken in the police cruiser of Mr. Mullins' arrest. That evidence showed the accused to be clearly intoxicated to a point that he would be impaired for many functions. It should be noted the video also showed the accused claiming to be waiting for a cab. On several occasions in the video the accused stated he was waiting for a cab. On others he said he had called

a cab and was waiting for it. Eventually the accused gave two breath readings of .190 and .180.

[7] From Constable Hirtle's evidence we know that the officer was first on the scene at Teazer's Pub parking lot at 2:15 a.m. He at that time noticed the vehicle of the accused parked in the parking lot. At approximately 2:20 the officer noted the accused slumped over the wheel and then pulled up behind the accused's vehicle. The officer dealt with the accused on scene at the parking lot until 2:34, at which time he left with the accused in his cruiser for the police station, a very short drive away. Constable Hirtle called for assistance, which resulted in Constable Bourque arriving on scene. Constable Bourque searched and secured the accused's vehicle. Bourque remained on scene and waited for a tow truck to arrive to remove the accused's vehicle from the parking lot.

[8] The accused testified and indicated that he had been at Teazer's bar that evening with another couple. It was a cold evening and that he got into his vehicle to wait for a cab. His testimony regarding this was as follows:

> We left the bar and it was closing time and we were the last ones to leave and I was with another couple and they got in the one cab that was waiting and I said I'll wait for the next one and it took a while to come and I got into my car 'cause it was really cold.

In direct examination he testified that he had no intention to set the vehicle in motion. In cross examination he was asked if he had called a cab, to which he replied, "I believe so". The accused also agreed that he had started the vehicle and added that the lights come on automatically when the vehicle is started. The purpose was to keep warm. The accused testified he waited between five and ten minutes before leaving the bar for his vehicle after the first party took a taxi.

[9] The law in relation to the essential elements that constitute "care or control" of a motor vehicle has a lengthy history. For the most part areas of judicial consideration centred around the issue as to whether risk of the danger of an accused setting a vehicle in motion is an essential element of the offence of care or control under 253(1) of the *Code*. There has been some uncertainty in the law concerning this proposition that has led to a dearth of case law among courts at all

levels. Very recently the Ontario Court of Appeal had weighed in on the matter in *R. v. Smits* [2012] ONCA 524, a judgment which was handed down on August 1, 2012. The Supreme Court of Canada however clarified the issue in *R. v. Boudreault* [2012] SCC 56, decided on October 26, 2012. *Boudreault* provides a practical, useful and cogent statement of the law for which I am sure every trial judge in Canada is thankful for. It also contained a succinct summary of the law prior to that decision. Given that the historical jurisprudence is contained in *Boudreault*, I will spare both this court and the reader a lengthy review thereof.

[10] In *R. v. Boudreault* (supra), the accused realized he was too drunk to drive when requested to leave the apartment he was in, and had an individual there call a taxi for him. That person called not once, but twice. As Justice Fish indicates at paragraph 2 of the decision, Mr. Boudreault was unable to wait in the apartment after the second call, and due to the cold weather he entered his vehicle and turned on the heat. Parenthetically one is left speculating as to what aspect of Boudreault’s drunken demeanour led to his early ejection, but I digress. Approximately 20 to 25 minutes after the second call, the taxi arrived. The taxi driver found Mr. Boudreault asleep in his vehicle. The taxi driver called the police, who then attended and arrested Boudreault, charging him with having care and control under 253(1)(a) and (b).

[11] Justice Fish at paragraph 9 of *R. v. Boudreault* (supra), stated as follows:

> For the reasons that follow, I have concluded that “care or control”, within the meaning of s. 253(1) of the *Criminal Code*, signifies (1) an intentional course of conduct associated with a motor vehicle; (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit; (3) in circumstances that create a *realistic risk*, as opposed to a *remote possibility*, of danger to persons or property.

He went on to indicate that only the third element was in issue before the court. That issue was whether a realistic risk of danger to persons or property was an essential element of an offence of care of control in that case. It should be noted that prior to *Boudreault* there had been a divergence in the law as to whether risk of danger was indeed an essential element of the offence under 253(1).

[12] Equally important are the pronouncements of the Supreme Court of Canada which followed the finding of risk of danger as an element of 253(1). Justice Fish stated at paragraphs 11 to 13 that:

> The existence of a realistic risk of danger is a matter of fact. In this case, the trial judge, applying the correct legal test, found *as a fact* that there was no such risk.
>
> I recognize, as the trial judge did, that a conviction will normally ensue where the accused, as in this case, was found inebriated behind the wheel of a motor vehicle with nothing to stop the accused from setting it in motion, either intentionally or accidentally.
>
> Impaired judgment is no stranger to impaired driving, where both are induced by the consumption of alcohol or drugs. Absent evidence to the contrary, a present ability to drive while impaired, or with an excessive blood alcohol ratio, creates an inherent risk of danger. In practice, to avoid conviction, the accused will therefore face a tactical necessity of adducing evidence tending to prove that the *inherent* risk is not a *realistic* risk in the particular circumstances of the case.

[13] In relation to the issue of risk it is clear that such risk to persons or property must be a realistic risk as opposed to a remote possibility. What does that mean? Justice Fish went on to say in *R. v. Boudreault* (supra), the risk of danger must be realistic and not just theoretically possible. Further that such risk need not be probable or even serious or substantial.

[14] It is also clear from paragraph 36 of *R. v. Boudreault* (supra), that an intention to set a vehicle in motion is not an essential element of the offence of 253(1) and that an accused found in the driver's seat will be under a presumption of having care and control unless the accused satisfied the court that he had no intention to drive.

[15] The concept of what amounts to a realistic risk that a vehicle will be set in motion was further considered by Justice Fish. At paragraphs 41 to 42 the Court stated:

> A realistic risk that the vehicle will be set in motion obviously constitutes a realistic risk of danger. Accordingly, an *intention* to set the vehicle in motion suffices *in itself* to create the risk of danger contemplated by the offence of care or control. On the other hand, an accused who satisfies the court that he or she had no intention to set the vehicle in motion will not necessarily escape conviction: An inebriated individual who is found behind the wheel and has a present ability to set the vehicle in motion – without intending at that moment to do so – may nevertheless present a realistic risk of danger.
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> In the absence of a contemporaneous intention to drive, a realistic risk of danger may arise in at least three ways. First, an inebriated person who initially does not intend to drive may later, while still impaired, change his or her mind and proceed to do so; second, an inebriated person behind the wheel may unintentionally set the vehicle in motion; and third, through negligence, bad judgment or otherwise, a stationary or inoperable vehicle may endanger persons or property.

Again at paragraph 28 of the majority decision in *R. v. Boudreault* (supra), Justice Fish said as follows:

> I need hardly reiterate that "realistic risk" is a low threshold and, in the absence of evidence to the contrary, will normally be the only reasonable inference where the crown establishes impairment and a present ability to set the vehicle in motion. To avoid conviction, the accused will in practice face a tactical necessity of adducing credible and reliable evidence tending to prove that no

> realistic risk of danger existed in the particular circumstances of the case.

[16] In *R. v. Szymanski* [2009] O.J. No. 3623 (O.S.C.J.) Justice Durno examined a number of factors that can be considered in determining whether there exists a real danger in care and control cases. Justice Durno listed the following:

> While perhaps easily defined, what evidence will establish or refute that real risk is not clear. However as recommended in *Toews*, cases that have dealt with the issue provide valuable assistance in determining the criteria. The following non-exhaustive list illustrates areas that have been relied upon in determining if the real risk arises.
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> > a) The level of impairment. *R. v. Daines*, [2005] O.J. No. 4046 (C.A.), *R. v. Ferguson* (2005), 15 M.V.R. (5th) 74 (S.C.J.), *R. v. Ross* (2007), 44 M.V.R. (5th) 275 (O.C.J.) In *Ogrodnick*, Wittman A.C.J. qualified his comments about speculation and conjecture by accepting that it was an appropriate basis to find care or control because the level of intoxication demonstrates unpredictability or a risk pattern of behaviour. Para. 54. In *Ross*, the trial judge found that this consideration might relate to the likelihood of the accused exercising bad judgment, the time it would take to become fit and the likelihood that he or she would be presented with an opportunity to change their mind during that time.
> >
> > b) Whether the keys were in the ignition or readily available to be placed in the ignition. *Pelletier,* supra.

c) Whether the vehicle was running. *R. v. Cadieux*, [2004] O.J. No. 197 (C.A.)
d) The location of the vehicle, whether it was on the side of a major highway or in a parking lot. *Cadieux, R. v. Grover*, [2000] A.J. No, 1272 (Q.B.)

e) Whether the accused had reached his or her destination or if they were still required to travel to their destination. *Ross,* supra.

f) The accused's disposition and attitude *R. v. Smeda* (2007), 51 M.V.R. (5th) 226 (Ont. C.A.)

g) Whether the accused drove the vehicle to the location of drinking. *R. v. Pelletier*, [2000] O.J. No. 848 (C.A.)

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. *Ross,* supra.

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. *Cadieux, Ross, R. v. Friesen*, [1991] A.J. No. 811 (C.A.), *R. v. Gill* (2002), 33 M.V.R. (4th) 297 (S.C.J.) para. 21, *Ross,* supra.

j) Whether the accused had a stated intention to resume driving. In *Cadieux*, supra, where the accused testified he was not driving and was waiting to sober up. The Court of Appeal held that his evidence that he would not drive until he was sober only went to weight.

k) Whether the accused was seated in the driver's seat regardless of the applicability of the presumption. *R. v. Pelletier*, [2000] O.J. No. 848 (C.A.)

l) Whether the accused was wearing his or her seatbelt. *Pelletier*, supra.

m) Whether the accused failed to take advantage of alternate means of leaving the scene. *Pelletier*, supra.

n) Whether the accused had a cell phone with which to make other arrangements and failed to do so. *Cadieux,* supra.

Cases where there was found to be a "real risk" of change of mind include: *R. v. MacMillan*, [2005] O.J. No. 1905 (C.A.), *R. v. Ferguson* (2005), 15 M.V.R. (5th) 74 (S.C.J.), *R. v. Mussleman*, [2005] O.J. No. 3340 (S.C.J.), *Sandhu*, supra.

[17] In applying the facts before this court we know that it was approximately 2:05 to 2:35 a.m. from when the accused began waiting for a taxi and when he was taken from the scene by Constable Hirtle. In that 30 minute time span no taxi had arrived. We also know the accused was highly intoxicated as evidenced both from his high blood alcohol readings and his demeanour in the police cruiser. The accused was found in the driver's seat. The engine was running and the vehicle was operable. The accused had some control over the fittings of the vehicle as

evidenced by the headlights coming on. Whether they turned on automatically or not does not detract from the fact that the accused could control that aspect of the vehicle.

[18] The question also remains as to the accused's intentions. In his direct evidence he stated that the other couple got into the cab that was waiting and that the accused said he would wait for the next one. That implies that the first couple took a cab that was parked outside the bar by happenstance and the accused would wait for another to show up at some time. It would not seem to indicate that any specific cab had been called. The police car video did show the accused on several occasions explaining that he was waiting for a cab, and on others adding that he had called a cab. In cross examination, when asked if he had called a cab the accused replied, "I believe so". Given the equivocal answers on whether he was waiting for a cab or had in fact called a cab, together with the fact that for at least a half hour after leaving the bar no cab had appeared for the accused, I find that there was no reliable evidence before me to conclude a cab had been called. As stated in *R. v. Boudreault* (supra), it is up to the accused tactically to call evidence tending to prove that no realistic risk of the accused setting the car in motion existed. There was no evidence before this court from one of the few taxi companies in the town of Amherst that a call was logged to attend to the pub on the night in question.

[19] The proof of "realistic risk" of setting the car in motion is a low one in these cases. Here I find there was, in fact, a realistic risk of the accused setting his vehicle in motion on the night in question. The accused's high level of impairment, the fact that no cab had arrived, called or not, in a significant period of time, his starting the vehicle, all lead the court to the conclusion that there was a realistic risk that Mr. Mullins would set his car in motion. Accordingly, I convict him of the 253(1)(b) charge. I will issue a judicial stay in relation to the 253(1)(a) charge.

**JPC**