**PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** *R. v. Watts*, 2021 NSPC 8

**Date:** 20210113
**Docket:** 8341703
**Registry:** Dartmouth

**Between:**

Her Majesty the Queen

v.

Cassandra Melissa Watts

# DECISION

| | |
|---|---|
| **Judge:** | The Honourable Judge Frank Hoskins |
| **Heard:** | February 11, 2020, in Dartmouth, Nova Scotia<br>September 14, 2020, in Dartmouth, Nova Scotia<br>December 17, 2020, in Dartmouth, Nova Scotia |
| **Decision:** | January 13, 2021 |
| **Charge** | Section 320.14(1)(b) of the *Criminal Code* |
| **Counsel:** | Katie Lovett, for the Crown<br>Thomas Singleton, for the Defence |

**By the Court:**

**Introduction**

[1] This is the decision in the matter of *The Queen & Cassandra Watts*, who is charged with impaired operation of a conveyance -a motor vehicle- contrary to s. 320.14(1)(a) of the *Criminal Code,* and with the offence of having, within two hours after ceasing to operate a motor vehicle, a blood alcohol concentration that was equal to or exceeded 80 mg of alcohol in 100 ml of blood, contrary to s. 320.14(1)(b) of the *Criminal Code.*

[2] On March 30, 2019, at 12:45 a.m., and at 1:05 a.m., Ms. Watts was found in the driver's seat of a motor vehicle that was stuck in a ditch on the East Chezzetcook Highway. Two drivers passing by observed Ms. Watts' car in the ditch as they drove along the highway. Ms. Watts sought their assistance to remove her vehicle from the ditch. The vehicle could not be removed without the assistance of a tow truck. The police arrived on scene shortly thereafter. Ms. Watts was arrested for having committed the alleged impaired driving offences. She provided two breath samples for analysis. The first sample was taken at 2:38 a.m., and the second sample at 03:05 a.m. Both samples resulted in readings of 180 milligrams of alcohol in 100 millilitres of blood.

[3] The central issue raised in this case is whether Ms. Watts was in care or control of her motor vehicle while her ability to operate it was impaired by alcohol.

[4] I reserved my decision until today, so that I would have time to carefully consider and thoroughly reflect upon the evidence, and the oral and written submissions of counsel.

[5] I will briefly summarize the surrounding circumstances which have emerged from the evidence presented, touch upon the law, and then provide my analysis, which has led me to the result in respect to the issue of whether the Crown has proven beyond a reasonable doubt, the two alleged offences as described in the Information.

**Summary of the Evidence**

[6] The Crown called three witnesses: Michael Quinn, David Miller, and Constable Jeff Stevens. The defence did not call evidence.

**The Evidence of Michael Quinn**

[7] Michael Quinn, a resident of Chezzetcook, testified that he worked until midnight at the Halifax Shipyard on March 29, 2019. On March 30, 2019, he left his place of employment at 12:01 a.m. and drove home. He stopped to get pizza on his way home.

[8] At approximately 12:45 a.m., he observed a vehicle in the ditch near St. Barnabas Church on the East Chezzetcook Highway. He stopped and observed someone in the car. He noticed the car in the ditch because the car's headlights were on. Mr. Quinn observed a woman in the driver's seat when he arrived, and he thought the vehicle was still running. He testified that the woman exited the vehicle from the driver's side door and asked him to move her car during which she said, "back my car out of the ditch," while she was standing beside the driver's door. He told the woman he could not move the car. She then requested to use his cellphone. Mr. Quinn could not remember whether he gave the woman his cellphone or dialed the number for her. He found his interaction with her bizarre because he saw that the woman already had a cellphone in her possession. He also stated that there were no visible signs of injuries.

[9] Mr. Quinn testified that the woman's vehicle was positioned "straight into the ditch". He described the driver as a small woman. He added, "she wasn't dressed for the weather". She was not wearing a jacket when he arrived. He said it was a "coolish, misty night". He did not see anyone else in the area. He also stated that the woman did not say much, but he added that her ability to communicate was fine. He did not smell anything emanating from the woman. He was approximately 15 feet away from her.

[10] Mr. Quinn remained on scene with the woman for approximately five minutes. His home is located very close to the scene. He estimated his home to be 30 seconds away. He returned to the scene approximately 15 minutes later when he saw the police arrive.

**The Evidence of David Miller**

[11] David Miller, a resident of Lower East Chezzetcook, testified that he and his wife played cards with their friends in Gaetz Brook on the evening of March 29, 2019. They left their friend's house between 12:50 a.m. and 12:55 a.m. on March 30, 2019.

[12] When Mr. Miller turned onto East Chezzetcook Road, he saw a car in a ditch of the church parking lot. He stated that the car was "nose-down" in the ditch. He drove into the church parking lot and exited his vehicle. He stated that the woman behind the wheel of the vehicle opened the driver's side door. No one else was in the vehicle. He said to the woman, "are you all right?", to which she responded that she was fine. He stated that she appeared to be fine to him. Mr. Miller also testified that the woman stated, "I'm trying to get someone on the phone for a tow truck." He said he could not tell whether the car was still running, but said he thought it was not

running when he arrived. He said the "dome light" was on inside the vehicle. He added that when the door opened, the dome light was on.

[13] Mr. Miller testified that the woman asked again if he could get her a tow truck. He got back in his vehicle and called 911. He stated the woman got in the backseat of his vehicle because it was a cold night. He testified that she smelled of liquor. He stated the woman did not have a jacket on and he did not want her "falling around on the gravel", so he told her to get in his vehicle. He added that the woman was in his vehicle for approximately 10 minutes before the police arrived.

[14] Mr. Miller described the woman as angry "because she couldn't get nobody on the phone". He said she had been trying to get a tow truck. He said the woman told him she was coming from a friend's place. He said, in his opinion, the woman's vehicle was not moveable.

[15] Mr. Miller described the weather as being cold, clear, and not raining.

**The Evidence of Constable Jeff Stevens**

[16] Constable Jeff Stevens testified that he is a member of the RCMP and has been a police officer for 14 years. He stated that, as a police officer, he has experience dealing with people under the influence of alcohol and drugs. He added

that a large portion of his time involves dealing with individuals under the influence of alcohol and/or drugs. He also estimated that he has been involved in a couple of hundred impaired investigations during his career.

[17] On March 30, 2019, he was working at the Cole Harbour, Nova Scotia detachment. He said it was approximately 6-7 degrees Celsius when he began his shift on the evening of March 29, 2019. He said it was a little bit cooler and somewhat foggy outside at the time of the incident. He said the road conditions were dry.

[18] At 1:05 a.m., Constable Stevens was dispatched to a call about a vehicle in the ditch on Highway 7 near Conrad Settlement Road, where the driver may have consumed alcohol. He left the Cole Harbour area and arrived on scene at approximately 1:23 a.m. Upon arrival, Constable Stevens discovered a white Kia vehicle facing downwards into the ditch at the church parking lot. He testified that in his opinion the vehicle would need to be towed from the ditch. He did not remember if the vehicle was running when he arrived, nor did he recall where the keys were located.

[19] He briefly spoke to Mr. Miller, and then asked Ms. Watts, who was sitting in the back seat of Mr. Miller's vehicle, to exit the vehicle, which she did. Ms. Watts

identified herself. Constable Stevens stated that Ms. Watts was very quiet; she did not say a lot. He also added that he was satisfied after speaking to Ms. Watts that she was not injured. Constable Stevens detected a strong odour of liquor or alcohol coming from Ms. Watts' breath when she spoke to him. As a result of that observation, coupled with the location of the vehicle, and the time of night, he became suspicious that she had alcohol in her body and demanded that she provide a breath sample. He then escorted Ms. Watts to his police cruiser where Ms. Watts provided a sample of breath for the purpose of analysis. She registered a fail on the approve screening device. Having failed the approved screening device, coupled with everything he heard and observed, Constable Stevens formed the belief that Ms. Watts' ability to operate a motor vehicle was impaired by alcohol. Based on this belief, he arrested Ms. Watts for impaired driving, demanded a second breath sample for the purpose of analysis by an approved instrument, and provided her with the police caution and her *Charter* rights, all of which she stated that she understood. After declining to consult with legal counsel, Ms. Watts provided two samples of her breath, which resulted in the readings as contained in Exhibit 1.

**An Application of the Relevant General Principles**

[20] Before I embark upon my analysis of the central issue in this case, I will address the importance of the relevant general principles, and then address the law in respect to the alleged offences.

**Burden of Proof**

[21] The burden is upon the Crown to prove these allegations beyond a reasonable doubt. This legal or persuasive burden never shifts to the accused, Ms. Watts, as it remains with the Crown throughout the trial. Indeed, the presumption of innocence can only be displaced by credible and reliable evidence that establishes beyond a reasonable doubt all the essential elements of the offences charged.

[22] In *R. v. Starr*, 2000 S.C.R. 144, the Supreme Court of Canada held that this burden of proof lies "much closer to absolute certainty than to a balance of probabilities", and in *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court held that it is not sufficient to conclude that an accused person is probably or likely guilty for a conviction to be registered.

[23] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[24] The ultimate issue, as noted by Justice Binnie in *R. v. Sheppard*, 2002 SCC 26, is not credibility but it is reasonable doubt.

[25] In *R. v. Mah,* 2002 NSCA 99, Justice Cromwell, reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond a reasonable doubt.

[26] Lastly, the Court may believe all, none, or some of a witness' evidence. I am also entitled to accept parts of a witness' evidence, reject other parts, and, similarly, I can afford different weight to different parts of the evidence that I have accepted.

[27] It is against this context I must consider the issues. I am mindful that the presumption of innocence is displaced only by proof beyond a reasonable doubt.

[28] It is trite to say that most criminal trials involve an assessment of the reliability and credibility of witnesses; this case is no exception. Therefore, it is essential that the credibility and reliability of each witness be considered in light of all of the other evidence presented. In this case, there are no real issues surrounding the credibility and reliability of the witnesses as each witness testified to the best of their abilities and seemed genuine and honest. Each witness struck me as being clear, and concise, and they testified in a straightforward manner.

[29] I am also mindful that the proper approach to the burden of proof is to consider all the evidence together and not to assess individual items of evidence in isolation. In other words, I must consider the totality of the evidence in determining whether the Crown discharged its burden of proving the offences beyond a reasonable doubt.

[30] This case, like most others, involves consideration of both direct and circumstantial evidence. With respect to circumstantial evidence, I am mindful of the instructive comments of the Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33, particularly paragraphs 35 to 37, where Justice Cromwell wrote:

> [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point [1966] S.C.R. 254. However, that view is no longer accepted. In assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.
>
> [36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

> [37]When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with the appellant that the Crown thus may need to negative these reasonable possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation. (Emphasis added)

[31] Importantly, Justice Cromwell added, that it is not always easy to differentiate between a plausible theory and mere speculation:

> [38] Of course, the line between a "plausible theory" and "speculation" is not always easy to draw. But the basic question is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

[32] Justice Beveridge pointed out more recently in *R. v. Snow*, 2019 NSCA 76, at paras. 48 -49:

> [48] [a]s noted earlier, counsel suggested that it is settled law that there must be an evidentiary basis for any inference to be drawn.
>
> [49] As a general proposition, that is accurate. It is certainly so where the inference to be drawn is necessary to establish some element of an offence beyond a reasonable doubt. But in circumstances where an accused suggests an alternate explanation inconsistent with guilt, there is no obligation to call evidence to establish a factual basis for that alternate explanation.

[33] While it is settled law that there must be an evidentiary basis for any inference to be drawn, particularly where the inference to be drawn is necessary to establish some element of an offence beyond a reasonable doubt, in circumstances where an accused suggests an alternate explanation inconsistent with guilt, there is no obligation to call evidence to establish a factual basis for that alternate explanation. Thus, conclusions alternative to the guilt of the accused need not be based on proven facts.

**The Issues**

[34] As stated, the central issue in this case is whether the Crown has established, beyond a reasonable doubt, that Ms. Watts was in *care or control* of her motor vehicle by virtue of the statutory presumption in s. 320. 25 of the *Criminal Code*, and whether the presumption was rebutted by the defence. If the presumption was rebutted, then the issue becomes whether the Crown has established, beyond a reasonable doubt, that Ms. Watts was in *de facto* or *actual care or control* of her motor vehicle.

[35] The final issue is whether the Crown proved beyond a reasonable doubt that Ms. Watts committed the offence of impaired operation as alleged in the Information.

**The Position of the Parties**

[36] The Crown contends that Ms. Watts was in care and control of a motor vehicle at or about 12:45 a.m. and at approximately 1:05 a.m. on March 30, 2019. The Crown submits that it is indisputable that Ms. Watts was observed sitting in the driver's seat of a motor vehicle which was in a ditch. Therefore, the Crown submits that she is *deemed* to have been in care and control by virtue of s. 320.35 of the *Criminal Code.* The Crown acknowledged that the presumption can be *rebutted* by evidence that she did not intend to set the vehicle in motion, but stresses that the *risk of danger* is *not* an element of care or control that it has to establish where it relies on the statutory presumption to prove care or control. The Crown further submits, in the alterative, that Ms. Watts should be found to have been in *de facto* care or control of the motor vehicle. The Crown submits that a *risk of danger* is only part of the *actual* or *de facto* care or control analysis.

[37] Lastly, the Crown also submits that the evidence establishes beyond a reasonable doubt that Ms. Watts was impaired when she drove her vehicle into the ditch. Therefore, the Crown submits that she should be found guilty of the impaired operation charge pursuant to s. 320.14(1)(a) of the *Criminal Code.*

[38] The defence disagrees and contends that Ms. Watts was *not* in care or control of her vehicle on the date and times in question as there was *no risk* of putting the vehicle in motion because the vehicle was *inoperable*. In support of this proposition, the defence argues that the decision in *R. v. Boudreault*, 2012 SCCC 56, requires the Crown to establish the existence of a *realistic risk of danger to persons or property* before care or control is *deemed* to exist under s. 320. 35 of the *Criminal Code*. Put differently, the defence submits that the Crown cannot rely on the statutory presumption without establishing that there was a realistic risk of danger of putting the vehicle in motion. Moreover, the defence submits that the evidence establishes that the presumption was rebutted because the vehicle was inoperable and thus there was no realistic risk of danger.

[39] Further, the defence argues that the Crown has failed to prove beyond a reasonable doubt that Ms. Watts was in *actual* or *de facto* care or control as there was no realistic risk of putting the vehicle in motion because it was inoperable as a result of being stuck in a ditch.

[40] Lastly, the defence further submits that the Crown has failed to prove beyond a reasonable doubt that Ms. Watts drove her vehicle while impaired by alcohol, and

thus, should be found not guilty of committing the alleged offence of impaired operation, contrary to s. 320.14(1)(a) of the *Criminal Code*

**Findings of Facts**

[41] Having carefully considered the totality of the evidence, I am satisfied beyond a reasonable doubt that the Crown has established the following facts, which provide the factual foundation for my legal analysis of the issues raised in this case. Before setting out the facts, let me state that I am mindful of what Justice Watt, of the Ontario Court of Appeal stated in his authoritative text, *Watt's Manual of Criminal Evidence*, 2011 ed. (Toronto: Carswell, 2011), in the "Commentary" at p. 104:

> An *inference* is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that *may*, not must be drawn in the circumstances. It does *not* change the allocation of the burden of proof, nor alter the standard of proof to be met by any party. [Emphasis in original.]
>
> The boundary that separates permissible inference from impermissible speculation in connection with circumstantial evidence is often a very difficult one to determine.

[42] I accept Mr. Quinn’s evidence and find that on March 30, 2019, at about 12:45 a.m. he observed a Ms. Watts’ car in the ditch near St. Barnabas Church on the East Chezzetcook Highway. I also accept Mr. Miller’s evidence and find that around 1:05 a.m. he also observed Ms. Watts’ car in the ditch.

[43] Mr. Quinn stopped his vehicle, exited, and observed that there was a person in the car. The car lights were on. He observed Ms. Watts in the driver's seat of the car. She opened the driver's side door. She was the only occupant of the vehicle. Mr. Quinn observed that Ms. Watts exited the vehicle from the driver's side door. Upon exiting, she asked him to move her car. She stated, "back my car out of the ditch," while she was standing beside the driver's door. Mr. Quinn told her that he could not move the car. Ms. Watts then asked to use his cell phone. He thought her request was odd because Ms. Watts was in possession of a cell phone.

[44] I accept Mr. Quinn's evidence and find that the vehicle was positioned "straight into the ditch". I also accept Mr. Quinn's evidence and find that Ms. Watts was not wearing a jacket and it was a "coolish, misty night". I also find that there was no one else in the area. Mr. Quinn remained on scene with Ms. Watts for approximately five minutes. He returned to the scene approximately 15 minutes later when he saw the police arrive.

[45] I also accept Mr. Miller's evidence and found that sometime between 12:50 a.m. and 12:55 a.m. on March 30, 2019, he and his wife left their friend's residence to return home. As he turned his vehicle onto East Chezzetcook Highway, he observed a car in the ditch of the church parking lot, which I infer from the totality

of the evidence would have been around 1:05 a.m. The car was nose-down in the ditch. He drove into the church parking lot and exited his vehicle. Mr. Miller observed Ms. Watts sitting in the drivers' seat, behind the wheel of the vehicle. She was the lone occupant of the vehicle. He asked Ms. Watts, "are you all right?" to which she responded, "I'm trying to get someone on the phone for a tow truck." Mr. Miller noticed that the dome light was on inside the vehicle. Ms. Watts asked again if he could get a tow truck. Mr. Miller returned to his vehicle and called 911. He noted that Ms. Watts did not have a jacket on, and he did not want her "falling around on the gravel", so he told her to get in his vehicle. She entered his vehicle and sat in the back seat because it was a cold night. He smelled an odour of liquor after she entered his vehicle. Ms. Watts remained in his vehicle for approximately 10 minutes before the police arrived.

[46] I accept and find that Ms. Watts was upset that she could not contact anyone as she was trying to get a tow truck. I also accept and find that Ms. Watts told Mr. Miller that she was coming home from a friend's place. Mr. Miller expressed his opinion that the vehicle was not moveable, which I accept as being consistent with both Mr. Quinn's and Constable Steven's view. That is, the vehicle could not be moved without the assistance of a tow truck because it was stuck in a ditch.

[47] I find that Ms. Watts never abandoned her vehicle after she drove it into a ditch while driving home from a friend's place. She remained in care and control of her vehicle while it was in the ditch. While it cannot be determined exactly when (at what time) Ms. Watts drove her vehicle into the ditch, it can reasonably be inferred from the totality of the evidence that she drove it into the ditch prior to Mr. Quinn's arrival on scene. I am satisfied that Ms. Watts' behaviour demonstrated an intentional course of conduct associated with the vehicle when she was occupying the driver's seat with the headlights on when Mr. Quinn arrived on scene at 12:45 a.m. She was the sole occupant of the vehicle. It is also reasonable to infer that after Ms. Watts drove her car into the ditch she wanted to remove it, but could not, which led her to ask for Mr. Quinn's help to back her car out of the ditch. I find that her request is an active step taken to have the vehicle removed from the ditch, which demonstrates an intentional course of conduct associated with the vehicle, and a present intent to put the vehicle in motion. At this point in time, I find that she had the intention of putting her vehicle in motion. Thus, it is also reasonable to infer that Ms. Watts' intention was to remove her car so she could continue to drive it home, which was her destination. In other words, I find that she occupied the driver's seat when she tried to get her vehicle unstuck, intending to drive home if she had

succeeded. There is no evidence that Ms. Watts sought or asked for a drive home, or for someone to come and pick her up from the scene.

[48] While there is no direct evidence regarding the operability or mechanical fitness of the car after it was driven into the ditch, it is reasonable to infer from the evidence that the vehicle was not damaged to the extent that it was *inoperable* in the sense that it could not be operated after it was removed from the ditch. The vehicle was immoveable or immobilized being stuck in a ditch. It was incapable of being moved without the assistance of a tow truck.

[49] Again, there is no evidence that the vehicle could not have been driven had it become unstuck. Ms. Watts drove the vehicle into the ditch. She asked Mr. Quinn to back her car out of ditch, which leads me to infer that there was nothing wrong with the mechanical fitness or operability of the vehicle.

[50] I do find, however, that the vehicle could not be removed out of the ditch without the assistance of a tow truck. Thus, I find that the only reasonable inference is that the vehicle was drivable, but temporarily immoveable without the assistance of a tow truck.

[51] I also find that at around 1:05 a.m. Ms. Watts was seated in the driver's seat with the dome light on inside the vehicle when Mr. Miller arrived on scene. I find

that she told Mr. Miller that she was attempting to call for a tow truck. Again, it is reasonable to infer from the evidence that Ms. Watts' intention was to have her vehicle removed from the ditch so that she could continue to drive home. Again, there is no evidence to suggest that her intention was not to drive, such as making alternate plans to get home, her ultimate destination. Ms. Watts told Mr. Miller that she was driving home from a friend's place. Given the manner in which she was dressed, the location of the vehicle in a ditch on Highway 7 near Conrad Settlement Road, and the time of day, it is reasonable to infer that Ms. Watts was going to continue to drive her vehicle home after it was removed from the ditch.

[52] I find that at about 1:05 a.m., on March 30, 2019, Constable Stevens was dispatched to a call about a vehicle in the ditch on Highway 7 near Conrad Settlement Road. I accept his evidence that it was a bit cooler, and somewhat foggy at the time, but the road conditions were dry. He arrived on the scene at about 1:23 a.m. Upon arrival he discovered a white Kia vehicle facing downwards into the ditch at the church parking lot. I accept his opinion, which is consistent with both Messrs. Quinn and Miller, that the vehicle needed to be towed from the ditch.

[53] Constable Stevens asked Ms. Watts to exit Mr. Miller's vehicle, which she did. He then confirmed her identification by looking at her Nova Scotia Driver's

Licence. Upon speaking with her, Constable Stevens detected a strong odour of liquor emanating from her breath. He also observed that her eyes were red, glassy, and watery. Based on the location of the vehicle, the time of the night, and his conversation with Mr. Miller, Constable Stevens was satisfied that Ms. Watts had been the lone occupant of the vehicle in the ditch. At 1:29 a.m., Ms. Watts provided a roadside sample of her breath, which resulted in a reading of “fail”. Ms. Watts’ vehicle was removed from the ditch by a tow truck. Constable Stevens transported Ms. Watts to the Cole Harbour RCMP detachment arriving at 2:13 a.m.

[54] There is no dispute with respect to the issues of jurisdiction, date and time of this incident, or the validity of the breath demands made under ss. 320. 27 and 320. 28 by Constable Stevens. Nor is there any issue with respect to admissibility of the Certificate of Qualified Technician (Exhibit 1) which establishes that Ms. Watts provided two samples of her breath into an approved instrument operated by a qualified technician, Constable Christopher Brennan, on March 30, 2019 at 2:38 a.m. and 3:05 a.m. An analysis of each sample was made by the instrument, showing that the accused had a blood alcohol concentration of 180 milligrams of alcohol in 100 millilitres of blood. As previously mentioned, the primary issue is whether the Crown established that Ms. Watts was in *care or control* of her motor vehicle.

## The Relevant Statutory Provisions

[55] Section 320. 14 of the *Criminal Code* provides:

> Everyone commits an offence who
>
> (a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug,
>
> (b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood.

[56] Subsection (5) states:

> No person commits an offence under paragraph (1)(b) if
>
> (a) they consumed alcohol after ceasing to operate the conveyance;
>
> (b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of breath or blood; and
>
> (c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with subsection 320.31 or (2) and with their having had, at the time when they were operating the conveyance, a blood concentration that was less than 80 mg of alcohol in 100 mL of blood.

[57] Section 320. 11 of the *Criminal Code* defines ***operate*** to mean:

> … (a) in respect of a motor vehicle, to drive it or to have ***care or control*** of it

[58] Section 320. 14 of the *Criminal Code* prohibits not only driving a conveyance while impaired, but it also prohibits a person who is in *care or control* of a vehicle. Proof that the accused was operating a motor vehicle is sufficient to prove that the accused person either drove or had care or control of a motor vehicle. A person cannot drive a motor vehicle without having care or control of it: *R. v. Drolet*, [1990] 2 SCR 1107; *R. v. Plank*, (1986) 28 C.C.C. (3d) 386 (Ont. C.A.).

[59] Parliament's objective in enacting s. 320.14 of the *Criminal Code* was to prevent a risk of danger to public safety: *R. v. Boudreault*, 2012 SCC 56, at para. 32. In *R. v. Price* (1978), 40 C.C.C. (2d) 378, at 383-384 (NBCA), approved in *R. v. Toews*, [1985] 2 S.C.R. 119, at p.126, Limerick J.A. commented on the mischief sought to be prohibited by the section:

> 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 to power of directing and regulating; domination, command, sway." The word "care" refers to the custody of a chattel, to the having of it in charge or under protection and is unrelated to motion. If Parliament had intended that an intention to set the motor vehicle in motion was an essential element of the offence of "care or control" it would have used other or modifying words. 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.

[60] The *actus reus* of the offence is the assumption of *care or control* when the ability to drive has been impaired by the consumption of alcohol. The *mens rea* is the intent to assume *care or control* after the voluntary consumption of alcohol: *R. v. Toews*, [1985] 2 S.C.R. 119, at para. 7.

[61] The Crown may establish care or control without proof of any intention to drive on the part of the accused. An "intention to drive" is not an essential element to the offence. An intentional course of conduct associated with the vehicle does not mean the Crown must prove that the accused had an intention to drive: *R. v. Ford*, [1982] 1 S.C.R. 231. The accused's intention is relevant, however, in so far as it may contribute to the presence of the required *mens rea* for the offence or tend to exclude it: *Toews*, at para.7.

[62] There are *three ways* that a person can be found to have care or control of a motor vehicle under s. 320.14 of the *Criminal Code.* The first two are found in s. 320.14 which makes it an offence to have care or control of a motor vehicle where the person's ability to operate the vehicle is impaired by alcohol, drugs, or a combination thereof; or if the person's blood alcohol level exceeds 80 milligrams of alcohol in 100 millilitres of blood. The third way is by the Crown relying on s. 320.35 of the *Criminal Code*.

**The Statutory Presumption: Section 320.35 of the *Criminal Code***

[63] Section 320.35 of the *Criminal Code* provides a third means to prove care or control. It creates a presumption that where an accused occupies the driver's seat, he or she is presumed or deemed to have care or control of the vehicle. This presumption can only be rebutted if the accused establishes, on a balance of probabilities, that he or she did not occupy the driver's seat for the purpose of setting the vehicle in motion.

[64] Section 320. 35 of the *Criminal Code* provides:

> In proceedings in respect of an offence under section 320.14 or 320.15, if it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat or position for the purpose of setting the conveyance in motion.

**The Purpose of the Presumption**

[65] It is important to consider the purpose of the statutory presumption in determining the essential elements of the offence of care or control.

[66] In *R. v. Whyte*, [1988] 2 S.C.R. 3, the Supreme Court Canada commented on the purpose of the presumption. At para. 46, Dickson C.J. stated:

> [46] In 1947, Parliament enacted the presumption now found as s. 237(1)(a), as a proviso to s. 285(4). The purpose of the proviso was said at the time of its introduction to be to clarify the content of the offence and to make it difficult for an accused to avoid conviction for the care or control [page25] offence on the ground that he or she was too impaired to assume control of the vehicle. …

[67] Later at para. 47, Chief Justice Dickson wrote:

> [47] This history shows that there is a serious problem with the mental element of this offence, because the fact of intoxication itself raises doubts about the accused's mental state and ability to [page26] form an intention. The presumption was created by Parliament in response to that history. On the one hand, it was repugnant to theories of criminal liability that a person could be convicted of an absolute liability crime, with no possibility of a defence based on the mental state of the accused. On the other hand, as the Minister of Justice commented, it is shocking to hear that an accused could be acquitted of an offence for which consumption of alcohol is a required element, because he was too intoxicated to be guilty. The presumption was added to resolve the problems caused by both of these alternatives. 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 position adopted is admittedly a compromise. It is an attempt to balance the dangers posed by a person whose abilities to reason are impaired by alcohol with the desire to avoid absolute liability offences. It is an attempt by Parliament to recognize that alcohol, because of its effects on the reasoning process, may in some cases require a special treatment, while avoiding absolute liability offences.

[68] In *Whyte,* the Supreme Court concluded that the statutory presumption violated the right to be presumed innocent under s. 11(d) of the *Charter* but was saved by s. 1. In doing so, the Court stressed the preventive purpose of the section.

[69] As previously stated, I find that the evidence of Mr. Quinn establishes that Ms. Watts was seated in the driver’s seat when he arrived on scene at 12:45 a.m.

The evidence of Mr. Miller also establishes that Ms. Watts was seated in the driver's seat when he arrived on scene at 1:05 a.m. On both occasions the *only* reasonable inference to draw from the totality of the evidence is that Ms. Watts occupied the driver's seat for the purpose of setting the vehicle in motion as she was trying to have her vehicle removed from the ditch so that she could continue to drive home.

[70] While there is no evidence as to when Ms. Watts entered her vehicle, I find that she was in care or control of her vehicle at 12:45 a.m. when Mr. Quinn observed her in the driver's seat with the headlights on, located in the ditch. I also find that Ms. Watts was in care or control of her vehicle at 1:05 a.m. when Mr. Miller observed her occupying the driver's seat of her vehicle with the dome light on inside the vehicle.

[71] It is indisputable that Ms. Watts' vehicle could not be removed from the ditch without the assistance of a tow. Thus, the defence contends that the Crown is prohibited from relying on presumption in s. 320.35 because there was *no risk of danger* of the vehicle being put in motion.

**Whether s. 320.35 requires the Crown to establish a *risk of danger* to rely on the presumption.**

[72] The issue in this case is whether the Crown must prove that Ms. Watts' occupation of the driver's seat at 12:45 a.m. and at 1:05 a.m. created a *realistic risk of danger* in order for the presumption in s. 320.35 of the *Criminal Code* to apply.

[73] For the reasons that follow, I have concluded that the Crown does *not* have to establish a *risk of danger* for the presumption in s. 320. 35 to apply. Therefore, based on my findings of fact, as set out earlier in these reasons, the Crown is entitled to rely on the presumption to establish care or control.

[74] In my view, the *presumption of care or control* applies if the Crown establishes beyond a reasonable doubt that the accused occupied the driver's seat of a motor vehicle. Once the Crown proves that, then the accused bears the onus of rebutting the presumption of care or control. The accused must establish, on the balance of probabilities, that they had no intention to set the vehicle in motion. Put differently, the accused has the burden of establishing that they, more likely than not, did not occupy the driver's seat for the purpose of setting the vehicle in motion.

[75] Let me be clear, a *risk of danger* is not a part of the Court's analysis when determining if the presumption enacted by s. 320.35 applies. An analysis of whether

there is a realistic risk of danger is only necessary when the presumption does *not* apply, and the Crown seeks to prove actual or *de facto* care or control by an accused.

[76] I have reached this conclusion after considering the history and purpose of the presumption in s. 320.35, and the relevant case law, and by applying a contextual analysis of the whole decision in *Boudreault.*

[77] While it might be fair to say that Justice Fish's specific comments in paras. 38 to 39 in the *Boudreault* decision seem to suggest that the Crown must establish a *realistic risk of danger* to persons or property before it can rely on the presumption in s. 320.35, a full and contextual reading of the decision reaffirms that this additional element was not meant to apply to the statutory presumption, but rather only to the essential elements of the offence in s. 253, now s. 320.14.

[78] Justice Fish, for the majority, wrote at paras. 38 to 39, in *Boudreault*:

> 38 At a minimum, the wording of the presumption signifies that a person who was found drunk and behind the wheel cannot, for that reason alone, be convicted of care or control if that person satisfies the court that he or she had no intention to set the vehicle in motion. Dickson C.J. made this plain in *R. v. Whyte*, [1988] 2 S.C.R. 3, at p. 19: "It cannot 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 ... ."
>
> 39 Put differently, s. 258(1)(*a*) indicates that proof of voluntary inebriation and voluntary [page169] occupancy of the driver's seat do not by their coexistence alone conclusively establish "care or control" under s. 253(1) of the *Criminal Code*. Something more is required and, in my view, the "something more" is a realistic risk of danger to persons or property.

[79] In *R. v. MacKenzie*, [2013] A.J. No. 899, Brown J., in delivering the judgment for the Alberta Court of Queen's Bench, conducted a comprehensive and thoughtful analysis of this issue. In doing so, Justice Brown reached the conclusion that Fish J's comments in paras. 38-39, were directed at interpreting s. 253, not the presumption, which I agree, because the issue in *Boudreault* focused on actual or *de facto* care or control. The operation of the presumption was not in issue as the trial judge found that the statutory presumption had been rebutted by the accused. At Para. 47, Fish J. made it clear that the presumption was not in issue. He stated:

> 47 Parliament, in its wisdom, has until now seen fit to create only one reverse onus in the context of the care and control offence. It is found in s. 258 of the Code and **is not in issue on this appeal.** Any other reversal of the burden of proof for example, as to the existence of a realistic risk of danger to persons or property is a matter for Parliament and not for the courts. And it would be [page171] subject, of course, to constitutional scrutiny under the *Canadian Charter of Rights and Freedoms*. (Emphasis added)

[80] Justice Cromwell, writing in dissent in *Boudreault,* reaffirmed that the majority decision is focused on the interpretation of care or control in the context where the presumption does not apply. He stated, at para. 67:

> In this case, the presumption of care or control in s. 258 Cr. C. was rebutted. Thus, the discussion that follows is only concerned with the interpretation of care or control in the context where the presumption does not apply.

[81] In *R. v. Blair*, [2014] O.J. No. 4296, (Ont. S.C.J.), Trotter J., as he then was, considered the majority decision in *Boudreault* and reached the same conclusion that paras. 38-39 considered in context was merely describing the operation of the presumption in the light of its holding in *Whyte.* At para. 13, Justice Trotter stated:

> There is nothing in the language of *Boudreault* that suggests that the Court modified or altered the operation of the presumption by requiring the Crown to go further and prove a realistic risk of danger when the presumption stands unrebutted. When the presumption is not rebutted, all elements of "care or control" (both the *mens rea* and *actus reus* components, as described in *Smits,* paras. 49 to 51) are deemed to exist.

[82] There are numerous cases which have reached the same conclusion as reached in the decisions of *Mackenzie* and *Blair*, including: *R v. Brzozowski*, 2013 ONSC 2271; *R v. Tharumakulasingam,* 2014 ONCJ 362; *R. v. Coomansignh*, 2014 ONCJ 560; *R. v. Arulrasan,* 2015 ONCJ 100; *R v. Jonah*, 2015 NBPC 2; *R. v. Murray*, 2015 NBPC 10; *R. v. Boudreau*, 2015 NBPC 8; *R. v. Tharumakulasingam*, 2016 ONSC 2008; *R v. Ablack,* 2016 ONCJ 290; *R. v. Dhesi*, 2018 ONCJ 729; *R. v. Sivaraman*, 2018 ONCJ 636; *R. v. Sarasin,* 2018 ABQB 237; *R. v. Williams*, 2019 ABQB 243; *R. v. Thomas*, 2020 ONSC 5375; *R. v. Tibbo*, YKTC 19.

[83] In summary, I endorse the reasoning in, and the conclusions of those decisions, which have uniformly held that *Boudreault* did not change the law.

Therefore, where the presumption applies, the Crown need not prove that there was a risk of danger.

**Did the Defence rebut the presumption of care or control?**

[84] Based on my findings of fact for this case, I am *not* satisfied that the defence established on, the balance of probabilities, that Ms. Watts had no intention to set her vehicle in motion when she had care or control of it at 12:45 a.m. and at 1:05 a.m. In other words, the presumption in s. 320.35 applies and the defence has not rebutted it. I will now attempt to further explain my reasons for having reached this conclusion.

[85] As stated, the evidence of Mr. Quinn establishes that Ms. Watts was seated in the driver's seat when he arrived on scene at 12:45 a.m. The evidence of Mr. Miller establishes that Ms. Watts was seated in the driver's seat when he arrived on scene at 1:05 a.m., when 911 was called and Constable Stevens was dispatched.

[86] Ms. Watts did not testify. She was not required to do so in order to defeat the presumption, particularly if there is evidence that is relevant to the issue. The defence relied on the evidence adduced in the trial to establish that Ms. Watts did *not* have the intention of setting the vehicle in motion at the times she occupied the driver's seat because the vehicle was *inoperable*. That is, it could not be moved

without a tow. Further, she was trying to get it towed. Nevertheless, I find that the only reasonable inference to draw from the totality of the evidence is that Ms. Watts' intention was to have her vehicle removed from the ditch so that she could continue to drive it home. Let me explain.

[87] Ms. Watts took active steps to have the vehicle removed from the ditch by asking Mr. Quinn to remove it and by asking Mr. Miller to assist in her efforts to call a tow truck, which demonstrates an intent to continue to drive her vehicle home after it is removed from the ditch.

[88] While it is indisputable that the vehicle required a tow truck to be removed from the ditch, there is no evidence as to the mechanical fitness of the vehicle once it was removed from the ditch to suggest that it could not have been driven.

[89] On the totality of the evidence, the only reasonable inference to conclude is that Ms. Watts intended to have the car removed from the ditch. Her comments to Mr. Quinn and Mr. Miller demonstrate her intention to extract the vehicle from the ditch and get it back on the road again. Mr. Quinn testified that the accused asked him to move her car by saying, "Back my car out of the ditch," while standing beside the driver's door of the vehicle. She then asked Mr. Quinn if she could use his phone to call someone. Similarly, Mr. Miller testified that the accused said to him, "I'm

trying to get someone on the phone for a tow truck", and that she was angry that she could not reach anyone.

[90] Ms. Watts' vehicle was stuck in a ditch on the Lower East Chezzetcook Road. She did not ask Mr. Quinn or Mr. Miller to drive her anywhere. She did not ask Mr. Quinn or Mr. Miller to call 911. Instead, she asked both witnesses for their help in removing her vehicle from the ditch. Her requests for Mr. Quinn and Mr. Miller to assist her in removing the vehicle from the ditch, instead of calling 911, driving her home, or driving her back to her friend's house, demonstrate that her intention was to get the vehicle on the road again.

[91] It should be parenthetically noted that this case can be clearly distinguished from the circumstances in the *Bouderault* case, where Mr. Boudreault had a concrete and reliable plan to get a drive home.

[92] For all the foregoing reasons, I conclude that the defence has *not* displaced or rebutted the presumption in s. 320.35. Therefore, I find that Ms. Watts is deemed to have care or control at 12:45 a.m., and at 1:05 a.m. on March 30, 2019 notwithstanding, that her vehicle could not be removed from the ditch without the assistance of a tow truck, which I will address specifically later in these reasons.

[93] The Certificate of Qualified Technician (Exhibit 1) establishes that Ms. Watts provided two samples of her breath into an approved instrument operated by a qualified technician at 2:38 a.m., which is within two hours of her being in care or control at 1:05 a.m. on March 30, 2019.

[94] Given that Ms. Watts was in care or control at 12:45 a.m., the first sample of breath was still taken within two hours after she had care or control of the vehicle.

[95] Nevertheless, s. 320. 31(4) of the *Criminal Code* states that if the first sample of breath was taken more than two hours after the person ceased to operate (have care or control) of the conveyance and the person's blood alcohol concentration was equal to or exceeded 20 milligrams of alcohol in 100 millilitres of blood, a person's blood concentration within those two hours is conclusively presumed to be the concentration established in accordance with s. 320.14(1), plus an additional five milligrams of alcohol in 100 millilitres of blood for every interval of 30 minutes in excess of those two hours.

[96] Thus, given the first sample of breath was taken at 2:38 a.m., that the result of the proper analysis was 180 milligrams of alcohol in 100 millilitres of blood, and the second sample of breath was taken at 03:05 a.m., that the result of the proper analysis was 180 milligrams of alcohol in 100 millilitres of blood, it can be concluded that at

12: 45 a.m. and at 1:05 a.m., Ms. Watt's blood alcohol concentration exceeded 80 milligrams of alcohol in 100 millilitres of blood when she had care or control of her motor vehicle.

**Inoperable Motor Vehicle**

[97] As previously mentioned, where the presumption in s. 320.35 of the *Criminal Code* applies, the risk of danger is irrelevant. Thus, it is irrelevant whether the motor vehicle in question is inoperable. In other words, when the presumption is *not* displaced or rebutted, there is no need for the court to consider the issue of whether the vehicle is operable or immovable. The authority for this proposition is found in *R. v. Hayes*, [2008] N.S.J. No. 100. In that case, Hamilton J.A., in delivering the judgment of the Nova Scotia Court of Appeal, considered the *statutory presumption* in a case where there was no dispute that the snowmobile was inoperable that the driver was impaired by alcohol, or that he was sitting in the driver's seat when the police came across him. The issue was whether he had deemed or actual care or control of the snowmobile. In explaining the operation of the statutory presumption, she wrote, at para. 26:

> The Court in R. v. Ferguson, [2005] O.J. No. 182, Ontario Supreme Court of Justice, explains the consequences of deemed care or control when an impaired accused is in the driver's seat of an inoperable vehicle and fails to rebut the s. 258(1)(a)

> presumption by not satisfying the trier of fact that s/he did not intend to set the vehicle in motion:
>
> [12] When an individual is found in the driver's seat of a vehicle, there is a presumption of care or control pursuant to s. 258(1)(a) of the Criminal Code. The presumption can be rebutted if the defendant establishes on a balance of probabilities that he or she was not in the driver's seat for the purpose of setting the vehicle in motion.
>
> [13] If the presumption is not rebutted, the individual is deemed to be in care or control of the motor vehicle and there is no need for the prosecution to prove beyond a reasonable doubt that the vehicle had some potential to create danger in the hands of the impaired defendant. When the presumption is not displaced, there is no need for the trial judge to address the issue of whether the vehicle is operable or immovable and/or the issue of dangerousness. (emphasis)

[98] Justice Hamilton also referred to *R. v. Dennis*, [2000] N.S.J. No. 57, an earlier decision of the Nova Scotia Court of Appeal. In that case a flat tire caused the accused's vehicle to go into a ditch and become stuck in deep snow. The accused was found in the driver's seat with the engine running. As the vehicle could not be put in motion, nor was there any evidence of acts on the accused's part involving the use of the car or its fittings which involved a risk of putting it in motion, there was no risk of danger. Chipman J. A. addressed the presumption in *obiter*, where at paras. 23-24 he wrote:

> [23] In short, nothing in the language used in the authorities dealing with the mens rea and the actus reus of care or control supports the proposition that where an individual is deemed to be in care or control of a motor vehicle by virtue of the presumption found in s. 258 of the Criminal Code, in circumstances in which a vehicle cannot be moved, the presumption for that reason does not operate. To the extent that the reasoning of Ryan, J.C.C. in Dairou, supra, can be said to support such a conclusion, we do not agree with it. As Dickson, C.J.C. said for the court in

R. v. Whyte, [1988] 2 S.C.R. 3; 86 N.R. 328; 64 C.R. (3d) 123; 6 M.V.R. (2d) 138; [1988] 5 W.W.R. 26; 42 C.C.C. (3d) 97; 29 B.C.L.R. (2d) 273; 51 D.L.R. (4th) 481; 35 C.R.R. 1, at pp. 109-110:

> "... If an accused does not meet this requirement [ie. of proving the absence of intent to set the vehicle in motion] the trier of fact is required by law to accept that the accused had care or control and to convict. But of course it does not follow that the trier of fact is convinced beyond a reasonable doubt that the accused had care or control of the vehicle ..."

See also R. v. Whyte, [1988] 2 S.C.R. 3; R. v. Burbella (2002), 5 C.R. (6th) 174, 167 C.C.C. (3d) 495 (Man. C.A.), para. 16 and R. v. MacAulay, (2002) 8 C.R. (6th) 108, 169 C.C.C. (3d) 321 (PEICA) para. 24.

[99] In *R v. Pharai,* 2007 ONCJ 486, at para. 13, Justice Brewer's observation is apposite:

> The inoperability or immobility of an automobile is not determinative of whether an accused person is in care or control. As noted in *R. v. Wren, supra*, "an accused will have care or control of an inoperative vehicle, if that vehicle in the hands of an impaired person has the potential to create some danger". Potential dangers arising from the combination of an intoxicated person and an immobile automobile have been found to arise in circumstances where:
>
>> efforts are made or arrangements have been put in place to extricate the vehicle and potentially return it to a driveable state, such as by summoning a tow truck or seeking assistance from others: see R. v. Magagna (2003), 173 C.C.C. (3d) 188 (Ont. C.A.); R. v. Wilford, [2004] O.J. No. 258 (C.A.); R. v. MacMillan, [2005] O.J. No. 1905 (C.A.); R. v. McBrine, [2007] O.J. No. 142 (C.A.);
>>
>> there was an intentional use of the car's equipment, as in R. v. Johal, [1998] O.J. No. 1223 (S.C.), where the accused assisted in removing his car from a ditch by steering and accelerating it as it was being towed; and

> there was a realistic risk of an unintentional use of the fittings of the automobile, as in R. v. Vansickle, [1990] O.J. No. 3235 (C.A.), aff'g [1988] O.J. No. 2935 (Dist. Ct.) where there was a likelihood that the accused might inadvertently turn off the headlights of a vehicle that was stuck in the middle of a road during white-out storm conditions.

[100] Having determined that Ms. Watts was in care or control of a motor vehicle at 12:45 a.m., and at 1:05 a.m. on March 30, 2019, and having considered and applied s. 320. 31(4) of the *Criminal Code*, I am satisfied beyond a reasonable doubt that she was impaired by alcohol while in care or control of a motor vehicle (conveyance). Therefore, I find Ms. Watts guilty of committing the offence of having within two hours after ceasing to operate a motor vehicle a blood alcohol concentration that was equal to or exceeded 80 milligrams of alcohol in 100 millilitres of blood, contrary to s. 320.14(1)(b) of the *Criminal Code,* as described in the Information.

**Actual or *de facto* Care or Control**

[101] Although I have concluded that Ms. Watts has *not* rebutted the presumption in s. 320.35 of the *Criminal Code,* I will proceed to address the alternate method open to the Crown to prove beyond a reasonable doubt that Ms. Watts was in actual or *de facto* care or control of her motor vehicle on the date and times in question.

[102] Before addressing the issue of whether the Crown has established that Ms. Watts was in actual or *de facto* care or control of her motor vehicle on the date and times in question, some cautionary comments or general observations may be necessary in respect to when the time of care or control is determined.

[103] Care or control has been found in some cases based *not* on a present risk of danger, but instead on recent past driving combined with present care or control: See, for example: *R. v. Saunders*, [1967] S.C.J. No. 21. Although this issue was not specifically addressed in *Boudreault,* the majority's decision does stress that the care or control analysis is on the present risk of danger.

[104] I mentioned this only because there appears to be some disagreement in the case law as to when the accused's intent in occupying the vehicle should be measured. Is it at the time they are found in the driver's seat, or from the time the person first entered the vehicle to assume care or control? Prior to the *Criminal Code* amendment in 1985, the accused could rebut the presumption only by establishing that he or she *did not enter* the vehicle for the purpose of setting it in motion. After the amendment, the accused person must show that they did not *occupy the driver's seat* for the purpose of putting it in motion. As Justice Kenkel

observed in his text, *Impaired Driving in Canada*, 4th Edition, (LexisNexis Canada Inc.) at p. 58:

> The previous wording of the presumption section referred to "entering the vehicle", which was changed to "occupying the driver's seat". The Ontario Court of Appeal ruled that the intent of the driver is measured at the time he or she first assumed care or control and was ongoing unless relinquished. Most other courts found that the amended legislation focusses on the accused's intent at the time he or she is found occupying the driver's seat. As *Boudreault* instructs that the care or control analysis is on the present risk of danger, it may be that pre-*Wren/Boudreault* cases should be reconsidered.
>
> When *R. v. Toews* and *R. v. Ford* were decided, the *Criminal Code* was significantly different from the provisions today. The former provision s. 237(1) concerning the presumption of care or control read "…unless he establishes that he did not *enter* or mount the vehicle for the purpose of setting it in motion…" Section 258(1)(a) now reads: "… unless the accused establishes that the accused did not *occupy* that seat or position for the purpose of setting it in motion…" The new provision replaces an inquiry into the purpose on entering or mounting a vehicle with an inquiry into the purpose of occupying the driver's seat as that purpose relates to the issue of care or control. Decisions that interpret the earlier standard which dealt with the purpose on "entering" the vehicle must be used with great caution.

[105] In *R. v. Agyemang,* [2014] O.J. No. 5047, at para. 77-78, Durno J. in delivering the judgment of the Ontario Superior Court also cautioned about relying on cases pre-*Boudreault* that held that a person whose ability to operate a motor vehicle was impaired remained in care or control if they had not relinquished custody of the vehicle.

[106] He wrote:

> 76 After *Wren* and *Boudreault,* where the Crown's case is based on *de facto* or actual care or control, the Crown is required to prove beyond a reasonable doubt there was a realistic risk of danger as an element of the offence. In order to find the accused guilty, the judge must conduct the "risk inquiry" and conclude that element has been established to the criminal prosecution degree of certainty.
>
> 77 No doubt, pre-*Wren* and *Boudreault* judgments held that a person whose ability to operate a motor vehicle was impaired remained in care if he or she had not relinquished custody of the vehicle. Those cases must be viewed with caution in light of *Wren* and, most importantly, the Supreme Court's finding in *Boudreault* that the risk of danger must be realistic, not theoretically possible.

[107] As previously mentioned, when the accused rebuts the s. 320.35 presumption of care or control of the motor vehicle or where the Crown is unable to rely on the presumption, the alternative route to establishing the offence requires the Crown to prove beyond a reasonable doubt that the accused had actual or de facto care or control of the vehicle.

[108] In *Boudreault*, the Supreme Court considered the definition of *care or control* within the meaning of s. 253(1) of the *Criminal Code*. In doing so, Fish J. observed 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* of danger to persons or property. He identified these elements as the -"three essential elements of care or control"-

under s. 253 (1) of the *Criminal Code*, and reaffirmed that the law is settled that *an intention* to set the vehicle in motion is *not* an essential element of the offence.

[109] With respect to the *first essential element,* "an intentional course of conduct associated with the vehicle", as I stated earlier in these reasons, I am satisfied beyond a reasonable doubt that Ms. Watts never abandoned her vehicle after she drove it into a ditch while driving home from a friend's place. I am satisfied that Ms. Watts' behaviour demonstrated an intentional course of conduct associated with the vehicle when she was occupying the driver's seat with the headlights on when Mr. Quinn arrived on scene at 12:45 a.m., and at 1:05 a.m. when Mr. Miller arrived on scene. Ms. Watts was the sole occupant of the vehicle on both occasions. It is also reasonable to infer that after Ms. Watts drove her car into the ditch, and that she had the intention to remove it but could not, which led her to ask for Mr. Quinn's help to back her car out of the ditch, and to ask Mr. Miller to assist in her efforts to call a tow truck. I find that her request are is of person is an active step taken to have the vehicle removed from the ditch, which demonstrates an intentional course of conduct associated with the vehicle, and a present intent to put the vehicle in motion. At this point in time, I find that she had the intention of putting her vehicle in motion. Thus, it is also reasonable to infer that Ms. Watts' intention was to remove her car so she could continue to drive it home, which was her destination. In other words, I find

that she occupied the driver's seat when she tried to get her vehicle unstuck, intending to drive home if she had succeeded. There is no evidence that Ms. Watts sought or asked for a drive home, or for someone to come and pick her up from the scene.

[110] With respect to the *second essential element*, which states, "by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit", I am satisfied beyond a reasonable doubt that Ms. Watts' blood alcohol level exceeded the legal limit during the material times in question. As previously mentioned, having determined that Ms. Watts was in care or control of a motor vehicle at 12:45 a.m., and at 1:05 a.m. on March 30, 2019, and having considered and applied s. 320. 31(4) of the *Criminal Code*, I am satisfied beyond a reasonable doubt that she was impaired by alcohol while in care or control of a motor vehicle (conveyance).

[111] With respect to the *third essential element*, Justice Fish noted that the – *risk of danger* - must be *realistic* and not *just theoretically possible*. Nor need the risk be *probable*, or even *serious* or *substantial.* At para. 25, Fish J. explained:

> 35 To require that the risk be "realistic" is to establish a low threshold consistent with Parliament's intention to prevent a danger to public safety. To require only that the risk be "theoretically possible" is to adopt too low a threshold since it would criminalize unnecessarily a broad range of benign and inconsequential conduct.

[112] Justice Fish expressed the view that Parliament's intention in enacting s. 253(1) of the *Criminal Code* was to criminalize *only conduct that creates a realistic risk of danger* that normally arises from the mere combination of alcohol and motor vehicle. Conduct that presents no such risks falls outside the intended reach of the offence. He further stressed that the risk to be *realistic* is to establish a low threshold consistent with Parliament's intention.

[113] At paras. 41 and 42 of *Boudreault*, Justice Fish elaborates on the circumstances that create a realistic risk, as opposed to a remote possibility, of danger to persons or property:

> 41 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.
>
> 42 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.

[114] At paras. 45 to 46, Justice Fish further expressed the view that:

> 45 [A]nyone found inebriated and behind the wheel with a present ability to drive will -- and *should* -- almost invariably be convicted. It hardly follows, however, that a conviction in these circumstances is, or should be, "automatic". A conviction will be neither appropriate nor inevitable absent a realistic risk of danger in the particular circumstances of the case
>
> The care or control offence captures a wide ambit of dangerous conduct: Anyone who is intoxicated and in a position to immediately set the vehicle in motion faces conviction on those facts alone.

[115] Lastly, at paras. 48 to 49, Justice Fish noted that:

> 48 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.
>
> 49 The accused may escape conviction, for example, by adducing evidence that the motor vehicle was inoperable or, on account of its location or placement, could, under no reasonably conceivable circumstances, pose a risk of danger. Likewise, use of the vehicle for a manifestly innocent purpose should not attract the stigma of a criminal conviction. As Lamer C.J. observed in *Penno*, "The law ... is not deprived of any flexibility and does not go so far as to punish the mere presence of an individual whose ability to drive is impaired in a motor vehicle" (p. 877).

[116] After recognizing that the existence or not of a realistic risk of danger is a finding of fact, Fish J. emphasized the necessity of the trial judge examining all of the relevant evidence, including the consideration of a number of factors as set out by Durno J. in *R. v. Szymanski*, (2009) 88 M.V.R. (5th) 182 (Ont. S.C.J.), at para. 93, and by Duncan J. in *R. v. Ross*, 2007 ONCJ 59, at para. 14.

[117] Justice Fish also highlighted the importance of the existence of an "alternate plan" in the court's assessment of the risk to danger. He wrote, at para. 52:

> 52 The impact of an "alternate plan" of this sort on the court's assessment of the risk of danger depends on two considerations: first, whether the plan itself was objectively concrete and reliable; second, whether it was in fact implemented by the accused. A plan may seem watertight, but the accused's level of impairment, demeanour or actions may demonstrate that there was nevertheless a realistic risk that the plan would be abandoned before its implementation. Where judgment is impaired by alcohol, it cannot be lightly assumed that the actions of the accused when behind the wheel will accord with his or her intentions either then or afterward.

[118] In present case, there is no evidence of an objectively concrete and reliable plan for Ms. Watts to get home without driving her vehicle. Thus, it is reasonable to infer from the evidence that Ms. Watts' intention was to drive her vehicle home after it was removed from the ditch. Put differently, the only reasonable inference to draw from the totality of the circumstances is that Ms. Watts possessed the intent to move her vehicle from the ditch and drive home. Thus, there was a *realistic risk* that she would continue driving.

[119] As noted by Fish J., the decision in *Szymanski* identified a non-exhaustive list of the factors that can inform the court's assessment of whether or nor there exists a realistic risk of danger. In *Szymanski,* Durno J., at para. 93, wrote:

93 While perhaps easily defined, what evidence will establish or refute that real risk is not as 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.

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 risky 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.

[120] As stated earlier, within two hours after ceasing to operate her vehicle Watts had a blood alcohol concentration that exceeded 80 milligrams of alcohol in 100 millilitres of blood. In other words, at the time that Ms. Watts had care or control of her vehicle she had a blood alcohol concentration that exceeded 80 milligrams of alcohol in 100 millilitres of blood, which exceeded the legal limit.

[121] There was no evidence as to where the keys to the vehicle were located, but it can be reasonably inferred that Ms. Watts was in possession of the keys, as the car was in the ditch with the vehicle's lights on and she asked Mr. Quinn to back her vehicle out of the ditch, which I infer that the keys were readily accessible.

[122] As previously stated, it can be reasonably inferred from the totality of the evidence that Ms. Watts' intention was to have her vehicle removed from the ditch

so that she could resume driving it home. There is insufficient evidence to suggest that she had made any concrete or alternative plans to have someone drive her home.

[123] Given that Ms. Watts' vehicle was stuck in a ditch on a rural highway after midnight, and her repeated requests for assistance to remove her vehicle from the ditch, her intention was to resume driving home.

[124] Ms. Watts did not ask Mr. Quinn or Mr. Miller to drive her home or drive her back to her friend's house. Moreover, while Ms. Watts used her cell phone in her attempts to find a tow truck, there is insufficient evidence to infer that she used her cell phone to find an alternate means of leaving the scene.

[125] Again, it is reasonable to infer from the evidence that Ms. Watts' intention was to drive her vehicle home after it was removed from the ditch: there was no evidence that the vehicle was *inoperable,* as it was only immobilized. Therefore, I find that Ms. Watts was in care or control of her vehicle and that there was a *realistic risk* that she would continue driving after the vehicle was removed from the ditch. Therefore, I am satisfied beyond a reasonable doubt that there was a realistic risk of danger that was not just theoretically possible nor probable or even serious or substantial.

[126] Indeed, in my view, based on the totality of the evidence, Ms. Watts' intention was to set her vehicle in motion by having it removed from the ditch so she could resume driving it, which suffices in itself to create the risk of danger contemplated by the offence of care or control. As stated by Fish J. in *Boudreault*, at para. 41, "[A]n *intention* to set the vehicle in motion suffices *in itself* to create the risk of danger contemplated by the offence of care or control."

[127] The following cases illustrate similar circumstances as in the present case where the necessary element of risk of danger exists in which immovable vehicles require the assistance of a tow truck.

[128] In *R. v. Balendra*, [2012] O.J. No. 3115, the Ontario Superior Court upheld the trial judge's finding of fact that the necessary element of risk may be shown where there exists the possibility that after the tow truck operator arrived and extricated the vehicle from a ditch, the driver could have driven off. In that case, at para. 12, the Court quoted the trial judge's analysis:

> In this case, there was no evidence that the vehicle was inoperable or unmovable if it had been extricated. It had obviously been mobile when it went into the ditch. There was no evidence that the damage it sustained was extensive. The engine worked. I infer from this together with the defendant's eagerness to escape police scrutiny that it was in fact operable and he intended to move it if he could get it out. In my view the defendant had superintendence and control over the vehicle and there was a risk that he would move it and thus create a danger. He was in care or control.

[129] In *R. v. Laroque*, 2010 ONCA , leave refused [2010] S.C.C.A. No. 186, the Court of Appeal endorsed the trial judge's findings that the appellant created a risk that he would put the car in motion while he was impaired and thereby create a danger to the public or himself. In that case, the trial evidence included the appellant's repeated requests to the passerby for a rope with which to pull the car back on the road from a snowbank. The trial judge also found as a fact that the appellant was the sole occupant of the vehicle, which led to the conclusion that he had control of the keys. At para. 80 and 81 of the trial judge's decision, [2008] O.J. No. 5838, Justice Whalen's comments are apposite:

> 80 If he could not start the car or it was inoperable, I am puzzled why the accused kept pressing Mr. Barbarie about pulling the vehicle out of the snow bank with a rope. If he was stranded on an isolated dark country road, I would have thought he would have been asking Mr. Barbarie for a ride to the city or to some other place of help or shelter. I conclude that the accused's repeated appeals for a rope to pull him out of the snow bank demonstrated that his purpose was to get the car on the road again and underway and if that is so he had a way of getting it going.
>
> 81 Also, Mr. Larocque wasn't really stranded, if you think about it, because he had a telephone at the scene and he could have called for help, including the police, had he wanted. In any event, he was clearing looking for a passer-by who might come along and pull him out of the snow bank. I conclude that being pulled out by a passer-by was a reasonable possibility and given the accused's condition and probable ability to restart the car, therein lies the very real prospect of danger to the public. If he was able to get the car going again, it was operable. Then, in his condition, he posed a danger. I conclude that the accused was only a good rope's length away from being able to get the car back in motion and that the vehicle was operable and that he would have been able to operate it one way or another once it was freed. I therefore also conclude that both, in the broader sense and the narrower legal one, the accused had care and control of the vehicle at the time in question.

[130] Also, in *R. v. MacMillan*, [2005] O. J. No. 1905, the Ontario Court of Appeal upheld the trial judge's findings of a reasonable risk of danger in circumstances where the accused called a tow truck to remove it. The Ontario Court of Appeal, at para. 4, agreed with the trial judge and held that there existed a risk of danger that the appellant could have changed his mind and driven off after the tow truck operator arrived and extricated the vehicle from the ditch. The Court held:

> In our view, the trial judge could reasonably find a risk of danger. This risk was the possibility that after the tow truck operator arrived and extricated the car, the respondent could have changed his mind and driven off, or inadvertently could have set the car in motion.

[131] Similarly, in *R. v. Capone*, [2010] O.J. No. 1172 (SC), Hill J., at para. 20, observed:

> 20 The necessary element of risk may be shown where there exists "the possibility that after the tow-truck operator arrived and extricated the car the driver could have driven off": R. v. MacMillan, [2005] O.J. No. 1905 (C.A.) at para. 4; see also R. v. McBrine, [2005] O.T.C. No. 237 (S.C.J.) at para. 89-92, 95, 97 (aff'd [2007] O.J. No. 142 (C.A.) at para. 3-4).

[132] In *Capone*, the appellant's vehicle, an SUV, was discovered half in the ditch and half on the shoulder of the road. The vehicle's lights were on. The appellant was the driver and sole occupant of the vehicle. The engine was revving, and the

wheels were spinning but the vehicle was not moving out of the ditch. The effort to back out of the ditch was not successful. In upholding the trial decision, Hill J. endorsed the trial judge's analysis. He wrote:

> 16 The learned trial judge properly summarized the care or control issue as requiring proof by the prosecution of an ongoing relationship of the appellant with his vehicle involving "the real possibility or real danger of his setting the vehicle in motion, coupled with the necessary impairment or excess blood alcohol".
>
> 17 The trial court concluded that the Crown had proven care or control on the basis of the following circumstances
>
> > (1) before arrival of Const. Wang, the appellant had attempted to extricate his vehicle from the ditch in an apparent effort to drive away;
> >
> > (2) there was no evidence that the apparently previously operable vehicle had become inoperable;
> >
> > (3) there was no evidence that Mr. Capone had surrendered the keys to his vehicle;
> >
> > (4) the appellant was in the vicinity of his vehicle;
> >
> > (5) there was no evidence of abandonment on the appellant's part of an intention to drive once his vehicle was pulled from the ditch:
>
> There is nothing before me in these facts to point to anything other than a conclusion that if this man had been able to get his vehicle out of the ditch, with the assistance of the tow-truck driver, he would not have gone on his way, as he had originally clearly intended to do.

[133] Lastly, in *R. v. McBrine*, [2007] O.J. No. 142, the Ontario Court of Appeal upheld the trial judge's reasoning in a case where the accused drove his vehicle into a stone gate post of a private driveway. The trial judge found he was in both care and control of the vehicle until the police arrived, based on the accused's proximity to his vehicle, the fact he had the keys in his possession, his declared intention to

continue driving once he was able to, and his repeated attempts to obtain assistance in extricating his vehicle so he could drive it. The judge concluded the accused never abandoned care and control of the vehicle. The trial judge held there was a risk of danger to himself and others if he made further attempts to extricate the vehicle. In endorsing the trial judge's reasoning, the Court of Appeal, at para. 3, stated:

> 3 In detailed reasons, the trial judge reviewed the governing principles and reached her conclusion on the basis of the appellant's close proximity to his vehicle with the keys of the vehicle in his possession, his declared intention to continue driving once able to do so and his repeated attempts to obtain assistance in extricating his vehicle so that he could carry out his intention. In addition to the risk that the appellant would attempt to drive his vehicle once it was extricated, the trial judge held that there was a risk of danger to the appellant and others if further attempts were made to extricate the vehicle. Moreover, she held that there was no abandonment of the care and control of the vehicle.

[134] These cases are mere illustrations of situations where the courts have found the necessary element of risk exists where the possibility that after the tow-truck operator arrived and extricated the car the driver could have driven off.

[135] It should be noted that I am aware that these cases pre-date the *Boudreault* decision, but like in *Boudreault*, all of the decisions confirm that the necessary element of risk exists where there is a realistic risk of putting an immovable vehicle in motion after the vehicle is extricated from a ditch and becomes movable or drivable.

[136] For all of the foregoing reasons, I am satisfied that the Crown has established beyond a reasonable doubt the third essential element that is there was a realistic risk of danger because Ms. Watts' intention was to set her vehicle in motion by getting it back on the road so she could resume driving home, which in itself created the risk of danger contemplated by the offence of care or control.

**Impaired Operation: Section 320.14 (1)(a)**

[137] The Crown contends that the evidence establishes beyond a reasonable doubt that Ms. Watts' ability to operate her motor vehicle was impaired by alcohol, and thus, she should be found guilty of committing the offence of impaired operation, contrary s. 320.14(1)(a) of the *Criminal Code*. The Crown submits that the evidence of an unexplained accident, coupled with observations and opinions of Constable Jeff Stevens, and David Miller, support the contention that Ms. Watts' ability to operate a motor vehicle was slightly impaired by alcohol, as defined in *R. v. Stellatio,*[1994] 2 S.C.R. 478.

[138] The defence, however, contends that there is insufficient evidence to find Ms. Watts guilty of impaired operation. The defence submits that it would be speculative for the court to conclude what caused Ms. Watts' vehicle to enter the ditch, and the time that the vehicle entered the ditch. In other words, there is no evidence of driving

nor is there any evidence as the to time the vehicle entered the ditch. Therefore, the defence argues that the Crown has failed to prove the offence beyond a reasonable doubt that Ms. Watts' ability to operate her motor vehicle was impaired by alcohol or drug.

[139] In this case there is no expert evidence to explain the readings contained in the certificate. Thus, absent expert opinion evidence relating blood alcohol concentration readings to Ms. Watts' ability to drive, consideration of breathalyzer test results assessment does not permit the court to speculate as to the qualified impact of the documented readings on Ms. Watts' level of impairment and her ability to operate a vehicle. It does, however, confirm that Ms. Watts had alcohol in her system, which weighs in the circumstantial inference-drawing exercise. The authority for this proposition is found in *R. v. Dinelle*, [1986] N.S.J. No. 246 (CA), where the principal issue concerns the weight given by a trial judge, in determining a conviction for impaired driving, to a certificate containing the results of breathalyzer tests. In that case, the appellant contended that the trial judge erred by taking judicial notice of the results of the Certificate of Analysis as a piece of evidence in establishing impairment and also convicting him of impairment when the Crown had not proven its case beyond a reasonable doubt. The Court disagreed. The Court held that the trial judge considered the certificate as only one piece of

evidence before him which indicated that prior to the time the appellant was stopped in his vehicle he most likely had consumed alcohol. The trial judge properly considered the certificate, and in doing so did not draw upon any technical or special knowledge which is unknown to persons of intelligence generally. Further, the Court stressed that the trial judge did not attach such weight to the certificate that all other evidence was excluded from consideration. Once the certificate was admitted in evidence, the trial judge was entitled to look at it and consider the certificate as part of the whole case.

[140] In the present case, the investigating officer formed reasonable suspicion based all the totality of the circumstances that Ms. Watts had consumed alcohol, which is confirmed by the certificate (Exhibit 1). He also formed reasonable grounds to make a breath demand after Ms. Watts registered a fail on the roadside screening device. While it is difficult to determine her exact level of impairment, it can be reasonably inferred from the evidence that Ms. Watts was under the influence of alcohol when she drove her vehicle inexplicably into the ditch. There is no apparent external cause of the accident. The weather was clear, and the road conditions were dry. The court cannot, however, speculate as to other causes of the bad driving where no such evidence is adduced, such as the driving was caused by fatigue, confusion, inattention, or excessive speed rather than the influence of alcohol. In

this case, there is no explanation for what caused Ms. Watts' vehicle to drive into the ditch other than the inference of bad driving which may have been caused by her being under the influence of alcohol. I say that mindful that there is no burden upon Ms. Watts to prove anything as the legal or persuasive burden never shifts to an accused in a trial; it remains with the Crown throughout the trial. I stress this point because it is important to be careful not to shift the burden upon the defence.

[141] Let me be clear, in determining the extent to which the certificate of analysis (Exhibit 1), may be relied upon in regard to the offence of impaired operation (s. 320.(1)(a)), I can only rely on the certificate for the limited purposes of establishing Ms. Watts consumed alcohol on the date in question. The evidence cannot be used to infer any particular amount of alcohol was consumed, or what, if any, impact the alcohol consumption had on impairment. As previously mentioned, an expert was not called in this case to interpret the readings contained in the certificate of analysis. Therefore, I cannot speculate as to the qualified impact of the results of the breath analysis, the reading contained in Exhibit 1, on Ms. Watts' ability to operate her vehicle. It does, however, confirm that she had consumed alcohol and therefore requires an examination of all the evidence relating to the issue of Ms. Watts' impairment, which includes the observations and opinions of the Messrs. Quinn and Miller, and Constable Stevens. In other words, I can consider the following evidence

in determining whether the Crown proved beyond a reasonable doubt that Ms. Watts' ability to operate her vehicle was impaired by alcohol: Exhibit 1, the certificate, as evidence that Ms. Watts consumed alcohol; the unexplained accident; the smell of alcohol on her breath; and her failure of the roadside screening device which led the officer to form reasonable grounds to make a breath sample demand under s. 320. 28 of the *Criminal Code.*

[142] Mr. Quinn did not detect any indicia of impairment in respect to Ms. Watts. Mr. Murray's evidence was that he could smell an odour of liquor. Constable Stevens' evidence was that he could smell a strong odour of alcohol or liquor on Ms. Watts' breath, and that her eyes were red, glassy, and watery. He also considered the unexplained accident, the time of the day, and Ms. Watts' demeanour in forming his suspicion that she had consumed alcohol. After she failed the roadside screening device he formed the requisite grounds to make a breathalyzer demand.

[143] Upon assessing the totality of the evidence, I am not persuaded beyond a reasonable doubt that Ms. Watts' ability to operate a motor vehicle was impaired by the consumption of alcohol on the date and times in question. While I am highly suspicious that her ability was impaired by alcohol when she drove her vehicle on the date in question, I am not persuaded based on the totality of the evidence that she

committed the offence under s. 302.14(1)(a), and thus, I find her not guilty of that offence.

[144] With respect to the offence of impaired operation, s. 320.14 (1)(a), the Crown must prove beyond a reasonable doubt that the Ms. Watts' ability to operate her vehicle was *slightly impaired* by alcohol as described by the Supreme Court of Canada in *Stellatio*. This requires evidence of driving and of impairment. Having care or control of a motor vehicle with a blood alcohol concentration of over 80 milligrams is not probative in proving the offence of impaired operation unless expert opinion evidence relating blood alcohol level to impairment establishes that Ms. Watts' ability to operate a motor vehicle was slightly impaired.

[145] In this case, Exhibit 1 establishes that Ms. Watts' blood alcohol concentration as more than .80 milligrams of alcohol in 100 millilitres, which is relevant to the offence under s. 320. 14(b), but not helpful in determining whether Ms. Watts' ability to operate her vehicle on the date in question was slightly impaired. As previously stressed, Exhibit 1 does not permit an inference as to the amount of alcohol consumed unless an expert has established a correlation between the results and a level of impairment. I cannot take judicial notice of the readings contained in Exhibit 1. In other words, the Court cannot take judicial notice that at a certain blood

alcohol level the accused would be impaired: *R. v. Letford*, [2000] O.J. No. 4841 (C.A.). The mere fact that an accused had more than 80 milligrams of alcohol in 100 millilitres of blood at time of the offence is not evidence itself of impairment: *R. v. Good*, [1991] O.J. No. 2183 9 (C.A.). Thus, without expert evidence, Exhibit 1, the results of the breath tests, cannot be evidence of a particular degree of impairment.

[146] Having considered all of the evidence adduced in this case, I am not satisfied that the Crown has proven beyond a reasonable doubt the impaired operation offence.

[147] Let me add, as I emphasized earlier in these reasons, the burden of proof lies much closer to absolute certainty than to a balance of probabilities, and it is **not** sufficient to conclude that an accused person is probably or likely guilty for a conviction to be registered.

[148] Therefore, for all of the foregoing reasons I find Ms. Watts not guilty of committing the impaired operation offence under s. 320.14(1)(a) of the *Criminal Code*.