PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Phillips*, 2017 NSPC 24

Date: March 29, 2017
Docket: 2949881-82
Registry: Dartmouth

Between:

HER MAJESTY THE QUEEN

v.

ALEXANDER PHILLIPS

DECISION

JUDGE: The Honourable Judge Theodore K. Tax

DECISION: March 29, 2017

CHARGES: **THAT** on or about the 3rd day of January, 2016 at or near Lower Sackville, Nova Scotia did have the care or control of a motor vehicle was impaired by alcohol or drug, contrary to Section 253(1)(a) of the *Criminal Code*.

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

COUNSEL: Brandon Trask, for the Crown
Alex Baranowski, for the Defence

By The Court (Orally)**:**

Introduction

[1] Mr. Alexander Phillips has been charged with having care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol contrary to section 253(1)(a) of the *Criminal Code* as well as having care or control of motor vehicle after having consumed alcohol in such quantity that the concentration thereof in his blood exceeded 80 mg of alcohol in hundred milliliters of blood, contrary to section 253(1)(b) of *Criminal Code*. Those offences were alleged to have occurred on or about January 3, 2016 at or near Lower Sackville, Nova Scotia.

[2] The Crown proceeded by way of summary conviction and trial evidence was heard on February 27 and February 28, 2017. The Court reserved its decision until today's date.

[3] In this case, the large majority of the facts are not disputed between the parties. However, the issue is whether or not the Crown has established all of the essential elements of the care or control charges beyond a reasonable doubt. In particular, the key issue is whether the Crown has established, beyond reasonable doubt, that Mr. Phillips had de facto or actual "care or control" of his motor vehicle after having consumed alcohol which impaired his ability to operate a motor vehicle and as such, there was a "realistic risk of danger" of setting the vehicle in motion and being a danger to persons or property.

Position of the Parties

[4] Defence Counsel does not dispute that the facts would allow the Crown to rely on the statutory presumption of care or control set out in section 258(1)(a) of the *Code*, since the accused was found to be occupying the seat ordinarily occupied by the driver of the motor vehicle when he was located by the police officer. However, Defence Counsel submits that the evidence of Mr. Phillips rebutted that statutory presumption and established that he had a plan to get back to his own home without setting his vehicle in motion. While Defence Counsel does acknowledge that

the Crown has established that Mr. Phillips had de facto or actual care or control of the vehicle without relying on the presumption, it is the position of the Defence Counsel, based upon *R. v. Boudreault*, 2012 SCC 56 that Mr. Phillips did not represent a realistic risk of danger to set the vehicle in motion, either intentionally or accidentally, or being a danger to other persons or property.

[5] For his part, the Crown Attorney does not dispute that the evidence of Mr. Phillips was sufficient to rebut the statutory presumption of care or control set out in section 258(1)(a) of the *Code*. However, it is the position of the Crown that the evidence established all of the essential elements of the "care or control" charges under section 253(1) of the *Criminal Code* as set out by the Supreme Court of Canada at para. 33 of the *Boudreault* case. It is the position of the Crown that: (1) Mr. Phillips actions demonstrated an intentional course of conduct with his motor vehicle, which established either de facto or actual care or control of his motor vehicle; (2) his ability to operate or drive a motor vehicle was impaired by alcohol or his blood-alcohol level exceeded the legal limit; and (3) the circumstances in which Mr. Phillips course of conduct occurred, did create a "realistic risk of danger" to persons or property.

Factual Background

[6] As previously mentioned, the large majority of the facts and circumstances of this case are not in dispute between the parties. The Crown called 3 witnesses during the trial, Ms. Michelle Fredericks who was the girlfriend of Mr. Phillips at the time of this incident. The other Crown witnesses were Const. John Warrington of the RCMP who was the arresting officer and Const. Travis Gallant, who arrived at the Fredericks house to determine if Mr. Phillips' manual transmission vehicle was operational and could be started with the key that was located in the vehicle. Defence Counsel called 2 witnesses - Mr. Alexander Phillips as well as his mother, Ms. Mona Phillips.

[7] The only exhibit filed in this case was a Certificate of a Qualified Technician [Const. Wayne Cathcart of the RCMP] who certified on January 3, 2016 that he received two samples of breath from Mr. Alexander Phillips into an approved instrument as defined in section 254(1) of

the *Criminal Code* and that he is a person designated under that subsection as a "Qualified Technician" to operate that instrument. Const. Cathcart certified that the first sample was taken at 4:29 AM on January 3, 2016 and the result of the proper analysis indicated that there was 210 mg of alcohol in 100 mls of blood. The second sample was taken at 4:51 AM on January 3, 2016 and resulted in the same analysis.

[8] The evidence established that Mr. Phillips was planning to spend the night at Ms. Frederick's house during the early morning hours of January 3, 2016. At that point, they had been in a relationship of boyfriend and girlfriend for about eight months. Ms. Fredericks lives with her parents and other members of her family at 61 Quaker Crescent in Lower Sackville, Nova Scotia. Mr. Phillips' car was parked on the street in front of the house, approximately 20 to 25 feet from the front door.

[9] Mr. Phillips and Ms. Fredericks had decided to celebrate the New Year on January 2, 2016 and had consumed alcohol during that evening, continuing on into the early morning hours of January 3, 2016. At about 3 AM, Mr. Phillips and Ms. Fredericks got into a verbal argument, during which he became loud and emotional. Ms. Fredericks was concerned that Mr. Phillips might wake up her baby and her parents, so she told him to leave the house because he was becoming too noisy. Since she was living in her parent's house, it seems clear that she had the authority to tell Mr. Phillips that he had overstayed his welcome and that he was to leave the house immediately.

[10] During the evening, Mr. Phillips had been drinking rum, but to stop his drinking, Ms. Fredericks had hidden the bottle of rum from him. However, he found it and took it out to his car, when he left the Fredericks' house. Mr. Phillips was only wearing light pyjama bottoms and a housecoat. The witnesses estimated that the temperature was 0°C to -1°C. As Mr. Phillips was leaving the house, Ms. Fredericks told him that she had sent a text message to his mother to come and get him. Ms. Mona Phillips' evidence established that the text message from Ms. Fredericks to her was sent at 3:06 AM. The evidence also established that Ms. Mona Phillips and Mr. Phillips lived in the Prospect, Nova Scotia area and that it would take about 30 minutes to drive to the Fredericks' house at that time of day.

[11] After Mr. Phillips went out to his car, Ms. Fredericks looked out the window of her house and saw a light in the car. She initially believed that he had started the car and was concerned for his safety because he had taken the keys to the car, had a bottle of rum, they had just been in an argument and she was worried that he might drive home. As it turned out, she later learned from the police officers that the car had not been started and that the light that she had viewed in the car was probably from Mr. Phillips listening to music or talking on his cell phone.

[12] After Ms. Fredericks saw the light in Mr. Phillips' car, she called Mr. Phillips' mother to ask her what to do because her son was out in the car, had been drinking and that she thought that he was going to drive the car. Ms. Fredericks said that Ms. Phillips told her to call the police. Based upon the timing of the dispatch call to the police officers, Ms. Fredericks probably called the police at about 3:20 AM on January 3, 2016.

[13] From her perspective, Ms. Mona Phillips stated that when she received the call from Ms. Fredericks, she was told that her son was in his car and had "left the house," leaving the impression that her son had driven away. Based upon the information related to her by Ms. Fredericks, Ms. Phillips was concerned about her son's safety and the safety of others, which is why she told Ms. Fredericks to call the police. After she got that call, Ms. Phillips phoned her son and told him to pull over to the side of the road and stop. During that call, Ms. Phillips realized that her son had not driven anywhere and that his car was still parked in front of the Fredericks' house, so she told him to stay where he was and she would come and get him. She was about half way to the Fredericks' house when she received a call from a police officer that her son had been arrested.

[14] Const. Warrington confirmed that he received a call from dispatch at 3:22 AM, which related information provided by Ms. Fredericks to the police and that he responded to the call at 3:29 AM arriving at 61 Quaker Crescent within a couple of minutes. Based upon this timeline established by the evidence, Mr. Phillips had been in his vehicle parked in front of the Frederick's house for approximately 20-25 minutes, when the police officer arrived at that location.

[15] Ms. Phillips testified that a male police officer called her on her cell phone approximately 10 – 15 minutes after she had left her house. Based upon the timeline established by the witnesses,

Ms. Phillips said that she only took a few minutes to get ready and left her house and had driven to the area of Exhibition Park which was about 10 minutes from her house. The officer told her that there was no point to come and get her son as they were processing him for the charges before the court. They added that they would call her when it was time to come and get her son from the police station.

[16] Mr. Phillips was seated in the driver seat of his vehicle, a 2010 Toyota Yaris with a manual transmission, which was parked in front of 61 Quaker Crescent, when the police arrived at that location. Const. Warrington noted that there was an odor of alcohol coming from the breath of Mr. Phillips when he opened the door to the vehicle and he noticed a bottle of rum on the passenger seat. The keys were in the center console. The driver's seat was not reclined, the engine had not been turned on and neither the radio nor the heater were running. The driver's seat had been moved back and Mr. Phillips could not reach the pedals without moving the seat forward. The car had been left in neutral, but the emergency brake was engaged. The evidence was not clear whether there was a slight grade in the street at that location, however, Const. Gallant did confirm that the key turned on the engine and that once the emergency brake was lowered, the car could be moved forward or in reverse by a driver. The wheels of the vehicle had been previously turned towards the curb.

[17] The light that Ms. Fredericks had observed was from Mr. Phillips cell phone as he was watching a movie, while remaining in the car to stay out of the cold weather, especially, considering the way he was dressed at that time.

[18] Mr. Phillips stated that he had no intention of moving his car and that he was waiting for his mother to come and get him as Ms. Fredericks had told him when he left the house. The plan for Mr. Phillips to get home without driving his car had been arranged by Ms. Fredericks with his mother and the call from his mother confirmed that she was leaving the house to come and get him. The keys to the ignition were in the center console and he acknowledged that could easily grab them. Mr. Phillips' plan was to remain in the car without heat and without turning on the car until his mother got there and he added that she had given him a couple of updates by phone and text message. However, he confirmed that his mother did not arrive at the Fredericks' house

because he had been arrested by the police before she got there.

[19] In addition, there was no dispute with respect to the reasonable and probable grounds for Const. Warrington to read the breath demand, there was no issue about the provision of Mr. Phillips' *Charter* rights or the police cautions. Mr. Phillips did comply with the breath demand and provided two suitable samples of his breath, which each registered 210 mgs. of alcohol in 100 mL of blood.

Analysis

[20] As indicated at the outset, there is largely no factual dispute between the parties and there is certainly no dispute between them with respect to the issues of jurisdiction, date and time of this incident or the validity of the breath demand made by Const. Warrington. The key issue is whether the Crown has established, beyond a reasonable doubt, all of the essential elements of a "care or control charges" contrary to section 253(1) of the *Criminal Code* and in particular, whether the Crown has established that Mr. Phillips care or control of his motor vehicle occurred in the circumstances which created a "realistic risk" of danger to persons or property.

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

[21] The leading cases from the Supreme Court of Canada on the issue of "care or control" of a motor vehicle while impaired are *R. v. Ford*, [1982] 1 SCR 231; *R. v. Toews*, [1985] 2 SCR 119; *R. v. Whyte*, [1988] 2 SCR 3; and *R. v. Penno*, [1990] 2 SCR 865. In those cases, the Supreme Court of Canada established that the *mens rea* for having "care or control" of a motor vehicle is the intent to assume care or control, after the voluntary consumption of alcohol or a drug. The *actus reus* is the assumption of care or control, without proof of any intention to drive on the part of the accused, if the accused has engaged in some acts which involved the use of the car, its fittings and equipment and the act or series of acts involved an element of risk of putting the vehicle in motion, even if unintentionally, and thereby creating a danger.

[22] Since "care or control" of a motor vehicle is a separate offence from driving or operating a

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

[23] The *Penno* case, *supra*, made it clear, however, that the law does not punish an accused for his or her mere presence in the seat normally occupied by the driver of a vehicle. Ultimately, in *Ford* and *Toews*, the Supreme Court of Canada stated that each case will depend on its own facts and circumstances and while many factors could be considered, it is almost impossible to establish an exhaustive list of acts which could qualify as acts of "care or control."

[24] More recently, the Supreme Court of Canada stated in *Boudreault, supra*, at para. 33, that the essential elements of "care or control" under section 253(1) of the *Criminal Code* are as follows:

> (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.

[25] In addition, in *Boudreault*, at para. 42, the Court stated that:

> In the absence of a contemporaneous intention to drive, a realistic risk of danger may arrive 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.

[26] Moreover, the Court added in para. 48 of the *Boudreault* that the "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 the 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.

[27] The Court added that one of the factors of particular relevance in cases of this nature is whether the accused took care to arrange what has been referred to as an “alternate plan” to ensure his or her safe transportation home. In *Boudreault* at para. 52, the Court noted that the impact of this “alternate plan” on the court’s assessment of the risk of danger depends primarily on two considerations: firstly, whether the plan itself was objectively concrete and reliable and secondly, whether it was, in fact, implemented by the accused. The Court noted that a plan may seem to be “watertight” but the accused’s level of impairment, demeanor or actions may demonstrate that there was nevertheless a realistic risk that the plan would be abandoned before its implementation. In the final analysis, the trial judge must be satisfied beyond a reasonable doubt, that despite the “alternate plan,” there remained a realistic risk of danger in the circumstances.

[28] In *R. v. Szymanski*, 2009 Canlii 45328 (Ont. S.C,) at para. 93, Justice Durno reviewed several cases to prepare a non-exhaustive list which illustrates the myriad of factors that courts have considered in determining whether there was a “real risk” of danger arises in "change of mind" cases. Looking at the factors that were outlined by Durno J. in the *Szymanski* case and my detailed review of the evidence presented in this case, I find as follows:

a) **Level of impairment of the accused person** – Based on the evidence of Ms. Fredericks and Mr. Phillips, I find that Mr. Phillips was, in his own words “drunk” and was intoxicated after having consumed alcohol for several hours during the evening of January 2, 2016 and the early morning hours of January 3, 2016. There was not a great deal of evidence with respect to how much alcohol Mr. Phillips had consumed, but the evidence was clear that he had been drinking alcohol for several hours and that he took the bottle of rum with him to continue drinking alcohol in his car after he was told to leave the Fredericks’ house;

b) **Were the keys in the ignition or readily accessible** – Mr. Phillips had the keys to his vehicle when he left his girlfriend’s house around 3 AM on January 3, 2016, but they were not placed in the ignition. When the police officers arrived at 61 Quaker

Crescent, the police located the keys to the vehicle in the center console, but Mr. Phillips had only used them, up to that point, to unlock the doors to his vehicle. However, in those circumstances, I find that the keys to the vehicle were readily accessible to him from the driver's seat;

c) **Whether the car was running** – Mr. Phillips' vehicle was not running when Const. Warrington arrived in front of 61 Quaker Crescent, Lower Sackville, Nova Scotia around 3:30 AM on January 3, 2016;

d) **The location of the vehicle** – Mr. Phillips' car was parked on a residential street in Lower Sackville, which was relatively flat in the area of the Fredericks' house. Although the emergency brake of the car was engaged, Mr. Phillips had stated that the manual transmission was left in neutral, and the wheels of the vehicle had been turned towards the curb. In those circumstances, if the parking or emergency brake was disengaged, either intentionally or accidentally, his vehicle may not have moved anywhere, since the front wheels were in contact with the curb. Const. Gallant confirmed that the vehicle was operational and when he turned on the engine and put the transmission in gear, the car was able to move back and forth, since there were no physical impediments to prevent the vehicle for moving from that location;

e) **Was the accused at his final destination** – Obviously, Mr. Phillips was not at his own residence where he lived with his mother, although he did apparently spend several evenings at the Fredericks' house as he planned to do on the evening of January 2-3, 2016. However, after the verbal altercation between him and Ms. Fredericks, Mr. Phillips was told to leave the house and he obviously did so in relative haste, as he was only dressed in light pyjama bottoms and a housecoat when he went out to his car. Mr. Phillips' evidence did establish that he stayed at his girlfriend's house when he was going to school in that area and that he had some clothes and school supplies in the back seat of his car. He did not go into the back seat to dress more warmly because he believed his mother would be at that location in a short time.

In those circumstances, I accept Mr. Phillips' evidence that when he got into his car, he did not intend to drive it home, but rather, to seek temporary refuge from the elements, since he had been told to leave Ms. Fredericks' house and he believed that his mother was on the way to get him. I find that the evidence established that Mr. Phillips had been told by Ms. Fredericks that his mother was on the way to pick him up and his mother had contacted him to say that she was on the way and not to drive anywhere. Essentially, Mr. Phillips' "plan" had been established by Ms. Fredericks and his mother and that the "plan" was for Mr. Phillips to leave his car at the Fredericks' house and he would pick it up later. Moreover, the "plan" did not depend on him finding someone to drive his car back to his house. In addition, I accept Mr. Phillips' evidence that he had not driven his car after having consumed the alcohol at the Fredericks' house and that he did not go into the car to "sleep it off" until he felt he was able to drive without his ability to do so being affected by the consumption of alcohol. In those circumstances, I do not find that this was one of those situations where a "realistic risk" of danger arose from a "change of mind" after Mr. Phillips had rested for a period of time and mistakenly believed that his ability to drive was not impaired by alcohol;

f) **The accused's disposition and attitude** – According to Ms. Fredericks, Mr. Phillips was angry, emotional and acting "erratic" when they were arguing and drinking alcohol. While they were arguing, Mr. Phillips was loud and Ms. Fredericks was concerned that he would wake up her parents and her young baby. Although Ms. Fredericks had hidden the bottle of rum that they were drinking, Mr. Phillips was able to find the bottle and took it out to the car with him. The bottle was found on the passenger seat of the vehicle and it would appear that Mr. Phillips had continued to drink rum while he was in his vehicle, waiting for his mother to arrive;

g) **Whether the accused drove his vehicle to the location of the drinking** – Mr. Phillips had driven his car to his girlfriend's house at some point during the day on January 2, 2016, but he and Ms. Fredericks drank their alcohol while they watched

the movie at her house. They did not go to another location to drink alcohol and then drive back to her house. Moreover, Mr. Phillips testified that he and Ms. Fredericks drank alcohol to the point of being "drunk" in the past, either at his house or her house, but he had never left the residence to drive the car back to the other person's house;

h) **Whether the accused started driving after drinking and then pulled over to "sleep it off" or use the vehicle for some other purpose** – Although Mr. Phillips had driven his vehicle to the Fredericks' house before he started drinking alcohol with his girlfriend on the evening of January 2, 2016, I find that there is no evidence that Mr. Phillips drove his car anywhere after he had been drinking alcohol, nor did he pull his vehicle over to the side of the road "to sleep it off." I find that his stated intention was to seek temporary refuge in the car from the elements, especially given the way in which he was dressed at that time, until his mother arrived to take him home;

i) **Whether the accused had a plan to get home without driving while impaired or over the legal limit** – I find that Mr. Phillips' evidence, the evidence of his mother, Mona Phillips and the evidence of Ms. Michelle Fredericks established that Ms. Fredericks had developed the "plan" to get Mr. Phillips home without him driving the car while he was impaired or over the legal limit. She had sent a text message and had phoned Mr. Phillips' mother. Ms. Mona Phillips had immediately left her house and had contacted her son to tell him to stay where he was and that she would be there shortly.

In those circumstances, I find that there was an objectively reliable and "concrete plan" which had been established by Ms. Fredericks and Ms. Mona Phillips and that Ms. Fredericks had communicated that "plan" to Mr. Phillips as she directed him to leave her house. In addition, the "plan" had been immediately acted upon by Ms. Mona Phillips as I accept her evidence that she told her son to wait where he was and she would be there shortly to pick him up and take him home. Mr. Phillips was also acting on that "plan" by waiting in his car, without the key in the ignition,

without the engine being turned on to operate the heating system and without using any other fittings of the vehicle. I find that the only reason she did not pick up her son that evening, was because Ms. Phillips had been told by a male police officer, probably around 3:30 AM, that there was no point in continuing to 61 Quaker Crescent as her son had been arrested and would be released later;

j) **Whether the accused had a stated intention to resume driving** – Mr. Phillips stated that he never intended to drive back to his house while he was intoxicated and pointed out that he was aware of the arrangements for his mother to come and get him at the Fredericks' house. Mr. Phillips' "plan" was to leave his car there until he could pick it up later. Moreover, there was no evidence that Mr. Phillips had previously operated his car after he had consumed a significant amount of alcohol and therefore, there was no issue that he had stated any intention to resume driving in that condition;

k) **Whether the accused was seated in the driver's seat, regardless of the applicability of the presumption** – Mr. Phillips' evidence confirmed the observations of Const. Warrington that he was seated in the driver's seat, when the police officer arrived in front of 61 Quaker Crescent;

l) **Whether the accused was wearing the driver's seatbelt** – It is not clear from the evidence whether Mr. Phillips was wearing the seatbelt while he was seated in the driver seat of his vehicle, but it is clear that the keys to the vehicle were not in the ignition and there is no evidence that he had operated any of the other fittings or equipment of his vehicle that morning. Given the temperature at about 3 AM on January 3, 2016 and the rather skimpy clothing that Mr. Phillips was wearing at the time that the police officers arrived on scene, I find this fact is very indicative of his intention not to operate the motor vehicle or drive anywhere, as it certainly would have been quite cold in the vehicle without the engine running or any heat. In addition, I accept Mr. Phillips' evidence that he was either watching a movie or playing music on his cell phone, which would have been the light which Ms. Fredericks had observed from an upstairs window of her house and that it was not

the lights of the dashboard or the radio of his car;

m) **Whether the accused failed to take advantage of alternate means of leaving the scene** – I find that the evidence established that Mr. Phillips had been presented with a "plan" for an alternate means of leaving the scene without driving his vehicle. The car had been safely parked on the residential street in front of the Fredericks' house and I accept his evidence that he had sought refuge in the vehicle, after essentially being evicted from the house, until his mother picked him up;

n) **Whether the accused had a cell phone to make alternate arrangements and failed to do so** – I find that the evidence of Mr. Phillips and his mother, Mona Phillips established that he had his cell phone with him when he went out to his vehicle after being evicted by his girlfriend from the Fredericks' residence and that he used to the cell phone to receive calls from his mother. Since Ms. Fredericks and his mother had told him that she was on her way to get him, I find that, in those circumstances, a concrete and reliable plan had been put in motion, and so, there was no need to use his cell phone to make or attempt to make alternate plans.;

[29] After having considered the totality of the evidence in relation to all of the factors which have been mentioned above and the essential elements of this charge as identified by the Supreme Court of Canada in *Boudreault*, I have come to the conclusion that the Crown has established beyond reasonable doubt that Mr. Phillips had actual or de facto care or control of his motor vehicle at all relevant times to the issues before the court. I find that the Crown established the actus reus of this offence has I have no doubt that Mr. Phillips had "care or control" of his motor vehicle by having possession of the key, which he used to gain entry to his vehicle, although I find that he did not use that key to engage in any acts which involved the use of the car's fittings or equipment.

[30] In addition, I find that he was seated in the driver's seat with the key to the ignition easily accessible to him and the means were readily available to set the vehicle in motion. Moreover, I find that there were no physical, mechanical or other impediments to Mr. Phillips operating his vehicle and that it would not have taken much effort for him to move the seat slightly forward, put

the key in the ignition, put his foot on the clutch, start the car and put it in gear and set it in motion.

[31] Furthermore, I find that there is no dispute in the evidence that Mr. Phillips was by his own account "drunk" and I find that in his state of intoxication his ability to drive a motor vehicle was impaired by the consumption of alcohol and that the breathalyzer readings also established that the blood-alcohol level was over 2½ times the legal limit at all relevant times.

[32] However, with respect to the third essential element of a "care or control" case under section 253(1) of the *Criminal Code* which was identified by the Court in *Boudreault*, I find that Mr. Phillips' evidence was credible and reliable and tended to prove that there was no realistic risk of danger which existed in all of the particular circumstances of this case. This was not a situation where Mr. Phillips had driven the vehicle after having consumed alcohol or that he had pulled over to "sleep it off" and then changed his mind to continue driving when he believed it was safe to do so. In addition, I find that this is not a case where I could reasonably conclude that Mr. Phillips, who was certainly intoxicated and behind the wheel of his vehicle, might unintentionally set the vehicle in motion. Furthermore, I find that this was not a situation where through negligence, bad judgment or otherwise a stationary or inoperable vehicle may endanger persons or property.

[33] Although Mr. Phillips intentionally placed himself in the driver's seat of his vehicle with the key to operate the vehicle in a location without any physical or other impediments to its operation, I accept his evidence that he entered the car to seek temporary refuge from the cold weather, given the fact that he was only wearing light pyjama bottoms and a housecoat in near 0°C conditions during the early morning hours of January 3, 2016. I also find that there was an objectively concrete and reliable plan which had been put in place by Ms. Fredericks and his mother, he had been informed of that plan by Ms. Fredericks and the plan had been confirmed by his mother on the telephone and by her immediately getting in her vehicle to pick up her son shortly after 3 AM on that morning. In fact, she was half way to the Fredericks' house when the police officers arrived at 61 Quaker Crescent and arrested her son.

[34] In the final analysis, I am satisfied, beyond a reasonable doubt, that the Crown has established that Mr. Phillips had actual or de facto care or control of his motor vehicle after having

consumed a significant amount of alcohol which impaired his ability to operate a motor vehicle. However, I find that the Crown has not established, beyond reasonable doubt, in all the circumstances of this case, that Mr. Phillips represented a "realistic risk" of danger to persons or property.

[35] Having come to those conclusions, and not being satisfied beyond reasonable doubt that the Crown has established all of the essential elements of the care or control offences contrary to section 253(1) of the *Code*, as alleged in the Information, I hereby find Mr. Phillips not guilty and acquit him of both charges which were before the court.