Date: 2019 01 16
File: T-2-CR-2017-000303

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

– and –

-

GERALDINE ELLEZE

REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT GORIN

Heard at:	Fort Providence, Northwest Territories
Date of Decision:	January 16, 2019
Counsel for the Crown:	Andreas Kuntz
Amicus Curiae:	Steven Fix

[Section 253(1)(b) of the *Criminal Code*]

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1. INTRODUCTION

[1] Geraldine Elleze is charged with operating a motor vehicle while her blood alcohol exceeded the legal limit of eighty milligrams percent contrary to s. 253(1)(b) of the *Criminal Code*. She was originally also charged with operating a motor vehicle while her ability to do so was impaired. However, the Crown stayed the impaired count on the date of her trial.

[2] Her trial on the remaining count contrary to s. 253(1)(b) proceeded to trial on August 29th of 2017 in Fort Providence. Mr. Fix appeared on her behalf to request a further adjournment of her trial. When I refused the adjournment, Mr. Fix graciously agreed to my suggestion that he assist as *amicus curiae.*

[3] At the conclusion of the evidence, I had heard no admissible evidence of Ms. Elleze actually operating a motor vehicle. The admissible evidence I had heard was compatible only with her having had care or control of a motor vehicle. I asked counsel to provide me with submissions on whether or not the offence of care or control of a motor vehicle "over 80" was included in the count of operation of a motor vehicle "over 80". Counsel were unable to provide me with complete

submissions. I adjourned the matter over to December 7th for argument with written submissions to be provided the week before. Counsel were also to provide me with written submissions on further issues they wanted to raise.

[4] Submissions were provided as requested and after having heard them, I found Ms. Elleze guilty, advising that the matter would be adjourned over to today's date at which time, I would advise Ms. Elleze of my reasons and proceed with her sentencing. To be clear, I have found her guilty of having committed the offence of care or control of a motor vehicle while "over 80", which I have concluded is included within the full offence of operating a motor vehicle while "over 80". I have found her not guilty of the full offence of operating a motor vehicle while over 80. My reasons for doing so are set out in the following paragraphs.

2. ANALYSIS

A. Is Care or Control of a Motor Vehicle Included in Operation of a Motor Vehicle?

[5] It is well established that s. 253(1)(b), although it consists of one subsection, in fact creates two separate offences: operation of a motor vehicle, and other means of transport, while "over 80" and care or control of a motor vehicle, etc., while "over 80".[1] The jurisprudence is now also clear that care or control of a motor vehicle is included in operation of a motor vehicle. However, since the past cases dealing with whether or not care or control is included within operation are informative of some of the further issues that I must determine, I will review them briefly.

[6] In *R. v. Drolet*, [1990] 2 SCR 1107, the Supreme Court of Canada ruled that having care or control of a motor vehicle is necessarily included in operating a motor vehicle. The Supreme Court's judgment was very short, simply stating that it adopted the reasoning of the Quebec Court of Appeal's majority decision.[2]

[1] *R. v. Toews,* (1985) 2 S.C.R. 119.
[2] *Drolet c. R.,* [1988] JQ no.2283, (Q.C.A.).

[7] Prior to *Drolet*, the jurisprudence had been divided on what was meant by the term "lesser included offence" set out in the applicable jurisprudence. Cases such as *R. v. Pitcher*, [1988] N.J. No. 134. (Nfld. C.A.), stood for the proposition that the word "lesser" required that the included offence be less serious than the larger offence. According to the reasoning used in *Pitcher,* since both the operating and the care or control offences were punishable by the same penalties, they were of equal gravity. Therefore it could not be said that care or control of a motor vehicle while "over 80" was a *lesser* offence included within operation of a motor vehicle while "over 80".

[8] On the other hand, cases such as *R. v. Plank*, 1986 O.J. No. 318, (Ont. C.A.); (1986) CCC (3d) 387, ruled that the word "lesser" simply meant that the requisite elements of the offence were necessarily included in the larger offence. They held that the included offence is lesser in the sense that it is a necessary ingredient, or in other words a smaller component, of the larger offence. Thus, because it is impossible to drive a motor vehicle without having care or control over it, care or control of a motor vehicle when impaired is included within operating a motor vehicle while impaired.

[9] *R. v. Plank* also stood for the proposition that a charge of impaired operation of a motor vehicle is sufficient to inform the accused that he faces an included offence of having care or control of a motor vehicle while over 80. The court stated:

> Turning to the second notion or principle referred to by Martin J.A. in *R. v. Simpson*, supra, is a charge of driving having consumed alcohol to degree specified in s. 236(1) sufficient to inform the accused that he faces an included offence of having care or control of the motor vehicle? I am aware of the concern expressed by C. R. McQuaid J. in *R. v. Gaudet* (1980), 55 CCC 2(d) 273, 26 N. & P.E.I.R. 464. However, with respect, as I think the words of s. 236(1) are themselves sufficient to inform the accused charged with driving that he faces an included offence of having care or control, so also does the charge of driving. Such a charge is not ambiguous to a lawyer or layman: driving must include an assumption of care or control. [3]

[3] (1986) C.C.C. (3d) 387 at 395.

[10] The foregoing passage as well as the entire reasoning set out in *Plank* by Brooke J.A. was adopted by the Quebec Court of Appeal in *Drolet* and therefore the Supreme Court of Canada as well.

[11] I note as well that it is invariably the case that one is taken to have notice of any offence that is a necessary ingredient of the actual offence charged. *This is so whether the offence set out in the indictment uses the words of the statute that creates it or is further particularized*. So long as an offence is necessarily included in the offence that is charged, the accused is taken to have notice of it.

B. Was the Charge Further Particularized?

[12] Both counsel agree that following the Supreme Court of Canada's judgment in *Drolet*, it is clear that care or control of a motor vehicle is included in operating a motor vehicle.

[13] However, Mr. Fix argues that due to discussions and comments that occurred between counsel and the court, "[t]he allegation had effectively been particularized to include 'operation' as an essential element."[4] He argues that Ms. Elleze, therefore did not have notice that she was also liable to be convicted of the care or control offence .[5]

[14] For reasons, I will discuss later, I disagree with the argument that the Crown had furnished the further particulars that bound it. There is also the question of whether or not it would have made a difference had the specific particulars alleged by Mr. Fix actually been furnished. Because much of what I have already said is relevant to this second issue, I will deal with it first.

i) Would the further particulars that are alleged to have been furnished by the Crown made any difference?

[15] As stated, Mr. Fix argues that the Crown had particularized the charge *"to include 'operation' as an 'essential' element."* However, the initial charge already included "operation" as an essential element. It was already particularized in the manner he suggests in that it alleged that Ms. Elleze:

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[4] Written Submissions of Amicus Curiae, paras. 37 & 38.
[5] *Ibid.*

> On or about the 4th day of June 2017, at or near the Hamlet of Fort Providence in the Northwest Territories having consumed alcohol in such a quantity that the concentration thereof in her blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did ***operate*** a motor vehicle contrary to section 253(1)(b) of the Criminal Code.

[Emphasis Mine]

[16] S. 587 is the section of the *Criminal Code* which deals with applications to furnish particulars. It states:

> 587 (1) A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars
>
> […]
>
> (f) further describing the means by which an offence is alleged to have been committed; or
>
> (g) further describing a person, place or thing referred to in an indictment.
>
> (2) For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.
>
> (3) Where a particular is delivered pursuant to this section,
>
> (a) a copy shall be given without charge to the accused or his counsel;
>
> (b) the particular shall be entered in the record; and
>
> (c) *the trial shall proceed in all respects as if the indictment had been amended to conform with the particular*.

[Emphasis mine]

[17] So even if Mr. Fix were correct in his submission that the Crown had furnished the further particulars as he suggests, Ms. Elleze's jeopardy would remain unchanged. She would still have had notice of the allegation having committed the lesser and included offence of care or control over 80. As stated in the jurisprudence I have already referred to, an accused is taken to have notice of any included offence regardless of whether the offence charged uses the words of the statute or is further particularized.

[18] Indeed, the offence would not have been further particularized since nothing further was added to the charge.

[19] Mr. Fix submits that the case of *R. v. Pincemin*, [2004] S.J. No. 134, (Sask. C.A.), is authority which supports his argument. Again, I must respectfully disagree. In *Pincemin*, the accused was charged with care or control of a motor vehicle while impaired and over 80. The accused testified in his own defence on both charges, but in so doing revealed that prior to the circumstances that were being relied upon by the Crown, he had been driving his vehicle. The trial court convicted on the count of impaired care or control on the basis that the accused had admitted operating a motor vehicle prior to his arrest and had therefore also been in care or control. On appeal, the Saskatchewan Court of Queen's Bench quashed the accused's conviction. However, the Saskatchewan Court of Appeal then allowed the Crown's appeal and restored the conviction.

[20] Mr. Fix argues that it is significant that in *Pincemen*, the Court of Appeal found it significant that the accused had not applied for particulars. At paragraphs 28 and 29, Tallis J.A. stated:

> 28. As an initial matter we observe that the respondent did not apply for "particulars" of the Crown's allegations or move for a directed verdict on either count. However, the respondent argues that the Crown is limited by the initial case it presents and cannot look to the respondent's testimony to support a conviction on any other basis.
>
> 29. In the circumstances of the case the question of guilt or acquittal fell to be determined at the end of the whole of the case.

[21] With the greatest of respect, I am of the view that what the Court of Appeal was suggesting was that the accused could have applied for a particularization narrowing the time frame of the transaction the Crown was relying on as making out the count he faced to exclude the earlier interval when he had been driving the vehicle. Furthermore, the Court was not saying that it would necessarily have granted the application had it been made.

[22] As stated, Mr. Fix submits that during the proceeding against Ms. Elleze the count was further particularized *"to include 'operation' as an 'essential' element."* As I have stated, this would not have left his client in a different situation than the original charge did. Mr. Fix does not suggest that the time frame of the transaction was narrowed. This is apparent from what he has said in his written submissions.

[23] It was also made clear in his oral submissions. During his oral argument supplementing his written submissions, Mr. Fix stated that if an accused were charged with assault with a weapon, he could not be convicted of common assault if the count had been particularized as assault with a weapon. In other words, if the Crown was unable to prove that a weapon was used during the incident giving rise to the charge, but otherwise proved all of the elements of a common assault, the accused could not be convicted of either the full offence or the lesser and included offence. For the reasons I have already articulated, I am unable to agree with Mr. Fix's position.

ii) Did the Crown furnish particulars?

[24] Furthermore, as I previously stated, I am of the view that the Court did not order the Crown to furnish further particulars. Nor did the Crown do or say anything from which one could reasonably conclude that it had voluntarily limited its theory or theories of the accused's criminal culpability in respect of the remaining count.

[25] There was no application for further particulars to be furnished. Mr. Fix is correct that the court observed that the charges alleged operation and not care or control at the outset. The court's comments were made during the adjournment application made on behalf of Ms. Elleze.

[26] Mr. Fix is also correct that the Crown stayed count 1, the impaired count, on the basis that it alleged operation rather than care or control and did not appreciate that the same wording applied to count 2, the over 80 count.

[27] However, the Crown then elected to proceed on count 2 as it stood. None of what went on prior to this point changed the particulars of the charge. None of what occurred changed what offences were included or not included.

[28] While an opening address of the Crown may be taken into account when construing the indictment,[6] there was no opening statement provided by the Crown and in my view, nothing to indicate that the time frame of the transaction being relied upon by the Crown was being limited. Neither was there any real indication by the Crown that the count was being limited to operation.

[6] *R. v. Douglas,* [1991] 1 S.C.R. 301, at paras 42 & 42

[29] The transcript of the August 29th proceedings indicates that when I ruled on the adjournment application made on behalf of Ms. Elleze by Mr. Fix, I noted that the charge had been outstanding for well over a year and that Ms. Elleze's first appearance had already been over a year ago. I also noted that the cause of the delays had been the accused's request to be given time to obtain counsel. One trial had already been cancelled. The second trial date had been set on April 11th. It was confirmed on March 30th. The arresting officer had travelled from Nova Scotia to testify in Ms. Elleze's trial as well as on other matters. I stated that the witness that Ms. Elleze wanted to call in her own defence and who had not shown up in court, had not been subpoenaed. In denying the adjournment, I concluded that the matter had simply gone on far too long and that while the proposed witness had not attended, there was nothing compelling her to attend.

[30] These were the factors that led me to decline the adjournment request. The fact that the charge was one of operation rather than care or control did not factor into my analysis whatsoever. After denying the adjournment, any statement that I made to the effect that the remaining count was one of "operating" a motor vehicle was made to address Crown counsel's earlier confusion concerning the wording of the count that remained before the court.

[31] In respect of Mr. Fix's argument that Ms. Elleze premised her position at trial in response to an allegation of operation while over 80, I have two comments. Firstly, as stated in *Drolet*, by being charged with operation, she had notice that she was also charged with the included offence of care or control.

[32] Secondly, Mr. Fix did in fact focus on the care or control aspects of the offence when he cross-examined the arresting officer, Constable Savage clearly provided no admissible testimony on actual operation of a motor vehicle. If Mr. Fix or the accused was of the view that the allegation was limited to operation and that care or control were somehow excluded as a possibility, why cross-examine on the care or control aspects at all?

[33] I am also unable to accept any suggestion that the accused's admission of her blood alcohol readings or her decision not to testify was premised on the assumption that the Crown was limited to actual operation as its theory of criminal liability. There is nothing on the record from the proceedings of August 29th to

indicate that this was the case. Once again, if it was why cross-examine the arresting officer on the care or control aspect. Why cross-examine him at all?

[34] Moreover, when I raised the issue of whether or not care or control of a motor vehicle was included in operation of a motor vehicle, there was no mention of the Crown somehow being limited as a result of the further particularization of the offence as now suggested by Mr. Fix. The issue was never raised during the evidentiary portion of trial. That being the case, it is very difficult for me to accept that the conduct of Ms. Elleze's case was based on the assumptions now argued by Mr. Fix.

[35] The manner in which Mr. Fix framed his arguments while the trial was in progress is also noteworthy. Mr. Fix's position at trial was that Ms. Elleze was prepared to admit the readings provided the officer had grounds to make the breath demand. After the officer's testimony, Mr. Fix advised that his client was not calling evidence and argued that the reasonable grounds necessary to make the breath demand were present. I heard argument on the point. I ruled that the reasonable grounds were present.

[36] The following exchange between Mr. Fix and myself took place:

> MR. FIX: Thank you, Sir. I just – secondary argument: She's been charged with operating a motor vehicle, and she did – I would suggest there's no evidence that she was operating. Maybe there's evidence that she was in care or control. I think the Court, in fairness, alerted all the parties to that. There's been no application to amend the charge.
>
> THE COURT: No application to amend the charge. Is it an included offence?
>
> MR. FIX: *That's the question, Sir.* And it would be my submission that it's not.
>
> THE COURT: Okay. Well, why do you say that?
>
> MR. FIX: *Well, it's a separate and distinct offence. It involves certainly different characteristics. There's a rebuttable presumption that arises in a care and control situation that an accused would not be aware of if not*

> *charged under that section. It doesn't appear to me – or I would submit it's not subsumed and so is not an included offence*.

[Emphasis Mine]

[37] The Court was on circuit in the community of Fort Providence. I reviewed the provisions of s. 662 the Code dealing with the specific offences that are deemed to be included within others and noted that there was nothing to the effect that having care or control of a motor vehicle was included in operating a motor vehicle. I stood the matter down. When court reconvened, I advised counsel that I had noted that the annotations in *Martin's Criminal Code* dealing with the issue appeared to indicate that the jurisprudence on the issue was conflicting.

[38] I advised that I was contemplating requesting written submissions on the topic. Mr. Fix responded by saying.

> MR. FIX: Thank you, Sir. And I will, of course, comply with the Court's direction as well as possible.
>
> Just a reminder that I – you know, I wasn't retained by – by Ms. Elleze. Two things: There is – I think that's fair that it's conflicting, but, also, if it comes up, I would also add that I don't know that there's evidence before the Court of care and control. There was no evidence that she was in the seat.

[39] I advised that I would need written submissions and that he could deal with the issue he had just raised in them. Ms. Elleze had absented herself from the court room so I stood the matter down to deal with what was happening more completely.

[40] When we reconvened, I confirmed that the Crown had closed its case. I confirmed with Mr. Fix that he was calling no evidence. I advised Ms. Elleze of the issue and that we were adjourning so that it could be addressed.

[41] Mr. Fix then stated:

> MR. FIX: Thank you, Sir. I certainly will attend to the written submissions on the issue, and I will meet any deadline the Court feels appropriate.

> While we're here, I would like to address – in the event that the Court finds that it's an included offence, I would like to address the facts.
>
> Firstly, it would be my submission that there is not evidence giving rise to the presumption, i.e., that Ms. Elleze was seated in – I believe that the wording was actually 'seated in the seat normally occupied by the driver". I think the evidence was standing astride with one foot on each side of the – and he called it a four-wheeler. He called it a number of things. And so I'm not sure if the Court would have to take judicial notice of what kind of vehicle it was and whether or not "standing astride" amounted to "seated in the seat normally occupied by".
>
> And then as far as de facto care and control, the only evidence you have is that she took the key out, and that is, in my respectful submission, is not evidence of operating any fixture that would cause the danger of the vehicle being put in motion.
>
> So it would be my respectful submission, if the court finds after written submissions that it is an included offence, but that – the offence isn't made out.

[42] I advised Mr. Fix that he could address the further issue he had just raised in his written submissions and adjourned the matter to December 7th to review the written submissions and for further oral argument.

[43] As stated there was no mention by Mr. Fix of the Crown having restricted itself to proving actual operation of the motor vehicle by further particularizing the count.

[44] In his written submissions he now states:

> 37. Ms. Elleze premised her position at trial in response to an allegation of impaired operation. Her counsel confirmed his understanding that the charge was one of operation with excess blood alcohol, he framed the issue in terms of operation ("the issue is whether or not she was *operating*"), he admitted proof of blood-alcohol content, and the accused neither testified nor called any evidence to rebut the presumption in section 258(1)(a) or to establish that she did not have *de facto* care or control of the quad (see 47/7-8).

> 38. It would be wholly destructive of Ms. Elleze's right to make full answer and defence to allow the Crown to seek a conviction on the basis that she was in care or control. This Court has already found that there was insufficient evidence of operation to found a conviction on that basis (61/26-62/4) and that finding should result in the accused's acquittal.

[45] I am unable to accept any suggestion that Ms. Elleze was admitting proof of her blood alcohol level and electing not to call evidence, on the premise that she faced jeopardy solely on the basis of actual operation of the motor vehicle. These assertions were not made during or immediately following the trial. After raising the issue of care or control of a motor vehicle being included in operation of a motor vehicle, there was no application to re-open cross-examination and Mr. Fix confirmed that Ms. Elleze was not calling evidence. Nor did Mr. Fix submit that the Crown through its conduct during the trial had limited itself to establishing actual operation of the motor vehicle in proving the guilt of Ms. Elleze. When I consider all of these factors I am unable conclude that she had been misled when she elected to admit the blood alcohol readings and to not call evidence.

C. Was there Sufficient Evidence of a Motor Vehicle?

[46] I find it has been proved beyond a reasonable doubt that Ms. Elleze was on a motor vehicle at the time she was observed by Constable Savage. He described it at various points as a four-wheeler, a quad and a vehicle. He made reference to its engine. He said he believed it to be running based on the fact that she turned the key and took it out. He said he saw her turn the ignition off and pull the key out. He said that when he observed her she was not wearing a helmet. He described her as having both legs on either side of the quad and being slightly off the seat leaning forward.

[47] Based on the foregoing I find it difficult to imagine that what Constable Savage was describing was anything but a motor vehicle. I also note that at least in the Northwest Territories, the term quad and four-wheeler are completely synonymous with an all-terrain vehicle that runs on its own power.

[48] There is nothing that calls into question the accuracy of Constable Savage's evidence. His evidence made sense, was consistent, uncontradicted and seemed unembellished. His testimony held up under skilled cross-examination. I found him to be a truthful and accurate witness.

D. Has the Crown Failed to Prove Care and Control of the Motor Vehicle?

[49] Finally, Mr. Fix argues that the Crown has failed to prove care or control of the motor vehicle that Ms Elleze was found to be occupying. I find that the Crown has proved beyond a reasonable doubt that Ms. Elleze was in care or control of the motor vehicle. I find that the presumption set out in s. 258(1)(a) applies and that it has has not been rebutted. I also find that *de facto* care or control of the motor vehicle has been proved beyond a reasonable doubt. In making both conclusions, I am in substantial agreement with the submissions of the Crown.

i) Does the presumption set out in s. 253(1)(a) of the Criminal Code apply?

[50] S. 258(1)(a) of the Criminal Code states:

> 258 (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or subsection 254(5) or in any proceedings under any of subsections 255(2) to (3.2),
>
> (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, vessel or aircraft or any railway equipment or who assists in the operation of an aircraft or of railway equipment, the accused shall be deemed to have had the care or control of the vehicle, vessel, aircraft or railway equipment, as the case may be, unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, vessel, aircraft or railway equipment in motion or assisting in the operation of the aircraft or railway equipment, as the case may be;

[51] Constable Savage stated that when he first observed Ms Elleze, *"As I pulled up on scene – or as I had turned first onto the road, I saw that there was one person on – on the vehicle and they weren't wearing a helmet."* When he was later describing the position of Ms. Elleze he stated, *"she had both legs on either side of the quad and was either slightly off the seat or just leaning forward, but she – she wasn't standing, and she wasn't sitting back completely relaxed."*

[52] Constable Savage referred to Ms. Elleze several times as the "driver" of the vehicle. He described Ms. Elleze as being *"on the vehicle"* and turning the ignition of the vehicle off and taking the key out when she saw him.

[53] I agree with the Crown that Constable Savage's evidence, which as I have stated I find to be truthful and accurate, proves beyond a reasonable doubt the facts necessary to engage the presumption that Ms Elleze was in care or control of the motor vehicle that she was on. Her feet were astride the all-terrain vehicle. She was either slightly off the seat or just leaning forward. However, even if she was slightly off the seat, she was in a position to reach the vehicle's ignition and keys. In short, she occupied the seat or position ordinarily occupied by a person who operates a four wheel all-terrain vehicle.

[54] As stated by Brophy J. in *R. v. J.M.W.,* [2010] O.J. No. 6352, 2010 ONCJ 782:

> 57 Firstly, a question has to be asked about whether the presumption set out in s.258(1)(a) of the *Criminal Code* applies with respect to the accused occupying the seat or position ordinarily occupied by a person who operates a motor vehicle. The evidence of the officers is that the accused was positioned in such a way that at least one knee was on the seat ordinarily occupied by the operator. Does this constitute occupying the seat? Given the manner in which ATV's can be used, I think it does.

[55] I find that the evidence adequately establishes the facts necessary to engage the presumption set out in s. 258(1)(a) and that that presumption has not been rebutted.

ii) Is de facto care and control established?

[56] Mr. Fix also submits that the Crown has failed to prove that Ms. Elleze was in *de facto* care or control. In support of his submission, he quotes the following paragraphs from *R. v. Boudreault,* 2012 SCC 13, the Supreme Court of Canada's most recent pronouncement on the elements for *de facto* care and control:

> [33] In this light, I think it helpful to set out once again the essential elements of "care or control" under s. 253(1) of the *Criminal Code* in this way:
>
> (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.

> [34] The risk of danger must be *realistic* and not just *theoretically possible*: *Smits*, at para. 60. But nor need the risk be *probable*, or even *serious* or *substantial*.
>
> [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.

[57] In support of his argument that *de facto* care or control is not made out Mr. Fix submits:

> In the present case, there is no evidence that the accused was the owner of the vehicle, that she possessed licensing documents, or that she was engaged in any particular course of conduct in relation to the vehicle. Ms. Elleze's statements to Constable Savage were not made the subject of a *voir dire* and are inadmissible for the truth of their contents. At best, for the Crown, the only act in relation to the vehicle, its fittings or equipment that can be attributed to the accused was the removal of a key. Even assuming that this was an "ignition" key, that act in no way creates a realistic risk of danger. The Crown has not proven beyond a reasonable doubt that Ms. Elleze was in *de facto* care or control.[7]

[58] It is true that it was not established that Ms. Elleze was the owner of the vehicle or that she possessed licensing documents. However, she was on the vehicle and she was operating the vehicles ignition. Constable Savage's evidence was that she removed the key. However, he also testified that she had turned off the ignition.

[59] I find that by placing herself on the vehicle with the keys in it in the manner that she was situated when she was first observed by Constable Savage, Ms. Elleze was engaged in an intentional course of conduct associated with a motor vehicle. It has undeniably been established that her blood alcohol level was well beyond the legal limit at 180 milligrams percent.

[60] In determining whether or not there was a realistic risk of danger of persons or property, I agree with the following submissions that Mr. Kuntz has made on behalf of the Crown:

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[7] Written Submissions of Amicus Curiae, para. 44.

> 28. The Crown submits that, but for the intervention of the RCMP, there was a realistic risk that the quad would have been set in motion by a person whose blood alcohol content was in excess of the statutory limits, thereby constituting a realistic risk of danger to persons or property.
>
> 29. In *R. v. Boudreault*, the Supreme Court of Canada established the low threshold for establishing a realistic risk, in order not to thwart Parliament's efforts at addressing the public safety risk posed by drunk driving [: *R. v. Boudreault*, 2012 SCC 56 at para 35, Fish J.].
>
> 30. Furthermore, in paragraph 48 of *R. v. Boudreault*, the Supreme Court of Canada ruled 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[: *Ibid.*, at para 49.].

[61] It may be that the actual acts of turning off the ignition and removing the key did not create a realistic risk of danger. However, one must look at the risk that was present prior to that point when she was being observed by Constable Savage. She was on the vehicle, with a blood alcohol reading of 180 milligrams percent. She was in a position to operate the vehicle's fittings and equipment. The fact that she turned the vehicle's ignition off and removed the key is an indication that she was willing and able to do so.

[62] I conclude that at the time Ms. Elleze was first observed by Constable Savage there was a realistic risk that she would put the vehicle in motion, either intentionally or by accident and that there was therefore also a realistic risk of danger to persons or property.

[63] I find that all of the elements of *de facto* care or control of a motor vehicle while over 80 have been proven beyond a reasonable doubt.

3. CONCLUSION

[64] For the foregoing reasons I have concluded that:

a) The offence of having care or control of a motor vehicle while over 80 is included within the offence of operating a motor vehicle while over 80;
b) The initial discussions and comments that occurred on the part of the Crown, Mr. Fix, and the court during the trial did not eliminate the possibility of the accused being found guilty of the included care or control offence;
c) It has been proved beyond a reasonable doubt that the object that Ms. Elleze was occupying was a motor vehicle; and
d) That both deemed and *de facto* care or control of that motor vehicle by Ms. Elleze have been proved beyond a reasonable doubt as has the fact that her blood alcohol level was 180 milligrams percent at the time - and all of the other necessary ingredients of care or control over 80.

[65] I thank both Mr. Kuntz and Mr. Fix for their assistance.

Robert Gorin
T.C.J.

Territories, this 16th day of
January, 2019

R. v. Geraldine Elleze, 2019 NWTTC 01

Date: 2019 01 16
File: T-2-CR-2017-000303

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

– and –

-

GERALDINE ELLEZE

REASONS FOR DECISION
of the
HONOURABLE JUDGE ROBERT GORIN

Heard at:	Fort Providence, Northwest Territories
Date of Decision:	January 16, 2019
Counsel for the Crown:	Andreas Kuntz
Amicus Curiae:	Steven Fix

[Section 253(1)(b) of the *Criminal Code*]