*Date of Corrigendum: 2019 02 13*
*Date: 2019 01 16*
*File: T-1-CR-2018-001468*

**IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**– and –**

**WYATT DANIEL MORGAN**

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**REASONS FOR DECISION**
**of the**
**HONOURABLE JUDGE ROBERT GORIN**

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**Corrected Judgment**: A corrigendum was issued on February 13, 2019; the corrections have been made to the text and the corrigendum is appended to this judgment.

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| Heard at: | Yellowknife, Northwest Territories |
| Date of Decision: | January 25, 2019 |
| Counsel for the Crown: | Pierre-Luc Bergeron |
| Defence Counsel: | Peter Harte |

[Ss. 253(1)(a) & 253(1)(b) of the *Criminal Code*]

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## 1. INTRODUCTION

[1] The accused is charged with having care or control of a motor vehicle while his ability to do so was impaired by alcohol and while his blood alcohol level exceeded of 80 milligrams of alcohol in one hundred millilitres of blood contrary to the provisions of s. 253(1)(a) and 253(1)(b) of the *Criminal Code*. Both charges arise out of the same circumstances which occurred on July 29th of last year in Yellowknife in the Northwest Territories.

[2] I find the accused guilty of both offences. In *R. v. Prince*, the Supreme Court of Canada held that the *Kienapple* principle is applicable in such circumstances. [1] Therefore, I am entering a judicial stay on count 1 and entering a conviction on count 2 only.

[3] I find that the Crown has established all of the requisite grounds of the offences beyond a reasonable doubt. Date, place, identity, and jurisdiction have all been established. It is also established that the accused was intoxicated to the point

[1] [1986 2 S.C.R. 480, at para. 38

that his ability to operate a motor vehicle was impaired and that his blood alcohol level was at 210 milligrams percent.

[4] The sole issue at trial was whether or not the accused was in care or control of the motor vehicle at the time that he was found to be in the driver's seat.

[5] I find that the accused has rebutted the presumption set out in s. 258(1)(a) which provides that where an accused is charged under s. 253,

> (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;

[6] I conclude that the presumption has been rebutted, because I accept his evidence that he was in the vehicle for the purpose of consuming alcohol and not driving the motor vehicle.

[7] However, I also find that under all of the circumstances, it has been proved beyond a reasonable doubt that the accused had entered into an intentional course of conduct associated with the motor vehicle in circumstances that created a realistic risk of danger to persons or property. I conclude therefore that *de facto* care or control has been established to the requisite standard.

## 2. ANALYSIS

[8] The Crown's case consisted of an agreed statement of facts which was entered as an exhibit in these proceedings. To summarize, the statement of facts states that:

- On the date charged at 4:15 a.m. the police responded to a complaint of a possible impaired driver in the parking lot outside of a local hotel;

- The vehicle that had been described was located. The engine was running with the lights illuminated and the left turn signal on. When the police parked behind the vehicle, the occupant of the vehicle turned the 4-way hazard lights on and then turned them off;

- When police talked to the accused who was the vehicle's only occupant, he was sitting in the driver's seat. He was noted to have a strong odour of alcohol on his breath, and bloodshot watery eyes. He was mumbling with slurred speech while drooling and moving slowly. He was unable to locate his driver's license or insurance;

- When the accused was asked where he was going, he stated that he was home and denied being in a car. The officer also noted a number of open and closed cans of beer in the vehicle;

- The police arrested the accused for impaired care or control of a motor vehicle. Due to his poor balance, the police assisted the accused in walking to the police vehicle;

- The vehicle's fob was located in the centre console. The vehicle was "push to start" and operable;

- At 5:33 a.m. and 5:55 a.m. the accused provided breath samples both of which indicated blood alcohol levels of 210 milligrams percent;

- The accused was generally polite and cooperative throughout the investigation;

[9] The accused testified that:

- He had travelled to Yellowknife for a wedding and had arrived with his wife and child the day before. He had rented the vehicle in which he was found;

- He was at the reception of the wedding he had attended until about 2:00 a.m. He went to the hotel room where he was staying. He wanted to drink more. However, he did not want to disturb his wife and child and decided to drink in his rental vehicle instead;

- He consumed 6 beers in the vehicle. He turned the vehicle on because he wanted to listen to the radio. Because he was unfamiliar with "push to start" vehicles, he did not know how to turn on the radio without starting the engine;

- He was in the vehicle solely to drink and not to put the vehicle in motion. He was in it for the purposes only of drinking and listening to the radio. He says that therefore he was not wearing his seat belt;

- To put the vehicle in motion, he had to put his foot on the brake push a button on the shifter leaver and then pull it into drive;

- He was not aware that he had put the signal light on. He could not hear it due to the noise level in the vehicle. He inadvertently put on the 4-way hazard lights when he saw the police;

[10] As stated, given the accused's testimony and the facts set out in the foregoing paragraphs, I accept that the accused did not occupy the driver's seat for the purpose of putting the vehicle in motion. I find that the presumption set out in s. 258(1)(a) has been rebutted. However, that does not end the matter. The issue of *de facto* care or control must still be determined

[11] *R. v. Boudreault*[2] is the Supreme Court of Canada's most recent pronouncement on care or control of a motor vehicle. The majority set out the elements of "care or control" where it stated:

> [9] For the reasons that follow, I have concluded that "care or control", within the meaning of s. 253(1) of the *Criminal Code*, signifies (1) an intentional course of conduct associated with a motor vehicle; (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit; (3) in circumstances that create a realistic risk, as opposed to a remote possibility, of danger to persons or property.[3]

[12] In *Boudreault*, the majority held that while the risk must be real rather than theoretical, the threshold for establishing a realistic risk is nonetheless low. The

[2] 2012 SCC 56
[3] *Ibid.,* at para 9 per Fish.

low threshold was established in order not to thwart Parliament's efforts in addressing the public safety risk posed by drunk driving.[4]

[13] Moreover, at paragraph 48 the court stated:

> (…) "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.

[14] The accused was grossly intoxicated when he was observed by the police. He was given assistance when walking due to his poor balance. Not only did he have slurred speech, he was drooling. More importantly, he was in a highly befuddled and disoriented state. He did not know where he was. He thought he was home in another community. He thought that he was not in a vehicle. He accidently turned on the vehicle's hazard light when the police pulled up.

[15] It may have been that placing the vehicle in motion would have required the accused to place his foot on the brake and simultaneously push the button on the shifter lever and pull it back into drive. One might argue that the risk was low. However, I find that the risk of him doing so was not merely theoretical. I find that it has been established beyond a reasonable doubt that the risk was realistic.

## 3. CONCLUSION

[16] In this case, the Crown has established impairment on the part of the accused and a present ability to set the vehicle in motion. In this case, the accused has denied the intention to set the vehicle in motion. I accept his evidence in that regard.

[17] However, I find that based on the agreed statement of facts, the only reasonable conclusion is that the accused was grossly intoxicated and, as a result, in a very befuddled and disoriented state. He had already inadvertently activated two of the vehicle's indicator lights at different times. He had also turned the

[4] *Ibid.,* at para 35 Fish J.

engine on because he did not know how to turn on his radio without doing so. While in order to put the vehicle in motion, he would have had to brake, press the button on the shift lever and pull it back simultaneously at the same time, the risk that he would have done so was real and not merely theoretical.

[18] I therefore have found him guilty of both impaired care or control of a motor vehicle and care or control of a motor vehicle while "over 80" contrary to ss. 253(1)(a) and 253(1)(b) of the Code. As stated, a judicial stay will be entered on count 2. A conviction will be entered on count 1.

"Robert Gorin"

Robert Gorin
T.C.J.

Dated at Yellowknife, Northwest
Territories, this 25th day of January, 2019

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**Corrigendum of the Reasons for Decision**
**of**
**The Honourable Judge Robert Gorin**

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1. The file number indicated in the Reasons for Decision reads as:

   T-2-CR-2018-001468

   The Reasons for Decision file number has been corrected to read:

   T-1-CR-2018-001468

2. Signature Block, page 6. The wording of the sentence contains reads:

   Territories, this 25th day of January, 2019

   Paragraph 5 has been corrected to read:

   Dated at Yellowknife, Northwest
   Territories, this 25th day of January, 2019

3. The citation has been amended to read:

   Citation: R. v. Wyatt Morgan, 2019 NWTTC 02

*Date of Corrigendum: 2019 12 13*
*Date: 2019 01 25*
*File: T-1-CR-2018-001468*

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