



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Boudreault, 2012 SCC 56

**DATE:** 20121026

**DOCKET:** 34582

**BETWEEN:**

**Donald Boudreault**  
Appellant  
and  
**Her Majesty The Queen**  
Respondent  
- and -  
**Attorney General of Ontario**  
Intervener

**CORAM:** LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ.

**REASONS FOR JUDGMENT:** Fish J. (LeBel, Deschamps, Abella, Moldaver and Karakatsanis JJ. concurring)  
(paras. 1 to 57)

**DISSENTING REASONS:** Cromwell J.  
(paras. 58 to 92)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

---

R. v. BOUDREAUULT

**Donald Boudreault**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

and

**Attorney General of Ontario**

*Intervener*

**Indexed as: R. v. Boudreault**

**2012 SCC 56**

File No.: 34582.

2012: June 6; 2012: October 26.

Present: LeBel, Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Criminal law — Care or control of motor vehicle while impaired — Elements of offence — Accused starting vehicle to keep warm while waiting for taxi — Accused falling asleep in driver's seat — Whether or not accused in care or control of vehicle — Whether risk of danger is essential element of care or control offence — Whether trial judge erred in finding that there was no risk of danger — Criminal Code, R.S.C. 1985, c. C-46, s. 253(1).*

*Criminal law — Appeals — Whether trial judge committed error of law alone — Whether Crown had right of appeal against acquittals — Criminal Code, R.S.C. 1985, c. C-46, s. 676(1)(a).*

B was inebriated and unfit to drive when it was time for him to return home after a night of drinking. At B's request, a taxi was called for him, for which he had to wait outside. It was a cold and windy February morning. B got into his truck, started the engine, turned on the heat and fell asleep. When the taxi arrived, the driver called the police. B was arrested and charged with having care or control of a motor vehicle (1) while his ability was impaired by alcohol and (2) with more than 80 mg of alcohol in 100 mL of his blood, contrary to ss. 253(1)(a) and (b) of the *Criminal Code*. He was acquitted on both counts at trial but the Court of Appeal allowed the Crown's appeal, set aside the acquittals and entered convictions.

*Held* (Cromwell J. dissenting): The appeal should be allowed and the acquittals restored.

*Per* LeBel, Deschamps, **Fish**, Abella, Moldaver and Karakatsanis JJ.: “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. With respect to the third element, the risk of danger must be realistic and not just theoretically possible. Parliament’s objective in enacting s. 253 of the *Criminal Code* was to prevent the risk of danger to public safety that normally arises from the mere combination of alcohol and automobile. Conduct that presents no such risk falls outside the intended reach of the offence. To require that the risk be “realistic” is to establish a low threshold consistent with Parliament’s intention.

The existence of a realistic risk of danger is a matter of fact. In the absence of evidence to the contrary, a realistic risk of danger 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 evidence tending to prove that no realistic risk of danger existed in the particular circumstances of the case. The trial judge must examine all of the relevant evidence and may consider a number of factors, including whether the accused took care to arrange an alternate plan to ensure his safe transportation home.

In this case, the trial judge, applying the correct legal test to the evidence he accepted, found as a fact that there was no realistic risk of danger. The trial judge's conclusion on the facts, however surprising or unreasonable it may appear to another court, did not give rise to a question of law alone. This is the only ground upon which the Crown, pursuant to s. 676(1)(a) of the *Criminal Code*, can appeal the acquittal of an accused. This Court is therefore bound, as a matter of law, to allow B's appeal, to set aside the judgment of the Court of Appeal, and to restore the acquittals entered at trial.

*Per Cromwell J.* (dissenting): Risk of danger is not an element of the offence of care or control. The attempt to limit by means of statutory interpretation the potentially wide ambit of the care or control offence by reading in both this new essential element and a new evidentiary rule that operates against the accused is not consistent with well-settled principles of statutory interpretation and seriously undercuts the provision's preventive purpose. Accordingly, the trial judge erred in law by holding that the risk of danger was an essential element of the offence.

The question of what the expression "care or control" means in s. 253(1) of the *Criminal Code* is an issue of statutory interpretation. "Care or control" are not technical legal words in the context of the provision. If the ordinary meaning of these words applies, one is in care or control of a motor vehicle when one acts to assume the present ability to operate the vehicle or has its superintendence or management. The scheme and object of the provision suggest that Parliament intended the ordinary

meaning to apply. The purpose of criminalizing having care or control of a vehicle while impaired is preventive. While the evil is the danger of impaired operation of a vehicle, a wider ambit of criminality has been created to prevent that evil from materializing.

Section 253 being preventive in nature, the element of risk will be relevant to the assessment of whether the person has care or control of a motor vehicle. Since the intention of driving the vehicle is not pertinent under the care or control offence, the risk must be assessed by looking at the accused's use of the vehicle. If an accused acts to assume the present ability to operate the vehicle or its superintendence or management, there is an inherent risk of danger, unless objectively viewed, the accused's use of the vehicle involves no such risk. Accordingly, not all acts in relation to a vehicle will necessarily constitute acts of care or control. The degree of involvement of the accused with the vehicle will need to be more than trivial to constitute care or control. The determination of whether the accused was in care or control will depend upon a careful consideration of the particular facts of the case.

In any event, even if the creation of risk were an essential element of the offence, the trial judge erred in law in finding that it had not been proved. There is no dispute that the absence of intent to set the vehicle in motion is not a defence, but the trial judge in effect made it so by basing his conclusion that there was no risk on evidence that B did not intend to drive. Having found this legal error, the Court of

Appeal was correct to set aside the acquittals and enter convictions. When applying the correct legal test, care or control was amply proved in the present case.

### Cases Cited

By Fish J.

**Referred to:** *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Wren* (2000), 47 O.R. (3d) 544, leave to appeal refused, [2000] 2 S.C.R. xii; *R. v. Smits*, 2012 ONCA 524, 294 O.A.C. 355; *R. v. Decker*, 2002 NFCA 9, 209 Nfld. & P.E.I.R. 44, leave to appeal refused, [2002] 4 S.C.R. vii; *R. v. Burbella*, 2002 MBCA 105, 166 Man. R. (2d) 198; *R. v. Shuparski*, 2003 SKCA 22, [2003] 6 W.W.R. 428, leave to appeal refused, [2003] 2 S.C.R. x; *R. v. Mallery*, 2008 NBCA 18, 327 N.B.R. (2d) 130; *Saunders v. The Queen*, [1967] S.C.R. 284; *R. v. Toews*, [1985] 2 S.C.R. 119; *R. v. Penno*, [1990] 2 S.C.R. 865; *R. v. Price* (1978), 40 C.C.C. (2d) 378; *Ford v. The Queen*, [1982] 1 S.C.R. 231; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Lockerby*, 1999 NSCA 122, 180 N.S.R. (2d) 115; *R. v. Szymanski* (2009), 88 M.V.R. (5th) 182; *R. v. Ross*, 2007 ONCJ 59, 44 M.V.R. (5th) 275.

By Cromwell J. (dissenting)

*R. v. Toews*, [1985] 2 S.C.R. 119; *R. v. Price* (1978), 40 C.C.C. (2d) 378; *R. v. Johal* (1998), 124 C.C.C. (3d) 249; *Saunders v. The Queen*, [1967] S.C.R. 284; *R. v. Whyte*, [1988] 2 S.C.R. 3; *Ford v. The Queen*, [1982] 1 S.C.R. 231; *R. v. Penno*,

[1990] 2 S.C.R. 865; *R. v. Decker*, 2002 NFCA 9, 209 Nfld. & P.E.I.R. 44, leave to appeal refused, [2002] 4 S.C.R. vii; *R. v. Burbella*, 2002 MBCA 105, 166 Man. R. (2d) 198; *R. v. Shuparski*, 2003 SKCA 22, [2003] 6 W.W.R. 428, leave to appeal refused, [2003] 2 S.C.R. x; *R. v. Mallery*, 2008 NBCA 18, 327 N.B.R. (2d) 130; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559.

### **Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, s. 1.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 253, 258, 676(1)(a).

APPEAL from a judgment of the Quebec Court of Appeal (Bich, Bouchard and Wagner JJ.A.), 2011 QCCA 2071 (CanLII), SOQUIJ AZ-50804519, [2011] J.Q. n° 16451 (QL), 2011 CarswellQue 12345, setting aside the acquittals entered by Daoust J., 2010 QCCQ 11443 (CanLII), SOQUIJ AZ-50700675, [2010] J.Q. n° 13622 (QL), 2010 CarswellQue 13757, and entering convictions. Appeal allowed and acquittals restored, Cromwell J. dissenting.

*Jean-Marc Fradette and Marie-Ève St-Cyr*, for the appellant.

*Michaël Bourget and Christine Gosselin*, for the respondent.

*Benita Wassenaar*, for the intervener.



The judgment of LeBel, Deschamps, Fish, Abella, Moldaver and Karakatsanis JJ. was delivered by

FISH J. —

## I

[1] Donald Boudreault was too drunk to drive — and knew it — when he was asked to leave the apartment of Danye Dubois, whom he had earlier met at a bar. He therefore asked Ms. Dubois to call for a taxi. And she did, not once but twice.

[2] Unable to wait in the apartment after the second call, Mr. Boudreault decided to wait in his pickup truck, rather than outdoors in the bitter cold and howling wind. He started the motor and turned on the heat while awaiting the taxi's arrival. At no time did he attempt to set his truck in motion before the taxi arrived. Nor, of course, afterward.

[3] Approximately 45 minutes after the initial call, and 20 to 25 minutes after the second, the taxi finally arrived. The taxi driver found Mr. Boudreault asleep in the driver's seat. That he was inebriated could hardly have come as a surprise: He would not otherwise have summoned the taxi to take him home.

[4] Instead of awakening Mr. Boudreault so that he could be driven home, the taxi driver called the police.

[5] Mr. Boudreault was arrested and charged with having care or control of a motor vehicle (1) while his ability was impaired by alcohol and (2) with more than 80 mg of alcohol in 100 mL of his blood, contrary to ss. 253(1)(a) and (b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[6] He was acquitted on both counts at trial (2010 QCCQ 11443 (CanLII)) but the Court of Appeal, on an appeal by the Crown, set aside the acquittals and entered convictions instead (2011 QCCA 2071 (CanLII)). Mr. Boudreault now appeals to this Court, urging us to quash his convictions by the Court of Appeal and to restore his acquittals at trial.

[7] We are required on this appeal to settle an issue of law that divided the courts below — and has divided other courts across the country as well. And we are required to then determine whether the trial judge, in acquitting Mr. Boudreault, committed an error of “law alone”, within the meaning of s. 676(1)(a) of the *Criminal Code*. If he did not, the Crown had no right of appeal against his acquittals, however surprising — even unreasonable — we may find that judgment to be: *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 32.

[8] Essentially, then, the appeal raises two distinct issues of law — the first of general application, the second of particular application here. Set out

interrogatively, these issues can be framed this way: Is risk of danger an essential element of the offence of care or control under s. 253(1) of the *Criminal Code*? And, if it is, did the trial judge in this case err in law in finding that there was no such risk in the present circumstances?

[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.

[10] Only the third element — realistic risk of danger — is in issue on this appeal. The Crown submits that risk of danger is not an element of “care or control” under s. 253(1) of the *Code*. The trial judge found that it is. With respect, I agree with the trial judge.

[11] The existence of a realistic risk of danger is a matter of fact. In this case, the trial judge, applying the correct legal test, found *as a fact* that there was no such risk.

[12] I recognize, as the trial judge did, that a conviction will normally ensue where the accused, as in this case, was found inebriated behind the wheel of a motor

vehicle with nothing to stop the accused from setting it in motion, either intentionally or accidentally.

[13] Impaired judgment is no stranger to impaired driving, where both are induced by the consumption of alcohol or drugs. Absent evidence to the contrary, a present ability to drive while impaired, or with an excessive blood alcohol ratio, creates an inherent risk of danger. In practice, to avoid conviction, the accused will therefore face a tactical necessity of adducing evidence tending to prove that the *inherent* risk is not a *realistic* risk in the particular circumstances of the case.

[14] That is what happened here. The trial judge was satisfied that Mr. Boudreault would not, in fact, have set his vehicle in motion. And this was the only risk of danger in issue at trial.

[15] The judge's conclusion on the facts, however surprising or unreasonable it may appear to another court, did not give rise to *a question of law alone*. And, as I indicated earlier, this is the only ground upon which the Crown, pursuant to s. 676(1)(a) of the *Criminal Code*, can appeal the acquittal of an accused at trial.

[16] I therefore feel bound, as a matter of law, to allow Mr. Boudreault's appeal, to set aside the judgment of the Court of Appeal, and to restore his acquittals at trial.

[17] On February 7, 2009, Donald Boudreault went out drinking. When the bar closed, he returned to the home of Danye Dubois. She, apparently sober, drove Mr. Boudreault's truck for him from the bar to her apartment, where the drinking continued well into the morning of February 8.

[18] At around 10:00 a.m., Mr. Boudreault decided to go home. By his own admission, he was inebriated and unfit to drive. At Mr. Boudreault's request, Ms. Dubois called a taxi for him. The service she called, "Taxic", sends two drivers — one to take the inebriated motorist home, and the other to drive his vehicle.

[19] After 20 to 25 minutes — an unusually long time, since Mr. Boudreault had used the Taxic service in the past and its drivers had arrived immediately ("*tout de suite*" (A.R., vol. II, at p. 86)) — there was still no sign of the taxi. Ms. Dubois called Taxic once more. At that point, wanting to go to sleep, Ms. Dubois asked Mr. Boudreault to wait outside: [TRANSLATION] ". . . go warm up your truck," she said, "the taxi is coming" (A.R., vol. II, at p. 69).

[20] A February morning in Jonquière, Quebec, it was minus 15 degrees Celsius outside, with winds blowing at 40 km/h. Mr. Boudreault left the apartment and got into his truck — which was in a private driveway, on level terrain, its automatic transmission set to "park" (A.F., at para. 30, note 13). He started the engine, turned on the heat, and fell asleep.

[21] At 10:44 a.m., the police received a call from the Taxic driver, who had arrived at Ms. Dubois's home and reported seeing a man sleeping in the driver's seat of a motor vehicle. The police arrested Mr. Boudreault shortly thereafter. His ability to drive was manifestly impaired.

[22] Upon arrest, Mr. Boudreault asked that he be left alone so that he could drive home. The trial judge attached no probative weight to this statement and took care to explain his conclusion in this regard. At the police station, a breathalyzer test yielded results of 250 mg of alcohol per 100 mL of blood at 11:40 a.m. and 242 mg of alcohol per 100 mL of blood at 12:05 p.m. — both over three times the legal limit of 80 mg/100 mL.

[23] Daoust J. of the Court of Quebec held that where there is no risk of putting a motor vehicle in motion, the courts must conclude that there is no care or control within the meaning of s. 253(1) of the *Code*. In his view, no such risk existed in this case. Mr. Boudreault, though intoxicated, knew what he was doing and took all the necessary precautions. From his own prior experience, Mr. Boudreault was well aware of the gravity of driving while impaired. He had a concrete and reliable plan to get home. And finally, the evidence established that his plan would in fact have prevented him from driving — it was the driver of the taxi he had summoned who called the police.

[24] The Court of Appeal allowed the Crown's appeal and entered convictions. The Court considered that an intention to drive is not an essential

element of the offence. The trial judge had therefore erred in considering a lack of intention to drive as proof that there was no risk of setting the vehicle in motion. In its view, [TRANSLATION] “there was such a risk given the respondent’s advanced state of intoxication, since his blood alcohol level was more than three times the legal limit and this might have greatly affected his judgment had he woken up” (para. 6).

### III

[25] I turn now to consider the issue of general application that concerns us here: Is risk of danger an essential element of the offence of care or control under s. 253(1) of the *Criminal Code*?

[26] As mentioned earlier, I believe that it is.

[27] In recent years, five provincial appellate courts have reached the same conclusion: *R. v. Wren* (2000), 47 O.R. (3d) 544, leave to appeal refused, [2000] 2 S.C.R. xii (and again, more recently, in *R. v. Smits*, 2012 ONCA 524, 294 O.A.C. 355); *R. v. Decker*, 2002 NFCA 9, 209 Nfld. & P.E.I.R. 44, leave to appeal refused, [2002] 4 S.C.R. vii; *R. v. Burbella*, 2002 MBCA 105, 166 Man. R. (2d) 198; *R. v. Shuparski*, 2003 SKCA 22, [2003] 6 W.W.R. 428, leave to appeal refused, [2003] 2 S.C.R. x; *R. v. Mallery*, 2008 NBCA 18, 327 N.B.R. (2d) 130.

[28] With respect for those who have adopted an opposing view, I agree with Robertson J.A. in *Mallery*, that “[t]he concept of danger provides a unifying thread

which promotes certainty in the law while balancing the rights of an accused with the objectives of the legislation” (para. 4).

[29] The divergence of opinion on this question may find its roots nearly a half-century ago in *Saunders v. The Queen*, [1967] S.C.R. 284, where the accused, while impaired, was found in the driver’s seat of an *inoperable* vehicle but was nonetheless convicted of “care or control” while impaired. To the extent that *Saunders* may be interpreted to exclude a risk of danger as an element of “care or control”, it has since been overtaken by subsequent decisions of the Court, notably *R. v. Toews*, [1985] 2 S.C.R. 119, and *R. v. Penno*, [1990] 2 S.C.R. 865.

[30] In *Toews*, McIntyre J. held that

acts of care or control, short of driving, are acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. [Emphasis added; p. 126.]

[31] And in *Penno*, citing *Toews*, Lamer C.J. reaffirmed the requirement of risk of danger in these terms:

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. In fact, *Toews* stands for the proposition that when a person uses a vehicle in a way that involves no risk of putting it in motion so that it could become dangerous, the courts should find that the *actus reus* was not present. [Emphasis added; p. 877.]



[32] Parliament's objective in enacting s. 253 of the *Code* was to prevent a risk of danger to public safety: *Toews* at p. 126, citing *R. v. Price* (1978), 40 C.C.C. (2d) 378 (N.B.C.A.), at p. 384. Accordingly, conduct that presents no such risk falls outside the intended reach of the offence.

[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.

[36] It is settled law that an intention to set the vehicle in motion is *not* an essential element of the offence: *Ford v. The Queen*, [1982] 1 S.C.R. 231. This may appear anomalous in view of the presumption set out at s. 258(1)(a) of the *Criminal Code*, which provides that an accused who was found in the driver's seat of a motor vehicle

shall be deemed to have had the care or control of the vehicle . . . unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle . . . in motion . . .;

[37] Accordingly, an accused found in the driver's seat will be presumed, as a matter of law, to have care or control of the vehicle, unless the accused satisfies the court that he or she had no intention to drive — an intention that, pursuant to *Ford*, is not an essential element of the offence!

[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 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.

[40] I agree with Justice Cromwell that Parliament’s purpose in enacting the care or control provision was preventive, and directed at the inherent danger that normally arises from the mere “combination of alcohol and automobile”: *Saunders*, at p. 290. With respect, however, I believe this supports my 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*.

[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.

[43] The only risk of danger alleged by the Crown in this case was that Mr. Boudreault would, at some point, set his vehicle in motion intentionally.

[44] The Crown contends that a risk of danger is not an essential element of care or control under s. 253(1) of the *Code*. It submits that, even where the presumption of care or control under s. 258(1)(a) is not engaged, the Crown need only prove voluntary consumption of alcohol beyond the legal limit (or leading to impairment) and “some use of the car or its fittings and equipment” (R.F., at para. 32 citing *Toews*, at p. 126). Accordingly, in the Crown’s submission, an inebriated accused found behind the wheel of a car, with the key in the ignition and the motor running, is subject to automatic conviction.

[45] As I mentioned at the outset, anyone 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.

[46] 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.

[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 subject, of course, to constitutional scrutiny under the *Canadian Charter of Rights and Freedoms*.

[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).

[50] The existence or not of a realistic risk of danger is a finding of fact: see *R. v. Lockerby*, 1999 NSCA 122, 180 N.S.R. (2d) 115, at para. 13; *Smits*, at para. 61.

The trial judge must examine all of the relevant evidence to this end and may consider a number of factors: see e.g. *R. v. Szymanski* (2009), 88 M.V.R. (5th) 182 (Ont. S.C.J.), at para. 93, *per* Durno J.; *R. v. Ross*, 2007 ONCJ 59, 44 M.V.R. (5th) 275, at para. 14, *per* Duncan J.

[51] One of the factors of particular relevance in this case is that the accused took care to arrange what some courts have called an “alternate plan” to ensure his safe transportation home.

[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.

[53] For example, even where it is certain that the taxi will show up at some point, if the accused occupied the driver’s seat without a valid excuse or reasonable explanation, this alone may persuade the judge that “his judgment [was] so impaired that he [could not] foresee the possible consequences of his actions”: *Toews*, at p. 126, again citing *Price* at p. 384. The converse, however, is not necessarily true. Even where it is probable that the taxi will appear at some point and the accused

occupied the driver's seat *with* a valid excuse or reasonable explanation, the trial judge may nonetheless be satisfied beyond a reasonable doubt that there remained a realistic risk of danger in the circumstances.

#### IV

[54] The trial judge in this case committed no error of principle in outlining the applicable law. He recognized that the absence of an intention to drive is not a defence and is only relevant to rebutting the presumption in s. 258(1)(a) of the *Criminal Code*. He also correctly noted that a risk of danger is an essential element of the offence. Finally, the trial judge turned his mind to the possibility that the risk may materialize by setting the vehicle in motion, either intentionally or unintentionally. In this latter regard, the trial judge recognized that the risk of [TRANSLATION] “the vehicle being set in motion involuntarily” is a danger the offence is designed to prevent (para. 35). He did not, however, expressly address that danger in this case. This is hardly surprising: At no point during the trial did the Crown allude *at all* to any such risk in this case.

[55] The parties do not dispute any aspect of the evidence relied on by the trial judge in his reasons.

[56] Finally, applying the correct legal test to the evidence he accepted, the trial judge concluded there was *no risk* that Mr. Boudreault would at any point intentionally set the vehicle in motion. As earlier mentioned, this finding of fact,

however unsatisfactory or unreasonable it may appear to others, was not reviewable on an appeal by the Crown.

[57] I therefore feel bound, as a matter of law, to allow Mr. Boudreault's appeal, to set aside the judgment of the Court of Appeal, and to restore his acquittals at trial.

The following are the reasons delivered by

CROMWELL J. —

#### I. Introduction

[58] It is an offence to have “care or control” of a motor vehicle while one's blood alcohol ratio exceeds the legal limit of 80 mg of alcohol per 100 mL of blood (“.08”) or while one's ability to operate the vehicle is impaired. This appeal concerns whether the trial judge properly interpreted and applied the elements of the care or control offence in the appellant's case.

[59] The trial judge found that in order for the accused to be in “care or control” of a vehicle, his acts in relation to it must give rise to a risk of danger. In other words, creation of a risk of danger is an essential element of the offence. The



judge also found that there was no such risk here because the appellant did not intend to drive. My colleague Fish J. would uphold these findings. I respectfully disagree.

[60] My view is that risk of danger is not an element of the offence. My colleague attempts to limit by means of statutory interpretation the potentially wide ambit of the care or control offence by reading in both this new essential element and a new evidentiary rule that operates against the accused. Respectfully, this result is not consistent with well-settled principles of statutory interpretation. In addition, this approach, in my respectful view, seriously undercuts the provision's preventive purpose. In any event, even if the creation of risk were an essential element of the offence, the trial judge erred in law in finding that it had not been proved. There is no dispute that the absence of intent to set the vehicle in motion is *not* a defence. But the trial judge in effect made it so by basing his conclusion that there was no risk on evidence that the appellant did not intend to drive (2010 QCCQ 11443 (CanLII)).

[61] In my view, the Court of Appeal for Quebec was correct to set aside the acquittals entered by the trial judge and to enter convictions (2011 QCCA 2071 (CanLII)). I would therefore dismiss the appeal.

## II. Analysis

[62] The appeal raises two issues: first, did the trial judge err in law by finding that the risk of danger is an essential element of the care or control offence in

s. 253(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and second, did he err in finding that there was no such risk here?

[63] My colleague Fish J. has admirably set out the facts and decisions so that I can proceed immediately to my analysis of these issues.

A. *Is a Risk of Danger an Essential Element of the Care or Control Offence?*

[64] The relevant provision is s. 253(1) *Cr. C.*:

**253.** (1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,

(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or

(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

[65] In *R v. Toews*, [1985] 2 S.C.R. 119, McIntyre J. noted that the *mens rea* of the care and control offence is the intent to assume care or control after the voluntary consumption of alcohol or a drug and that the *actus reus* is the act of assumption of care or control when the voluntary consumption of alcohol or a drug has impaired the ability to drive (p. 124).

[66] The question of what the expression “care or control” means in this section is of course an issue of statutory interpretation. The approach to the issue is not controversial: we are to read the words in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. We are not to apply a presumption of *Charter* compliance absent ambiguity.

(1) Ordinary Meaning and Statutory Purpose

[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.

[68] I begin with the text of the provision. “[C]are or control” are not technical legal words in this context. The ordinary sense of the word “care” denotes charge or protection while “control” denotes command and direction: see, e.g., *R. v. Price* (1978), 40 C.C.C. (2d) 378 (N.B.S.C. (App. Div.)), at pp. 383-84; *R. v. Johal* (1998), 124 C.C.C. (3d) 249 (Ont. Ct. (Gen. Div.)), at p. 253. It follows that if the ordinary meaning of these words applies, one is in care or control of a motor vehicle when one acts to assume the present ability to operate the vehicle or has its superintendence or management.

[69] The scheme and object of the provision suggest that Parliament intended the ordinary meaning to apply. The purpose of criminalizing having care or control of

a vehicle while impaired (or over .08) is preventive. While the evil is the danger of impaired operation of a vehicle, a wider ambit of criminality has been created to prevent that evil from materializing. The unanimous Court, speaking through Fauteux J., commented on this preventive purpose in *Saunders v. The Queen*, [1967] S.C.R. 284, at pp. 289-90:

Obviously, every one agrees that the true object of the provisions . . . is to cope with and protect the person and the property from the danger which is inherent in the *driving, care or control* of a motor vehicle by anyone who is intoxicated . . . .

...

. . . these and the other related provisions of the Code manifest the determination of Parliament to strike at the very root of the evil, to wit: the combination of alcohol and automobile, that normally breeds this element of danger which this preventive legislation is meant to anticipate” [Underlining added; italics in originals.]

[70] In *R. v. Whyte*, [1988] 2 S.C.R. 3, when discussing the constitutionality of the presumption of care or control now found at s. 258 *Cr. C.*, Dickson C.J. held that “Parliament wished to discourage intoxicated people from even placing themselves in a position where they could set a vehicle in motion” (p. 26 (emphasis added); see also *Ford v. The Queen*, [1982] 1 S.C.R. 231, at p. 249; *Toews*, at p. 126).

[71] I conclude that the provision’s preventive purpose supports giving the expression “care or control” in this context its ordinary meaning.

[72] Further, this view is reinforced by the well-settled proposition that the intent to set the vehicle in motion is not an element of the care or control offence. The contrary interpretation, which was adopted in dissent by Dickson J. in *Ford*, was expressly rejected by the majority reasons, written by Ritchie J.:

Nor, in my opinion, is it necessary for the Crown to prove an intent to set the vehicle in motion in order to procure a conviction on a charge under s. 236(1) [now s. 253(1)] . . . . Care or control may be exercised without such intent where an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent. [Emphasis added; pp. 248-49.]

(See also *Toews*, at p. 123; *R. v. Penno*, [1990] 2 S.C.R. 865, at pp. 875-77 and 895.)

Dickson J. adopted the majority position in *Ford* when writing for the unanimous Court in *Whyte*:

Is the intention to set the vehicle in motion an ingredient of the offence of having care or control of a motor vehicle while impaired, or is the absence of such intention simply a way for an accused to rebut the presumption of care or control? This Court settled the question in *Ford v. The Queen*, [1982] 1 S.C.R. 231, when Ritchie J. for the majority held that the intention to set the vehicle in motion is not an element of the offence. Proof of lack of intention is simply an evidentiary point that rebuts the presumption of care or control of the vehicle established by s. 237(1)(a). The Court recently reaffirmed *Ford* in *R. v. Toews*, [1985] 2 S.C.R. 119. [Emphasis added; p. 17.]

In *Toews*, McIntyre J. also held that the absence of intent to drive did not afford the accused any *defence* to the infraction of care or control (p. 124).

[73] Section 253 being preventive in nature, the element of risk will be relevant to the assessment of whether the person has care or control of a motor vehicle. Since the intention of driving the vehicle is not pertinent under the care or control offence, the risk must be assessed by looking at the accused's use of the vehicle. Indeed, risk should not be assessed on the premise that the accused's actions will accord with his or her intentions. In my view, if an accused acts to assume the present ability to operate the vehicle or its superintendence or management, there is an inherent risk of danger, unless objectively viewed, the accused's use of the vehicle involves no such risk. As Lamer C.J. wrote in *Penno*, at p. 877, "when a person uses a vehicle in a way that involves no risk of putting it in motion so that it could become dangerous, the courts should find that the *actus reus* was not present".

[74] Not all acts in relation to a vehicle will necessarily constitute acts of care or control. The degree of involvement of the accused with the vehicle will need to be more than trivial to constitute care or control. Courts should not assess mechanistically the numbers and nature of the acts performed by the accused. Rather, the determination of whether the accused was in care or control will depend upon a careful consideration of the particular facts of the case. As this Court held in *Toews*, at p. 126, "[e]ach case will depend on its own facts and the circumstances in which acts of care or control may be found will vary widely."

[75] With respect, the approach adopted by my colleague significantly undermines this preventive purpose as the acquittals on the facts of this case

demonstrate. The accused got in his vehicle while drunk, sat behind the wheel, started the engine and fell asleep. When awakened, still very drunk, by the police and with the engine of his vehicle still running, he asked to be left alone *so that he could drive home*. It is difficult to imagine a case falling more squarely within the preventive purpose of the care and control provision. The preventive function of the provision is not to encourage finely tuned legal debates about the characterization of a risk that could materialize: the provision seeks to prevent the risk from materializing by criminalizing a wider array of conduct in which that risk is likely to be, but may not in fact be present.

(2) Authority

[76] Some appellate courts have taken the view that a risk of danger constitutes an essential element of this offence: see, e.g., *R. v. Decker*, 2002 NFCA 9, 209 Nfld. & P.E.I.R. 44, at paras. 25-31, leave to appeal refused, [2002] 4 S.C.R. vii; *R. v. Burbella*, 2002 MBCA 105, 166 Man. R. (2d) 198, at para. 22; *R. v. Shuparski*, 2003 SKCA 22, [2003] 6 W.W.R. 428, at paras. 46-47, leave to appeal refused, [2003] 2 S.C.R. x; *R. v. Mallery*, 2008 NBCA 18, 327 N.B.R. (2d) 130, at paras. 52-53. As discussed in the previous section of my reasons, this interpretation is not in my view supported by the text or the purpose of the provision. Nor is it supported by the governing authorities from this Court.

[77] My colleague is of the view that the Court's decisions in *Toews* and *Penno* incorporate a risk of danger as an element of the offence. I respectfully

disagree. There was a clear statement to the contrary in *Saunders*, where Fauteux J. ruled, at p. 290, that nothing in this provision “indicate[d] an intent of Parliament to exact, in every case, as being one of the ingredients of the offences, the proof of the presence of some element of actual or potential danger or to accept, as a valid defense, the absence of any” (emphasis added). We ought not to assume that later decisions of the Court intended to depart from this statement absent some clear intention to do so. However, as I see it, no subsequent decision of the Court evidences any disagreement with *Saunders* on this point.

[78] *Saunders* has not been overtaken by subsequent decisions of this Court. Rather, as stated above, this Court has consistently interpreted the object of this provision as preventing the risk of danger that arises when alcohol and motor vehicles are combined. Thus, the provisions on drinking and driving seek to address a social problem which our society has been struggling with for years. As Lamer C.J. noted in *Penno*, at pp. 882-83:

The measure is part of the scheme set up by Parliament to protect the security and property of the public that are put to risk by persons whose ability to drive is impaired but who are, in any event, in care or control of a motor vehicle. . . . The social concern, common to the “drinking and driving” family of offences, is the severe risk to life, security or property of the public that is posed by persons whose ability to drive is impaired, but who are nevertheless in control of a motor vehicle. This concern was recognised by this Court to be of great importance in *Curr v. The Queen*, [1972] S.C.R. 889, *R. v. Hufsky*, [1988] 1 S.C.R. 621, *R. v. Thomsen*, [1988] 1 S.C.R. 640, and in *Whyte*, *supra*, at p. 27.

(See also *Whyte*, at pp. 20-21.)



[79] Viewed in this light, I do not agree that the Court's previous decisions have incorporated a risk of danger, realistic or otherwise, as an essential element of the offence.

[80] In *Ford*, the evidence was that the intoxicated accused had been in and out of his stationary vehicle a number of times and had started and turned it off on a number of occasions over the course of the evening. The trial judge found as fact that the accused had agreed that someone else would drive the car when it came time to move it and that he had no intention of driving the vehicle. Nonetheless, the trial judge was found to have erred in law because he found that the accused's absence of any intention to drive was a defence and the case was remitted for trial. Ritchie J. held there was care or control where "an accused performs some act or series of acts involving the use of the car, its fittings or equipment, such as occurred in this case, whereby the vehicle may unintentionally be set in motion creating the danger the section is designed to prevent" (p. 249). There was no expression of any disagreement with *Saunders*. Given the facts of the case and the absence of disagreement with *Saunders*, I would read the decision as simply referring to the purpose of the broad definition of care or control in the provision rather than as reading in a new essential element of the offence.

[81] In *Toews*, McIntyre J. held that acts of care or control were "acts which involve some use of the car or its fittings and equipment, or some course of conduct associated with the vehicle which would involve a risk of putting the vehicle in

motion so that it could become dangerous” (p. 126). The accused had been found asleep in a sleeping bag on the front seat of his truck. While the key was in the ignition, the evidence was that the last driver of the vehicle was a friend. The Court concluded that the accused was unconscious and therefore not in *de facto* care or control and, given that there was no evidence that it had been the accused who had put the key in the ignition, it had not been shown that the accused had performed *any* acts of care or control. The case did not turn on the absence of risk and there was no disapproval of the Court’s earlier decision in *Saunders*. In my opinion, the Court simply linked the element of care or control to its objective; the Court did not read into the provision a new essential element.

[82] In *Penno*, the issue was whether the accused could raise the defence of intoxication to the care or control offence. On the issue of what constitutes care or control, Lamer C.J., writing for himself, noted that *Toews* “stands for the proposition that when a person uses a vehicle in a way that involves no risk of putting it in motion so that it could become dangerous, the courts should find that the *actus reus* was not present” (p. 877 (emphasis added)). Importantly, however, Lamer C.J. added that the Court in *Toews* “did not base its decision on the absence of *mens rea* that would derive from the accused’s intent to use the vehicle for another purpose than to use it as a motor vehicle, that is to use it as a bedroom” (p. 877 (emphasis added)). Rather Mr. Toews’ acquittal was based on the fact that there was *no evidence that he had performed any acts of care or control* and therefore had not performed the *actus reus* (p. 877).

[83] I conclude that the authorities of this Court do not support incorporating risk as an essential element of the offence.

(3) Charter Considerations

[84] There is a final interpretative consideration which I find to be important. Some of the appellate courts which have favoured reading in risk as an essential element have done so to avoid what they perceive to be the over-inclusiveness that may result from giving the expression “care or control” its ordinary meaning in this provision. For example, in *Mallery*, at para. 47, the court relied on *Charter* considerations in adopting danger as an element of the offence. My colleague Fish J. cites Robertson J.A., at para. 4 of that case, to the effect that incorporating the concept of risk of danger serves to balance the rights of an accused with the objectives of the legislation. My colleague also notes that interpreting the provision to mean that the risk of danger is merely theoretically possible as opposed to realistic would be “to adopt too low a threshold since it would criminalize unnecessarily a broad range of benign and inconsequential conduct” (para. 35). Respectfully, however, this approach to interpretation is wrong in law.

[85] It is well established that absent ambiguity in the statutory text, the courts should not apply an interpretative presumption of *Charter* compliance: see, e.g., *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 62. Applying such a presumption pre-empts judicial review and the possibility of resort to the justification of limiting provisions under s. 1 of the *Charter*. The

appropriate context in which to assess whether Parliament has appropriately balanced the rights of the accused is in a *Charter* challenge to the legislation, not in the course of interpreting an unambiguous statutory text.

[86] In this case, Parliament chose to use the words “care or control” which are everyday words with a well-settled meaning. No one has suggested that they are in any way ambiguous. Moreover, as discussed earlier, the broad meaning of care or control is consistent with Parliament’s preventive purpose: the net of criminality has been cast widely in order to avoid the inherent risk of the interaction of alcohol and automobiles. My colleague, however, would interpret the expression “care or control” in order to narrow it, so that it means that the circumstances must give rise to a realistic risk of danger to persons or property. Having read in this new essential element to narrow the ordinary meaning of the words “care or control”, my colleague would then create a new evidentiary rule. As my colleague expresses it at para. 13, “[a]bsent evidence to the contrary, a present ability to drive while impaired, or with an excessive blood alcohol ratio, creates an inherent risk of danger.” Or, as expressed at para. 46 of my colleague’s reasons, “[a]nyone who is intoxicated and in a position to immediately set the vehicle in motion faces conviction on those facts alone”. It is unclear what sort of burden the accused bears under this approach. At para. 13, it appears that the accused simply bears a tactical burden of adducing evidence tending to prove that the inherent risk is not a realistic risk in the particular circumstance. However, one gets a different impression from para. 41. There, it is proposed that “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” (underlining added; italics deleted). I understand this to mean that once the Crown has proved an intention to drive, the accused must disprove it but even then will not necessarily escape conviction. Thus, the intention to drive, which under our consistent jurisprudence is not an essential element of the offence, becomes a fact that if established by the Crown, requires conviction unless the accused establishes the contrary — and even then, he or she may not be acquitted. In my respectful view, this is not a result that can be reached through statutory interpretation.

[87] I would emphasize that to give the expression “care or control” its normal meaning does not result in an offence of strict liability. There can be no care or control where, as for example in *Toews*, there are no acts of care or control by the accused. The issue of whether an accused, whose only acts in relation to the vehicle occurred while it was inoperable, can be said to be in care or control has not been resolved by this Court; *Saunders* simply held that an inoperable motor vehicle was nonetheless a motor vehicle within the definition then contained in the *Criminal Code*. In this case the vehicle was operable and I would leave the issue of care or control in the case of an inoperable vehicle to another day when the point is both pertinent and fully argued.

[88] I conclude that the trial judge erred in law by holding that the risk of danger was an essential element of the offence.

*B. Did the Trial Judge Err in Finding That There Was no Risk Here?*

[89] Even if, contrary to my view, risk is an essential element of the offence, I would uphold the Court of Appeal's decision to reverse the acquittals entered by the trial judge. The trial judge erred in law in holding that there was no risk of putting the vehicle in motion since the accused did not have the intention to do so. Although the trial judge correctly noted at para. 38 of his reasons that the absence of intention to put the vehicle in motion did not constitute a defence for the accused, he in effect made it so. He held that there was no risk *because* the accused did not intend to drive:

[TRANSLATION] At no time would the accused have left with his vehicle, as he had no intention whatsoever of driving it. In the Court's opinion, since the accused had taken every necessary precaution and had his wits about him when he got into his pickup and since, what is more, it was the taxi driver he had called who reported him, there was no risk that he would use the vehicle.

In these circumstances, the *actus reus* has not been made out, since there was no risk. [Emphasis added; paras. 39-40.]

[90] On this point, I adopt as my own the following comments of the Court of Appeal, at para. 7 of its reasons:

[TRANSLATION] Since proof of an intention to drive is not an essential element of the offence of having the care or control of a motor vehicle, the trial judge erred in finding that there was no risk of the

respondent's setting his vehicle in motion on the basis that he had no intention to drive.

[91] Having found this legal error, the Court of Appeal was correct to set aside the acquittals and enter convictions. When applying the correct legal test, care or control was amply proved here. When the police found the appellant, he was sleeping behind the driver's seat, the keys in the ignition, the engine running. The evidence was that he was the one who turned on the engine of the vehicle. By his presence in the driver's seat of a running vehicle that he had started, he had the ability to operate the vehicle, and had its superintendence or management. By placing himself behind the wheel of the truck and by starting the engine, he clearly committed acts of care or control in relation to the vehicle. On being awakened by the police behind the wheel of his vehicle with its engine running, he asked that he be left alone *so that he could drive home*. There is no dispute that his blood alcohol ratio was over the legal limit at the time. The evidence was that the first test undertaken by the police officers revealed a blood alcohol content of 250 mg per 100 mL of blood and the second test revealed a blood alcohol content of 242 mg per 100 mL of blood.

### III. Disposition

[92] I would dismiss the appeal, uphold the Court of Appeal's decision to enter convictions and remit the matter to the trial judge for sentencing.

*Appeal allowed, CROMWELL J. dissenting.*

*Solicitors for the appellant: Fradette, Gagnon, Têtu, Le Bel, Girard,  
Chicoutimi.*

*Solicitor for the respondent: Directeur des poursuites criminelles et  
pénales du Québec, Chicoutimi.*

*Solicitor for the intervener: Attorney General of Ontario, Toronto.*