

Citation: *R. v. Schafer*, 2024 YKTC 4

Date: 20240117  
Docket: 21-00872  
21-00872A  
Registry: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**  
Before His Honour Judge Chisholm

REX

v.

NATHANIEL ESAU ALEXANDER SCHAFER

Appearances:  
Peterson Ndlovu  
Christiana Lavidas

Counsel for the Crown  
Counsel for the Defence

**REASONS FOR JUDGMENT**

[1] CHISHOLM T.C.J. (Oral): Mr. Nathaniel Schafer is charged with *Criminal Code* offences of operating a motor vehicle when his ability to do so was impaired by alcohol (s. 320.14(1)(a)) and operating a motor vehicle with a blood alcohol level exceeding the legal limit (s. 320.14(1)(b)). The Crown proceeded summarily in this matter.

[2] The offences are alleged to have been committed on February 5, 2022, in Whitehorse, when police located Mr. Schafer in the driver's seat of a stationary sport

utility vehicle (the “SUV”)<sup>1</sup>, which was running. There were other people in the vehicle with Mr. Schafer when police investigated this matter. Both the Crown and defence led evidence that the vehicle in question was stuck in the snow.

[3] The issue to be determined is whether Mr. Schafer exercised care or control of the vehicle. If he did, then he was “operating” it according to the definition of “operate” in the *Criminal Code*.

### **Summary of Evidence**

[4] Four witnesses were called by the Crown. The defence called Mr. Schafer to testify, as well as another witness.

#### *Delton Whipple-Grantham*

[5] Mr. Whipple-Grantham testified that on February 5, 2022, he was on Grey Mountain Road in Whitehorse with a few other friends, including Adam Torgerson. Mr. Torgerson’s truck had become stuck while travelling up the road. Mr. Whipple-Grantham and others were attempting to pull Mr. Torgerson’s truck out of the snow just beyond the last pull-out. Once Mr. Torgerson’s truck was removed from the snow, it was towed to the pull-out/parking area.

[6] It was at this point that Mr. Whipple-Grantham noticed a silver SUV that was stuck in snow at the end of the parking lot, close to a snowbank, approximately 150 yards away. The SUV’s wheels were spinning. He ultimately approached the SUV and

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<sup>1</sup> The vehicle in question was variously labelled by witnesses as a SUV, a GMC Yukon, and a GMC Suburban, and described as being silver, white, or black in colour. However, the parties do not dispute that the various descriptions were of the same vehicle.

offered to try to pull it out of the snow by attaching a tow strap to his truck and the stuck SUV. While offering assistance, he dealt with Mr. Schafer who was outside the SUV. When he initially saw Mr. Schafer, he appeared from the driver's side corner coming towards Mr. Whipple-Grantham. Mr. Schafer advised him that "we're stuck".

[7] Mr. Whipple-Grantham connected a tow strap from the SUV to his truck and tried pulling the SUV out of the snow, but he could not get sufficient traction. He retrieved his strap before leaving the area. He thought that Mr. Schafer may then have entered the driver's seat, but he was not certain. Mr. Whipple-Grantham believed that the snow was half-way up the side of the SUV's tires. It appeared to him that the SUV was being turned around when it became lodged in the snow.

[8] After returning to where Mr. Torgerson was, Mr. Whipple-Grantham decided to call the police. He did so because Mr. Schafer was slurring his words which led him to believe he was intoxicated, and he thought he may have been driving. After calling the police, he left the area and returned home.

[9] Mr. Whipple-Grantham indicated that due to the passage of time, his memory of what occurred was somewhat "blurry". He also agreed in cross-examination that he had never seen Mr. Schafer occupying the driver's seat of the SUV.

*Adam Torgerson*

[10] Mr. Torgerson testified that in the late afternoon of February 5, 2022, he and a few friends drove up Grey Mountain Road to retrieve his truck which had become stuck on a trail on the mountain just after the last pull-out on the road.

[11] A number of individuals were there to assist him, including Mr. Whipple-Grantham who had driven up the mountain in his own truck. Around 8:30 p.m. or 9:00 p.m., after Mr. Torgerson's truck was extricated from the snow, he and others were talking, when Mr. Whipple-Grantham walked up and advised that he was going to tow another vehicle which was stuck. It was a white SUV approximately 100 feet away, at the other end of the pull-out area. Mr. Torgerson was able to see that it was stuck as it was unable to generate any momentum when trying to move back and forth. Mr. Whipple-Grantham advised Mr. Torgerson that he suspected that the individual he had talked with was the driver and that he had been drinking alcohol. Mr. Whipple-Grantham had a tow strap hooked up to the SUV, but not yet to his truck.

[12] Mr. Torgerson testified that he and friends had been pulling out his own truck from the snow while Mr. Whipple-Grantham was speaking to the male outside of the stuck SUV. Mr. Torgerson explained that as Mr. Whipple-Grantham believed the male he had been talking to had been drinking alcohol, he did not really want to pull him out. As a result, Mr. Torgerson went with him to help retrieve the strap. Mr. Whipple-Grantham spoke to the male in the presence of Mr. Torgerson. Mr. Torgerson noted that this individual was slurring his words.

[13] Mr. Torgerson testified that after retrieving the tow strap, Mr. Whipple-Grantham wondered whether he should call 911. Mr. Torgerson advised him that he should do so. The call was made by Mr. Whipple-Grantham in Mr. Torgerson's presence.

[14] Mr. Torgerson provided a statement to police approximately three months after the incident.

*Cst. N. Perro*

[15] Cst. Perro became involved in the investigation of this matter after receiving a complaint at 10:12 p.m. on February 5, 2022. She agreed to accompany Cst. Fraser, the lead investigator, whom she followed in a separate vehicle up Grey Mountain Road after completing another call for service.

[16] Cst. Perro testified that it was a snowy evening and that Grey Mountain Road had not been plowed. She and Cst. Fraser located the suspect vehicle at the second pull-out area. The vehicle, a “black GMC Suburban” type vehicle, was parked close to the snowbank on the perimeter of the pull-out area. There were no other vehicles. She walked up to the passenger side of the vehicle which was running with its lights on.

[17] Cst. Perro spoke to the person in the front passenger side seat who had rolled her window down. She testified that she believed that the woman provided her driver’s licence, and she understood her name to be Kerry MacIntosh-Smarch.

[18] The defendant, Mr. Schafer, was in the driver’s seat and there were three people in the back seat with whom she was not familiar. She knew Mr. Schafer because she had been previously stationed in the small community of Old Crow for two years and had met him there. Cst. Perro testified that Mr. Schafer indicated that he was helping to push the vehicle out and only entered the driver’s seat to get warm. He also stated that they were waiting for someone to come to pull them out.

[19] According to Cst. Perro, the SUV appeared to be stuck in the snow. The SUV was tight to a berm that appeared to have been created by a snowplow. The front and

back driver's side wheels appeared to be stuck in the snow. She did not believe that the vehicle could be moved.

[20] Cst. Perro testified that after being requested by Cst. Fraser, she administered an approved screening device ("ASD") to Mr. Schafer, which resulted in a "fail" result. She believed that Mr. Schafer provided a proper sample on his first attempt. Cst. Fraser then arrested the accused. The woman in the passenger seat, who was the registered owner, told Cst. Perro that she had not been drinking alcohol. She voluntarily provided a sample of her breath into the ASD which confirmed that she had no alcohol in her body. Cst. Perro testified that as a result, she decided to use discretion and leave the vehicle with the owner. She understood that the owner had requested someone to come to the scene to extract the vehicle from the snow.

*Cst. T. Fraser*

[21] Cst. Fraser testified that he received a call for service at approximately 10:12 p.m. on February 5, 2022, regarding a possible impaired driver on Grey Mountain Road. He and Cst. Perro responded to the complaint, attending in separate vehicles to the last plowed pull-out area on the road.

[22] Cst. Fraser indicated he observed packed snow with light powder snow on top on Grey Mountain Road. In the turnout or parking lot area, Cst. Fraser testified that he observed a "GMC Yukon". This vehicle was facing Cst. Fraser's police vehicle, and its headlights were illuminated. There was a high snowbank to the left of the driver's side of the suspect vehicle and the tires on this side of the vehicle were immediately

adjacent to the snowbank. The driver's side door could not be fully opened because it contacted the snowbank. The vehicle was idling.

[23] After receiving information from his dispatch, Cst. Fraser understood the SUV was registered to a Kerry MacIntosh. He approached the driver's side door and spoke to the defendant who was in the driver's seat. Cst. Fraser could not recall if Mr. Schafer was wearing a seatbelt. There were four passengers in the vehicle. Cst. Fraser testified that Mr. Schafer told him that he was not driving the vehicle but had been trying to get it unstuck. Cst. Fraser had observed alcoholic beverage cans in the snowbank adjacent to the vehicle. Mr. Schafer also told him that he had consumed alcohol. As a result of this, Cst. Fraser made an ASD demand. He requested that the defendant sit in the police vehicle for the ASD test, as it was quite cold outside.

[24] Cst. Perro administered the ASD test as Cst. Fraser was not an approved operator of the device at that time. Mr. Schafer provided two or three insufficient samples, before a proper sample was provided. The test result was a "fail", after which Cst. Fraser arrested Mr. Schafer for impaired operation of a motor vehicle. Mr. Schafer was brought to the attachment by Cst. Fraser. After speaking with counsel, Mr. Schafer provided samples of his breath into an approved instrument, the results of which were 200 mg/% in each case. He described Mr. Schafer as being cooperative and calm during the investigation.

[25] Cst. Fraser was of the view that the SUV could have been set in motion if it had become unstuck.

*Shayla Battaja-Green*

[26] Ms. Battaja-Green is 33 years old and is an education advocate with the Yukon First Nations Education Directorate. She testified that she met Mr. Schafer through mutual friends in the summer of 2021. On February 5, 2022, he called her and asked her if she could pick him up in the Porter Creek subdivision. After doing so, she also picked up two other individuals in downtown Whitehorse. They decided to go for a drive. She described herself as the designated driver, as all of her passengers were under the influence of alcohol. They drove in the downtown core, in the Riverdale subdivision, and up Grey Mountain Road.

[27] Ms. Battaja-Green testified that she was confronted with a significant quantity of snow while driving in the Grey Mountain Road area, which had resulted in other vehicles becoming stuck. She explained that she became stuck while making a U-turn. The more she tried to move her vehicle, the deeper the tires got stuck. She testified that Mr. Schafer exited the vehicle and asked two individuals if they could help get the vehicle unstuck. They agreed and used a tow strap attached to the back of Ms. Battaja-Green's vehicle and to the back of their vehicle to try to pull her vehicle out of the snow. Instead of being successful, her vehicle ended up in deeper snow.

[28] When this attempt to extricate her vehicle occurred, she was in the driver's seat and Mr. Schafer was outside the vehicle guiding her verbally. The two individuals who tried to help left, so she called for a tow truck, however the company was too busy to assist her. Subsequently, Mr. Schafer called J.J. VanBibber to help pull them out.



While these arrangements were being made, Ms. Battaja-Green testified she remained in the driver's seat.

[29] While waiting for Mr. VanBibber to arrive, Mr. Schafer thought they should all exit the vehicle to dig out the snow around the tires which would assist Mr. VanBibber in pulling the vehicle out. As Mr. Schafer was wearing large boots he went to the driver's side where the snow was deeper. Ms. Battaja-Green did not want to exit the vehicle from the driver's side door into the deep snow as she was wearing low cut footwear, so instead she exited the vehicle by crawling over the console and getting out on the passenger side.

[30] After digging, the four of them entered the vehicle to get warm because it was cold outside. Ms. Battaja-Green went into the front passenger seat close to where she had been digging, Mr. Schafer in the driver's side, and the other two entered the back seat. She testified that she had no intention of letting Mr. Schafer drive, as it was her vehicle, and she was the designated driver. She would not let an intoxicated person drive her vehicle. Her plan was to get back in the driver's seat when Mr. VanBibber arrived to tow the vehicle.

[31] Ms. Battaja-Green testified that during the five minutes the four of them were inside the vehicle warming up, the police showed up. She explained that she provided Cst. Perro with her driver's licence and advised her that Mr. Schafer had not been driving.

[32] Ms. Battaja-Green testified that Mr. Kerry MacIntosh-Smarch is the previous owner of the SUV, her former spouse, and father of her children. She noted that

Cst. Perro advised her that the vehicle insurance card was expired so she contacted Mr. MacIntosh-Smarch to have him text her a copy of the newer insurance card which contained both her name and his name. She also indicated that the vehicle registration was in both their names.

[33] When Mr. Schafer was arrested, Ms. Battaja-Green volunteered to provide a sample of her breath into the ASD to prove that she had not consumed any alcohol. When the police left with Mr. Schafer, it took another 15 minutes for Mr. VanBibber to arrive. He had a friend with him, and they used a tow strap to extract the vehicle from the snow. She explained that it was very difficult to get the vehicle unstuck. She indicated that at no time was Mr. Schafer driving her vehicle that evening. If he had decided to drive, she would not have allowed him to drive. She was fully aware that he was intoxicated, as were the other two passengers.

*Nathaniel Schafer*

[34] Mr. Schafer testified that on February 5, 2022, he was at a friend's house in the Porter Creek subdivision drinking alcohol when he decided to call Shayla Battaja-Green to inquire if she wanted to take him for a drive. He indicated that she was sober, and he was not. After she came to get him, they drove downtown to pick up two other people at a local eatery and pub.

[35] They drove around for awhile before driving up Grey Mountain Road. Ms. Battaja-Green was driving, Mr. Schafer was in the front passenger seat, and the other passengers were in the back seat. He testified that Ms. Battaja-Green became stuck while trying to turn around in the last pull-out area on the road. At some point, he

exited the vehicle to seek assistance from others. He asked a group of individuals for help and one of them agreed to help. That individual backed up his vehicle towards the rear end of Ms. Battaja-Green's vehicle, and then attached a tow rope to the back of each vehicle. As this individual attempted to pull Ms. Battaja-Green's vehicle, Mr. Schafer testified that he was positioned outside the vehicles so that he could communicate with Ms. Battaja-Green during the tow. Ultimately, the attempted extrication was unsuccessful. Mr. Schafer described Ms. Battaja-Green's vehicle as being more stuck than before the attempt to get it unstuck. The individual who had attempted the tow asked for his strap back, unhooked it and left the area.

[36] Mr. Schafer got back in the passenger seat of the SUV. As no tow trucks were available, he contacted J.J. Phelps-Vanbibber who said he could be there to help in 30 to 45 minutes. While waiting for assistance, Mr. Schafer testified that he thought it made sense for the four of them to exit the vehicle and dig around the tires. He believed that this would make it easier for Mr. Phelps-VanBibber to get Ms. Battaja-Green's vehicle unstuck when he arrived. Mr. Schafer started digging around the front wheel on the driver's side. As Ms. Battaja-Green was wearing short boots or shoes, she exited the front passenger door and dug around one of the passenger side wheels. He did not recall where the two other passengers dug.

[37] After approximately 15 minutes outside, Ms. Battaja-Green became cold and entered the vehicle through the front passenger door to get warm. The two other passengers returned to their seats in the back, and Mr. Schafer testified that he entered the driver's seat to warm up. He did not put the seatbelt on. He explained that his plan was to wait for Mr. Phelps-VanBibber to arrive at which time he would have helped

guide Ms. Battaja-Green from outside her vehicle while her vehicle was being pulled out of the snow. He had no intention to drive the vehicle. He told the police officers that he was not driving, and that Ms. Battaja-Green was the sober driver. As the police were escorting him down the mountain after his arrest, he recalled seeing Mr. Phelps-Vanbibber's truck going up the mountain road. During cross-examination, Mr. Schafer agreed that he had been drinking alcoholic beverages while in Ms. Battaja-Green's vehicle, and that alcohol can impair judgment.

## Law

[38] The definition of "operate" in section 320.11 of the *Code* includes: (a) in respect of a motor vehicle, to drive it or to have care or control of it.

[39] As set out in *R. v. Szymanski*, 2009 CanLII 45328, at para. 29, the Crown has three avenues to establish care or control of a motor vehicle:

- 1) evidence of driving a vehicle because the offence of impaired operation is included in a charge of care or control;
- 2) applying the statutory presumption of care or control [now found in s. 320.35] of the *Criminal Code*;
- 3) *de facto* or actual care or control involving a risk of danger as an essential element.

### *Statutory Presumption of Operation*

[40] The *Criminal Code* provides at s. 320.35 that in proceedings pursuant to ss. 320.14 and 320.15, if it is proved that an accused occupied the seat ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance unless they establish that they did not occupy that seat for the purpose of setting the conveyance in motion. This is known as a rebuttable presumption.

[41] In the case at bar, the Crown relies on this presumption as the police located Mr. Schafer in the driver's seat of the SUV. As such, Mr. Schafer bears the onus of rebutting this presumption. The evidentiary threshold to rebut the presumption is on a balance of probabilities. It follows, therefore, that Mr. Schafer must establish, on a balance of probabilities, that he was not occupying the driver's seat of the vehicle for the purpose of setting it in motion (*R. v. Weir*, 2005 BCSC 1740, at para. 35; *R. v. Ganda*, 2014 MBQB 173, at para. 50).

[42] If Mr. Schafer rebuts the presumption of operation, the Crown is nonetheless able to rely on "...what is commonly referred to as *de facto* or actual care or control" (*R. v. Smits*, 2012 ONCA 524, at para. 48).

[43] The leading case in this area is *R. v. Boudreault*, 2012 SCC 56, where, at para. 33, the Court reiterates the essential elements of "care or control":

- (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.

[44] The Supreme Court of Canada explained that although a realistic risk of danger is a low threshold, it must be more than theoretically possible. At the same time, the risk need not "...be *probable*, or even *serious* or *substantial*" (para. 34). Whether there is a realistic risk of danger is a finding of fact (para. 50).

[45] In **Szymanski**, at para. 93, the Court provided a helpful, non-exhaustive list of factors that a court may consider when analyzing risk of danger on the basis of circumstantial evidence. The Court in **Smits**, at para. 63, referred to this list favorably, and summarized it, as follows:

- (a) The level of impairment, which is relevant to the likelihood of exercising bad judgment and the time it would take for the accused to become fit to drive;
- (b) Whether the keys were in the ignition or readily available to be placed in the ignition;
- (c) Whether the vehicle was running;
- (d) The location of the vehicle;
- (e) Whether the accused had reached his or her destination or if the accused was still required to travel to his or her destination;
- (f) The accused's disposition and attitude;
- (g) Whether the accused drove the vehicle to the location where it was found;
- (h) Whether the accused started driving after drinking and pulled over to "sleep it off" or started using the vehicle for purposes other than driving;
- (i) Whether the accused had a plan to get home that did not involve driving while impaired or over the legal limit;

- (j) Whether the accused had a stated intention to resume driving;
- (k) Whether the accused was seated in the driver's seat regardless of the applicability of the presumption;
- (l) Whether the accused was wearing his or her seatbelt;
- (m) Whether the accused failed to take advantage of alternate means of leaving the scene;
- (n) Whether the accused had a cell phone with which to make other arrangements and failed to do so.

[46] The issue to be determined in a case of this nature is whether there is an evidentiary foundation that a risk of danger exists whereby the accused, while impaired, would put the vehicle in motion. This involves the Court assessing what “may occur in the not-too-distant future” (para. 61 of *Smits*).

[47] The Court of Appeal in *Smits*, at para. 62, referred to *Watt’s Manual of Criminal Evidence* (Toronto: Carswell, 2011), at p. 43, to illustrate the approach to be taken in assessing circumstantial evidence when determining whether a risk of danger arises:

Where evidence is circumstantial, it is critical to distinguish between inference and speculation. *Inference* is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be *no* inference without objective facts from which to infer the facts that a party seeks to establish. If there are *no* positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

[48] The language of this passage in the most recent edition of this text, *Watt’s Manual of Criminal Evidence* (Toronto: Carswell, 2021), at p. 51, is virtually identical.

[49] In *R. v. Barreira*, 2020 ONCA 218, the Court stated at para. 48:

...It should be noted, on this point, that circumstantial evidence does not have to totally exclude other conceivable inferences. However, those alternative inferences must be reasonable, not just possible: *Villaroman*, at para. 42. ...

## **Analysis**

### *Testimony of the Witnesses*

[50] I will make some general observations of the testimony of the witnesses. All the witnesses in this matter were faced with the challenge of testifying almost two years after the incident occurred. Additionally, it was apparent that at least some of the witnesses did not have the benefit of having recorded their observations in a timely fashion after the alleged incident. For example, Mr. Torgerson testified that he did not provide a statement to the police until three months after the occurrence. Similarly, Cst. Perro did not commence her supplementary report until approximately one month after the allegations arose.

[51] This is an important factor in assessing the reliability of their evidence, since the passage of time tends to cause memories to fade. This may help explain why, for example, Cst. Perro believed that Mr. Schafer provided a sample of his breath into the approved screening device on the first attempt, while Cst. Fraser testified that the defendant had made multiple attempts before providing a proper sample. In the case of Mr. Torgerson, the delay in being able to provide a statement may assist in understanding why he believed that Mr. Whipple-Grantham set up a tow rope, but never made an attempt to pull the SUV out of the snow, while Mr. Whipple-Grantham testified that he attempted to extricate the vehicle without success.



[52] I found that Mr. Whipple-Grantham provided credible and reliable evidence despite the passage of time. He frankly admitted that his memory of these events was far from perfect. He was quick to point out when he either did not know or was uncertain.

[53] I found that Ms. Battaja-Green was a credible and reliable witness who testified in a forthright fashion. In my view, she answered questions in a balanced fashion. I accept her evidence that Cst. Perro requested to look at her licence, yet somehow her name was recorded as Kerry MacIntosh-Smarch. It is likely that this occurred innocently when Cst. Perro looked at the registration and insurance documents which contained both Ms. Battaja-Green's and Mr. MacIntosh-Smarch's names. The video evidence from Cst. Perro's vehicle clearly indicates that it was Ms. Battaja-Green exiting the front passenger side of the vehicle, and not Kerry MacIntosh-Smarch as had been recorded by Cst. Perro.

[54] I am of the view that Mr. Schafer testified in a forthright fashion. He was not argumentative and conceded points made by the Crown. For example, he admitted that he could have taken a seat in the back of the vehicle to warm up, as opposed to entering the driver's seat. At the same time, his memory was somewhat negatively affected by his significant consumption of alcohol.

*Whether the presumption of operation has been rebutted?*

[55] I find that Mr. Schafer has met his onus on a balance of probabilities and rebutted the presumption that he occupied the driver's seat of the SUV for the purpose of setting the vehicle in motion. I accept the evidence that Ms. Battaja-Green had been

driving her vehicle that evening as the sober driver, and that Mr. Schafer had not driven the vehicle. There is also confirmatory evidence from Cst. Perro that Ms. Battaja-Green was sober which was the basis for the officer using her discretion not to have the vehicle towed and impounded. Additionally, I have the evidence provided to Cst. Perro by the defendant that he was in the driver's seat of the stuck vehicle to warm up.

[56] Second, I accept Mr. Schafer's evidence that he did not occupy the seat of the SUV with the intention of driving. In my view, his testimony is consistent with what he said to Cst. Perro, the first officer to speak with him, specifically that he was not driving, but entered the driver's seat to warm up. As to his subsequent comments to Cst. Fraser that he was not driving the vehicle, but "only trying to get it unstuck", those words are ambiguous and do not clearly suggest that he was doing so while seated in the driver's seat. For example, there is uncontested evidence that he was trying to get the vehicle "unstuck" by asking Mr. Whipple-Grantham to tow it out of the snow. Indeed, Ms. Battaja-Green testified that Mr. Schafer was helping Mr. Whipple-Grantham outside the vehicle to try to get it unstuck.

[57] Even though I have found that Mr. Schafer has rebutted the presumption, I must now consider whether he had *de facto* or actual care or control of the SUV.

*Whether Mr. Schafer had de facto or actual care or control of the vehicle?*

[58] The first two prongs of the test in ***Boudreault*** have been clearly met by the evidence, namely that Mr. Schafer's ability to operate the vehicle was impaired by alcohol, and he intentionally entered the driver's seat of the vehicle. The fundamental

issue to be determined is whether the Crown has proved that the circumstances in this case created a realistic risk of danger to persons or property.

[59] As explained in *Boudreault*, at para. 42, such a danger can arise in the following ways:

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.

[60] I now turn to the question of whether the overall circumstances in the case at bar created a realistic risk of danger to persons or property.

[61] Based on the approved instrument readings, Ms. Battaja-Green's evidence, and the evidence of Mr. Whipple-Grantham and Mr. Torgerson, I find that Mr. Schafer was quite intoxicated. As such, he may have exercised bad judgment by deciding to try to put the vehicle in motion. At the same time, he was polite and cooperative with police during their investigation.

[62] Second, the key was in the ignition of the vehicle and the vehicle was running, however, I accept the evidence of Ms. Battaja-Green and that of Mr. Schafer that he had not driven the vehicle that evening.

[63] Third, I take into account that the vehicle was in a remote area with little traffic. Nonetheless, there was a danger to Mr. Schafer and the other occupants of the vehicle if it was put in motion while he occupied the driver's seat.

[64] Fourth, the vehicle had not reached its ultimate destination. However, I find that there was a plan in place to have the vehicle towed out of the snow while Ms. Battaja-Green occupied the driver's seat, and for her to continue to drive her vehicle once it was unstuck.

[65] Fifth, Mr. Schafer did occupy the driver's seat, but I find that he was not wearing a seatbelt.

[66] Sixth, he used a cell phone to call Mr. VanBibber to attend to Grey Mountain Road to extract the vehicle from the snow, so that Ms. Battaja-Green could drive her passengers home.

[67] Additionally, I have considered the possibility of the vehicle becoming unstuck while Mr. Schafer was in the driver's seat. I have pondered the evidence of Cst. Fraser that he believed that the SUV could become unstuck due to its 4-wheel drive capacity. However, in my view, the evidence clearly establishes that there was virtually no likelihood of the vehicle becoming unstuck. I have come to this conclusion based on the unsuccessful initial efforts of Ms. Battaja-Green to extricate the vehicle from where it was stuck, the unsuccessful attempt of Mr. Whipple-Grantham to tow the vehicle out of the snow, and Ms. Battaja-Green's recollection of the significant difficulty that Mr. VanBibber had in getting the vehicle unstuck with his truck. Although the Crown has argued that the fact that Ms. Battaja-Green and her passengers dug the snow around the stuck wheels while awaiting Mr. VanBibber would suggest that the vehicle could possibly have been set in motion, Mr. VanBibber's subsequent difficulties in removing the vehicle from the snow would strongly suggest otherwise.

[68] I am mindful of the passage of **Boudreault**, at para. 9, that “care or control” in the context of the *Criminal Code* is the intentional course of conduct associated with a vehicle, by a person whose ability to drive is impaired or whose blood alcohol level exceeds the legal limit, in circumstances that create a *realistic risk*, as opposed to a *remote possibility*, of danger to persons or property.

[69] In all the circumstances, I conclude that there was no realistic risk that Mr. Schafer might put the SUV in motion either intentionally, accidentally, or negligently.

[70] In conclusion, I find Mr. Schafer not guilty of the two charges before the Court.

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CHISHOLM T.C.J.