

## **Short Snappers:**

### **C. Care and Control**

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*Impaired Driving – The Changing Landscape*

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## CARE OR CONTROL : The Twilight Zone of Impaired Driving Law

### A. INTRODUCTION

1. The law respecting “care or control” (or “care and control” as many refer to it) is best characterized as multiple shades of grey certain to cause practitioners and judges alike far more confusion than enlightenment the deeper one examines it. The Alberta Court of Appeal’s most recent important consideration of this topic in **R. v. Ogrodnick** [2007] A.J. No. 514 perhaps only adds to the quagmire.
2. This paper is styled as a case study of a recent (and successful) summary conviction appeal by the Crown from a trial acquittal (**R. v. Flight** 2012 ABQB 285). The writer was Defence counsel at trial and on appeal. Modified excerpts of the appeal memoranda and parts of the appeal court’s decision are woven together to demonstrate the intricacies of a typical care or control case. I wish to acknowledge the assistance of Jim Edgett of my office in the preparation of my appeal memorandum and the permission of Crown appellate counsel Matthew Dalidowicz for the use I have made of his memorandum here, and thank them both for their contributions.

### B. LEGISLATION

3. The relevant provisions of the Criminal Code are as follows:

#### Operation while impaired

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...

258(1) In any proceedings under section 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3)

(a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle. . . the accused 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.

## C. FACTS

4. The Accused was charged with impaired operation of a motor vehicle. At trial the Crown wished to rely on the evidence that related to the Accused's actual operation of the motor vehicle as observed by a waitress; in the alternative the Crown wished to rely upon evidence that related to the Accused later being observed in care or control of the motor vehicle by police. The trial judge rejected the evidence that the Accused was the operator of the motor vehicle when observed by the waitress and also found that the Accused was not in *de facto* care or control of the motor vehicle. The Accused was acquitted. The Crown argued on appeal that the trial judge's finding that the Accused had rebutted the presumption of care or control was in error. (Crown memo)
5. The trial judge found that the Accused had rebutted the presumption of care or control. But the Accused did not testify regarding the presumption. The trial judge based his finding partly on observations made by the police officer, partly on inferences made therefrom. Binding case law however suggests that this falls well short of the standard incumbent on an accused to successfully rebut the presumption. Although in some cases the presumption may be rebutted by way of Crown evidence alone, this was not such a case. The Accused did not marshal evidence capable of rebutting the care or control presumption on a balance of probabilities. The presumption ought to have remained intact such that no further analysis (such as the *de facto* care or control analysis) would have been required. (Crown memo)
6. The trial judge held that when the Accused was found by the arresting officer he was fully impaired to operate a motor vehicle by reason of alcohol consumption. The Court also accepted the evidence of the officer that the Accused stumbled out of the driver's side of the motor vehicle when he pulled in behind the Respondent's vehicle and activated his emergency lights. Therefore, impairment and occupation of the driver's seat of a vehicle were proven beyond a reasonable doubt. The narrow issue on appeal was whether the trial judge erred in holding that the Respondent rebutted the presumption by showing on the balance of probabilities that he did not intend to set the vehicle in motion. (Defence memo)
7. When the officer arrived at the address of the registered owner he received from dispatch he found a vehicle which was properly parked but not running. (Defence memo)
8. The officer testified that there was a male person (later identified as the Accused) who had his eyes closed and head down in the driver's seat of the vehicle when he arrived; the officer activated his emergency lights, the Accused opened the driver's side door and stumbled out of the vehicle. The officer had no idea what the Accused had been doing in the truck or how long he