

THE PROVINCIAL COURT OF MANITOBA

BETWEEN:) Mr. M. Himmelman,
) for the Crown
 HER MAJESTY THE QUEEN)
) Mr. J. Rogala,
 - and -) for the Accused
)
 BRANDI LYNNE MARIE BOURGEOIS,)
) Judgment delivered
 Accused.) June 15, 2012

1 HARVIE, P.J. (Orally)

2 You are charged with having care and control,
 3 there are two counts, having care and control of a motor
 4 vehicle both while you're impaired and with an elevated
 5 blood alcohol level. The Crown is not asking for a
 6 conviction on the impaired charge. It's asking the court
 7 to consider the charge of care and control over .08.

8 And I'm going to shorten my comments a little bit
 9 because I think that the lawyers have done a really
 10 thorough job of reviewing the law and I think their review
 11 of the law has been very accurate. And I think Mr.
 12 Himmelman's been very fair in terms of review of your
 13 evidence. When an accused testifies, there's certain tests
 14 that are to be applied in terms of considering your
 15 evidence and frankly I accept your evidence. I think you
 16 testified in a very forthright way. So really, the
 17 question is, even with your evidence, has a defence been
 18 raised or has the Crown proved the case beyond a reasonable
 19 doubt?

20 So I have to look at all of this and, and, you

1 know, I'm sure your lawyer has explained to you there are
2 certain presumptions in the Criminal Code in terms of care
3 and control that Crown has acknowledged have been rebutted.
4 I have to really look at the actual circumstances, given
5 the nature of the evidence that you provided.

6 And you've explained the situation as to how the
7 vehicle got where it was that evening and I want to pause
8 for a moment and say, we're not here to judge you on what
9 went on earlier that evening. We're here to look at your
10 actions in and around the time that you were found behind
11 the wheel of the vehicle, impaired. And you were clearly
12 impaired. You were clearly over .08.

13 THE ACCUSED: Yes.

14 THE COURT: So I have to look at that evidence
15 and, first of all, I look at the whole issue of care and
16 control. I recognize that you were sitting behind the
17 wheel of the vehicle where the driver normally sits and the
18 lights were on and the radio was on and things of that
19 nature, but you said that you didn't enter the vehicle with
20 the intention of putting it into motion. And I accept
21 that. That alone isn't enough but I pause for a moment and
22 say that I accept that.

23 I think I have to look at the totality of the
24 circumstances. You say that you were -- not only did you
25 not attempt to move the vehicle but the vehicle couldn't
26 have been moved. And I think your evidence was that after
27 the fellows were trying to get it out and you were rocking
28 the vehicle back and forth, that it really made it worse
29 instead of better and it was snugged in, that you were
30 trying to push it out and help and that just really didn't
31 work. And, and your evidence was that it was stuck and I
32 think your evidence is supported by the observations of
33 your clothing. That supports a suggestion that you were
34 trying to push it out and you weren't trying to move it and

1 drive it out. It's also supported by the evidence of
2 Constable Safiniuk who said that it was, the vehicle was
3 stuck essentially. And I think it was consistent with the
4 circumstances of the evening as a whole, the rain, the
5 location that the vehicle was found in. I'm mindful of the
6 fact that, first of all, that you were in the vehicle, you
7 weren't there with the intention to move it, that you were
8 waiting for the fellows to come back. You didn't attempt
9 to move it.

10 I think I can distinguish this case from the
11 McMillan (phonetic) decision. The judge suggested that the
12 whole risk was made out in McMillan because the car, once
13 it was extricated, could have been moved. The driver
14 could've changed his mind and set the car in motion.
15 That's not consistent with the evidence here of the accused
16 that I accept. She indicated that even if the guys had
17 come out and come back and they had got the vehicle out,
18 that she had no intention of driving that night.

19 I think the most significant element here is with
20 respect to the whole status of the vehicle and whether it
21 presented a danger, because really that is a requisite
22 element of, of care and control. And it's really the
23 element that the, the law is in place to try and protect.
24 First of all, we don't want --

25 THE ACCUSED: Sure.

26 THE COURT: -- people sitting in the driver's
27 seat of the car because you could accidentally put it into
28 -- when you're drunk, because you can accidentally put it
29 into motion. But if the vehicle is stuck and there's no
30 element of danger, well, that puts things in a different
31 light.

32 So having said all of that, I accept your
33 evidence. I think I have a reasonable doubt with respect
34 to the requisite element of danger. I think the vehicle

1 was stuck. I don't think it has to be permanently stuck.
2 Obviously, it was eventually removed. But having made the
3 findings that I have, I am entering an acquittal with
4 respect to this charge. All right? Now --

5 MR. HIMMELMAN: I take it that's both counts,
6 Your Honour?

7 THE COURT: Yes.

8 MR. HIMMELMAN: Thank you.

9
