
CANADA / JUDGMENT

Schuerhaus v. Wilson

2016 BCSC 120

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Supreme Court of British Columbia

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2016 BCSC 120 Schuerhaus v. Wilson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schuerhaus v. Wilson,

2016 BCSC 120

Date: 20160127

Docket: 168204

Registry: New Westminster

Between:

Tristan Schuerhaus

Petitioner

And

Constable Keith Wilson

Respondent

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for Petitioner:

P.W. Cote

Counsel for Respondent:

R.C. Mullett

Place and Date of Hearing:

New Westminster, B.C.

January 8, 2016

Place and Date of Judgment:

New Westminster, B.C.

January 27, 2016

I. Introduction

- [1] This is an application under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 [JRPA] for the judicial review of a police officer's decision to impose on the petitioner a 24-hour driving prohibition.
- [2] I will digress for a moment to explain some procedural aspects of this case.
- [3] In this case the 24-hour driving prohibition was imposed on the basis of grounds to believe that the petitioner's ability to drive was affected by a drug, specifically marihuana. The prohibition scheme for drug impairment is different than that for alcohol insofar as there is no administrative review procedure as there is with alcohol-based prohibitions. Accordingly, the only available review remedy is a direct application to court under the JRPA.
- [4] One consequence of this differing procedure is that, unlike in alcohol cases, there is no written decision of an adjudicator to review and thus no document which expressly sets out the reasoning behind the decision being reviewed. Instead, there is merely the record, which in this case consists of the notice of prohibition, the police officer's occurrence reports, a standardized field sobriety test (SFST) check sheet and some limited related documents.
- [5] Counsel for the petitioner conceded that the petitioner was not entitled to amplify the record on review.
- [6] By way of a further procedural note, although the respondent police officer participated to the extent of filing an affidavit attaching and certifying the record of materials in this case, he did not otherwise participate in the proceedings and he did not file a response to the petition. Instead, the Attorney General of British Columbia filed a response and made submissions through counsel pursuant to the statutory authority granted by s. 16(2) of the JRPA.

II. Facts

- [7] On January 2, 2015, at about 11 p.m., R.C.M.P. Cst. Wilson attended at the Fort Langley Elementary School in Fort Langley, B.C. in response to a fireworks complaint. The complaint mentioned a vehicle at the school which was thought to be connected to the fireworks.

- [8] At the scene, Cst. Wilson located a vehicle parked in the school parking lot. The vehicle was registered in the name of Tristan Schuerhaus, the petitioner. Cst. Wilson noticed the windows of the vehicle were fogged and it appeared that there were people inside. Because there was a vehicle associated with the initial report to police, Cst. Wilson assumed that this vehicle was the one in question.
- [9] There were two males in the vehicle, one in the driver's seat and the other in the passenger seat. The person in the driver's seat was Mr. Schuerhaus. The engine of the vehicle was not running. Mr. Schuerhaus opened the window on his door and Cst. Wilson noticed a cloud of smoke exit. The cloud of smoke smelled heavily of burnt marihuana. Cst. Wilson also spotted some unburnt marihuana in the centre console of the vehicle.
- [10] As recorded in Cst. Wilson's occurrence report, Mr. Schuerhaus stated that he was "just hanging out with his friend" and that both of them lived in the area. Both persons provided driver's licences for identification purposes. Both were "new drivers".
- [11] At 23:20 hours Cst. Wilson arrested both Mr. Schuerhaus and his companion for possession of a controlled substance. On a search of Mr. Schuerhaus's person the keys to the subject vehicle were found in his left front pocket.
- [12] The next events were as noted in Cst. Wilson's report:

Constable WILSON requested that a SFST trained member attend the scene and conduct a test on SCHUERHAUS as he was in care and control of his vehicle.

At 23:30 the SFST demand was read to SCHUERHAUS and he was asked if he understood and agreed to do the test.

A trained SFST member attended the scene from the traffic section and conducted the test. The test later determined that SCHUERHAUS was in fact impaired by a drug.

At 23:40 hours, a 24 hour prohibition from driving was issued to SCHUERHAUS. The vehicle was towed from the scene by Clover towing and a taxi was called to the scene for SCHUERHAUS.

- [13] The only other items of information of potential relevance to the issues in this case available to Cst. Wilson were Mr. Schuerhaus's address, which was an address in Langley, and information derived from a CPIC search which revealed two prior 24-hour prohibitions for drugs, one imposed on December 3, 2012 and the other on December 31, 2012.

III. Positions of the Parties

A. The Petitioner

- [14] The petitioner does not dispute that there were reasonable grounds for Cst. Wilson to believe he was under the influence of drugs, specifically marihuana, at the time, but argues that there was insufficient evidence that he was a "driver". In particular, the petitioner maintains that there was insufficient evidence on which the police officer could have

concluded the petitioner had care or control of his car as that concept has been defined by in *R .v. Boudreault*, 2012 SCC 56. He submits that the officer ought to have done more to ascertain Mr. Schuerhaus's intentions concerning the vehicle.

- [15] The petitioner surmises that the police officer may have relied on the Criminal Code presumption of "care or control", a presumption created by s. 258(1)(a) of the Criminal Code, but emphasizes that this presumption does not apply here because this is not a Criminal Code matter.
- [16] While conceding that the test on review is one of "reasonableness", the petitioner submits that the information available to the police officer, consisting as it did of little more than the petitioner sitting in the driver's seat of a stationary car, did not permit the police officer to draw the conclusion that the petitioner had care or control of his vehicle. The petitioner submits that the police officer's reasoning on this point was manifestly flawed. For these reasons the petitioner submits that the decision in question was unreasonable and ought to be set aside.

B. Attorney General

- [17] Through her counsel, the Attorney General submits that the petitioner's argument can only succeed if the court concludes the evidence could not support the "care or control" conclusion reached by the police officer.
- [18] The Attorney General noted that, contrary to one of the submissions of the petitioner, the police officer's investigation was not hasty or superficial in that the officer's occurrence report shows he arrived on scene at 22:54 hours and the prohibition was not imposed until 23:40 hours, some 46 minutes later. The Attorney General also notes the officer's occurrence report was remarkably detailed for such a minor incident.
- [19] While conceding that the Criminal Code presumption does not apply in this case, the fact that the petitioner was in the driver's seat with the keys in his pocket are still important facts. Further facts that lend support for the officer's conclusion are: (1) a taxi was called for the petitioner (but not for his friend) and so clearly the petitioner was going somewhere, which supports a conclusion that he intended to drive; and (2) the petitioner had two prior 24-hour suspensions due to drugs which indicates that impairment by drugs has not deterred him from driving in the past.
- [20] The Attorney General noted the proceedings in question are administrative proceedings, not criminal proceedings, and criminal law concepts, such as the prohibition against propensity reasoning, should not be imported. These proceedings are administrative in nature and the 24-hour driving prohibition is merely a means to remove a potentially dangerous driver for what is an insignificant period of time.

IV. Discussion

A. Standard of Review

- [21] Although the parties agree that the standard of review in this matter is that of "reasonableness", counsel nonetheless spent a fair bit of time in their submissions articulating what that means.
- [22] The starting point for any discussion on standard of review is *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. Mr. Justice Binnie said the following about *Dunsmuir* and of the reasonableness standard in particular:
- [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[Emphasis added.]

- [23] In *Nagra v. British Columbia (Superintendent of Motor Vehicles)*, 2010 BCCA 154, the court said the following about the context of driving prohibition reviews:
- [26] As this Court has indicated, driving-prohibition reviews involve balancing individual and societal interests, with the focus being on public safety. These reviews are intended to be expeditious. Apt in this regard is the following from the judgment of Madam Justice Southin in *Bahia v. British Columbia (Superintendent of Motor Vehicles)*, 2006 BCCA 511, 232 B.C.A.C. 219:
- [24] ... I have in the forefront of my mind the legislative purpose of this fasciculus of sections: it is to establish a rapid response to someone driving while impaired while giving a summary avenue of redress to a driver in a case where the peace officer was wrong in his judgment. It is not in keeping with the legislative purpose to import into this administrative process the panoply of procedural protection an accused enjoys in a criminal prosecution.

[Further citations omitted.]

- [24] The court in *Nagra* also confirmed that a decision maker is not bound by the normal rules of evidence and that the review hearing is in the nature of a civil proceeding in which issues are decided on a balance of probabilities: *Nagra* at para. 18.

- [25] The court in *Nagra* came to the following conclusion about the extent of deference to be accorded to the decision maker:
- [27] The fact that a driver provides evidence capable of refuting the BAC test results does not mean that the adjudicator is left in the position of being unable to decide. Whether there is conflicting evidence or not, the adjudicator's decision will be based on the review record. It is for the adjudicator to decide what evidence in that record to accept, and what to reject. In this respect, I agree with the following from the judgment of Madam Justice Gray in *Shadow v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCSC 790, 29 M.V.R. (4th) 145:
- [13] Making findings of fact, including choosing what or who to believe and not believe, and drawing inferences from the evidence, is the responsibility of the adjudicator. If there is some evidence upon which a finding could reasonably be made, this court should not interfere.
- [Emphasis in original.]
- [26] Our Court of Appeal revisited the issue in *Scott v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCCA 554. In *Scott* the court said:
- [28] The appellants say the decision of this Court in *Nagra v. British Columbia (Superintendent of Motor Vehicles)*, 2010 BCCA 154, stands for the proposition that the court will never interfere as long as there was some evidence upon which the adjudicator's finding could have reasonably been made. With respect, I do not agree that *Nagra* stands for such a broad proposition.
- [31] In general terms, it is correct to state that an adjudicator's decision will be regarded as reasonable if there is some evidence upon which the adjudicator's finding could reasonably be made. However, that will not be the case when the adjudicator's reasoning process is manifestly flawed. This point was recently made in *Whyte v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCCA 454, where Mr. Justice Harris said the following:
- [11] As it appears to me, the judge quite properly recognized that the adjudicator is entitled to make findings of fact, provided they are reasonably supportable by some evidence in the record. Those findings include making credibility findings, even on the basis of a written record. A court will not interfere unless those findings are unreasonable. But a court is entitled to interfere if the route to a decision is demonstrably unreasonable, even where the ultimate findings might be capable of being supported by the record. ...

[Emphasis in original.]

- [27] Scott proved to be the point of departure for the arguments in the case at bar. The Attorney General submitted that there was evidence on which the police officer in this case could reasonably support his conclusion that Mr. Schuerhaus was the "driver" and thus the petition ought to be dismissed, whereas the petitioner submitted that the police officer's decision was reached only by means of a conclusory leap that amounted to a manifest flaw in his reasoning process.
- [28] The Court of Appeal recently considered this area of the law, once again, in *Kenyon v. British Columbia (Superintendent of Motor Vehicles)*, 2015 BCCA 485. As noted at para. 51 of *Kenyon*, there the Superintendent asked the Court of Appeal to reconcile its decision in *Nagra* with its decisions in *Scott* and a further case, *Whyte v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCCA 454.
- [29] Before discussing *Kenyon* further, it is useful to review the decision in *Whyte*. *Whyte* involved the same issue that is raised in the present case, that is, whether the person subject to the prohibition was a "driver" at the relevant time.
- [30] In *Whyte* there was conflicting evidence on the subject. There, the officer described Mr. Whyte as being the driver and sole occupant of a running vehicle. Mr. Whyte said the vehicle was not running and the car keys were in the centre console. He said his plan was to have a friend drive him in his car from its present location to another location. The friend confirmed that same plan, that is, that she was to drive and Mr. Whyte was not. The adjudicator in *Whyte* concluded that he did not need to resolve the conflict in the evidence. He concluded that it was sufficient that Mr. Whyte was in the driver's seat with the keys close at hand and that this was enough for him to reject Mr. Whyte's assertion that he did not intend to drive.
- [31] On judicial review, the chambers judge allowed the application and remitted the matter for a new hearing. He held that the adjudicator was obliged to consider the competing evidence and to make findings of fact. On appeal, the Court of Appeal agreed, similarly concluding that while the evidence relied upon by the adjudicator was capable of supporting a finding that Mr. Whyte intended to drive, the adjudicator failed to address the conflicts in the evidence and to make the necessary findings of fact.
- [32] I return to *Kenyon*. In *Kenyon* the court said the following:
- [53] I agree with these comments. Judicial review judges should read the reasons of the adjudicator as a whole in order to assess whether the reasoning is so lacking in logic, or is otherwise flawed, that it renders the decision unreasonable despite the fact there is some evidence to support a conclusion that the decision falls within a range of acceptable outcomes.

[54] The phrase "manifestly flawed" was used in Scott, and it appears that judges of the Supreme Court have seized upon the phrase. The use of the term was not intended to replace the requirement that judicial review judges should review the reasons as a whole in order to assess whether the pathway to the conclusion is reasonable.

[55] Judicial review judges should not parse or dissect the reasoning. In order to set aside the decision, any flaw in reasoning should be obvious and should be fundamental to the conclusion reached by the adjudicator. In reviews of roadside driving prohibitions, where credibility is frequently the central issue, judges should not substitute their own credibility findings in place of those of the adjudicator. The fact that the adjudicator's reasoning is flawed in one respect does not necessarily lead to the conclusion that the reasoning as a whole is unreasonable. It is necessary to consider the reasons as a whole and determine whether the flaw is central to the conclusion.

[Emphasis added.]

[33] The court in Kenyon reconciled Nagra, Whyte and Scott as follows:

[56] In my opinion, Nagra can easily be reconciled with Whyte and Scott. In Nagra, the reasoning process of the adjudicator was not questioned, and the issue before the Court was whether the decision of the adjudicator fell within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (per Dunsmuir, para. 47). The Court concluded that the adjudicator's decision did fall within a range of acceptable outcomes because there was some evidence upon which the conclusion could reasonably have been reached.

[57] In each of Whyte and Scott, there was evidence to support the adjudicator's conclusion, but the issue was whether the adjudicator's reasoning process was reasonable. In Whyte, the Court concluded that the reasoning process was not reasonable because the adjudicator did not resolve conflicts in the evidence that went to the heart of the issue of whether Mr. Whyte was a driver. In Scott, the Court concluded that the adjudicator reached her conclusion on whether the driver had refused to give a breath sample in an unreasonable manner because she used a flawed approach to the assessment of credibility.

B. Care or Control

[34] Section 215(1) of the Motor Vehicle Act reads, in part:

"driver" includes a person having the care or control of a motor vehicle on a highway or industrial road whether or not the motor vehicle is in motion.

[35] As already noted, counsel for the petitioner cited Boudreault for the purpose of defining "care or control". In that case, the accused was charged with the Criminal Code offence of having care or control of a motor vehicle while his ability to operate it was impaired by alcohol. The Supreme Court of Canada framed the issue before it, and the answer, this way:

- [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.
- [36] The court went on to say the following, commencing with a definition of "care or control":
- [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.
- [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"

[37] Put differently, s. 258(1)(a) [the presumption of care or control] 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.

[Emphasis added.]

[37] Boudreault involved a Criminal Code offence, not an administrative prohibition as in the present case, but counsel for the petitioner submitted it established a definition that was also applicable to the Motor Vehicle Act. The Attorney General did not disagree. I note that the Boudreault definition has been applied to Motor Vehicle Act cases on prior occasions (see *Aitken v. British Columbia (Superintendent of Motor Vehicles)*, 2013 BCSC 363 and *Linares v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 1014), and indeed I have applied it as well: see *Mayes v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCSC 2256.

[38] Having reflected on the matter I will say I entertain some uncertainty that the Boudreault definition is as easily imported into the administrative context as counsel says because, as indicated in the underlined excerpt above, the Supreme Court of Canada seems to have linked the requirement for "realistic risk of danger" to the Criminal Code presumption of "care or control" established by s. 258(1)(a), a presumption that does not exist in the Motor Vehicle Act. This issue was neither raised nor addressed in *Aitken*, *Linares* or *Mayes*. However, since no submissions on this point were made in this case I will apply the Boudreault definition as a reasonable one for present purposes and leave that issue to be addressed, if need be, in a future case.

C. Analysis

[39] As noted earlier, the absence of a written decision setting out the reasoning of the police officer means that the Court can only infer the reasoning from the available facts. In saying this I do not mean to imply that there should be a written decision issued by police officers in these circumstances. Such a requirement would be wholly incompatible with the immediacy the decision requires as well as the relatively minor prohibition at issue.

[40] The police officer had before him the following facts:

- a) Mr. Schuerhaus was in the driver's seat of a vehicle that was parked in a Fort Langley elementary school parking lot late at night;
- b) the vehicle was registered in his name;
- c) the engine was not running and the keys to the vehicle were in his pocket; and
- d) Mr. Schuerhaus told the officer he was "just hanging out with his friend" and that both of them lived in the area.

- [41] On the latter point, the officer also knew Mr. Schuerhaus's address (which was an address in Langley) having seen Mr. Schuerhaus's driver's licence. As the officer was a member of the local R.C.M.P. detachment it seems very likely the officer would have had an idea how far it was from the school to Mr. Schuerhaus's residence, although that information was not before me on this review. Some indication of the distance involved is perhaps revealed by the fact Mr. Schuerhaus departed the scene via a taxi.
- [42] The Attorney General noted that CPIC search results in the police file, which among other things revealed two prior 24-hour prohibitions imposed on Mr. Schuerhaus, was additional evidence on which the officer might have relied in coming to the conclusion Mr. Schuerhaus intended to drive or at least there was a risk that he would do so. I have difficulty with this submission because the prior prohibitions are not probative of any point at issue in this case. While it is usually in the criminal context that objection is taken to propensity reasoning, it is not a concept limited to criminal law but is instead a concept directed at flawed reasoning. In *Ma v. Nutriview Systems Inc.*, 2016 BCCA 4, which was a civil case, the Court of Appeal said:
- [11] "Propensity" evidence, or reasoning, was discussed by Charron J.A. (as she then was) in *R. v. L.B.* (1997) 35 O.R. (3d) 35 (C.A.), which was cited with approval in *Handy [R. v. Handy, 2002 SCC 56]*. She observed that [at 57-8]:

propensity reasoning in and of itself is not prohibited. Indeed, it is usually inevitable, given the nature of the evidence and the reason for its admission. Therefore, the trier of fact is entitled to infer from the evidence of prior misconduct that he is more likely to be in possession of the narcotics in question and therefore guilty of the offence with which he is charged.

It is this propensity reasoning that is based solely on the general bad character of the accused, as revealed through this evidence of discreditable conduct, which is prohibited. Consider, for example, if Lepage had been charged with trafficking in a narcotic as a result of a sale of a piece of cocaine to a police agent, and the sole issue at trial was identification. Evidence that Lepage was a major dealer in drugs, without more would have probative value, but only to show that he is the type of person who could well have been selling the narcotics as alleged. In this example, there is nothing about the evidence of prior discreditable conduct that connects it to the sole issue in the case, identification. The risk of prejudice, in the sense described above, would be substantial. There would be a real risk that the trier of fact who learns that the accused is a major drug dealer "may view him as a bad man, one who deserves punishment regardless of his guilt of the instant offence and may be less critical of the evidence presently marshaled against him." No matter what probative value can be attached to the fact that he is a major dealer in drugs, the evidence would not be admissible since it is not connected to an issue in the case other than the accused's general disposition to commit the type of offence with which he is charged. If, on the other hand, the sale of the cocaine to the police agent had been carried out in unusual circumstances which bore some distinctive features and the evidence of prior drug dealings bore many of the same features, a connection may well be made to the issue of identification, and the evidence could be admitted if its probative value exceeded its prejudicial effect

Therefore, in assessing this aspect of the probative value of the evidence, it is important to circumscribe the meaning of "disposition" or "propensity" much in the same way as the notion of prejudice described above. The forbidden line of reasoning is that which leads to the conclusion that the accused committed the offence with which he is charged based, not on the strength of the evidence which has a connection to the issues in the case, but rather, on the strength of the evidence that he is a "bad person" who would have a tendency to commit this offence.

[Emphasis added.]

- [43] In this case the reasoning urged upon me by the Attorney General is that "he did it before so he is more likely to have done it again". This is impermissible reasoning because his prior prohibitions do not tell us anything about whether he intended to drive on this occasion.
- [44] I note, however, that there is no indication that the officer relied on the prior prohibitions in coming to the conclusion Mr. Schuerhaus had care or control of his vehicle. Indeed, based on the excerpt from *Ma v. Nutriview Systems Inc.* quoted above it might have been problematic for the Attorney General had the officer expressly relied on the prior prohibitions in coming to his conclusion.
- [45] This brings me to a related point. In submissions the petitioner surmised, then later asserted it was clear, that the officer had incorrectly relied on the Criminal Code presumption of "care or control". There is, however, nothing to suggest that he did and so I am unable to draw that inference.
- [46] I turn to the Boudreault elements. Only the first and third elements, listed at para. 33 of Boudreault, are at issue here. The reasoning or conclusion implicit in the officer's issuance of the notice of prohibition is that Mr. Schuerhaus likely intended to drive.
- [47] I conclude that there was evidence upon which the officer could reasonably come to this conclusion which, in general, is all that is required: see *Nagra* at para. 27 and *Scott* at para. 31. Although the petitioner submits that upholding the decision would be tantamount to finding "care or control" where a person merely occupied a driver's seat, there is more evidence than that here. The car was parked in an elementary school parking lot late at night. The car was Mr. Schuerhaus's. It seems obvious he had driven there. The keys were on his person. He did not live so close to the school that, later, he walked home, but instead he took a taxi. Even the petitioner's counsel agreed in the course of submissions that the location of the vehicle in the school parking lot suggests Mr. Schuerhaus might have been going to drive. Unlike the situation in *Whyte*, there was nothing in the record indicating a statement was made to the officer, or other evidence, that contradicted that.
- [48] As noted earlier, the petitioner submitted that the evidence on "care or control" was so thin that it was only through manifestly flawed reasoning that the police officer could come to the conclusion that Mr. Schuerhaus met the Motor Vehicle Act definition of "driver". It may be that, at some point, the evidence supporting a conclusion will be so wanting that the reasoning is manifestly flawed, but that point was not reached here. I would add that an

argument that a decision is manifestly flawed due to insufficiency of evidence is really just an insufficiency of evidence argument. They are essentially the same because, based on Nagra and Scott, the evidence has to be such that the decision maker could reasonably come to the decision in question.

[49] To borrow the words used in Dunsmuir, I conclude that the decision of the police officer in this case was grounded on sufficient facts to satisfy me that it falls within a range of possible, acceptable outcomes which are defensible in light of those facts and the applicable law.

[50] The petition is dismissed. No costs were sought and so I make no order for costs.

"Blok J."

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