Grounds for granting leave to appeal are governed by rule 62.02(5):

(5) Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question

and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

It is my opinion that the circumstances fall readily into para. (b). There appears to me to be good reason to doubt the correctness of the order of Kane J. as I have already indicated. There can be no doubt that the proposed appeal involves matters of considerable importance to the development of consistency in the application of the Model Law throughout the nations that have adopted it. As I understand it, the purpose and spirit of the I.C.A.A. in adopting the Model Law, was to make Ontario commercial arbitration law consistent with the law of other international trading countries so as to enhance and encourage international commerce in Ontario and the resolution of disputes by rules of*international*commercial* *arbitration;*for this it is important that appellate courts address the issues emerging in this case.

HENRY J.

* * * * *

Corrigenda

Released: March 7, 1991

Page 1, correction of counsel's name from "David C. Rosenberg" to " David C. Rosenbaum".

** Unedited **

Indexed as:
Kaverit Steel and Crane Ltd. v. Kone Corp.

Between
Kaverit Steel and Crane Ltd., 299565 Alberta Ltd., Kelly Viinikka, Eric Viinikka and James Caldwell, Plaintiffs, and Kone Corporation, Kone Holdings (Canada) Inc. Kone Inc. and Kone Cranes Incorporated, Defendants

Alberta Judgments: [1991] A.J. No. 450
No. 9103 06209

Alberta Court of Queen's Bench

Judicial District of Edmonton
Cooke J.
May 14, 1991
(14 pp.)

J.E. Redmond Q.C. and C.E. Mostert, for the Plaintiffs.
R.C. Secord and N.B. Thompson, for the Defendants.

REASONS FOR JUDGMENT

COOKE J.:-- The Defendant seeks to stay the proceedings commenced by Statement of Claim. The Plaintiff Kaverit Steel and Crane Ltd. (Kaverit) is a licensee and distributor of crane equipment and parts pursuant to written agreements with the Defendant Hone Corporation (Kone). It is alleged by the Plaintiff that these agreements grant to Kaverit certain exclusive and non exclusive rights in Alberta, British Columbia, Saskatchewan and the Yukon (the Territory) to manufacture, modify and use the Kone cranes.

It is alleged that Kone either directly or through its subsidiaries, specifically Kone Cranes Incorporated, has breached the agreements and is competing with Kaverit in the Territory.

Both the Licensing Agreement and the Distribution Agreement contain similar arbitration clauses. Section 21 of the License Agreements reads:

> Any dispute arising out of or in connection with this agreement shall be finally settled without recourse to the courts, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators designated in conformity with those Rules. The arbitrator or arbitrators shall have power to rule on their own competence and on the validity of the agreement to submit to arbitration. The place of arbitration shall be Stockholm, Sweden.

Section 20 reads:

> This agreement shall be construed and enforced in accordance with, and the rights of the parties shall be governed by the laws of the province of Alberta, Canada.

The Defendant argues that s. 21 is a broad and encompassing arbitration provision, that the dispute outlined in the Statement of Claim falls within the matters referred to arbitration pursuant to the arbitration clause and that the court should exercise the discretion contemplated by ss. 3 and 4 of the Alberta Arbitration Act, chap. A-43 which reads:

> 3 If a party to a submission or a person claiming through or under him commences legal proceedings in a court against another party to the submission or a person claiming through or under him in respect of a matter agreed to be referred, a

party to the legal proceedings may at any time before delivering any pleadings or taking any other steps in the proceedings, apply to that court for an order staying the proceedings.

4 The court to which an application is made under section 3 may make the order on being satisfied

(a) that there is no sufficient reason why the matter should not be referred in accordance with the submission, and

(b) that the applicant was at the time when the

proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration.

The Defendant relies on a list of authorities in which the courts have declined to allow the matter to be litigated where the parties had expressly agreed not only that the dispute would be resolved by arbitration but also the question as to whether the dispute fell within the terms of the arbitration clause.

These authorities also establish that it is not an argument to say that the arbitrator would be faced by difficult questions of law as there is provision in the Arbitration Act for such questions to be referred to the court for determination.

Heyman v. Darwins, Limited [1942] A.C. 356, Stokes-Stephens Oil Co. v. McNaught (1918) 57 S.C.R. 549; Scott and Sons Ltd. v. Del Sel (1922) S.C. 37 (H.L.); The Evje [194] 2 Lloyds R. 57 at 66; Mobil Oil Can. Ltd., v. Pan West Engr. and Constr. Ltd. [1973] 1 W.W.R. 412; Cascade Builders Ltd. v. Alta. Govt. Telephones (1976) 1 A.R. 257.

The Plaintiff answers that the*International*Commercial* *Arbitration*Act R.S.A. 1980 CI-6.6 (International Arbitration Act) is applicable not the Alberta Arbitration Act.

I am of the opinion that by operation of ss. 1, 2, 4 and schedule 1 of the International Arbitration Act that it is applicable to these arbitration provisions rather than the Alberta Act.

Specifically the provisions are:

1(1) In this Act,

(a) "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on*International*Commercial* *Arbitration*in New York on June 10, 1958, as set out in Schedule 1;

(b) "International Law" means the Model Law on *International*Commercial*Arbitration*adopted by the United

Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule 2.

2(1) Subject to this Act, the Convention applies in the Province.

(2) The Convention applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Part, but applies only in respect of differences arising out of commercial legal relationships, whether contractual or not.

4(1) Subject to this Act, the International Law applies in the Province.

Schedule 1

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

It will be recalled that this arbitration is to take place in Stockholm, Sweden but would be recognized and enforced in Alberta. This circumstance falls within the provisions cited in Schedule 1 article 1 above and in conjunction with the other provisions cited establishes that the International Arbitration Act is applicable.

The consequence of the application of the International Arbitration Act is that the following provisions of that act apply:

10 Where, pursuant to article II(3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

Article II

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The critical words in article II(3) are "inoperative or incapable of being performed".

The Plaintiff argues these provisions of the International Arbitration Act preclude arbitration in this case since the

parties to the arbitration clause do not include all of the litigants, th ...efore, no arbitration agreement to which all pa... ...i S.p.a. v. Bukama Gmbh (F.R.G.... ...cto Internazionale Privato e Pr... ...York Convention 1958.

Relevant t... ...le 2 to the Internationa... ...ITRAL*Model*Law*on Internationa... ...ie arbitration being outside of ... ...36 apply to the arbitration issue before the cour... ~~(Article 1 Scope of Application) The relevant sections are as follows:~~

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that

, if the decisions on matters submitted to arbitration

can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

end footno

(....)

The nub of the issue in this case is whether the Plaintiff has, by its Statement of Claim, proliferated the issues and thereby the parties with the result that the arbitration provision is frustrated. If so the Plaintiff's action should not deprive the Defendant of the stay. On the other hand, if litigants in this action, who are not party to the arbitration provision and who are not consenting to it, have raised legitimate causes of action which are connected to the main issue of breach of contract such that all matters should be tried in the same proceedings, then the arbitration provision is in the words of the statute, inoperative or incapable of being performed. Since arbitration is consensual in nature

persons not party to the agreement cannot be compelled to submit to the method of dispute resolution.

The answer to this question requires an analysis of the issues raised by the Statement of Claim to determine if there are some that cannot be resolved by the determination of the fundamental dispute between the two contracting parties, namely the alleged breach of the licensing and distributor agreements.

Firstly let us consider the Plaintiffs and their relationship to the causes of action plead. The Plaintiff Kaverit, the party to the licensing and distributor agreements with Kone, is a wholly owned subsidiary of the Plaintiff 299565 Alberta Ltd. the shares of which are owned by the Plaintiffs Kelly Viinikka, Eric Viinikka, James Caldwell and the Defendant Kone Holdings (Canada) Ltd.

(...)

The Defendant Kone, a Finnish corporation effectively controls the other three defendants. The application for the stay has been brought on behalf of all the defendants but there has been no acceding to the jurisdiction however, the defendant Kone Cranes incorporated is registered in Alberta and was duly served in Edmonton with the Statement of Claim.

Firstly I reject any argument that the non corporate Plaintiffs have an action by reason of the potential for loss of value of their shares in the number company by reason of the breach of the contract between Kone and Kaverit. Any damages or other remedy obtained by Kaverit will be visited upon the respective shareholders and no cause of action exists in them in that respect.

Kaverit has a cause of action against Kone Cranes

Incorporated the company said to be improperly operating within the Territory. That Defendant is registered within Alberta and is not a party to the arbitration clause.

The non corporate Plaintiffs allege ~~in paragraph 32~~ that the wrongful conduct of the Defendants, including a conspiracy to harm Kaverit, caused the loss of the sale of their shares to a purchaser who stood ready, willing and able to acquire those shares....

~~In paragraph 19,~~ Kaverit alleges a conspiracy by the Defendants or at least two of them to harm Kaverit by unlawful means and have in fact harmed Kaverit. However it must be said that the means by which such harm was achieved was the doing of the things which constitute the breach of the contracts which is a dispute squarely within the parameters of the arbitration clause.

~~In paragraph 25~~ Kaverit accuses the Defendants of unfair business practices and unfair competition. The Supreme Court of Canada in the decision of Canada Cement Lafarge v. B.C. Lightweight Aggregate 145 D.L.R. (3rd) 385 at 398 holds as follows:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that where as the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

The question of the unlawfulness of the Defendants' conduct may be addressed in the context of Canadian Competition law.

In paragraph 23 Kaverit alleges the tort of inducing breach of contract against Kone Inc. the American subsidiary by hiring a key employee of Kaverit.

The Plaintiffs would argue that the above analysis establishes that the Plaintiffs other than Kaverit have a cause

of action that should be heard in the same proceeding as the Kone/Kaverit breach of contract issue and that those other Plaintiffs never consented to the arbitration process and accordingly the arbitration clause is inoperative or incapable of being performed. It is also said for the Plaintiffs that even conceding the breadth of the arbitration provisions and the power of the arbitrator to determine his own competence those provisions would not extend to causes arising out of inducing breach of contract or conspiracy, or damages for breach of a federal competition statute or loss on a potential sale of shares.

The Defendants state that all matters complained of grow out of the root allegation of breach of contract between Kaverit and Kone, the two contracting parties, and the resolution of that issue resolves all the issues between all parties.

I am not satisfied that such is the case with respect to the conspiracy allegation and the unfair competition allegation.

I can also visualize an arbitrated resolution of the breach of contract issue on some divided basis which would not provide an answer to those shareholders whose sale was thwarted by the action of the Defendants. I did not detail the many rights claimed by Kaverit some of which are exclusive and some of which are non exclusive and some of which must give way to circumstances such as "turn key" projects undertaken by Kone. It is sufficient to say that an arbitration on the matters between Kone and Kaverit on the basis of the interpretation of the contract and the conduct of the parties will not likely be definitive of the issues raised by the other Plaintiffs.

The Defendants' position that all defendants are now prepared to be bound by arbitration does to provide an answer to those Plaintiffs who have alleged a bona fide claim and who are not consenting to an arbitration.

The authorities cited by the Defendants in this regard are applicable for example where a parent and wholly owned subsidiaries are dealing on the one hand with a parent and wholly owned subsidiaries on the other and it can be established that one group of companies intended to do business with the other group of companies.

In such cases even though the arbitration clause is consented to by only one party on each side others are considered to be alter egos and court action will be stayed in favour of arbitration.

If I were to grant a stay I could only do so in my view with respect to the parties Kaverit and Kone and then only with respect to the alleged breach of the two contracts. I may not have the power to prevent Kaverit from bringing action against Kone Cranes for invading their territory or for inducing breach of contract of the key employee and I do not have the power to bar the non corporate defendants from bringing action for conspiracy and damage for the loss of a sale of shares to a

third party. Clearly the potential exists for conflicting decisions.

In addition since my findings are solely for the purpose of this application if I grant the stay and an award is made in Stockholm all of these issues will have to be faced again when either party brings its recognition and enforcement application under schedule 2 ~~article~~ 36(1) (a) iii and iv. supra. That article allows this Court to refuse to recognize or enforce the Swedish decision if the award deals with a dispute not contemplated or falling within the terms of the submission or if the procedure was not in accordance with the agreement of the parties.

If the Swedish decision purports to answer all of the issues raised by all of the Plaintiffs there will be an objection to the recognition application both on the grounds of absence of consent to arbitrate by some of the Plaintiffs and on the further ground that the arbitrator exceeded his powers in attempting to deal with matter of Canadian public policy as expressed in Competition statutes and other issues beyond the parameters of the arbitration clause. That objection to the recognition application could surely be resolved only by a directed issue and viva voce evidence giving rise to the potential for conflicting decisions.

The application to stay is denied with costs. >>

COOKE J. IN THE PROVINCIAL COURT OF ALBERTA JUDICIAL DISTRICT OF EDMONTON

BETWEEN:

HER MAJESTY THE QUEEN - and - IVAN SEDLACEK

REASONS FOR JUDGEMENT

The accused is charged with two counts of "care and control", one while "impaired", the other while "over 80", both contrary to Section 255 of the Criminal Code.

The facts are fully set out in the written argument of Mr. Didrickson, Crown Prosecutor, and as set out I cannot improve on them. They are as follows:

"At 11:30 p.m. on April 20, 1990, the accused was observed in the driver's seat of a car parked on 83 Avenue west of 109 Street in the City of Edmonton, Province of Alberta. He was sitting in an upright position behind the wheel with his feet in the floor area of the driver's side near the foot controls. The doors were locked and his head was resting on the back of the top of the driver's seat. He appeared to be either asleep or unconscious. Initially, the motor of the car was idling at a moderate rate of speed.

2

A short time after midnight on April 21, 1990 emergency

personnel responded and attempted to rouse the accused by shouting at him, banging on the windows, and rocking the car. He did not respond. The speed of the idling motor increased to a very high rate and the motor apparently began to overheat to the point where smoke came out from under the hood, and smoke poured into the passenger area of the vehicle. Emergency personnel, fearing for the accused's safety, smashed the passenger side window to gain entrance into the vehicle. At that moment the accused awoke and stepped out of the vehicle on the driver's side. Emergency Personnel had to turn off the motor.

The accused displayed the usual signs of impairment by alcohol and was subsequently transported to Strathcona Station where he provided two breath samples which were analyzed at 200 mg. and 190 mg. of alcohol in 100 ml. of blood.

The police officer testified that, although he had briefly looked through the interior of the accused's vehicle, he did not test drive the vehicle nor did he visually inspect the drive train of the vehicle.

Mr. Weber testified on behalf of the accused that the accused had come to his place in the Millwoods area of the City in the late afternoon of April 20th to tow the vehicle (in which the accused was later found sitting) to the accused's home. Mr. Webber said that the accused was supposed to fix the automatic transmission of the vehicle which was, in his words, "slipping". To facilitate the towing of the vehicle, he testified that he personally disconnected one end of the drive shaft and secured the loose end of the drive shaft to the undercarriage of the car with wire so that It would not drag during the tow. He testified that he had to remove four bolts from the one end of the drive shaft in order to disconnect same. Mr. Webber further testified that once that vehicle had been towed to the accused's residence Mr. Webber borrowed the second vehicle (that had been used to tow the first vehicle and that was owned by the accused) 3 go back home. In the ignition of that vehicle was the accused's key ring containing several keys.

The accused testified that after towing the vehicle home he went to a bar and consumed a considerable amount of liquor before again returning home. When he arrived at home he found that he did not have the keys for his residence, and that his wife was not home. He testified that because he was cold, he crawled into the car that had been towed to his place and started the engine to keep war. He did not deny that he was sitting upright in the driver's seat in an unconscious state with the motor revving at a very high RPM at the time emergency personnel broke into the vehicle. The accused further testified that he knew that the vehicle was immobile because he had personally viewed the drive shaft laying In the trunk of the vehicle. The accused was very positive and adamant that the drive shaft was in the trunk of the vehicle."

The defence contends that an accused cannot be convicted of having the care and control of a motor vehicle, if it is established that the vehicle is inoperable.

Secondly, It is argued by the defence that if an accused rebuts the presumption in Section 258(1)(a) of the Criminal Code, he is entitled to an automatic acquittal.

Thirdly, it is contended that the vehicle in question was in fact inoperable.

The Court will deal with issue one and three together.

4

It is the Court's view that the facts in the present case can be distinguished from those in Saunders v. The Queen 1967 3 CCC 278. In Saunders, we had an operable vehicle which could not be set in motion because of an external factor, the Court making it clear that in such cases, it did not matter if the conditions preventing the vehicle from being set in motion was external or internal.

In his written submissions, Mr. O'Neill for the defence makes these observations re: the Saunders case:

"The Motor Vehicle was not running but was capable of running. The vehicle was subsequently driven to a police station after it was extricated from the ditch by a tow truck. While the rear wheels could spin on their own, the vehicle could not be moved without help from the tow. At trial, the accused was acquitted because the vehicle was not a "motor vehicle" within the meaning of Section 2 of the Criminal Code. The issue before the Supreme Court of Canada was: Whether an Inoperable motor vehicle was a "motor vehicle" within the meaning of Section 2 of the Criminal Code.

Mr. Justice Fauteux determined that the question to be answered in this case was whether the vehicle was of the type or kind contemplated by Section 2 of the Criminal Code.

It is respectfully submitted that Saunders, supra, stands for the proposition that the actual operability or functioning of a vehicle will not determine whether it is a "motor vehicle" within Section 2 of the Criminal Code. It Is submitted that this is a distinct issue from the one before the Court, the issue being whether care or control may be exercised over an inoperable vehicle. It is submitted therefore that Saunders has no application to the case at bar."

5

The Court is Inclined to agree with this submission that the Saunders case has no application in the present instance. Why? Because we are concerned in the present case with an inoperable vehicle. This was not the situation in Saunders. Here, the vehicle was towed to the location where it was found. The accused, admittedly intoxicated at the time, was sitting behind

the steering wheel of an inoperative vehicle. It was completely disabled. It was then not a motor vehicle at the time In question. In Saunders, we had an inoperable vehicle which became stuck temporarily. The issue in that case was a narrow one. It had been argued that the stuck car was not a motor vehicle in its stuck condition. It was a motor vehicle, said the Supreme Court.

In the present case, a point which can be legitimately raised is the credibility of the evidence offered by the defence on the operability of the vehicle.

Though it certainly can be contended that the evidence on this point leaves much to be desired, nevertheless, the evidence of the defence witness that he had disconnected the drive shaft, cannot be rejected or ignored. This was said to have been done after the vehicle had been towed to the location where it was subsequently found. There is nothing to indicate that this evidence is untrue, except the accused's own version that the drive shaft was in the trunk of the vehicle. To say the least, the evidence of the accused was unimpressive and unsatisfactory. But it must be recalled that he was very intoxicated on that evening and not much reliance can be placed on his evidence. But the same cannot be said of the evidence of the other defence 6 witness. It may well have been true.

The issue of danger to the public must be addressed here, because it had been raised by both counsel, particularly by the Crown.

In Saunders (Supra), Mr. Justice Fauteux makes these comments:

"Obviously, everyone agrees that the true object of the provisions of Section 222 and Section 223 is to cope with and protect the person and the property from the danger which is inherent in the driving, care and control of a motor vehicle by anyone who is intoxicated or under the influence of a drug or whose ability to drive is impaired by alcohol or a drug."

However, he also goes on to say:

"The definitions of the offences mentioned in Section 222 and 223 are also couched in a language that is plain and simple and in which nothing, either express or implied, indicates an intent of Parliament to exact, in every case, as being one of the ingredients of the offence, the proof of the presence of some element of actual or potential danger or to accept, as a valid defence, the absence of any.

However, in the present case, In the event that there has been a change in the jurisprudence in this area, and if It is now necessary to give consideration to the element of danger in cases where it arises, let us look at this issue.

The Crown contends as follows:

"It is submitted that the mischief sought to be prohibited by the care and control provisions should not be restricted to the possibility of setting the car in motion along the ground under its own power. The acts of the accused in the present case created a 7

real danger of smoke inhalation and possible suffocation of the accused himself and the potential danger of fire or explosion which could have injured the emergency personnel and onlookers."

In answer it is the Courts view that the possible danger mentioned above, is not the type of danger contemplated by the cases dealing with this matter. It is the danger created by the possibility of a vehicle being set in motion along the ground. Setting a vehicle in motion means more than just starting a vehicle.

Finally, the Court must consider the case of Regina v. Moffat 6[illegible] C.R. 155, a decision of the Ontario Court of Appeal. There, unknown to the accused, the tavern manager had earlier removed the cotter pin from the gear linkage arm, rendering the car of the accused effectively immobile.

The points raised in the present case were never considered or argued, it appears, in the Moffat decision. Though the Saunders case was mentioned and it even appeared that It was conceded by the defence that the rule in Saunders applied, the Court of Appeal was never called upon to make a ruling. The matter of an Inoperable vehicle never came up. The point before the Court of Appeal was one of mens rea, as the Court said - "The question arising for resolution on the facts as found by the trial judge is a narrow one".

In view of the lengthy submissions made by both Counsel on the question of care and control and the assertions made that certain Supreme Court of Canada decisions concerned with this issue are no longer law or have been modified, the Court makes the following observations:

8

Had the vehicle here been operable, there is no doubt that the accused in the present case would have been declared in care and control of the motor vehicle. The decision in Ford v. the Queen, 65 CCC 2d 392 would have applied, since the accused started the engine. That fact alone is sufficient to constitute the actus reus. In such a case, a mere expression of his lack of intention to drive would have been insufficient to rebut the presumption of care and control. Following the Ford decision, care and control may be exercised without an intent to drive where an accused performs some act or series of acts involving the use of the car, its fittings or equipment. In the present case this occurred. The Ford decision in the Courts view is still law and has not been supplanted by the case of Regina v. Whyte, 42 CCC 3d 97, a more recent Supreme Court of Canada

decision. Nor has Regina v. Toews (Supreme Court of Canada) 21

CCC 3d 24 over-ruled the Saunders case (Supra). All of these Supreme Court of Canada decisions are still valid and not inconsistent, on the particular facts before them, at that time.

The accused is acquitted and the charges against him dismissed.

End of document list