PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacDonald, 2012 NSPC 26

Date: 20120326
Docket: 2156688
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

v.

Jake Lendre Hugh MacDonald

Revised Decision:	The text of the original judgment has been corrected according to this erratum dated April 27, 2012. The text of the errautm is attached to this decision.
Judge:	The Honourable Judge Laurel Halfpenny MacQuarrie
Heard:	February 25, March 22, September 8, October 26 and December 12, 2011, in Port Hawkesbury, Nova Scotia
Written Decision:	March 26, 2012
Charge:	On or about the 19th day of December, 2009 at, or near Iron Mines, Nova Scotia, did while his ability to operate a motor vehicle was impaired by a drug did operate a motor vehicle contrary to section 253(1)(a) of the **Criminal Code**.
Counsel:	Shane Russell and Christa MacKinnon, for the Crown Kevin Patriquin, for the Defence

By the Court:

[1] Jake Lendre Hugh MacDonald is charged:

> On or about the 19th day of December, 2009, at or near Iron Mines, Nova Scotia, he did while his ability to operate a motor vehicle was impaired by drug did operate a motor vehicle contrary to section 253(1)(a) of the Criminal Code.

[2] This matter came on for trial on February 25, March 22, September 8, October 26 and December 12, 2011, with several applications, motions and rulings. As discussed with counsel, two of those rulings have been incorporated into this decision as they are explanatory in the decision that follows.

[3] The burden of proof is on the Crown to prove all elements of the offence beyond a reasonable doubt and Mr. MacDonald is presumed innocent throughout.

[4] At the commencement of the trial six exhibits were tendered by consent including a curriculum vitae of Constable Mark Skinner, a certificate for recognizing him as a Drug Recognition Expert by the International Association of Chiefs of Police, a blank Drug Influence Evaluation Sheet, a Drug Influence Evaluation Sheet with narrative for Mr. MacDonald, a curriculum vitae of Lori Campbell and her Forensic Science and Identification Services Laboratory Report.

[5] It was agreed there was no requirement by the Crown to tender a sample of Mr. MacDonald's bodily substance produced to Cst. Skinner on December 19, 2009.

[6] The Crown called three witnesses, two of whom it sought to have declared experts.

[7] Mr. MacDonald testified on a *voir dire* regarding admissibility of statements he made to the DRE officer which appear on the tendered Drug Influence Evaluation Sheet.

[8] It was agreed that evidence from all *voir dires* is evidence on the trial.

[9] The Court has reviewed and considered all the evidence in this matter, both *viva voce* and documentary and is only going to refer to those portions necessary for the giving of my reasons but as I say I have considered it in its entirety along with the submissions of counsel.

[10] On December 19, 2009 Constable Reid was at the Waycobah Detachment when he received a complaint of two youths drinking alcohol on the Cameron Road in Inverness County. He made patrol and as he entered the Orangedale Road he noted a vehicle approaching him at a high rate of speed, in excess of the posted speed limit. It matched the description of the complaint

[11] It was swerving on the roadway. He was uncertain as to whether it came across the centre line but it certainly came toward the police vehicle. He turned, activated his emergency equipment and at that time the vehicle appeared to speed up and pull away from him and he accelerated in pursuit.

[12] He lost sight of the vehicle and disengaged the emergency equipment but continued in its direction. At the end of the Orangedale Road he noted the same vehicle still driving at an accelerated rate of speed brake hard and turn down a side road which was a dead end.

[13] Constable Reid pulled up behind the vehicle and saw one lone male occupant in the driver's seat, Mr. MacDonald, the accused, whom he identified in court.

[14] Constable Reid approached the car and noticed immediately a very strong odour of burnt marijuana. He asked Mr. MacDonald for his licence, registration and insurance. Mr. MacDonald struggled to get the licence from his wallet with some fumbling and his hands appeared to be shaking. He provided insurance and registration that were not for the particular vehicle and indicated he did not have the same. Upon inquiry as to whether he had been consuming alcohol Mr. MacDonald's response was, "No, just smoking weed". It was agreed that this response was solely admitted for the purposes of reasonable grounds by the officer.

[15] Mr. MacDonald had blood shot eyes and his movements in general seemed very slow. His demeanor was very placid and laid back. Constable Reid formulated reasonable grounds that Mr. MacDonald was operating a motor vehicle

while impaired by a drug and placed him under arrest at 9:46pm, and asked him to exit his vehicle.

[16] After chartering and cautioning Mr. MacDonald, and explaining the same in everyday terms, Constable Reid read him the drug recognition demand requiring him to submit to an evaluation to determine whether his ability to operate a motor vehicle was impaired by a drug or combination of drug and alcohol and to accompany him for that purpose.

[17] Mr. MacDonald said he understood and indicated he wished to speak to counsel.

[18] They went to the Baddeck Detachment where they met Constable Mark Skinner. Mr. MacDonald spoke to duty counsel and then indicated his willingness to comply with the request to submit to the evaluation. It was approximately a 30 minute drive to the detachment.

[19] The trial then entered a *voir dire* on two issues: (1) the qualifications of Constable Skinner as a drug recognition evaluator as set out in section 254(3.1) of the *Criminal Code* and (2) whether he could provide expert opinion evidence regarding the processes' to determine whether a driver's ability to operate a motor vehicle is impaired by a drug or drugs and what categories of drug/drugs are causing such impairment.

[20] Section 254(3.1) of the *Criminal Code* provides:

> If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under paragraph 253(1)(a) as a result of the consumption of a drug or of a combination of alcohol and a drug, the peace officer may, by demand made as soon as practicable, require the person to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose.

[21] Section 254(3.4) provides:

> If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe, based on the evaluation, that the person's ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable,
>
> > (a) a sample of either oral fluid or urine that, in the evaluating officer's opinion, will enable a proper analysis to be made to determine whether the person has a drug in their body; or
> >
> > (b) samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine whether the person has a drug in their body.

[22] Constable Skinner outlined his specialized training regarding impaired operation of a motor vehicle. He took a Standardized Field Sobriety Testing course in June 2009, followed by training as a Drug Recognition Expert in October 2009 and completed his Drug Recognition Training the next month. He received his designation as a BAC DataMaster C Technician in September 2009 and training in the operation and calibration of Approved Screening Devices in February 2010. He completed his Standardized Field Sobriety Instructor course in May 2010.

[23] He received a designation from the International Association of Chiefs of Police as a drug recognition expert in December 2009 as a result of intensive classroom training in Halifax, and a practical component in Phoenix, Arizona. He gave detailed testimony as to the particulars of that training including the seven categories of drugs which exist, the observable signs/symptoms that put a person into one or two of those categories, maybe even three, based on behaviour and by using a standardized check sheet and standardized procedures from which an opinion is rendered.

[24] Constable Skinner tendered a blank copy of the Standardized Drug Influence Evaluation Form and gave particulars of the tests and observations he records on the form during the evaluation. It is standardized in that it is identical for use in the United States and throughout Canada.

[25] He described the twelve step process in the evaluation. The eleventh step is an opinion on impairment once he looks at the evaluation in it's entirety. It requires the drug recognition evaluator to have reasonable grounds to make a demand for such as a result of the first ten steps. This demand is codified in section 254(3.4) of the *Code*. If a sample of blood or urine, being the twelfth step, is taken it is then sent to a forensic laboratory for analysis as to the particular drug(s) found in the person's system.

[26] The regulations in section 254.1 of the *Criminal Code* set out the qualifications required of an evaluating officer in three areas: (1) they must be accredited by the International Association of Chiefs of Police, (2) there are specific physical coordination tests to be conducted, often referred to as Standardized Field Sobriety Tests and (3) the evaluation has certain tests and procedures to be followed under subsection 254(3.1) which are specialized.

[27] Constable Skinner's evidence went through each of these requirements. His testimony was very detailed in all aspects of what the evaluation entails. After a lengthy direct examination and thorough cross-examination on his training and the various components of the twelve step process, the Court then heard a "*voir dire* within this *voir dire"* with evidence from Lori Campbell.

[28] Ms. Campbell is a Forensic Alcohol Specialist and Toxicologist with the RCMP, National Forensic Services - Halifax, and has been with the RCMP since 1991 and in the toxicology section since 2003. She is a designated analyst under Section 254(1) of the *Criminal Code* for all provinces and territories except Québec. Ms. Campbell, in addition to all of her other training, has had the "Standardized Field Sobriety Testing Course", the "Drug Evaluation Classification Training Procedure" course, and several courses on the "Effects of Drugs on Human Performance and Behaviour"

[29] She completed a comprehensive 14 month Understudy Training period in the toxicology discipline with successful completion in 2003. Areas of study included methods of analysis, the various types of instrumentation used in the qualitative identification and quantification of drugs; the absorption, distribution, metabolism and excretion of drugs; the effects of various drugs and drug types on a person's behaviour and functioning; and the interpretation of drug concentrations in the blood.

[30] Ms. Campbell has been qualified as a forensic toxicologist with expertise in the analysis of bodily fluids for the presence of alcohol and drugs and their effects on the human body and the ability to operate a motor vehicle in Nova Scotia, including before this Court.

[31] The Crown sought to have her declared as an expert in "drug evaluation and classification including that of Standardized Field Testing with expertise in the analysis of bodily fluids for the presence of alcohol and/or drugs, the absorption, distribution, and elimination of alcohol and drugs in the human body and their effects on the human body including a person's ability to safely operate a motor vehicle."

[32] The Crown's intent being, if she was so qualified she would then testify in support of the Crown application to have Constable Skinner declared an expert.

[33] Counsel for Mr. MacDonald took no issue with the toxicologist expertise but did with the qualification of Ms. Campbell as an expert in drug evaluation and classification.

[34] Upon completion of direct and cross examination and submissions by counsel I gave my reasons for qualifying her in all areas sought by the Crown.

[35] The Crown's examination-in-chief continued with Ms. Campbell on the *voir dire* to determine what, if any expertise, Constable Skinner should be given.

[36] Ms. Campbell explained that the Standardized Field Sobriety Tests (SFSTs) were developed, from various physical coordination tests used by police to detect individuals impaired by alcohol and their ability to operate a motor vehicle.

[37] Issues arose in Los Angeles as drugs were becoming a problem and assessment methods were needed to detect drug impaired motorists as well. A group at the Southern California Research Institute were asked to evaluate a number of currently used physical coordination tests. By 1977 they had narrowed it down from 16 to 6 that were considered to be more reliable indicators of impairment then others. There were also laboratory studies where volunteers were dosed with various levels of alcohol and police officers performing traffic duties

were given training sessions to perform the tests that had received some degree of standardization up to that point.

[38] These took about fifteen minutes to perform which was considered a bit too long for roadside use so computer analysis was done to narrow it down to the three tests that are actually used today, the walk-and-turn, the horizontal gaze nystagmus, and the one-leg stand. She explained the variables and influences that could be associated with performance as well.

[39] The SFST's although validated with alcohol, their job is also to evaluate impairment of an individual by drug particularly the one-leg stand and the walk-and-turn test.

[40] They were considered so important that they were incorporated into the twelve step DRE Evaluation process as making up some of the divided-attention tests used to assess whether the person is impaired at the time of the evaluation. The intent was to design a robust systematic process that would reliably measure a person's impairment and various clinical examinations or psychological factors to determine whether the individual was under the influence of a particular drug.

[41] The process was put in place also to rule out alcohol and other possible medical issues and evaluate based solely on the possibility of drugs, and if there were drugs, what drugs or what category of drugs were responsible for the impairment.

[42] Ms. Campbell then detailed the twelve steps/elements that a drug recognition expert uses in determining impairment such as the divided attention tests, clinical measurements, muscle assessment, visual testing, presence of medical issues and the like. During the course of the evaluation the evaluator is constantly making notes on a diagram which is also referred to as the DRE face sheet, and each time a symptom is noticed it is indicated on the diagram as to what it is and how many times it was observed.

[43] When queried as to any validation studies of the DRE program she referenced both laboratory and field studies, including the Bigelow study at the John Hopkins University, and the Compton study. The latter involving actual drug impaired drivers who were stopped by police and brought in for a DRE evaluation.

The study covered the full twelve step evaluation with over five hundred subjects in a three month period, blood samples were provided and in 91% of the cases the subject had a drug present.

[44] On cross-examination, she was asked whether these studies were peer reviewed or published in any scientific journals. They were all published in scientific journals including National Highway Safety Traffic Administration documents.

[45] Ms. Campbell was familiar with the Heishman study that was published in the Journal of Analytical Toxicology which showed a success rate of only 51%. She outlined the problems with the study, including it was a laboratory study only, there were no police stops, no observations of a subject at the scene, no driving evidence, no interview with the arresting officer, there was no arresting officer. The subject received a drug in a double blind fashion, that is the evaluator giving the drug did not know what he/she was administering and if the subject felt a certain way they were not allowed to convey that to their evaluator, and the evaluator was not allowed to ask questions. Her conclusion was that half of the information that would normally be obtained during the twelve step evaluation is not present. Furthermore in a laboratory setting the scientific investigators were limited as to how much of a drug they can give a subject for ethical reasons.

[46] As Mr. Russell commenced submission to the Court on his application to have Constable Skinner declared a section 254(3.1) evaluating officer, defence counsel after having heard the *voir dire*, accepted Constable Skinner as such.

[47] The second issue on the *voir dire* was whether Constable Skinner be declared an expert to give opinion evidence regarding the processes' to determine whether a driver's ability to operate a motor vehicle is impaired by a drug or drugs and what category of drugs are causing the impairment.

[48] The Crown referred the Court to the decisions in **R v. Bois** [2010] O.J. No. 3495, **R v. Jansen** [2010] O.J. No. 959, **R v. J.B.** [2009] O.J. No. 5728, **R v. Primerano** [2006] O.J. No.5445, **R v. Labelle** [2007] O.J. No.5616, **R v. Cusson** [2008] N.B.J. No.423 and **R v. Charest** [2006] N.B.J. No.179 and argued the approach used in Ontario and in the **Cusson** case from New Brunswick are appropriate and urged this Court to adopt the same, that is that the evaluating

officers, with proper foundation are, expert witnesses, capable of providing opinion evidence.

[49] The contrary view found in **R v. Jurcevic** [2010] O.J. No.5231, **R v. Wakewich** [2010] O.J. No.1128, **R v. Ward** [2007] A.J. No.895 and **R v. Steeves** [2010] N.B.J. No.155 was urged by Mr. Patriquin to be the correct statement of the law. These cases held that evaluating officers are not experts because such a determination goes to the ultimate issue of impairment which is the function of the trial judge (see **Jurcevic** and **Wakewich**). Further that such is a novel science subject to scrutiny (see **Steeves),** and expert opinion status was not met because it failed on the reliability arm of the *Mohan* test. **Steeves** was relied on heavily by Mr. Patriquin in his submissions.

[50] **Bois** is an impaired operation by a drug case. At the commencement of the trial a witness was qualified to give expert evidence in the area of forensic toxicology with respect to symptomology of drugs. A police officer was then qualified as an evaluating officer, specifically as a certified drugs recognition expert and allowed to give opinion evidence with respect to whether somebody's ability to operate a motor vehicle was impaired by a drug.

[51] It is unclear as to whether these qualifications were by consent or if a *voir dire* had been held.

[52] In **Jansen**, again an impairment by a drug case, in which a *voir dire* was held, it was determined that the Constable was an evaluating officer under section 254(3.1) of the *Code*.

[53] In **R. v. J. B.** a youth was charged with driving while impaired by a drug. After a *voir dire* the police officers evidence was treated as expert opinion.

[54] The Crown's submission was that once the officer is qualified as an evaluating officer, it permits him to give opinion evidence without a challenge to the science or qualification and that such is analogous to a qualified breathalyzer technician being allowed to give opinion evidence. The Crown referred to the Frerjichs case from the Alberta Court of Appeal wherein ″the technician being qualified categorizes him in the class of an expert witness competent to give opinion evidence in relation to matters pertaining to the analysis...″ *(see para. 34)*.

[55] The Crown submitted that a *Mohan* type hearing was not necessary. The defence on the other hand argued that because such is a novel science a *Mohan* analysis has to be undertaken as the evidence goes to the ultimate issue.

[56] Justice Main stated at paragraph 77:

> Well when you see the qualified breath technician who routinely is asked what did you then do? Well then I presented him with the mouthpiece. And what did he do? He gave a suitable sample. Well couched in that simple answer, is a conclusion, is an opinion, that the sample provided was suitable. Well if you want to start challenging him on the suitability of the sample, well you want to go into training as to how long, how – what noise – there's a – an aura of expertise that comes with the training and we don't want to turn every trial, and I think that's part of what Mr. Barker and Ms. Hull are saying today, you don't want to turn the trial into a protracted examination of the officers ability to testify about each of those – the menusha of his or her opinion, such as the suitability of a breath sample going into the tube of the intoxilizer. So here, training is done, a set of standards. I'm sure you'll, anyone who is proffered as a drug recognition officer will be fully cross-examined about the extent of their training, how long, where, when, what their mark was on a particular course, but once that qualification has been established, and you look at the legislation that sets it up. The purpose of that legislation, I'm fairly persuaded by reading it, is to create a short cut to get that witness to the stand, identify their expertise, show – demonstrate they've been designated or qualified, or whatever, and then we get on to the evidence. Getting on to the evidence doesn't then put it on a higher pedestal but it makes it admissible and certainly open for challenge. And I'm actually quite looking forward to the creative challenges that are going to come up to really test what some of these officers are going to be observing. Because what they may be observing could be equivocal.

[57] Then in conclusion at paragraphs 102-123:

> **102** THE COURT: But, but this is going to be a challenge; but I'm fairly comfortable reading the legislation that it does have a purpose and part of that purpose is, first of all, to have consequences for people refusing those sobriety tests. So that you put extra little teeth into the scheme and the protocol there, but effectively to create a third step to allow the arresting

officer to bring the suspect driver to be evaluated. Then we get this newly created witness category of the drug recognition officer, the evaluating officer, who is then going to present evidence, within the ambit of his or her expertise, which is admissible and certainly open for challenge before any conclusion is made. And not just simply let him or her give the evidence, okay, here's my training, here's the steps I took, here's my conclusion and that's unassailable, it can't be. In fairness it can't be unassailable. It has to at least be opened for challenge. He could have graduated at the bottom of his class in Arizona or whatever when the testing was done. Or he may have missed a step.

103 So what's needed today? I'm attracted to the application but, again, I don't want to give it more weight than is intended.

104 MS. HULL: Well I think the most that Your Honour, can do on this case is to say that subject to the trial judge's right to rehear the application that on the J. B. matter the evaluating officer's evidence can be proffered once he's – as an opinion, once he's qualified by the Crown as an evaluating officer.

105 THE COURT: Mr. Eadie?

106 MR. EADIE: Certainly he can proffer an opinion Your Honour, as long as it's not being couched as expert evidence. And the reason I say ... .

107 THE COURT: That begs the question, because, again, once you go back to Wigmore or any of those evidentiary texts, some of it's indexed under opinion evidence, some of it's under the rubric under the expert evidence. But it comes down to the same thing, because of a certain area of expertise a person – and that expertise doesn't need to be formal, as we know in the case of alcohol .

108 MR. EADIE: Yes.

109 THE COURT: It can be life experience.

110 MR. EADIE: Yes.

111 THE COURT: But because of certain expertise a person is permitted, in law, to provide an opinion.

112 MR. EADIE: Yes.

113 THE COURT: And here in light of the officer's training as a drug recognition/evaluation officer.

114 MR. EADIE: The way Your Honour has stated it that way, I feel more comfortable with. I think at the end of the day, Your Honour, when we – when we – when this matter proceeds to trial, much of the issues that are set out in Mohan and other cases...

115 THE COURT: Yes.

116 MR. EADIE: ... with respect to, you know, validity, reliability, admissibility will all be explored, if I can put it that way, although it may not be a formal Mohan hearing, those issues are live issues ...

117 THE COURT: Yes.

118 MR. EADIE: ... and I think that will assist the court with respect to the weight to give the opinion evidence offered by the drug recognition officer.

119 THE COURT: Is there anything further we can do today? Other than my making some declaration on the record as to the extent of what that officer's evidence means once it's proffered?

120 MR. EADIE: I don't think so, Your Honour.

121 THE COURT: All right.

122 MR. HULL: Thank you.

123 THE COURT: Thank you. To conclude the matter then we're at, I like Mr. Eadie's phrase, we're really on the edge of new science. Parliament having brought in a certain protocol with respect to drug impaired driving we can understand the purpose of it, it's really to protect the community in terms of bringing people off the road who may, whose ability to drive or be in care and control of a vehicle is impaired by their having consumed or be under the influence of narcotics or controlled substances. The scheme of designating someone as a drug recognition officer, an evaluation officer, does allow a short cut in the sense that the Crown is able to prove qualifications of such a witness, in the instant case it will be sergeant Wieldon and that – once that qualification has been established the Crown can proffer and the evidence is admissible as to that officer's opinion both with respects to an evaluation of the presence of narcotics in the suspect as well to form the basis of the

> grounds to make a fluid demand. That, or course, we have to temper it with the other side, we understand then too, that will leave fully open to the defence to challenge the quality, the reliability, and other aspects, even credibility of such evidence and be open then for the Court to make a finding of fact based on all the facts and all the evidence in the trial, without prejudice to this application being revisited by the trial judge. Thank you counsel.

[58] In **Primerano** [2006] O.J. No. 4631**,** the Ontario Court of Justice ruled on the admissibility of expert evidence of a police officer and forensic toxicologist after a *voir dire* on a section 253(1)(a) offence involving drug impairment.

[59] At paragraph 7 Justice Blouin stated:

> The Supreme Court of Canada dealt with the issue of the admissibility of expert opinion evidence in the case of *R. v. Mohan*, 89 C.C.C. (3d) 402.
>
> > 'Admission of expert evidence depends on the application of the following criteria:
> >
> > (a) relevance;
> > (b) necessity in assisting the trier of fact;
> > (c) the absence of any exclusionary rule;
> > (d) a properly qualified expert.'

[60] In addressing each of those criteria Justin Blouin stated at paragraphs 8-10:

> **8** The proposed evidence is clearly relevant since it falls directly upon the subject matter of the charge before the Court, i.e. whether Mr. Primerano's ability to operate a motor vehicle was impaired by drugs.
>
> **9** Necessity is met by this evidence since the trier of fact would not be in any position to assess the issue of purported impairment without the analysis and the observations.
>
> **10** There is no exclusionary rule that applies to this evidence that I am aware of and finally I have come to the conclusion that both Sergeant Martin and Mr. Walker were properly qualified experts.

[61] In **Labelle**, Justice MacPhee of the Ontario Court of Justice followed a somewhat similar procedure in determining expertise as in **Primerano** (*supra*). The Court determined that a drug recognition evaluator can be declared an expert but only after a *Mohan* analysis is done**.**

[62] Some cases seem to bypass an analysis of when someone is an expert or suggest the legislation in section 254(3.1), and subsequent sections, mandate such. I do not agree.

[63] For this Court an expert can only be so designated and capable of giving opinion evidence after a *Mohan* analysis. In **R. v. Mohan** [1994] S.C.J. No. 36 the criteria for such a designation: relevance, necessity, and absence of any exclusionary rule are outlined.

[64] The first step of relevance is a "threshold" requirement to be decided by the Judge and such is a question of law.

[65] It is obvious that such evidence is relevant because it is directly on point as it relates to the issues to be determined. However, logically relevant evidence may be excluded if it's probative value is outweighed by it's prejudicial effect to an accused. Expert evidence is not to be admitted where such can be misused or will distort the fact finding process; that is, the "cost benefit" analysis **Mohan** refers to, and is sometimes seen when it is again to use **Mohan** language, "dressed up in scientific language"*(see paragraphs 18-19)*.

[66] In the **MacDonald** case before the Court , although there is scientific evidence, it is far from being of a nature that would be overwhelming to a jury, it's not complicated and references many things in it's application known to us all. There is no identifiable danger of such distorting the fact finding process in my mind and I find such to be highly relevant.

[67] The second criterion is that of necessity in assisting the trier of fact. As per **Mohan**,

> Expert evidence, to be necessary, must likely be outside the expert experience and knowledge of a judge or jury and must be assessed in light of it's potential to distort the fact-finding process. Necessity should not be judged by too strict a standard. The possibility that evidence will overwhelm the jury and distract them from their

> task can often be offset by proper instructions. Experts, however, must not be permitted to usurp the functions of the trier of fact causing a trial to degenerate to a contest of experts. (see headnote)

[68] Again, and as noted in **Primerano**, at paragraph 9, "necessity is met by this evidence since the trier of fact would not be in any position to assess the issue of purported impairment without the analysis and the observations".

[69] I agree with that premise and find that such evidence is clearly necessary.

[70] The third criterion is whether there is <u>any exclusionary rule</u> that applies to the evidence and in **MacDonald** there is none.

[71] Constable Skinner's curriculum vitae was tendered. He detailed the training he received as an RCMP officer on impairment by both alcohol and drug, the specialized training in both areas, in theory and practical settings. He gave very complete testimony about the procedure used in drawing his conclusions as to impairment and the "why" of each step in the process.

[72] Constable Skinner was extremely credible with respect to the knowledge and training he received, including personal demonstration in the Court of certain steps of the evaluation. He received the designations necessary to be a drug recognition expert and the issue is whether his evidence is "expert in nature".

[73] The Court was assisted in that regard by the evidence of Lori Campbell. Her evidence was on the "science" of it all if you will. It explained the testing and scrutiny of such through research, through peer review and how such has not been conceived or created in a vacuum. She outlined the purpose of it and how it has been validated in both controlled and field settings.

[74] Ms. Campbell was vigorously cross-examined on contra-indicated research and she explained quite easily the short comings and deficiencies of such.

[75] Mr. Patriquin suggested that the **Primerano** and **Labelle** cases lack sufficient authority because neither accused were represented by counsel. Such was not the case here.

[76] On the issue of such expertise going to the ultimate issue, I found that the proper scrutiny was given in this case.

[77] The ultimate issue is often before this Court in matters such as drug trafficking or possession for the purpose of trafficking and expert witnesses are called on to provide an opinion as to whether the evidence presented amounts to such offences, the very issue the Court must determine.

[78] I do not see this as being any different.

[79] The issue of impairment by a drug requires for the assistance of the Court's ultimate decision expert evidence of the nature Constable Skinner can provide and he is so qualified. As always, such is open to challenge, scrutiny and his evidence becomes a matter of weight.

[80] The trial then proceeded with Cst. Skinner identifying Mr. MacDonald in Court as the gentlemen he completed a drug evaluation in Baddeck on December 19, 2009. The Drug Influence Evaluation Sheet, commonly referred to as a "face sheet", that he prepared during the course of his evaluation of Mr. MacDonald was tendered. After confirming with Cst. Reid that Mr. MacDonald received his charter rights he commenced the evaluation.

[81] Cst. Skinner went through each of the twelve steps that comprise the evaluation, with the face sheet containing his observations of each step.

[82] His first step was to confirm with Cst. Reid that there were no reasonable grounds to believe Mr. MacDonald had consumed alcohol and that a breath analysis was not necessary.

[83] Cst. Skinner asked Mr. MacDonald a number of pre-evaluation questions such as an estimate of the time when he last slept, for how long, whether he was ill or had any injury, whether he was diabetic or epileptic and what he had had to eat that day, as well as the time.

[84] He queried Mr. MacDonald as to what he had had to drink in terms of beverages, alcoholic and non alcoholic, if he took insulin, had any physical disabilities, whether he was under the care of a doctor or a dentist, and if he was on

any medications or drugs. Mr. MacDonald indicated to Cst. Skinner that he had smoked a marijuana joint at 9:30pm.

[85] All pre-evaluation answers are recorded in the face sheet.

[86] Cst. Skinner then recorded general comments about Mr. MacDonald's attitude including he was cooperative, had a laissez-fair attitude, would laugh, in Cst. Skinner's opinion at unusual things and his walk was a bit slow and deliberate, his speech was hesitant, he would look at Cst. Skinner with a blank stare when trying to answer a question, his breath was normal, and there was no smell of liquor from it, his face was normal in colour, not flushed or pale and he confirmed he had not taken any drugs besides the marijuana joint. Cst. Skinner during the evaluation took three pulse readings from Mr. MacDonald, the first during this pre-evaluation stage, it being higher than the normal range.

[87] The next step was an eye evaluation. Mr. MacDonald does not wear glasses nor have contacts. Cst. Skinner looked at his eyes to determine if they were watery, glossy, or normal, to determine if he had what is called reddened conjunctivae. Such is noted when the white portion of the eye surrounding the pupil area is pink, it being an indicator of cannabis use says Cst. Skinner. Mr. MacDonald had such, and it is noted on the face sheet.

[88] Cst. Skinner then checked to see if his eyes were tracking equally, did a horizontal and vertical gaze nystagmus examination, which checks for an involuntary jerking of the eyes. None was present. One would expect to see the presence of horizontal or vertical gaze nystagmus in the categories of central nervous system depressants, inhalants and dissociative anesthetics. He would not expect to see either when someone is under the influence of cannabis.

[89] Mr. MacDonald's eyelids were droopy, almost half closed during the evaluation. This, again he says is consistent with cannabis use as well as narcotic analgesics use.

[90] The next step are the divided-attention tests. They include the Rhomberg balance test, the walk-and-turn test, and the one-leg stand.

[91] During the Rhomberg there was nothing remarkable other than some swaying by Mr. MacDonald. On the walk-and-turn there was quite a bit of difficulty noted by Cst. Skinner in that Mr. MacDonald reversed how he should stand, he had difficulty turning, difficulty concentrating and missed many of the heal to toe requirements. On the one leg stand, again it was noted that Mr. MacDonald swayed. Cst. Skinner indicated that a notation of a sway is anything that is more than six inches to one side or the other of the line.

[92] Next the finger-to-nose test was performed. Mr. MacDonald was to touch the tip of his finger to the tip of his nose however he used the pad of his finger thus creating a much larger surface area making it easier to hit the targe. He was for the most part close to actually being able to perform the test on the six attempts used, he touched the bridge of his nose, touched just under his nose as examples but was not successful on doing the task as directed.

[93] The next portion of the evaluation was examination of Mr. MacDonald's vital signs. His blood pressure was elevated at 172/88, the normal being 120-140/70-90. The pulse was checked again and it was still elevated at 120 beats per minute out of the normal range of 60-90 with his body temperature being normal. A normal body temperature, Cst. Skinner testified is consistent with cannabis use.

[94] The next step was the eye examinations. Cst. Skinner has a pupilometer to measure pupil size in room light, dark light, and in direct lighting conditions. His observations were that in darkness the pupils were outside the normal range, in room light they were within the range and in direct light both were just slightly outside the normal range.

[95] With marihuana use, one expects to see a larger than normal pupil diameter, that it can be normal, but in general, pupils are generally dilated as he observed with the room and direct light testing. Cst. Skinner, during the time in the dark room had Mr. MacDonald stick out his tongue wherein he noted a brown coating which is consistent with smoking, consistent with marijuana use.

[96] Next he examined Mr. MacDonald's muscle tone. He checked large muscle groups like forearms, thighs and upper legs to determine if the feel is normal, or if it is flacid, in this instance it was normal, which is consistent with cannabis use. Cannabis use, unlike other drugs does not change your muscle tone.

[97] Next Cst. Skinner looked for injection sites to check for track marks in terms of intravenous drug use. None were visible for Mr. MacDonald such being consistent with marihuana use as it is not injected, it is usually consumed orally or smoked.

[98] The next step relates to “statements”, wherein he asked Mr. MacDonald what drug he had been using. Mr. MacDonald advised he had smoked a ½ gram joint smoked about a half an hour before he was pulled over, and he indicated that it was a “big joint”. This took place in his car.

[99] Cst. Skinner then looked at his evaluation in its totality. He reviewed all the signs and symptoms as presented, as well the vital signs, and the psychophysical tests and formed an opinion that Mr. MacDonald was under the influence of a category of drugs, which in his opinion impaired him such that he should not be operating a motor vehicle. His opinion was that the drug category was cannabis.

[100] Cst. Skinner said the drug symptomology, that is certain symptoms that people will exhibit if under the influence of a certain category of a specific drug, indicated to him cannabis use by Mr. MacDonald. Someone impaired by cannabis generally demonstrates reddened conjunctivae, a laissez-fair attitude, difficulty concentrating, droopy eyelids with no vertical or horizontal gaze nystagmus, increased pulse, normal reaction to light, increased blood pressure with a normal body temperature, have normal muscle tone, with a dilated pupil size.

[101] Mr. MacDonald exhibited a great deal of the symptomology one would expect from someone under the influence of cannabis, commonly referred to as marijuana. Having formed this opinion Cst. Skinner read a urine demand to Mr. MacDonald, and he complied. A sample was collected at 11:20pm. This sample was then forwarded to the RCMP laboratory and an analysis was completed by Lori Campbell.

[102] Mr. Patriquin suggested that an elevated blood pressure or pulse rate outside of what the medical community considers to be the norm may not in fact be a specific person’s norm such that it should be a factor to be considered. Cst. Skinner agreed that people do run outside of the norm but not one or two factors

alone draw him to his ultimate opinion, again stressing the totality of the evaluation as the basis for his demand.

[103] Mr. Patriquin suggested that people who are tired can have droopy eyes. Cst. Skinner's evidence was that droopy eyes are not something he normally sees on someone who is tired, rather such is often an indicator of drug use, and that the eye examination is used to divide someone's attention as if they were driving, staring, using a signal light, horn, brake, gas, as he is trying to divide what they are doing to see how alert they are.

[104] Cst. Skinner reiterated to Mr. Patriquin the need to look at the entire evaluation in order to come to an opinion on impairment and that it is not a piece meal approach.

[105] Lori Campbell, her qualifications as an expert having previously been determined, testified that she was assigned to the case involving Mr. MacDonald and received an exhibit jar containing urine from the subject with the request to analyse it for drugs and to issue a report.

[106] The sample was subjected to a number of different toxological analysis and a report rendered.

[107] She reviewed the analytical techniques, or "kits" that screen for a particular drug or family of drugs. In the laboratory when there is a positive result for a class of drug, before a report can be rendered, such has to be confirmed by mass spectral identification on an instrument that requires a specific extraction procedure, that is extracting that particular class of drugs and running it on a unique analysis. She confirmed that these methods and procedures were used with respect to this sample and a report was prepared.

[108] The sample was found to contain a cannabis metabolite, specifically carboxy tetrahydrocannabinol which is commonly called "carboxy THC".

[109] Carboxy THC is an inactive metabolite that does not produce psychoactive effects like the parent drug, THC. The inactive metabolite is a byproduct of metabolism that ends up in urine after it has been in the body for a period of time. It is formed almost immediately as the cannabis is ingested and starts to be

converted to the inactive metabolite. It can show up in a sample three days later. Cannabis is unique in that there is no way to determine time of use. It is soluble in a persons body fat rather than being water soluble and thus can last for quite a period of time.

[110] Ms. Campbell explained cannabis is a drug that displays characteristics of a central nervous system stimulant or a central nervous system depressant and it can also produce hallucinogenic effects. It causes a person to lose their inhibitions, to become more relaxed and this includes a person's concentration becoming impaired. Ability to process information is lessened, attention span is reduced and if one is standing they would have impaired balance. It can also cause slurred speech, and in relation to driving it can cause a person to exhibit reduced tracking ability. Reduced tracking ability occurs in relation to yourself and another vehicle in front of you, as you are unable to maintain proper tracking ability and lane position can be effected.

[111] As the drug is in the body for a period of time, the effects that are predominant become more depressant in nature as opposed to stimulant.

[112] When cannabis is ingested, being most commonly smoked, the effects on a person start almost immediately and actually begin as the person is smoking the cigarette or "joint" and before they ever finish it.

[113] The peak effects occur generally between ten and thirty minutes from the start of smoking and can last for another two to four hours, although some studies show that there can even be residual effects on impairment after the four hour period.

[114] General effects on a person include loss of inhibition, a distortion of time, space and body image. The ability to have good depth perception is therefore compromised and the sense of taste, touch, and smell are heightened.

[115] It can cause pupil dilation but not necessarily, blood pressure increases outside of normal limits as does pulse. One other common effect is the lack of convergence, or the inability to cross one's eyes.

[116] There can be some variations depending on how much of the drug is used and the type of user but beyond that these are hallmark features which are expected to be seen.

[117] The only drug that she found in the analysis was cannabis.

[118] Ms. Campbell agreed with Cst. Skinner's evaluation conclusion that because of Mr. MacDonald's reaction to light, his increased pulse and blood pressure, normal muscle tone and body temperature, his droopy eyelids, pupil size, laissez-faire attitude, and reddened conjuctivae that he would be under the influence of cannabis.

[119] She further explained that reddened conjunctivae is unique to cannabis use. Red conjunctivae is a physiological effect that is only seen when the drug is active in the body. While a metabolite might appear in a urine sample days later, the presence of the red conjunctivae during an evaluation is indicative that drug use was more recent.

[120] Driving is a divided-attention task that takes a driver's attention to a number of places at the same time. A person under the influence of cannabis is effected as their ability to process this information as it is unfolding in front of a driver and hence to any to perform any requisite tasks. This is particularly so in an emergency situation, it impairs the driver's ability to notice first that something is unfolding, and secondly, that they should respond to it as well.

[121] Ms. Campbell agreed that the lack of convergence is something usually not seen with cannabis use, and that an elevated pulse and blood pressure can be for a specific individual outside of what the "norm" has been determined to be. She explained that guidelines for blood pressure and pulse were developed long before the DRE program by medical professionals and that they are guidelines but that a DRE officer looks at the totality of everything that is on the face sheet to form an opinion about whether the person is impaired at the time of the evaluation and by what drug or drugs.

[122] With the exception of the lack of convergence, Ms. Campbell stated that all of the other physiological effects that were noted are consistent with cannabis use, and that Cst. Skinner's demand for a sample was well founded.

[123] No defence evidence was presented at trial other than that already referenced.

[124] The Court at this stage of the trial had applications by Mr. MacDonald on the issue of voluntariness of his oral statements as recorded on the drug influence evaluation sheet by Constable Skinner. The Court found such were freely and voluntarily made and the reasons for such were given in an oral decision.

[125] Counsel for Mr. MacDonald then made a section 7 Charter application with respect to those same statements.

[126] It was agreed by counsel that the evidence on the *voir dire* on the voluntariness issue would be considered as evidence for the purpose of the *Charter* application by Mr. MacDonald.

[127] Mr. MacDonald sought exclusion of four questions and answers on the face sheet, pursuant to section 24(2) of the *Charter*.

[128] The burden of proof to establish the infringement pursuant to section 7 is on Mr. MacDonald on a balance of probabilities.

[129] On the Drug Influence Sheet the following 4 questions and responses are recorded.

Cst. Skinner:	Are you taking any medications or drug?
Mr. MacDonald:	Smoked a marihuana joint - 9:30pm.
Cst. Skinner:	What medicine or drug have you been using? How much?
Mr. MacDonald:	One 0.5 gram joint ½ hour before arrested/pulled over "It was a big joint though"
Cst. Skinner:	Time of use?
Mr. MacDonald:	9:30pm approx
Cst. Skinner:	Where were the drugs used?

Mr. MacDonald: "In my car"

[130] Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[131] It was the position of Mr. MacDonald that the responses to the questions cannot be used as part of the Crown evidence for proof of the offence alleged. It was the Crown's position that such was a proper use.

[132] Counsel for Mr. MacDonald asserted at paragraph 27 of his brief:

> That it would be nothing short of trickery for the police to inform an accused he need not say anything, but also inform him that he must partake in an evaluation whereby refusal to do so would result in a criminal charge, and then slip in a few questions ostensibly as part of the evaluation intending to use the answers as evidence against the accused. There should be at least a corresponding obligation on the police to differentiate to the accused as to which questions are solely for the purpose of the evaluation and which are not....

[133] Mr. Patriquin referred the Court to this issue which was touched upon by Chief Judge Curran in the decision of **R v. Dunlop** [2011] N.S.P.C. 30.

[134] Mr. Dunlop was charged at or near Amherst that while his ability to operate a motor vehicle was impaired by a drug did operate a motor vehicle. He was initially stopped for a motor vehicle infraction and upon going to the vehicle the constable noted the smell of marihuana coming from it. Mr. Dunlop pulled a roach out of the vehicle's ashtray and told the officer that he had smoked marihuana earlier. He was then arrested for possession of marijuana and read a field sobriety test demand. Once the test was conducted the officer gave Mr. Dunlop a drug recognition evaluation demand which Mr. Dunlop agreed to, after speaking with duty counsel.

[135] Chief Judge Curran's comments on this issue begin at paragraph 6:

> [6] As was pointed out by Mr. Melvin, on behalf of Mr. Dunlop, the drug recognition process approved in [the] *Criminal Code* regulations does not include interrogation. Mr. Melvin argues that his client was forced, by the threat of a refusal charge, to admit use of marijuana earlier in the day, thus incriminating himself. He further argues that because that admission was part of the basis upon which the constable relied in forming his belief that Mr. Dunlop was impaired by cannabis, and taking a resulting sample from him, that the taking of that sample should be found to be in breach of section 8 of the *Charter*, and that under section 24(2), the sample should be found inadmissible.
>
> [8] Mr. Baxter, for the crown, argued that Constable Galloway was entitled at common law to interrogate Mr. Dunlop during the drug recognition process, and that in any case, Constable Galloway had testified, on cross examination, that he had no relied upon the admission in interrogation to conclude impairment by cannabis....
>
> [9] Demanding that a person comply with a process or be charged with refusal, and then including an interrogation in that process, renders replies to the interrogation involuntary and contrary to the right against self incrimination. Use of the results of such an interrogation to advance criminal proceedings against an accused is akin to using a statutorily compelled report as evidence on a criminal charge, against the person who gave the report.

[136] Chief Judge Curran then referred to a somewhat parallel situation in the decision of **R v. White** [1999] 2 S.C.R. 417. A person made a report pursuant to the Motor Vehicle Act in British Columbia and the contents of the report, including statements by the person, were used or were attempted to be used in a subsequent criminal trial. The Supreme Court of Canada found this to be an unacceptable practice.

[137] The Crown in the case at bar submits that the statements are admissible for the truth of their contents and do not infringe section 7 of the **Charter** nor require any remedy under section 24(2).

[138] Mr. Russell referred to Constable Skinner's evidence that should Mr. MacDonald have not answered the questions asked to him on the face sheet, he

would not, because of such, have been charged with a refusal offence, and such distinguishes it from **White**.

[139] Upon questioning Mr. Russell confirmed there is nothing in the evidence of Constable Skinner that he ever told Mr. MacDonald such, or made him aware of the distinction.

[140] The Crown argued that the analysis in **Dunlop** based on **White** is distinguishable. **White** involved a legislative scheme where a person is required by law to provide information upon filing of a report under the Motor Vehicle Act with no Charter or police cautions, nor are people advised that they are being charged with any offence.

[141] The Crown further argued there is no evidence from the accused that he felt he had no choice but to answer all of the questions and that such burden rests with him. Mr. MacDonald was aware of his right to silence, his right to consult counsel which he exercised and he knew he did not have to say anything if he chose not to.

[142] The Crown pointed to Mr. MacDonald's evidence that he was comfortable with Cst. Skinner, it was a positive setting, he felt he was treated very well and did not feel he was being tricked or duped into doing anything.

[143] On cross-examination Ms. MacKinnon for the Crown asked Mr. MacDonald whether at any point in the testing if he asked Constable Skinner if he had to answer any particular questions, or if he inquired as to what would happen if he did not participate, and he answered in the negative.

[144] Mr. MacDonald told her the only time he asked any questions to the officer was whether he had to give the urine sample and the consequences if he did not, to which Constable Skinner replied, that if he did not he would be charged with refusal. Mr. MacDonald said he asked such at that point because he was unsure if that was part of the test that he had spoken to his lawyer about and wanted clarification.

[145] The Crown referred the Court to the decisions in **R v. Pomeroy** [2004] O.J. No. 5040 and **R v. Essibuah** [2007] O.J. No. 1484.

[146] Both of these decisions relate to a body of case law as to whether a Breathalyzer technician, in order to obtain a statement from an accused, is obligated to re-caution the person before undertaking Alcohol Influence Report questioning.

[147] As noted by Mr. Patriquin the **Pomeroy** decision is not a Charter case but rather deals with issue of voluntariness of a statement. Both **Pomeroy** and **Essibuah** hold that there is no obligation on the police to re-caution as part of the taking of a breath sample. They seem to suggest that such is part and parcel of the test or the preparation of the test. However, at paragraph 31 of **Pomeroy**, *(supra*),

> Takach J. interpreted the issue as one to be decided on a case-by-case basis having regard to the circumstances of each prosecution. In other words, a finding of involuntariness does not automatically arise from a failure to re-caution. He was right to adopt this approach. In this regard, I agree with the statement in R. v. Kruszewski, supra, at para.53:
>
> > 'I have reviewed the cases cited by counsel for the appellant. They appear to me to be fairly categorical. There is no absolute requirement that breath technicians re-caution accused persons prior to asking the questions in the Alcohol Influence Report. *However, failure to do so may well result in an adverse finding and the exclusion of the answers thereto*.' (emphasis added)

[148] The **Essibuah** case again is one dealing with the issue of voluntariness of statements given to a police officer and because the Crown sought to rely upon them for the truth of their contents, whether a re-reading of the caution was necessary was in issue.

[149] In that decision Justice Andre refers to varying lines of cases and attempts to answer the question which is the correct approach. Every case must be determined on its particular facts. One case of note that the learned Justice does refer is **R v. Elliott** from the Ontario Court of Justice a decision of Justice Bennett. At paragraph 26:

> If further questions are to be asked which may be incriminating, then the usual cautions should be given at that time so there is no confusion in the mind of the accused.

[150] During his testimony on the *voir dire* the following exchange between Mr. MacDonald and his lawyer took place:

> Q: Okay. After you spoke to your legal counsel, what did you understand about your participation in the drug evaluation?
>
> A: That I had to participate, or if I didn't I would be charged with refusal.
>
> Q: Okay.
>
> A: That's what the counsel told me.
>
> Q: Okay...
>
> A: Yes, sir.
>
> Q: That's... we already know this from testimony, I just want to confirm this with you. Okay. Now, what was your understanding about participating in this evaluation with Constable Skinner? What you could do and couldn't do?
>
> A: That I pretty well just had to do what he told me to.
>
> Q: Okay. And in relation specifically to questions asked to you by Constable Skinner?
>
> A: That it was a part of the test and I had to be cooperative.
>
> Q: Okay. At any point in time did Constable Skinner or any police officer tell you... differentiate between what you could and couldn't do as part of... what you had to do or did not have to do as part of this evaluation?
>
> A: No, sir.

[151] I find that there is a breach of Mr. MacDonald's section 7 Charter rights. Mr. MacDonald was given his right to counsel and he exercised the same. His understanding from his evidence on the *voir dire* makes it clear that he understood he had to cooperate with the test Constable Skinner was about to perform or face a charge of refusal. I accept his evidence in that regard.

[152] At no time was a differentiation made known to him by Constable Skinner that he did not have to answer the question portion of the evaluation, and only had to participate in the physical aspects of the evaluation.

[153] That is a difference with a significant distinction.

[154] There is no evidence that Constable Skinner set out to trick or mislead Mr. MacDonald but simply was performing the test as contained on a pre-printed form and there was no *malafides* in his conduct during the evaluation.

[155] It would be the ultimate violation of the rights that are contained in section 7 if Mr. MacDonald's answers were admissible for their truth.

[156] The police cannot through the guise of a form that, but for participation, would result in a charge, use its contents of the same to prove more than what is intended by the legislation and in this particular situation the regulations in the **Criminal Code**. As noted by Chief Judge Curran in the **Dunlop** case, there is nothing in those regulations that include interrogation.

[157] Turning now to a section 24(2) **Charter** analysis and the rule that now governs the same from **R v. Grant** [2009] 2 S.C.R 353, the Court has three factors which it must consider in deciding whether the admission of such evidence would bring the administration of justice into disrepute, (1) the seriousness of the Charter infringing state conduct, (2) the impact of the breach of the Charter protected interests of the accused, and (3) society's interest in the adjudication of the case on its merits.

[158] It is hard to imagine in this country a breach more serious than that of the right against self incrimination. It is at the heart of what citizens understand one of their rights to be.

[159] The impact of a breach on Mr. MacDonald's right to remain silent has to be significant given the Crown's position that it wishes to use the evidence obtained by the infringement. It is evidence that but for the infringement the Crown would not have and that is a significant breach.

[160] Regarding the final factor, namely society's interest in the adjudication of a case on its merits, this is not a situation where such is the only evidence that the Crown has. This is a case where this evidence truly is minimal in terms of the Crown evidence. Constable Skinner testified that this piece of evidence was but a part of his forming the grounds to make the demand for the urine sample and specifically stated he would have made the demand without this evidence.

[161] Cst. Skinner testified:

> Q: Okay. Now you stated in your testimony a moment ago that prior to even asking the questions you had your reasonable and probable grounds. You asked these questions. If Mr. MacDonald wouldn't have responded, what would you have done?
>
> THE COURT: Which questions?
>
> MS. MACKINNON: Oh Okay. Okay for his questions. If he would not have responded to, "What medicine or drug have you been using?".
>
> THE COURT: So those that are in issue, okay.
>
> A: I would have continued on and did exactly what I finished the evaluation doing and I would have made a demand for a sample of Mr. MacDonald's urine and obtained that sample.
>
> MS. MACKINNON: What about if he didn't respond time of use?
>
> A: I would have done the same thing. I would have just made the demand for the urine and continued on.
>
> Q: And, "Wherewere the drugs were used?"
>
> A: Same answer.

[162] And on cross-examination:

> Q: Right. So the question portions of the drug evaluation, are you saying that you don't need a response from any of those?
>
> A: They're a very small portion of the evaluation, Mr. Patriquin. If someone didn't want to answer them, the only thing I'd really like

> someone to answer, although I suppose they could just nod their head that they understood, would be questions like, "Do you understand?" and they could nod their head I suppose if they wanted to. But realistically I'm looking for someone to stop physically participating in this evaluation before a refusal, before even thinking about a refusal.
>
> Q: Okay. So, the questions are not a necessary part for your evaluation?
>
> A: Well they're nice and they're part of the 12 step standardized procedure by the International Association of Chiefs of Police, but they're not essential to me making a call at the end of the day.
>
> Q: Okay. Do you tell people that? That you're...
>
> A**:** No.

[163] Mr. MacDonald established on a balance of probabilities that the inclusion of the disputed questions and answers would bring the administration of justice into disrepute and they were ruled inadmissible.

[164] The issue now is whether the Crown has proven beyond a reasonable doubt that Mr. MacDonald's ability to operate a motor vehicle was impaired by a drug.

[165] The Supreme Court of Canada in **R v. Stellato** [1994], 2 S.C.R. 418 approved the reasons of Labrosse, J.A. [1993] O.J. No.18. He held that if evidence before a Court describes any degree of impairment from slight to great, the offence is made out. He rejected the appellants contention that the Crown must prove a persons ability to operate a motor vehicle was impaired by alcohol or a drug such that his "conduct demonstrated a marked departure from that of a normal person"

[166] Justice Labrosse referenced the reasoning from **R v. Campbell** [1991], 26 M.V.R. (2d) 319, a decision written by Justice Mitchell of the Prince Edward Island Court of Appeal. At paragraph 10:

> The **Criminal Code** does not prescribe any special test for determining impairment. It is an issue of fact which the trial judge must decide on the evidence. The standard of proof is neither more nor less than that required for any other element of a criminal offence. Before he can convict, a trial Judge must receive sufficient

> evidence to satisfy himself beyond a reasonable doubt that the accused's ability to operate a motor vehicle was impaired by alcohol.
>
> It is not an offence to drive a motor vehicle after having consumed some alcohol as long as it has not impaired the ability to drive. However, a person who drives while his or her ability to do so is impaired by alcohol is guilty of an offence regardless of whether his ability to drive is greatly or only slightly impaired. Courts must, therefore, take care when determining the issue not to apply tests which assume or imply a tolerance that does not exist in law. Trial judges constantly have to keep in mind that it is an offence to operate a motor vehicle while the ability to do so is impaired by alcohol. If there is sufficient evidence before the Court to prove that the accused's ability to drive was even slightly impaired by alcohol, the Judge must find him guilty.

[167] Since **Stellato** there have been numerous decisions from, most notably, Alberta and Saskatchewan which delineate factors to be considered in the assessment of impairment.

[168] In **R v. Landes** [1997], S.J. No. 785, Justice Klebuc on a section 253(a) appeal stated at paragraph 16:

> An opinion as to impairment, be it by the trial judge or a non-expert, must meet an objective standard of 'an ordinary citizen', or a 'reasonable person' in order to avoid the uncertainties associated with subjective standards, particularly when based on inferences. To that end a list of tests and observations has been developed for use by peace officers and courts in determining whether an accused's mental faculties and physical motor skills were impaired by alcohol to the degree of impairing the accused's ability to operate or drive a motor vehicle. Those observations and test include: (1) evidence of improper or abnormal driving by the accused; (2) presence of bloodshot or watery eyes; (3) presence of a flushed face; (4) odour of an alcohol beverage; (5) slurred speech; (6) lack of coordination and inability to perform physical tests; (7) lack of comprehension; (8) inappropriate behaviour.

[169] And further at paragraph 17:

> In my view, a trial judge must carefully review all of the reported tests and observations which inferentially support or negate any impairment of the accused's mental and physical capabilities, and then be satisfied beyond a reasonable doubt that the reasonable inferences to be drawn therefrom establish that the accused's ability was impaired to the degree prescribed by ss.253 and 255 of the Criminal Code. A piecemeal approach supporting or negating impairment is not permissible. See R. v. Hall at p.66.

[170] This reasoning is in my opinion equally applicable to cases of impaired operation of a motor vehicle by a drug.

[171] There is a crucial distinction to be made by trial judges. In **R v. Andrews** [1996], A.J. No.8 (Alta C.A.), this important distinction is set out at paragraphs 16-17:

> [16] Stellato approves the principle that a conviction on a charge of impaired driving can be founded on proof beyond a reasonable doubt of slight impairment of the ability to drive. If the ability to operate a motor vehicle is impaired (even slightly) by alcohol or drugs, it is not necessary that the degree of that impairment be marked.
>
> [17] The courts must not fail to recognize the fine but crucial distinction between "slight impairment" generally, and "slight impairment of one's ability to operate a motor vehicle". Every time a person has a drink, his or her ability to drive is not necessarily impaired. It may well be that one drink would impair one's ability to do brain surgery, or one's ability to thread a needle. The question is not whether the individual's functional ability is impaired to any degree. The question is whether the persons' ability to drive is impaired to any degree by alcohol or a drug. In considering this question, judges must be careful not to assume that, where a person's functional ability is affected in some respects by consumption of alcohol, his or her ability to drive is also automatically impaired.

[172] Impairment is, as per **Stellato**, *(supra)*, an issue of fact for the trial judge. Having heard the evidence in this matter it clearly is a very case specific finding.

[173] Justice Fuerth in **Jansen** *(supra)*, at paragraph 61 stated:

> The hurdle for the Crown in these cases is to relate back the findings of the evaluation, and the subsequent chemical analysis, to the time of the driving. In alcohol impairment cases, we frequently see the use of the breath tests mandated by the Code for which there are the statutory presumptions of accuracy and identity. The enactment of these presumptions by Parliament was based upon careful consideration of the science of breath alcohol testing, and of absorption and elimination rates as it relates to alcohol. In the case of drugs, the Crown does not have the benefit of the statutory presumptions, and must by cogent evidence relate back the findings of its expert evidence, and the consequent analysis, to the time of driving....

[174] Lori Campbell's report states:

> When cannabis is smoked or inhaled, peak effects start within 10-30 minutes, can last approximately 2-4 hours after use, and are dependant on dose and degree of experience with cannabis. The general effects that could be expected include a feeling of well-being; relaxation; drowsiness; emotional disinhibition; a distortion of time, distance and body image; enhanced taste of smell and touch; impairment of concentration; mild confusion and disorientation; garrulousness and spontaneous laughter; short-term memory deficits; reduction in attention span and ability to process information; decreased muscular strength; muscle tremors, impaired standing balance; and mild cognitive and motor impairment leading to impaired ability to perform complex tasks. Physiological effects include increases in heart rate and blood pressure; reddening of the conjunctiva of the eyes; lung irritation, dryness of the mouth and throat; and an increase in appetite.

[175] It goes on to relate such to a persons ability to operate a motor vehicle while under the influence of a drug, and cannabis in particular:

> Numerous aspects of driving are outside of a driver's conscious control and the effects that cannabis has on these leads to an overall decrease in car handling performance. Operational level skills involve aspects such as the ability to maintain the lateral position on the vehicle (i.e. stay in the lane of travel) and the ability to maintain headway (distance behind a lead vehicle). As cannabis impairs motor coordination, reaction time and the ability to estimate time and distance, this will obviously not make for a safe driving situation. Add subjective sleepiness, impaired vigilance, and the cognitive impairment of attention information processing and judgement, and it becomes apparent that driving will become a more hazardous experience, especially if an unexpected or emergency situation arrises.
>
> Cannabis is capable of impairing an individuals ability to operate a motor vehicle safely. The impairing effects of cannabis are dose-dependent and generally greatest within the first couple of hours after smoking a 'joint'. Most effects return to normal within 4 hours, although some complex divided-attention tasks can be impaired for up to 24 hours.

[176] In **Andrews**, *(supra)*, Justice Conrad stated at paragraph 23:

> Impairment is a question of fact which can be proven in different ways. On occasion, proof may consist of expert evidence, coupled with proof of the amount

> consumed. The driving pattern, or the deviation in conduct, may be unnecessary to prove impairment. More frequently, as suggested by Sissons C.J.D.C. in McKenzie, proof consists of observations of conduct. Where the evidence indicates that an accused's ability to walk, talk, and perform basic tests of manual dexterity was impaired by alcohol, the logical inference my be drawn that the accused's ability to drive was also impaired. In most cases, if the conduct of the accused was a slight departure from normal conduct, it would be unsafe to conclude, beyond a reasonable doubt, that his or her ability to drive was impaired by alcohol. Put another way, as was done in Stellato, the conduct observed must satisfy the trier of fact beyond a reasonable doubt that the ability to drive was impaired to some degree by alcohol....

[177] And further at paragraph 29:

> In my view the following general principles emerge in an impaired driving charge:
>
> (1) the onus of proof that the ability to drive is impaired to some degree by alcohol or a drug is proof beyond a reasonable doubt;
> (2) there must be impairment of the ability to drive of the individual;
> (3) that the impairment of the ability to drive must be caused by the consumption of alcohol or a drug;
> (4) that the impairment of the ability to drive by alcohol or drugs need not be to a marked degree; and
> (5) proof can take many forms. What it is necessary to prove impairment of ability to drive by observation of the accused and his conduct, those observations must indicate behaviour that deviates from normal behaviour to a degree that the required onus of proof be met. To that extent the degree of deviation from normal conduct is a useful tool in the appropriate circumstances to utilize in assessing the evidence and arriving at the required standard of proof that the ability to drive is actually impaired.

[178] Mr. MacDonald was placed under arrest by Cst. Reid at 9:46pm. He had just prior to arrest observed Mr. MacDonald's vehicle approaching him at a high rate of speed and swerving from its lane of travel. He also indicated that when he turned and pursued the vehicle, with emergency equipment activated, it accelerated its speed upon being pursued.

[179] Cst. Reid observed a very strong odour of burnt marihuana and described the physical difficulties Mr. MacDonald had retrieving documentation as well as the

presence of blood shot eyes, slow movements, he was placid and displayed a laid back demeanor.

[180] Cst. Skinner's evidence detailed the results of Mr. MacDonald's physical coordination tests and the physiological symptoms observed including his increased heart rate, blood pressure, reddening of the conjunctivae, normal body temperature, increased pupil dilation, normal muscle tone and droopy eyes as well as his laissez-fair attitude, inappropriate laughing and lack of comprehension.

[181] Lori Campbell's evidence is that when these symptoms are being displayed it affects a person's ability to have good depth perception, their ability to process information, their ability to perform necessary tasks, their ability to respond appropriately and their ability to perform appropriately as these things relate to driving. As noted in her report numerous aspects of driving are outside of a driver's conscious control and operational skills are affected. Very important in her testimony was that the presence of reddened conjunctivae is indicative of recent cannabis use and unique to it alone.

[182] A person's faculties which are impaired by cannabis as described by Ms. Campbell was evident throughout the time both officers were with Mr. MacDonald. The impairing effects upon one's ability to operate a motor vehicle as detailed in Ms. Campbell's evidence were active both at the time of driving and immediately thereafter at the roadside as found in Cst. Reid's evidence, as well as during the evaluation undertaken by Cst. Skinner. I accept the evidence of both officers.

[183] The Crown has through "cogent evidence related back the findings of its expert evidence, and the consequent analysis to the time of driving". (see Jansen, supra)

[184] In **R. v. Laprise** [1996] 1 C.C.C. (3d) 87 (Que. C.A.), the Court found that scientific analysis of bodily fluids can corroborate other impairment to drive evidence but without expert evidence of a correlation between the results and possible impairment of faculties, impairment to operate a motor vehicle is not met. I find in this case such is met.

[185] I find that the Crown has proven beyond a reasonable doubt that at the time of operation of Mr. MacDonald's motor vehicle he was under the influence of cannabis to a degree that his ability to drive was impaired. The overwhelming evidence in this case makes such a logical and reasonable inference.

L. Halfpenny MacQuarrie, J.P.C.

PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. MacDonald, 2012 NSPC 26

Date: 20120326
Docket: 2156688
Registry: Port Hawkesbury

Between:

Her Majesty the Queen

v.

Jake Lendre Hugh MacDonald

Revised judgment:	The text of the original judgment has been corrected according to this erratum dated **April 27, 2012**.
Judge:	The Honourable Judge Laurel Halfpenny MacQuarrie
Heard:	February 25, March 22, September 8, October 26 and December 12, 2011, in Port Hawkesbury, Nova Scotia
Written Decision:	March 26, 2012

Charge:	On or about the 19th day of December, 2009 at, or near Iron Mines, Nova Scotia, did while his ability to operate a motor vehicle was impaired by a drug did operate a motor vehicle contrary to section 253(1)(a) of the **Criminal Code**.
Counsel:	Shane Russell and Christa MacKinnon, for the Crown Kevin Patriquin, for the Defence

Erratum:

[1] Paragraph 49, last sentence, change “relieved on heavily” to “relied on heavily.”