

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Bacon*, 2019 NSPC 32

Date: 20190712

Docket: 8287132

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Gregory Bacon

Judge:	The Honourable Judge Theodore Tax ,
Heard:	May 14 & 15, 2019, in Dartmouth, Nova Scotia
Decision	July 12, 2019
Charge:	253(1)(a) of the Criminal Code
Counsel:	Tiffany Thorne, for the Nova Scotia Public Prosecution Self- Represented, for the Defence

By the Court:

[1] Mr. Gregory Dylan Bacon has been charged with having care or control of a motor vehicle while his ability to operate a motor vehicle was impaired by alcohol or drug, contrary to section 253(1)(a) of the **Criminal Code**. The offence is alleged to have occurred on or about July 11, 2018 at or near Cole Harbour, Nova Scotia. The Crown proceeded by way of summary conviction.

[2] Trial evidence was heard on May 14 and May 15, 2019. The Crown Attorney and Mr. Bacon made their closing submissions at the conclusion of the evidence on May 15, 2019. The Court reserved its decision until today's date.

[3] There is no dispute between the parties that during the early morning hours of July 11, 2018, Mr. Bacon had care or control of his motor vehicle and was operating it on the Forest Hills Pkwy. in Cole Harbour, Nova Scotia. At about 5:30 AM, the motor vehicle being operated by Mr. Bacon was seen weaving and drifting in the lanes on the road and then went off roadway, colliding with and breaking 2 telephone poles located on the side of the Parkway. A person following Mr. Bacon's vehicle, immediately called 911 and an RCMP officer arrived on scene within minutes.

[4] It is the position of the Crown that the police officer had reasonable grounds to believe that Mr. Bacon's ability to operate a motor vehicle was impaired as result of the consumption of a drug or of a combination of alcohol and a drug and made a demand to require him to comply with an evaluation by a Drug Recognition Evaluator. While the Crown Attorney does not necessarily dispute Mr. Bacon's evidence that he had not slept prior to the single vehicle accident, it is her position that the totality of the evidence established that the combination of fatigue, alcohol and drugs impaired Mr. Bacon's ability to operate a motor vehicle. In those circumstances, the Crown Attorney submits that they have established all of the essential elements of the charge before the court beyond a reasonable doubt.

[5] For his part, Mr. Bacon submitted that there is reasonable doubt as to whether any alcohol or drugs impaired his ability to operate a motor vehicle during the early morning hours of July 11, 2018. It is his position that the accident was caused by the fact that he had not slept in 24 hours, as he stayed up all night playing video games with a friend and, he simply fell asleep at the wheel of his vehicle. While he acknowledged during his testimony that, during the previous

day, he had consumed some alcohol and cocaine, he maintained that neither the alcohol nor the cocaine had any impact on his ability to operate his motor vehicle.

[6] Mr. Bacon also submits that the Drug Recognition Evaluator misinterpreted some of the results of the evaluation. He maintains that some of the results were due to the fact that he had not had any sleep for some time and that he had just been in a serious single vehicle accident where the airbags of the car had been deployed, saving him from serious physical injuries.

Summary of Trial Evidence:

[7] Mr. Ian Paterson was on his way to the Halifax airport on July 11, 2018 around 5 AM. At about 5:30 AM, he was travelling on the Forest Hills Parkway towards Main Street when he noticed a car in front of him, go off the road, hit and break 2 telephone poles. The single vehicle accident occurred just after Cole Harbour Place near the intersection of Teranaki Drive and the Parkway.

[8] Mr. Paterson said that the car which he was following had no lights on and near Auburn Drive, it had attempted to stop abruptly and then swerved towards and then out of Auburn Drive to continue on the Forest Hills Parkway. As the car continued down the Parkway, Mr. Paterson noted that the car drifted into the lane of oncoming traffic and then back to its proper travelling lane and then just drift off the road and slam into the 2 telephone poles. The car cut the first telephone pole in half and knocked down a second telephone pole near Teranaki Drive.

[9] Mr. Paterson immediately stopped and noticed that the driver and sole occupant of the vehicle had got out of the car and went to look at the front end of the car. Mr. Paterson said that the driver seemed to be “disoriented” and added that when he asked the driver if he was okay, the driver replied that he was “slightly disoriented.” On cross examination, Mr. Paterson agreed that when the EHS personnel and ambulance arrived on the scene, the driver also told them that he felt “all right and was just shaken up and disoriented.”

[10] Mr. Paterson had phoned the police to report the accident and said that they arrived at that location within 5 minutes. Const. Jonathan Patterson arrived at the scene of the accident at 5:29 AM. He spoke with Mr. Ian Paterson, who pointed out the driver of the black Hyundai car with heavy damage to its front end. After that, Const. Patterson went over to Mr. Bacon asked for and received his driver’s license and the insurance for the vehicle.

[11] Const. Patterson stated that he has had significant experience as a certified breath technician and that, during his conversation with Mr. Bacon, he did not detect any odour of alcohol from his breath. However, Const. Patterson also noticed that Mr. Bacon was having a difficult time to avoid falling asleep, his eyes were bloodshot, and they rolled when he spoke to him. Mr. Bacon was unsteady on his feet and had to steady himself by putting a hand on the car. Mr. Bacon had informed Const. Patterson that he had been up all-night playing video games with a friend.

[12] A few moments later, EHS personnel arrived and cleared Mr. Bacon. Const. Patterson placed Mr. Bacon in the back of his police car and turned the heat on as it was cool at that time of the morning. The police officer also stated that, with the heat on in the car, if Mr. Bacon was impaired by alcohol, then the warmth of the car would likely result in an odour of liquor coming through his pores. Const. Patterson did not detect any odour of liquor at that time. However, the police officer stated that Mr. Bacon fell asleep in the back of the police car and that he had to wake him up to continue to speak with him.

[13] Mr. Bacon told Const. Patterson that the accident had occurred because he was very tired, had been up all night at a friend's place and simply fell asleep while driving and went off the road. In Const. Patterson's opinion, Mr. Bacon was "very dopey" when he spoke with him, his eyes were rolling back in his head and he kept falling asleep. Given all of those factors, Const. Patterson formed the belief that Mr. Bacon's ability to operate a motor vehicle was impaired by drug and he read the Drug Recognition demand. Mr. Bacon said that he would comply with that demand.

[14] After reading the Drug Recognition demand at 6:03 AM on July 11, 2018, Const. Patterson provided Mr. Bacon with his **Charter** rights and a police caution. After that, the police officer contacted the detachment and arranged for a Drug Recognition Evaluator (DRE) from the Halifax Regional Police to meet them at the RCMP's Cole Harbour detachment office.

[15] Const. Patterson also read the breath demand to Mr. Bacon in order to demand that he provide suitable samples of his breath for analysis to determine the presence, if any, of alcohol in his blood. Mr. Bacon said he would comply with that demand and back at the detachment, Const. Patterson administered the breath test on an Intox EC/IR II. The result was .02 or 20 mg of alcohol in 100 ml of blood.

Const. Patterson was of the opinion that the alcohol present was a very low amount and had not caused the impairment that he had observed on Mr. Bacon.

[16] Const. Patterson described the weather and road conditions as being cool, at about 5:30 AM on July 11, 2018, there was no rain and the sun was just starting to come up. There was relatively little traffic on the Forest Hills Parkway at that time. Const. Patterson confirmed that police received a 911 call at 5:29 AM, he arrived at the scene within minutes and spoke to Mr. Bacon at 5:40 AM. He reiterated that he formed a belief, at the scene, that Mr. Bacon's ability to operate a motor vehicle was impaired by a drug, based upon Mr. Bacon's actions and reactions.

[17] Const. Patterson stated that there was a slight delay in leaving the scene of the accident until other officers arrived and took control of the scene and directed traffic around the accident. He left the scene of the accident with Mr. Bacon around 6:15 AM and arrived a short time later at the Cole Harbour detachment.

[18] Const. Christopher Hansen, a DRE with the Halifax Regional Police, was contacted to administer an evaluation of whether Mr. Bacon's ability to operate a motor vehicle was impaired by a drug or a drug in combination with alcohol. Const. Hansen arrived at the RCMP detachment around 7 AM to conduct his evaluation of Mr. Bacon. Prior to Const. Hansen's arrival, Const. Patterson maintained "continuity" of Mr. Bacon to ensure that he did not have any food or drink that might impact the test performed by the DRE.

[19] After the completion of the test by the DRE, the Halifax Regional Police officer made a demand for Mr. Bacon to provide a urine sample into a sealed vial. Const. Patterson received the sample from Mr. Bacon and sent the urine sample for analysis at the lab and then drove Mr. Bacon to his house. Mr. Bacon was not charged with this offence until November 21, 2018, which was a short time after the lab results of the urinalysis were received by the police.

[20] On cross-examination, Const. Patterson confirmed that Mr. Bacon had complied with all aspects of the investigation. When it was suggested that there were other reasons for the accident, Const. Patterson stated that, in his opinion, the charge was laid based upon all of the evidence gathered at the scene, by the DRE and the subsequent analysis of the urine sample. He agreed with Mr. Bacon that the motor vehicle accident was probably "life-threatening" because he had gone through 2 telephone poles, but he was surprised that Mr. Bacon was able to leave the scene with relatively few injuries. Finally, he confirmed that he had not seen Mr. Bacon consume any drugs, nor did he locate any drugs on him.

[21] Const. Christopher Hansen of the Halifax Regional Police was the certified DRE, pursuant to section 254 of the **Criminal Code** who arrived at the Cole Harbour detachment of the RCMP around 7 AM on July 11, 2018. He stated that he had been certified as a DRE by the International Association of Chiefs of Police as of June 18, 2018.

[22] As a result of that certification, Const. Hansen was qualified to give expert opinion evidence in relation to the identification of the signs and symptoms of drug impairment associated with the 7 drug categories, conduct of the 12-step DRE evaluation and interpretation of its results and whether the ability to operate a motor vehicle was impaired by drugs(s). The test results of the evaluation conducted by him of Mr. Bacon were noted by Const. Hansen on a so-called "face sheet" which was subsequently filed as Exhibit 3 in the trial.

[23] Prior to conducting the twelve-step process for the evaluation, Const. Hansen spoke to Const. Patterson to get some background information about the accident and any other things that he had noted. At 7:15 AM on July 11, 2018, Const. Hansen met with Mr. Bacon, but first had to wake him up as he had fallen asleep in the room where he was being held. Const. Hansen detected a "faint odour of alcohol when he entered the room. As a result, he read the breath demand to Mr. Bacon, but since he was not a certified breath technician, it was then that Const. Patterson conducted the breath test while Const. Hansen was present. The breath results were noted on Exhibit 3 as 20 mg of alcohol in 100 ml of blood.

[24] The breath results were the first step in the twelve-step analysis and the 2nd step, which had already been done, was an interview with the investigating officer to see what his grounds were for making the arrest and any observations of impairment.

[25] The 3rd step was a preliminary examination which included speaking to Mr. Bacon, checking his pulse, checking his pupils to see if they were equal and checking to see if there were any medical issues that needed to be attended to, including such things as whether Mr. Bacon was diabetic and needed insulin. Mr. Bacon indicated that he was not sick or injured. He also advised Const. Hansen that the last food he had consumed, was a six-inch Subway sandwich at 4 PM on July 10, 2018. Mr. Bacon also advised the officer that his last sleep was only for a few hours during the evening of July 9-10, 2018.

[26] The 4th step in the analysis required Mr. Bacon to follow a stimulus, in this case, the point of a pen, which was placed about 12 to 15 inches from his nose. The

stimulus was moved to the left and then the right as well as up and down and Mr. Bacon was instructed to keep his head still and only move his eyes. This part of the DRE analysis checked horizontal gaze nystagmus, vertical gaze nystagmus and whether there was a lack of convergence and a lack of smooth pursuit.

[27] Const. Hansen noted on the “face sheet” [Exhibit 3] that there was not smooth pursuit, so he checked each eye 2 times. Const. Hansen noted that there was vertical nystagmus as he moved the pen up and down and that there was involuntary jerking of the eyes at the top and bottom of the eye lids. There was also a lack of convergence as he brought the pen towards the nose from a distance to see if the eyes crossed and converged towards the centre. The right eye converged to the centre, but the left eye was straight ahead.

[28] Const. Hansen’s observations of Mr. Bacon’s eyes indicated, to him, the possible usage of drugs affecting smooth pursuit of the object. The lack of smooth pursuit was “distinct” at the maximum deviation. As a result of those tests, Const. Hansen said that a drug can cause nystagmus and he mentioned that it could have been caused by either a central nervous system depressant, an inhalant or a dissociative anaesthetic which are 3 of the 7 drug categories.

[29] The 5th part of the evaluation was the divided attention tests which included checking Mr. Bacon’s balance to see if there was any sway, a walk and turn test, a one leg stand test and a test of whether he could place his finger to his nose with his eyes closed. Const. Hansen’s observations of Mr. Bacon’s performance were placed on Exhibit 3. Const. Hansen believed that some of the difficulties that Mr. Bacon had in performing those tests were due to some form of impairment, as he had previously observed Mr. Bacon stumble into the door frame as he walked out of the room where they first met, he was quite sleepy and had watery eyes as well as a slurred and thick speech. He also noted that his face was very flaccid and relaxed, and it looked like he wanted to sleep.

[30] The 6th step involved taking Mr. Bacon’s pulse for a 2nd time, his blood pressure and his temperature at 8:05 AM. Const. Hansen noted that his systolic blood pressure was slightly higher than normal being 152, whereas the normal average ranges between 120 to 140. The officer also noted that the normal body temperature is from 36.5° C. to 37.5° C, and in this case, Mr. Bacon’s body temperature was 35.9°C.

[31] Const. Hansen stated, again, that no one part of the twelve-step analysis is determinative of his opinion, but rather, he draws an inference or an opinion from

the totality of the circumstances available to him including the background information and this evaluation.

[32] The 7th step required Const. Hansen and Mr. Bacon to be in a darkroom for 90 seconds to check the size of the pupils when the officer shined a light through his finger towards one of the eyes. In that way, the light shined is not bright enough to completely constrict the pupil. A chart is used by a DRE and it is placed against the pupil of the eye to measure the pupil size in millimetres. Const. Hansen also noted how long it took for the pupil to constrict after the light source was introduced. He indicated that anything more than one second is considered to be slow. Mr. Bacon's reaction to the light took a couple of seconds to constrict the pupil and, in Const. Hansen's opinion, that could be caused by either a central nervous system stimulant or depressant, or an inhalant.

[33] As part of that 7th step, the DRE checks the nasal area to see if any substances have been inhaled as well as in the mouth to see if there are any traces of anything that has been consumed. The only observation made during this part of the evaluation was that there was some dried blood in Mr. Bacon's nose which did not indicate anything out of the ordinary to Const. Hansen.

[34] The 8th and 9th step are done at the same time. The DRE checks to see the muscle tone of the subject and to check for any injection marks on the subject's arms. Const. Hansen noted that the muscle tone was "flaccid" and that there were no injection marks. Once again, the flaccid muscle tone could be an indication of the presence of a central nervous system depressant or narcotic analgesic.

[35] The 10th step is an interview to determine what, if any, medications Mr. Bacon was taking at the time. Mr. Bacon told him that he was not sure whether he was taking any meds at that time. As for Mr. Bacon's health, Const. Hansen stated that Mr. Bacon did not appear to be injured, irrational or confused, nor did he complain of any pain or indicate that he was in some distress. Const. Hansen noted that, for the most part, Mr. Bacon was trying to sleep.

[36] The 11th step in the evaluation is where the DRE forms an opinion after having considered all of the information gathered from the subject and the investigating officer as well as his own analysis of the previous 10 steps. Const. Hansen formed the opinion that Mr. Bacon's ability to operate a motor vehicle was impaired by a central nervous system depressant in combination with some alcohol (20 mg %). Const. Hansen added that alcohol is also a central nervous system depressant.

[37] After having completed all of the other steps in the DRE analysis and then forming the opinion that Mr. Bacon was under the influence of a central nervous system (hereafter “CNS”) depressant as well as alcohol which impaired his ability to operate a motor vehicle, Const. Hansen made a demand, at 8:30 AM, to provide a toxicological sample, in this case, a sample of Mr. Bacon’s urine. Const. Hansen stated that Mr. Bacon provided that sample, in his presence to ensure that no other substances were introduced into the sterile vial which was then sent off to the toxicology lab in Ottawa for analysis.

[38] The last witness called by the Crown was Mr. Christopher Keddy, who is a forensic toxicologist and provides opinions on the analysis, administration, absorption, distribution, metabolism, elimination and effect of drugs, alcohol and other intoxicants on human performance and behaviour, including driving a motor vehicle. Following a voir dire, Mr. Keddy was qualified as an expert to provide opinion evidence in those areas, and his curriculum vitae which outlined his education, training and employment history was filed as Exhibit 5.

[39] Mr. Keddy stated that, in this case, there was an analysis made by a DRE and a biological sample was obtained from Mr. Bacon and forwarded to him for analysis. The analysis performed by Mr. Keddy on Mr. Bacon’s urine sample which was provided in a sealed container by Mr. Bacon was to determine whether any drugs or drug related compounds were present in the sample. The biological sample had been held in a refrigerated storage area until it was retrieved and analysed by Mr. Keddy.

[40] Mr. Keddy stated that his findings may or may not line up with the DRE officer’s opinion. In this case, however, the DRE believed that a CNS depressant was involved, and he explained that it takes several different tests to determine whether one was present in Mr. Bacon’s body. The 4 methods or instrumentation to analyze the urine sample were outlined in Exhibit 6, which was the Forensic Science and Identification Services Laboratory Report prepared by Mr. Keddy on September 28, 2018.

[41] Mr. Keddy’s evidence and Exhibit 6 confirmed that the results of the analysis of the urine sample provided by Mr. Bacon had the presence of CNS depressant drugs and CNS stimulant categories, being lorazepam and cocaine. Mr. Keddy added, in his conclusions, that the presence of drugs and/or drug metabolites in the urine only confirms prior drug use and that “no direct inference can be made with respect to the time(s) of use or the degree of impairment at the

time of driving based on these findings alone.” Drug dose, manner of use and a person’s tolerance to the drug play a significant role in the effects experienced from any CNS active drug. Tolerance refers to decreased drug responsiveness after a period of repeated use.

[42] Mr. Keddy stated that lorazepam is also known by its tradename, Ativan. It is a prescription drug used in the management of anxiety, panic and certain kinds of seizure disorders. It is a member of the benzodiazepine group of drugs that can cause dose-dependent CNS depression. Adverse CNS effects which may occur include sedation, drowsiness, fatigue and weakness, reduced control of body movement, slowed reaction times, dizziness, memory impairment and slurred speech.

[43] In Mr. Keddy’s opinion, those effects from the usage of lorazepam impact a person’s ability to drive a motor vehicle as the driver’s attention to the environment around them is compromised. Dealing with a given task such as steering or braking is impacted by less coordination and slowed reactions to the situation. Mr. Keddy stated that driving a motor vehicle is a so-called “divided attention task” as there are usually cars in front, behind or oncoming, there is the requirement to stay in the proper lane, potential obstacles on the road and when travelling at speed, those tasks become even more difficult when a CNS depressant drug is present.

[44] Mr. Keddy stated that lorazepam is available in different dosages and its effects can last for different times from onset. If taken orally, the impact will be within 2 to 4 hours, with the peak reaction increasing and onset faster if the drug is taken under the tongue. In addition, if the dose taken is more than normal, it will take longer to reach the peak and the duration of the effects will be longer. Mr. Keddy stated that a standard situation might result in a 1 to 3-hour time period for the onset with a total of 4 to 6-hour duration of the effects.

[45] As for cocaine, it is a potent CNS stimulant used recreationally for its intense euphoric and energizing effects. Recreational cocaine use involves smoking (as crack), snorting, or injecting the drug and is associated with dose-dependent effects including euphoria, increased self-confidence, and sense of increased mental and physical energy. The stimulant effects of cocaine may last 15 to 45 minutes, depending on how the drug is used and the dose used. Once the stimulant effect wears off, fatigue, agitation and anxiety may follow.

[46] Mr. Keddy added that cocaine is not a prescription drug and the onset of its effects usually occur within minutes, especially if injected. The duration of the CNS stimulant effects from the usage of cocaine can be up to 90 minutes, but the increased energy will last between 15 to 45 minutes depending on how the drug was administered.

[47] As the cocaine's CNS stimulant effects wear off, Mr. Keddy stated that a person's body tries to counteract and a person may become drowsy, tired, or very sleepy during the transition and then, a CNS depressant kicks in. This secondary effect, as a CNS depressant, may last for hours. Either way, Mr. Keddy's opinion was that both the stimulant and the depressant effects from cocaine impact a person's ability to drive a motor vehicle.

[48] The euphoric effect from cocaine usage causes increased self-confidence in one's abilities which may result in overreaction to scenarios which unfold on the roadway, such as braking and accelerating properly, avoiding obstacles on the highway, paying attention to road signs and traffic signals. In those circumstances, a person may be less able to make sound decisions on short notice on the highway and as such, it is not compatible with safe driving. Mr. Keddy added that if alcohol is present, the combined impact on the ability to drive will be worse.

[49] On cross-examination, Mr. Keddy was asked to provide his opinion with respect to a hypothetical situation, where a person was tired from the lack of sleep and had done drugs during the preceding day. Based upon that hypothetical, Mr. Keddy's opinion was that an overtired person will perform less effectively on tests with the DRE officer and drive less effectively because of slowed decision-making, which creates a dangerous situation on the roads.

[50] Mr. Keddy confirmed that drugs can be found in a person's urine for 12 hours after it was taken, but the effects could have largely worn off by that time. He also confirmed that as part of the background for his analysis, he was provided information from the investigating agency on a "Face Sheet." He confirmed that he was aware of the fact that there was a single motor vehicle accident, 1 to 2 hydro poles had been broken and the driver of the vehicle had been examined by a DRE.

[51] Following Mr. Keddy's evidence the Crown Attorney closed her case and tendered the exhibits which had been filed during the trial.

[52] Mr. Bacon elected to testify during the trial and stated that he was overtired, had simply fallen asleep at the wheel of his vehicle and that the DRE analysis was

a “misunderstanding” of his state of mind at the time of the accident. He stated that, after the accident, he was in a state of shock and while he was out of the car he wasn’t thinking straight and he believes he was knocked unconscious for a few seconds, because his nose was covered in blood.

[53] Mr. Bacon was of the view that while he was driving his vehicle, he did not experience any effects from the drugs and alcohol that he had consumed some time prior to the accident. He acknowledged that cocaine and lorazepam were in his system, but denied that they had any impact on him at the time of the accident.

[54] Mr. Bacon stated that he had been at a friend’s house playing video games all night and then remembered that his father needed his car to get to work the next day. Mr. Bacon stated that he had paid for the car himself, but they shared its expenses. Mr. Bacon added that his license had the letter “N” on it, which restricted him from driving after 12 midnight and before 5 AM. He left his friend’s place after 5 AM and started driving towards his house, but it was hard for him to keep his eyes open, so he rolled down the windows and played loud music. However, he fell asleep and then drove off the road and hit the 2 telephone poles.

[55] On cross-examination, Mr. Bacon acknowledged that he was driving his vehicle on the Forest Hills Parkway around 5:30 AM on July 11, 2018 and that he was the only occupant of the vehicle. He agreed that when he was driving on that road, he could hardly keep his eyes open. He does recall drifting over the line, but stated that he was trying to get home, so he could give the car to his father for him to drive to his work location.

[56] Mr. Bacon said that, on July 10, 2018, he got up early and went to work from 7 AM to 10 AM, cleaning stores with his father. After he completed his work for the day, Mr. Bacon went to hang out with friends for the rest of the day. At around 4 PM on July 10, 2018, he went to Subway for a sandwich. He pointed out that Const. Hanson had noted that fact on the “Face Sheet.”

[57] On July 10, 2018, Mr. Bacon said that he arrived at his friend’s place in Highfield Park around 10 PM and then, they played video games throughout the night. Mr. Bacon stated that he had not consumed any alcohol with his friend. As the evening wore on, he realized that it was past midnight and that he was not able to drive at that time. He stated that he had consumed a couple of beers between 1 and 2 PM on July 10, 2018 and that he did some cocaine later that day.

[58] He also confirmed that before going to sleep the previous day, he took a lorazepam pill in order to help him sleep that evening. Mr. Bacon said that a friend had given him the lorazepam as he did not have a prescription for it. Mr. Bacon said that he only took one pill and added that he had consumed the 0.2 or 0.3 grams of cocaine during the afternoon of July 10, 2018, while he was with a friend and having a beer.

ANALYSIS:

[59] At the outset of my analysis, it is important to note the general principles which apply in all criminal trials. First, in a criminal trial the burden is on the Crown to prove the charges against any accused beyond a reasonable doubt. Furthermore, Mr. Bacon is presumed to be innocent of the charge before the court unless I conclude that the Crown has proved his guilt beyond a reasonable doubt. The effect of that presumption of innocence means that Mr. Bacon does not have to testify, present any evidence or prove anything. The burden of proof is on the Crown and it never shifts to Mr. Bacon.

[60] The presumption of innocence and the requisite standard of proof beyond a reasonable doubt are fundamental principles in our criminal law. The Supreme Court of Canada has established in cases such as **R. v. Lifchus**, [1997] 1 SCR 320 and **R. v. Starr**, [2000] 2 SCR 144 that “reasonable doubt” does not require the Crown to prove the allegations to an absolute certainty. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.

[61] It is also important to note that, in assessing all of the admissible direct and circumstantial evidence that was presented during the trial, the court must assess the credibility or believability and reliability or accuracy of that evidence and then determine whether to believe and accept all, some or none of the evidence of a witness, or accept parts of the witness’s testimony and reject other parts. In so doing, if the court accepts all or part of the evidence of a witness, then, the court may also determine what, if any weight, to assign to that evidence.

[62] In this case, the Crown must prove, beyond a reasonable doubt, that Mr. Bacon’s ability to operate a motor vehicle was impaired by alcohol and/or drug. The offence is made out if the evidence of impairment establishes, beyond a reasonable doubt, any degree of impairment of the accused’s ability to operate a motor vehicle, ranging from slight to great, and that the impairment was by alcohol

and/or a drug: See **R. v. Stellato**, 1993 Canlii 3375 (ONCA), adopted by the Supreme Court of Canada in [1994] 2 SCR 478, 1994 Canlii 94 (SCC).

[63] For the purposes of this case, it is also important to note that a person may be convicted of an offence contrary to section 253(1)(a) of the **Criminal Code** where their impairment of the ability to operate a motor vehicle was due partly to fatigue and partly to the consumption of alcohol and/or a drug. See, for example, **R. v. Pelletier**, 1989 Canlii 7166 (SKQB) on summary conviction appeal, at page 4; **R. v. Isley**, 1997 Canlii 1459 (BCSC) at para. 23-24; **R. v. Orr**, 2011 NSPC 2, at para 27 and **R. v. Bartello**, 1997 Canlii 1025 (ONCA).

[64] With respect to the essential elements of this offence, there is, in reality, no dispute between the parties that the evidence established that, at about 5:30 AM on July 11, 2018, Mr. Bacon was in care and control of a motor vehicle on the Forest Hills Parkway and operating it in the direction of Main Street. At that time, Mr. Ian Paterson happened to be driving on the Parkway on his way to the Halifax airport and found himself behind the vehicle being driven by Mr. Bacon. Mr. Paterson's evidence established that, as they continued down the Parkway, the vehicle in front of him drifted into the lane of oncoming traffic, back into its proper travelling lane and then drifted off the road and slammed into 2 telephone poles situated along the side of the road.

[65] The traffic on the Parkway was quite light and road conditions were clear and dry as it was not raining on that summer morning. The sun was just starting to come up. In those circumstances, I find that there were absolutely no environmental reasons or road conditions which would have caused the vehicle being operated by Mr. Bacon to drift in and out of the lane of traffic and continue drifting off the road slamming into the 2 telephone poles, causing significant damage to the front-end of his vehicle and deploying the airbags.

[66] I find that Const. Jonathan Patterson's evidence established that a 911 call had been placed at 5:29 AM with respect to a single vehicle accident and that he arrived on scene within 5 minutes. I find that the evidence of Mr. Ian Paterson, Const. Patterson and, for that matter, Mr. Bacon himself, established that Mr. Bacon was the driver and lone occupant of the vehicle involved in the accident. As a result, I find that Mr. Bacon had care or control of the motor vehicle around 5:30 AM, on 11 July 2018 at or near Cole Harbour, Nova Scotia.

[67] In those circumstances, I find that the Crown has also established the essential elements of the date and time, jurisdiction in which the offence is alleged

to have occurred as well as the identity of the driver as being that Mr. Gregory Dylan Bacon.

[68] As a result, the critical issue to be determined is whether the Crown has established, beyond a reasonable doubt, that Mr. Bacon's ability to operate a motor vehicle was impaired by alcohol and/or a drug during the early morning hours of July 11, 2018.

[69] In terms of the observations of Mr. Bacon and his driving of the vehicle just before the single vehicle accident, as I indicated previously, Mr. Ian Paterson had seen Mr. Bacon's vehicle weave or drift into the oncoming lane of traffic on the Parkway, come back into the proper lane and then drift off the road colliding into the telephone poles. There was no evidence before the court with respect to the speed of the vehicles, however, I find that it is reasonable to infer that Mr. Bacon's vehicle was probably being driven near the speed limit, if not higher, from the fact that his vehicle sheared off 2 telephone poles, located off the side of the road.

[70] With respect to the initial observations of Mr. Bacon, Mr. Ian Paterson immediately went over to the vehicle and asked Mr. Bacon, who was still seated in the driver seat of the vehicle, if he was okay. Mr. Paterson said that when he spoke to Mr. Bacon, the reply that he got was that he was "disoriented" and then he got out to look at the front end of his vehicle. Mr. Paterson did not observe any injuries on Mr. Bacon and added that Mr. Bacon told him that he was "just shaken up and disoriented." On cross examination, Mr. Paterson agreed with Mr. Bacon that he had complied with the directions of the police officer, but seemed to be in an "daze and a little out of it."

[71] I find that Const. Patterson's evidence and his experience as a certified breath technician provided the Court with detailed observations of Mr. Bacon from which he could form a belief as to whether Mr. Bacon's ability to operate a motor vehicle was impaired by alcohol and/or a drug. I find that Const. Patterson fairly stated that he, himself, did not detect any odour of alcohol from Mr. Bacon's breath after the initial conversation with him, as well as during a subsequent conversation with him after he was seated in the warm police car for a short time.

[72] I accept Const. Patterson's evidence, which was consistent with the evidence of Const. Hansen and, for that matter, not contradicted by Mr. Bacon, that when Mr. Bacon was left alone for a few moments, he would fall asleep. In addition, I accept Const. Patterson's evidence that when he spoke with Mr. Bacon, the accused appeared to be "very dopey," his eyes were bloodshot, and they were

rolling back in his head. In making those observations, Const. Patterson was aware that Mr. Bacon had informed him that the accident had been caused by him staying up all night, playing video games and simply falling asleep while driving his vehicle.

[73] I find that Const. Patterson fairly and reasonably considered the information provided to him by Mr. Bacon, along with the information provided by Mr. Ian Paterson, as well as his own observations that Mr. Bacon was “dopey” and, in his view, inexplicably falling asleep at a moment’s notice. In the officer’s opinion, Mr. Bacon’s reactions did not seem consistent with what his own experience was from the impact of a serious accident like that, ought to have caused. The officer expected that there would have been a significant adrenaline rush in Mr. Bacon, but in this case, he observed the opposite effect on him.

[74] Since Const. Patterson had already determined that there was no detectable odour of alcohol from Mr. Bacon’s breath, and after considering all of the other information that he had in relation to the accident and from his interactions with Mr. Bacon, I find that, pursuant to section 254(3.1) of the **Criminal Code**, Const. Patterson had reasonable grounds to believe that Mr. Bacon had committed an offence under section 253(1)(a) of the **Criminal Code** as a result of the consumption of a drug or a combination of alcohol and a drug.

[75] As a result, I find that the Crown has established that Const. Patterson made a timely and lawful demand at 6:03 AM on July 11, 2018, which required Mr. Bacon to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether Mr. Bacon’s ability to operate a motor vehicle was impaired by a drug or by a combination of alcohol and drug. The demand was made approximately 30 minutes after the single vehicle accident was reported to the police and it also required Mr. Bacon to accompany Const. Patterson to the police station for that purpose.

[76] I find that the evidence of Const. Christopher Hansen established that he was, on July 11, 2018, an officer who was certified as a Drug Recognition Expert accredited by the International Association of Chiefs of Police. Const. Hansen described in detail and performed each one of the 12 steps involved in the drug recognition evaluation tests and procedures to be followed during an evaluation under subsection 254(3.1) of the **Criminal Code**. Those evaluation tests and procedures are contained in Canada Regulations 2008-196, entitled “Evaluation of

Impaired Operation (Drugs and Alcohol) Regulations” made under the **Criminal Code**, which came into force on July 2, 2008.

[77] While Const. Hansen noted that no one part of the 12-step analysis is determinative of the opinion that he ultimately provided, I find that there are some steps in the drug evaluation which primarily rely on reflex and instinctive reactions to stimuli and others which do not do so. Based upon Const. Hansen’s description of the 12 steps, I find that the tests of horizontal gaze nystagmus, vertical gaze nystagmus and the lack of convergence test on the eyes, the examination of blood pressure, temperature and pulse as well as the pupil size of the eyes under different light levels, do not, in reality, depend on the subject’s ability to remember and perform a certain task.

[78] On the other hand, in my opinion, there are other tasks to be performed during the 12-step evaluation which do require a person to remember the instructions and then have the coordination and balance and perform a task which they have probably never previously practiced. In those circumstances, for a task such as standing on one leg for certain length of time without wavering or putting a foot down, I find that a person might not be able to perform those type of tasks on their best day in their own home, let alone under stressful conditions of being detained at a police station.

[79] In addition, I find that Const. Hansen’s evidence was supportive of the opinion which I have expressed above, when he stated that certain aspects of the 12-step analysis may be more indicative of the presence of certain drugs or a combination of drugs and alcohol. In particular, he was asked what, if any aspects of the twelve-step analysis would not likely be present, if the subject was simply overtired from a lack of sleep. Const. Hansen stated that, in his opinion, if the person was just tired from a lack of sleep, he would not expect to see the vertical gaze nystagmus, the horizontal gaze nystagmus, the slow reaction to the light stimulus and probably not see a lack of convergence in the eyes.

[80] It should also be noted that the case of **R. v. Bingley**, 2017 SCC 12, has concluded that section 254(3.1) of the **Code** gives the police investigative tools to enforce laws against drug impaired driving and that DRE opinion evidence is admissible to prove the offence of drug impaired driving, without the aid of a **Mohan voir dire**, provided that it was established that the witness is a certified DRE as specified in the Regulations. As I mentioned previously, Const. Hansen confirmed that he has been certified by the International Association of Chiefs of

Police as a Drug Recognition Expert, since June 18, 2018 and that Certificate was filed as Exhibit 2 in the trial.

[81] When Const. Hansen first met with Mr. Bacon at around 7:15 AM on July 11, 2018, I accept his evidence that he had to wake him up because he had fallen asleep and at that time, he detected a “faint odour of alcohol” when he entered the room. As a result, he read a breath demand and Const. Patterson who is a certified breath technician, conducted the breath test which resulted in a reading of 20 mg of alcohol in the 100 ml of blood. I accept Const. Patterson’s evidence that, while some alcohol was present in Mr. Bacon’s blood, he was of the opinion that it was not at a level which would have caused the impairment that he had observed on Mr. Bacon.

[82] Following the drug evaluation tests performed by Const. Hansen, and in particular, his observations with respect to Mr. Bacon’s difficulties in performing certain tests, he concluded that Mr. Bacon’s sleepiness, unsteadiness on his feet, watery eyes, slurred and thick speech, his face and muscle tone being flaccid were probably due to some form of impairment. In fact, it was Const. Hansen’s opinion that Mr. Bacon’s reactions and actions on several of the tests were due to the presence of alcohol and either a central nervous system stimulant or depressant or an inhalant.

[83] For those reasons, at the conclusion of the evaluation, Const. Hansen made a formal demand for Mr. Bacon to provide a urine sample. Mr. Bacon complied with that request and a urine sample was placed in a sterile vial and transported to the toxicology lab in Ottawa for analysis. I find that the evidence established that there was no issue with respect to the continuity of that sample or its storage at the laboratory until it could be analyzed by Mr. Keddy.

[84] In terms of the analysis of that toxicological sample, I accept Mr. Christopher Keddy’s evidence, after qualifying him on a voir dire as an expert to provide opinion evidence as a forensic toxicologist to analyze bodily fluids for the presence of alcohol or drugs and their effects on the human body as well as on the ability to safely operate a motor vehicle.

[85] I find that Mr. Keddy’s evidence established that his analysis of the urine sample provided by Mr. Bacon established that it contained drugs in the central nervous system depressant and central nervous system stimulant categories. I find that Mr. Keddy’s evidence and his laboratory report, which was filed as Exhibit 6 in the trial, confirmed that the urine sample contained lorazepam and cocaine. It is

important to note, however, that he made the point that no direct inference can be made with respect to the times of use or the degree of impairment at the time of driving, based upon those findings alone.

[86] During his evidence, Mr. Bacon acknowledged that he had consumed some beer and cocaine sometime between 1 and 2 PM on July 10, 2018 with one of his friends. In addition, Mr. Bacon acknowledged that he took one lorazepam pill to help him sleep on the evening of July 9, 2018. He also acknowledged that he did not have a prescription for the lorazepam, but a friend had given it to him and he was surprised that it helped him sleep that evening.

[87] Mr. Bacon confirmed that he had used cocaine, from time to time, before July 10, 2018 although not extensively. He stated that, on July 10, 2018, he took either .2 or .3 g of cocaine, which he obtained from a different friend during the day and then spent all night playing video games with a third friend.

[88] I find that Mr. Keddy's evidence outlined and established the typical central nervous system effects from the usage of lorazepam and cocaine and that those substances are capable of impairing a person's ability to operate a motor vehicle safely. I accept his evidence that the risk of impairment of a person's ability to operate a motor vehicle is increased when drugs and alcohol are used in combination, since the operation of a motor vehicle is a complex "divided attention" task, which requires the efficient performance of numerous simultaneous activities.

[89] In this case, I find that the evidence established that Mr. Bacon made a voluntary decision to operate his motor vehicle shortly after 5 AM on July 11, 2018, after having stayed up all night, playing video games with a friend. In addition to that sleep deprivation, Mr. Bacon had also previously decided, during the day, to consume some alcohol, in this case, beer although he could not specifically recall the amount or times when it was consumed. Mr. Bacon also decided to utilize 0.2 grams to 0.3 grams of cocaine. but he was not able to recall exactly how much or when he utilized that controlled substance. In addition to consuming alcohol and cocaine on July 10th or during the early morning hours of July 11, 2018, Mr. Bacon also acknowledged taking a pill of lorazepam on the previous evening to help him sleep, even though he did not have a prescription for that drug.

[90] I find that the breath test conducted on Mr. Bacon at about 7:30 AM on July 11, 2018 confirmed the presence of 20 mg of alcohol in 100 ml of blood. In

addition, I find that the urine sample which was taken on the morning of July 11, 2018 and subsequently analyzed by Mr. Keddy, established the presence of cocaine and lorazepam in his body when he operated his motor vehicle.

[91] Given the observations of Mr. Bacon related to the Court by the civilian witness, Const. Patterson and Const. Hansen, the breathalyzer result as well as the toxicological analysis performed by Mr. Keddy, I do not accept Mr. Bacon's evidence that the sole cause of the single vehicle motor accident with his car going off the road and shearing off 2 telephone poles, was only due to him being overtired, sleep deprived and falling asleep at the wheel.

[92] I find that Mr. Bacon made a conscious and voluntary decision to operate his motor vehicle at approximately 5 AM on July 11, 2018, after having consumed alcohol, taking a lorazepam pill as well as 0.2 g or 0.3 g of cocaine which initially had the effect of being a central nervous system stimulant, but once that effect wore off, it became a central nervous system depressant.

[93] In addition to operating his motor vehicle after having consumed those substances, which I find to have both a central nervous system stimulant effect and a central nervous system depressant effect, I find that Mr. Bacon also created a self-induced situation of extreme fatigue from a lack of food, having only consumed a six-inch sandwich at about 4 PM on July 10, 2018, then coupled all of that, by staying up all night playing video games.

[94] Taking all of those factors into account, I find that Mr. Bacon voluntarily and consciously assumed care and control of his motor vehicle and through a lack of rest or any sleep, the recent consumption of some alcohol, lorazepam and cocaine placed himself in an extremely fatigued position, likely causing him to fall asleep at the wheel of his vehicle, which resulted in the single vehicle accident around 5:30 AM on July 11, 2018.

[95] In those circumstances, I find that Mr. Bacon's extreme fatigue was the result of him superimposing alcohol, lorazepam and cocaine in his body, which was already suffering from a self-induced lack of sleep and a lack of food. In the final analysis, I find that the totality of the circumstances leads me to the inescapable conclusion that he made a conscious decision to operate his motor vehicle at a time when his ability to operate a motor vehicle was impaired, at least in part, by his voluntary and conscious decision to consume alcohol, lorazepam and cocaine which were all present in his body at the time of the motor vehicle accident on July 11, 2018 in Cole Harbour, Nova Scotia.

[96] For all of the foregoing reasons and taking into account the legal principles established in **R. v. Stellato**, supra, I find that the Crown has established, beyond a reasonable doubt, that Mr. Bacon had care or control of his motor vehicle while his ability to operate a motor vehicle was impaired to some extent by alcohol or drug or a combination thereof, contrary to section 253(1)(a) of the **Criminal Code**.

[97] Having come to that conclusion, I find Mr. Gregory Dylan Bacon guilty of the charge before the court.

Theodore Tax, JPC