PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Joyce*, 2017 NSPC 81

Date: 2017-09-12
Docket: 3000779
Registry: Pictou

Between:

Her Majesty the Queen

v.

David Allen Joyce

DECISION ON CHARTER APPLICATION TO EXCLUDE EVIDENCE AND VERDICT

Judge:	The Honourable Judge Del W. Atwood
Heard:	2017; 8 June, 12 September in Pictou, Nova Scotia
Charge:	Para. 253(1)(a) *Criminal Code of Canada*
Counsel:	T. William Gorman for the Nova Scotia Public Prosecution Service Douglas Lloy Q.C. for David Allen Joyce

By the Court:

Preface

[1] At around 10h00 on 16 March 2016, two members of the Pictou County Integrated Street Crime unit saw David Allen Joyce driving his truck down Foord Street in Stellarton and then negotiating a turn onto Bridge Avenue. Because of the erratic and hazardous way Mr. Joyce made that turn, the officers decided to conduct a traffic-safety stop.

[2] One of the officers was an "evaluating officer" as defined in sub-s. 254(1) of the *Criminal Code*; his interaction with Mr. Joyce led him to form the belief that Mr. Joyce's ability to drive was impaired by a drug. The officer took Mr. Joyce to the police station where he had Mr. Joyce perform a number of regulatory approved physical-coordination tests and procedures; he got Mr. Joyce to answer questions pertaining to health and drug ingestion; he collected biometric measurements of Mr. Joyce's body temperature, heart rate, and systolic and diastolic blood pressure. All this was done in accordance with an evaluation conducted under sub-s. 254(3.1) of the *Code*.

[3] At the conclusion of this process, the officer formed the opinion, based on the evaluation, that Mr. Joyce's ability to operate a motor-vehicle had been

impaired by one or more central-nervous-system stimulant drugs. In accordance with para. 254(3.4)(a) of the *Code*, the officer collected a urine sample from Mr. Joyce; the sample was sent off to an analyst. The analyst prepared a certificate of analysis under para. 258(1)(e) of the *Code* and identified a number of controlled substances as having been in Mr. Joyce's system, any one of which was, according to the analyst, capable of impairing Mr. Joyce's ability to operate a motor vehicle.

[4] So it is that Mr. Joyce came to be charged with drug-impaired operation of a motor vehicle.

[5] The prosecution elected to proceed summarily, and Mr. Joyce pleaded not guilty. Prior to the trial date, defence counsel filed with the court a *Charter* application seeking exclusion of most of the inculpatory evidence against Mr. Joyce. However, as the trial progressed, it became clear that the foundational factual premise of that application—specifically, that Mr. Joyce had been subjected to standard-field-sobriety testing at roadside—had never happened. Accordingly, the trial evolved ultimately into a question of whether the prosecution had proven beyond a reasonable doubt that Mr. Joyce's ability to drive had been impaired by a drug or drugs. For the reasons that follow, I find

the prosecution to have discharged that burden, and I find Mr. Joyce guilty as charged.

Charter application

[6] On arraignment, defence counsel gave notice of an application to be brought at trial alleging a violation of s. 8 and seeking an exclusion-of-evidence remedy under sub-s. 24(2) of the *Canadian Charter of Rights and Freedoms*. Defence argued that Mr. Joyce had been subjected to inadequately grounded physical-coordination tests at roadside—known as standard-field-sobriety testing (SFST)—and that all evidence collected by police following that testing ought to be excluded as its admission would bring the administration of justice into disrepute. The statutory authority for such roadside tests is found in para. 254(2)(a) of the *Code*. Counsel agreed procedurally that the trial proceed as a blended *voir dire*.

[7] As the taking of evidence at blended *voir dire* progressed, it became clear that Mr. Joyce had never been subjected to any form of SFST procedure. Although defence counsel did not explain to the court the basis for counsel's belief that SFST tests had taken place, it appears to me that the confusion arose, quite understandably, because of the fact that the evaluating officer (who was

one of the two officers who had detained Mr. Joyce initially) conducted, later on, a drug-recognition evaluation. The SFST screening process is an abbreviated, roadside form of the more extensive forensic drug-recognition evaluation, and so I can see how it is that the two might get confused for each other.

[8] In any event, at the end of the blended *voir dire*, defence counsel conceded in oral argument that there remained no *Charter* issues to be litigated pertaining to SFST. Defence counsel made fleeting reference to seeking *Charter* relief arising from what counsel asserted was an inadequately grounded drug-recognition-evaluation demand; however, most of counsel's submissions focussed on whether the prosecution had proven the elements of the charge beyond a reasonable doubt. Still, as there remains an air of reality in the *Charter* challenge, the court will deal with it.

[9] Section 7 of the *Canadian Charter of Rights and Freedoms* states:

> 7. 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.

[10] Although often pleaded in cases such as this, defence counsel did not raise s. 7 in this trial; consequently, it is not necessary for me to consider it further.

[11] Section 8 of the *Canadian Charter of Rights and Freedoms* states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

[12] Sub-s. 254(3.1) of the *Code* provides:

> (3.1) 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.

[13] As noted in the preface of this decision, Mr. Joyce was read an evaluation demand by one of the police officers who had stopped him; that officer also happened to be a qualified evaluating officer.

[14] The collecting of biometric information from a detainee, and the compelled participation of a detainee in physical-coordination and mental-acuity tests involve a state process which allows authorities to gather private information from people. A statutory drug evaluation is, inherently, the compelled use of a person's body to obtain information, which invades an area of personal privacy essential to the maintenance of the person's human dignity. Accordingly, a drug evaluation is a search and seizure: see *R. v. Colarusso* [1994] 1 S.C.R. 20 at para. 94 and *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 51.

[15] Under the statutory scheme in s. 254(3.1), evaluations do not require a warrant, just a reasonable-grounds belief and a properly worded demand. Accordingly, a drug evaluation is a warrantless search and seizure.

[16] *Hunter v. Southam*, [1984] 2 S.C.R. 145, held that, when feasible, there must be prior judicial authorization for a search and seizure. A warrantless search is *prima facie* unconstitutional, and the onus rests with the prosecution to establish the reasonableness of such a search. A search will be reasonable under s. 8 if it is authorized by law, if the law itself is reasonable, and if the search is executed in a reasonable manner: see *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278.

[17] No challenge to the governing statute has been raised in this case, and defence counsel does not allege that the drug evaluation was conducted in a manner that was unreasonable. Rather, what seems to be the defence argument is that the evaluating officer did not have reasonable grounds to make a sub-s. 254(3.1) demand, so that the evaluation was not authorized by law.

[18] As reviewed earlier, the s. 8 argument advanced initially by defence counsel sought to challenge an SFST procedure that, in fact, had never happened. Once that fact was clarified, defence counsel raised very briefly the adequacy of the evaluating officer's grounds for making a sub-s. 254(3.1) evaluation demand.

Although that argument was not developed very extensively, defence appeared to make reference to the same factors that had been raised when dealing with the aborted roadside-testing challenge. The issue is whether the evaluating officer had, prior to making a demand under sub-s. 254(3.1), reasonable grounds to believe that Mr. Joyce was committing, or at any time within the three hours preceding the demand had 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. Specifically, defence counsel pleaded the following in arguing the inadequacy of the officer's reasonable grounds for a demand:

> • [Mr. Joyce] appeared groggy. This is a subjective observation and not necessarily indicative of a drug in a person's body;
>
> • He had a raspy voice. Many people have that kind of voice, which is their natural speaking voice.
>
> • He appeared to be slurring his speech. Again, equivocal.
>
> • He had trouble extracting his papers from a folded fabric holder. Natural nervousness when faced with police presence can account for that without the intervention of drugs.
>
> • When asked for his licence, the Accused was attempting to find the same when the vehicle began rolling slowly forward. According to the officers, he was slow to respond to their commands to put the car in park. The Accused at this point was just pulled over by the police with the emergency equipment activated, was responding to a demand by the police for unidentified documents (likely vehicle registration) and was then asked by the police to produce his licence. With so many requests being made of him in a very short period of time, the fact that the Accused did not put his car in park and was slow to do so is not indicative of the reasonable possibility that he had a drug in his body.

[19] Defence counsel sought, in essence, to have the court examine each observation made by the evaluating officer in isolation, and then discount each

by a piecemeal presentation of innocent explanations for every external condition the officer saw.

[20] I invited counsel to consider the effect of the decision of *R. v. Schofield*, 2015 NSCA 5, upon this argument. The reply memorandum submitted to the court by defence counsel advanced the view that *Schofield* offered merely a "more particularized approach" to a sufficiency-of-grounds analysis.

[21] If, by reference to a more particularized approach, it is suggested that the judgment in *Schofield* directs a reasoning process different to the one advanced by the defence, I must agree.

[22] The fact is that *Schofield* offers a complete rebuttal of the each-observation-in-isolation argument proposed by defence counsel. *Schofield* explains the proper approach a court should take in assessing the sufficiency of grounds for a self-conscripting, forensic demand, including a drug-evaluation demand:

> 33 The question is - did the "totality of the circumstances" known to the officer at the time of the breath demand rationally support the officer's belief? The officer may infer or deduce, draw on experience, and ascribe weights to factors. Parliament expects the officer to do this on the roadside according to a statutory timeline, while informed by the available circumstances, but without either the benefit of trial processes to test the accuracy of his or her belief or "the luxury of judicial reflection". The officer must identify the supporting circumstances at the voir dire. But the officer was not expected to apply the rules of evidence at the roadside. So the support may be based on hearsay. The supporting connection must be reasonable at the time, but need not be proven correct at the later voir dire that considers s. 254(3).

> 34 The judge should not segregate the officer's criteria for piecemeal analysis, then banish each factor might have a stand-alone explanation. From the officer's roadside perspective, the factors may have had corroborative weights that together formed a sounder platform for an inference of impairment. The reductive approach denies that corroborative potential. As this Court recently said, of reasonable and probable grounds for a search warrant, (*R. v. Liberatore*, 2014 NSCA 109, para. 27):
>
> > The body of evidence isn't anatomized for a segregated analysis of each fragment. Viewed as a whole, its bits may be cross-confirmatory.
>
> 35 There is no minimum period of investigation, mandatory line of questioning or legally essential technique, such as a roadside screening. The judge should not focus on missing evidence. Rather, the judge should consider whether the adduced evidence of circumstances known to the officer reasonably supported the officer's view.

[23] There is a sound epistemological basis for this: Hypotheses are tested by assessing all available evidence. The forensic evaluation of evidence can be regarded in the same way as a mathematical model: a trial involves the proof of certain precise questions, the answers to which are unknown, and which are rarely binary; working toward an answer will require concurrent analysis of all variables, much as in a summation. Fragmentary analyses are antithetical to an evidence-based, logic-driven process.

[24] When I apply *Schofield* to this case, it is abundantly clear that the evaluating officer had ample reasonable grounds to believe that Mr. Joyce had just committed the offence of drug-impaired driving, sufficient to support a 254(3.1)-evaluation demand. Mr. Joyce’s grogginess, slurred speech, erratic driving (albeit observed only briefly), sluggish response to directions to produce

paperwork, and possession of what the evaluating officer believed was a controlled substance made the officer's subjective belief in Mr. Joyce's drug-induced driving impairment entirely reasonable, based on the totality of what the officer had observed.

[25] There was no *Charter* breach here, the sub-s 254(3.1) demand was lawful, and the evaluation evidence collected as a result of the demand will be admitted.

The offence of impaired driving

[26] Para. 253(1)(a) of the *Criminal Code* states:

> Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,
>
> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug.

[27] Para. 253(1)(a) of the *Code* criminalises impaired operation of a motor vehicle when the cause of the impairment is either alcohol or a drug. The provision defines one offence than can be committed by either means. Accordingly, alcohol-impaired-driving precedents are useful in analysing drug-impairment cases.

What constitutes the objective element impaired driving? The Stellato standard

[28] It was settled in *R. v. Stellato,* [1994] 2 S.C.R. 478, that the main objective criterion—or *actus reus*—for driving while impaired contrary to para. 253(1)(a) is any impairment; an earlier, more stringent test—proof of a marked departure from the norm—was discarded. *Stellato* was a one-line judgment; it dismissed an appeal from a decision of the Ontario Court of Appeal, which had held the following, found at (1993), 78 C.C.C. (3d) 380 at 384:

> In all criminal cases the trial judge must be satisfied as to the accused's guilt beyond a reasonable doubt before a conviction can be registered. Accordingly, before convicting an accused of impaired driving, the trial judge must be satisfied that the accused's ability to operate a motor vehicle was impaired by alcohol or a drug. If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. *If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.*
>
> [Emphasis added.]

[29] This has remained the gold standard. In *R. v. Marsh*, 2016 NSSC 65, at para. 48, the court cited *Stellato* and held that "if there is sufficient evidence before the Court to prove that an accused's person's ability to drive is even slightly impaired by alcohol, the judge must find the accused guilty". In *R. v. Brannan,* 1999 BCCA 669 at para. 8, the Court reaffirmed that the test for driving while impaired was "any impairment" . In *R. v. D.A.H.*, 2016 ONCJ 585 at para. 33, the Court held that even slight impairment to drive is

criminalised by the provision if it "relates to a reduced ability in some measure to perform a complex motor function whether impacting on perception or field of vision, reaction or response time, judgment, and regard for the rules of the road". Thus, the question is whether the person's ability to drive is impaired to any degree by alcohol—or, as in this case, a drug.

[30] Whether a drug or alcohol, the substance does not have to be the sole impairing factor: *R. v. Bartello*, [1997] O.J. No. 2226 (C.A.), at para. 2. See also *R. v. Marsh*, 2016 NSSC 65 at para. 48; *R. v. Deighan* 2017 ONSC 1220 at para. 31, and *R. v. Caldwell*, [2006] O.J. No. 3280 (Sup.Ct.J.), at paras. 10 to 13.

[31] In *R. v. Thomas*, 2012 SKCA 30, at para. 13, the Court held that a conviction for impaired driving would be warranted if a court were to find sufficient evidence to conclude beyond a reasonable doubt that an accused had driven while his or her ability to operate a motor vehicle had been impaired by alcohol or a drug. To be sure, the prosecution may lead evidence of alcohol or drug consumption and aberrant driving; however, given the complex nature of an impaired ability to drive, the standard might be met in the absence of evidence of bad driving—say, through evidence of the deterioration of a motorist’s judgment or attention, a loss of motor co-ordination or control,

increased reaction times, or diminished sensory perceptions, brought on by the voluntary consumption of alcohol or a drug. In short, erratic driving (coupled with evidence of the presence of alcohol or an impairing drug in the body) might offer a sufficient proof—but it is not necessary.

[32] Proof of impaired driving ability does not require evidence of gross physical symptoms; the impairment of the ability to drive—even if only slight—may relate to a reduced ability in some measure to perform complex motor functions, whether impacting on perception or field of vision, reaction or response time, judgment, or regard for the rules of the road; a person's decision-making skills and reaction time might be affected detrimentally by a level of alcohol or drug consumption in ways that are not exhibited manifestly in walking, talking or driving: *R. v. Smyth,* 2016 SKQB 214 at para. 35.

[33] I am able to glean from these cases the following generally accepted criteria for proof of the objective element of driving while impaired by a drug:

- the prosecution must prove beyond a reasonable doubt that the accused operated or had the care or control of a motor vehicle while his or her ability to operate that vehicle was impaired by a drug;

- the drug does not have to be the sole cause of the impairment; it need be a contributing factor only;
- any degree of impairment will suffice;
- proof of impairment may be established through a number of circumstantial factors—including the accused's manner of driving; however, proof of poor or erratic driving is not necessary, although it may be sufficient;
- the court must consider the totality of the tendered evidence, including but not limited to: the manner of driving; motor skills; pattern of speech; inability to communicate and walk; driving and safety judgment; affect; situational awareness; the ability to comprehend, process and respond to signs, directions and cues; evidence of consumption of an impairing drug; the proximate presence of an impairing drug;
- the court may infer that a person rendered lethargic, dysfluent, situationally unaware, or uncoordinated after consuming a potentially impairing drug will, because of that consumption, be impaired in the ability to operate a motor vehicle, even if only to a slight degree.

The mental element of impaired operation

[34] In *R. v. King*, [1962] S.C.R. 746, the majority held that:

> [t]he existence of *mens re*a as an essential ingredient of an offence and the method of proving the existence of that ingredient are two different things, and I am of opinion that when it has been proved that a driver was driving a motor vehicle while his ability to do so was impaired by alcohol or a drug, then a rebuttable presumption arises that his condition was voluntarily induced and that he is guilty of the offence created by [para. 253(1)(a)] and must be convicted unless other evidence is adduced which raises a reasonable doubt as to whether he was, through no fault of his own, disabled when he undertook to drive and drove, from being able to appreciate and know that he was or might become impaired.

[35] Accordingly, the mental-element, *mens rea* focus will fall—at least initially—on whether the accused consumed an impairing drug voluntarily, not whether the accused voluntarily chose to become impaired: see Morris Manning Q.C. and Peter Sankoff, *Manning, Mewett & Sankoff, Criminal Law*, 5th ed (Markham: LexisNexis, 2015) at para. 25.66.

[36] Once the prosecution establishes that the accused operated a motor vehicle in a drug-impaired condition, there arises a rebuttable presumption that the accused's condition was created voluntarily; the prosecution is not required to prove that the accused intended to render himself or herself impaired.

[37] However, that is, indeed, a rebuttable presumption.

[38] Application of the presumption will require additional analysis in polysubstance-use cases such as this one. *R. v. Domb*, 2011 ONCJ 756,

illustrates this point. If a person were to, say, combine prescribed medication with a controlled substance, and this combination impair the person's ability to operate a motor vehicle, then that person will have committed the *actus reus* of the offence; the *mens rea* element will have been proven presumptively, because the taking of the second substance was voluntary. However, this mental-element presumption may be rebutted by evidence that raises a reasonable doubt whether impairment of the accused's driving ability was an unknown or unforeseeable consequence of the ingestion of substances in combination.

[39] Even in a circumstance of polysubstance use, the prosecution is not required to prove that the accused was aware of the effect of combined ingestion: see *R. v. Parada*, 2016 SKCA 102, at para 33; automatically displacing the *King* presumption in such cases would fly in the face of common sense, as the impairing effect of combining drugs is well known. Further, the *King* presumption is not displaced by evidence that one did not know about the impairing effect of a particular dosage: *R. v. Honish*, (1991), 85 Alta. L.R. (2d) 129 (C.A.), affirmed [1993] 1 S.C.R. 458; or when the effects of a drug might begin to kick in: *R. v. Murray* (1985), 22 C.C.C. (3d) 502 at 504 (Ont.C.A.).

[40] Accordingly, the mental element—or *mens rea*—of drug-impaired driving will be proven when the prosecution establishes beyond a reasonable doubt that an accused:

- Intentionally operated or had the care or control of a motor vehicle;

and,

- Intentionally consumed or ingested an impairing drug prior to or during the time of care, control, or operation.

The statutory drug-evaluation scheme

[41] The drug-impairment-evaluation scheme was introduced into the *Code* in the *Tackling Violent Crime Act*, S.C. 2008, c. 6, ss. 18-25 in force 1 May 2008 by SI/2008-24, *Can. Gaz. Part II*, 2 April 2008. The preamble to the *Act* identified the mischief sought to be remedied by the amendment:

> Whereas driving under the influence of drugs or alcohol can result in serious bodily harm and death on Canada's streets . . . .

[42] Central to the amendment was the evaluation procedure. As I noted earlier in the *Charter* portion of this judgment, sub-s. 254(3.1) of the *Code* empowers a peace officer to demand that a person comply with a drug evaluation; that provision bears repeating:

> 254 (3.1) 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.

[43] An "evaluating officer" is defined in sub-s. 254(1) of the *Code* as "a peace officer who is qualified under the regulations to conduct evaluations under section (3.1)." The *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, SOR 2008-196, in force 2 July 2008 in virtue of s. 4, states that an evaluating officer must be a certified drug recognition expert accredited by the International Association of Chiefs of Police; furthermore, an evaluating officer must, in conducting an evaluation, follow the 12-step procedure described s. 3 of the *Regulations*.

[44] Questions arose quite soon after the rolling out of the drug-evaluation regime about the testimonial qualification of evaluating officers and whether their opinions might constitute original evidence of drug-induced impairment. Some of these and other questions might get sorted out statutorily should Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, 1st Sess., 42nd. Parl.,

Canada, 2017, ss. 3-8, First Reading 13 April 2017, get enacted; however, at the present time, the binding guidance of higher courts will have to do.

The impact of R. v. Bingley

[45] In *R. v. Bingley*, 2017 SCC 12, the Supreme Court of Canada resolved some of the uncertainty that had prevailed following the enactment of the new scheme.

[46] Before reviewing the legal points which *Bingley* actually decided, it is useful to review what it did not decide.

[47] *Bingley* did not hold that the evaluation procedure would constitute the only way of proving drug impairment. Circumstantial and expert-evidence proofs that existed before the in-force date of the evaluation regime—as in *R. c. Jobin*, [2002] J.Q. 575 (C.A.), and *R. v. MacDonald*, 2012 NSPC 26—continue to be available to the prosecution.

[48] *Bingley* did not allow for the unregulated reception of opinion evidence from evaluating officers. To the contrary, it held, at para. 12, that such evidence is not automatically admissible at trial.

[49] *Bingley* did not exempt the opinion evidence of evaluating officers from the requirements for the reception of expert evidence as outlined in *R. v. Mohan*,

[1994] 2 S.C.R. 9, and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. Again, to the contrary, the majority opinion in *Bingley* applied those criteria in paras. 13-17.

[50] *Bingley* did not decide that a qualificational *voir dire* would never be needed as a condition precedent to receiving opinion evidence from an evaluating officer. Rather, the majority in *Bingley* held at paras. 18-27 that a *voir dire* was not needed in that particular case. This was because defence counsel had admitted to all of the *Mohan* criteria except proof of the evaluating officer's special expertise; as the statutory drug-evaluation regime presumes conclusively the special expertise of evaluating officers, a *Mohan voir dire* was rendered unnecessary.

[51] *Bingley* did not decide that an evaluating officer should be treated as an expert in the science of drug-recognition evaluation; rather, the majority held at paras. 20 and 29-33 that the officer should be regarded as an expert in the limited scope of administering the 12-step procedure and making a determination, based on the administration of that procedure, whether a person being evaluated was driving while impaired by one drug or more.

[52] *Bingley* did not decide that an evaluating officer's opinion was conclusive proof of impairment; further, the statutory scheme does not create a presumption of evaluating-officer accuracy, so that there exists no analog to para. 258(1)(c) of the *Code*, a provision which presumes conditionally the accuracy of chemical breath analyses. To the contrary, as the majority held at para. 32, an opinion regarding drug-impairment offered by an evaluating officer is subject to manifold challenges. For instance, the officer:

- might not have conducted the evaluation correctly or completely,
- might not have observed the evaluation results accurately,
- might have made erroneous or incomplete records,
- might have given evidence at odds with a video recording of the evaluation made under sub-s. 245(2.1) of the *Code* or at odds with other eyewitnesses who observed the evaluation,
- might be refuted by actual bodily-sample evidence collected under sub-s. 254(3.4), or
- might render an opinion unsupported by the evaluation observations.

[53] To be sure, an opinion coming from a witness with expertise should not be rejected out of hand: *R. v. D.A.H.*, 2016 ONCJ 585, and *R. v. Sualim*, 2017

ONCA 178, at para. 37; however, as *Bingley* makes clear, there are many avenues for challenging a drug-evaluation officer's opinion.

[54] Significantly, *Bingley* does not obviate the need for an inquiry into a drug-evaluation officer's impartiality. In my view, this is a key point in drug-impairment cases that hinge on the evidence of drug-evaluation officers. The need for a party offering an expert witness to establish at the outset that the witness will appreciate the need for independence and impartiality is made abundantly clear in *White Burgess* at paras. 46-50, and in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 106; see also *R. v. Vassel*, 2018 ONCA 721 at para. 85. For a very good analysis of expert bias—especially the implicit kind, that can be hard to identify—see Déirdre Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge UK: Cambridge University Press, 2008) at 163-179. Establishing independence and impartiality at the outset is, in my view, essential in evaluating-officer cases, when the proffered expert is also a police investigator who was involved in the collection of evidence relied upon to advance the prosecution of the accused and who, unlike this case, might have been the person who laid the charge. This does not place an undue burden on the prosecution, and will be fulfilled through, as described in *White Burgess* at para. 47, the expert's attestation or testimony

recognizing and accepting the duty of objectivity. While this would not take very much to get done, just as with, say, testimony linking an offence to the geographic jurisdiction of the court, it is a short but necessary piece.

[55] Finally, neither *Bingley* nor the statutory regime creates a presumption of identity analogous to paras. 258(1)(c) and (d.1) (provisions which allow an analysed blood-alcohol concentration result to relate back to the last time of driving); accordingly, it will remain for the prosecution to connect the after-the-fact opinion of an evaluating officer regarding drug impairment back to the last point in time the accused operated or had care or control of a motor vehicle. This need to relate an evaluating officer's opinion back to the last time of driving was well understood before *Bingley*—see *e.g.*, *R. v. Jansen*, 2010 ONCJ 74 at para. 61; *R. v. Perillat*, 2012 SKPC 135 at para. 25; *Domb*, *supra*, at para. 43—and is an important part of the case for the prosecution, as the opinion-making stage of the regulatory evaluation comes as the end of a lengthy process, and will occur inevitably quite some time after the evaluated motorist last drove or had care or control.

Application of the drug-evaluation scheme to this case

[56] In this case, as in *Bingley*, the only issue that remained for the court to decide regarding reception of the evaluating officer's evidence was the officer's

special expertise. As the prosecution proved that the officer was a certified drug recognition expert accredited by the International Association of Chiefs of Police in accordance with SOR 2008-196, no *voir dire* was needed, and the officer's opinion was admissible in evidence. The officer's expertise has been conclusively and irrebuttably established by Parliament: *Bingley*, para. 27.

[57] Recall that it was the evaluating officer who had conducted the traffic stop which resulted in the detention of Mr. Joyce. The officer testified about his observations at roadside.

- He saw Mr. Joyce driving northbound on Foord Street.
- He saw Mr. Joyce's vehicle striking the curb once and advancing at a very slow rate of speed.
- He saw Mr. Joyce attempting a right-hand turn and almost colliding with a car which was stopped at a traffic-light-controlled intersection.
- He saw Mr. Joyce backing up his truck after the near collision.
- He saw Mr. Joyce driving on for about twenty seconds after police had activated on-board emergency lights.
- He saw Mr. Joyce striking the curb several times more while police were in slow-motion pursuit.

- He observed Mr. Joyce as being groggy and speaking with a slow, raspy and slurred voice.

- He observed Mr. Joyce as being very slow moving and having difficulty in getting his papers out of a folded fabric holder.

- He observed Mr. Joyce as being situationally unaware that his vehicle was still in drive and rolling forward as he tried lethargically to gather his papers together.

- He found three methamphetamine tablets in one of Mr. Joyce's pockets when he searched Mr. Joyce after having arrested him.

- He did not see Mr. Joyce consume any substances after the stop.

[58] Back at the station, the officer conducted a drug evaluation in accordance with the *Regulations*, which entailed the following:

- a preliminary examination, which consists of measuring the pulse and determining that the pupils are the same size and that the eyes track an object equally;

- eye examinations, which consist of

    - the horizontal gaze nystagmus test,

- the vertical gaze nystagmus test, and
- the lack-of-convergence test;

- divided-attention tests, which consist of
  - the Romberg balance test,
  - the walk-and-turn test,
  - the one-leg-stand test, and
  - the finger-to-nose test, which includes the test subject tilting the head back and touching the tip of their index finger to the tip of their nose in a specified manner while keeping eyes closed;

- an examination, which consists of measuring the blood pressure, temperature and pulse;

- an examination of pupil sizes under light levels of ambient light, near total darkness and direct light and an examination of the nasal and oral cavities;

- an examination, which consists of checking the muscle tone and pulse; and

- a visual examination of the arms, neck and, if exposed, the legs for evidence of injection sites.

[59] The evaluating officer testified on direct that he explained each step to Mr. Joyce so that he appeared to understand what was required of him. As the evaluating officer gave his evidence on direct examination, he was permitted to refer to a written report, and a fill-in-the-blank graphic matrix which he had completed at the time of the evaluation; the officer described his observations of Mr. Joyce's level of performance of each test.

[60] At the preliminary-observations stage, Mr. Joyce was seen by the officer as having poor and unbalanced coordination; his eyes were bloodshot; his voice was raspy and slurred; he appeared agitated. He told the officer he had taken 15 prescription pills that morning; he revealed being diabetic but seemed uncertain whether he had been prescribed insulin.

[61] The officer described doing an eye examination. Mr. Joyce exhibited a slow reaction to light. His pupil sizes were equal. He did not exhibit vertical nystagmus. He was unable to track a light stimulus. Mr. Joyce refused to follow instructions for the horizontal-gaze nystagmus procedure; he informed the officer that he was unable to cross his eyes for the convergence test.

[62] In proceeding to the divided-attention tests, the officer asked Mr. Joyce to estimate the passage of 30 seconds; Mr. Joyce called "time's-up" after the passage of only 21 seconds measured on a stopwatch. Mr. Joyce was unable to describe cues he had used to estimate his time counts because, as he explained it to the officer, "I forgot". The officer had to stop the walk-and-turn and standing tests as he was afraid Mr. Joyce was going to fall over and hurt himself. Mr. Joyce had trouble with each of the prescribed finger-to-tip-of-nose touches: he raised his arm very quickly on each of the six prompts, and his aim was off on each attempt. Mr. Joyce missed touching the tip of his nose on all six attempts: on his first attempt, Mr. Joyce began to raise his right hand, recovered to his left, but then touched below his left nostril; on his second attempt, he touched below his right nostril; on his third attempt, he touched the top of his right nostril; on his fourth attempt, he touched below his right nostril; on his fifth attempt, he touched below his right nostril; on his sixth attempt, he touched just above his lip. Mr. Joyce exhibited eyelid tremors throughout this part of the evaluation.

[63] Mr. Joyce had elevated pulse rates of 120 beats per minute, 140 bpm and 158 bpm; according to the officer, the normal pulse rate for a male of Mr. Joyce's stature is 60-90 bpm. Mr. Joyce had an elevated systolic/diastolic

blood pressure of 160/110 in millimeters of mercury (mmHg). A normal range for systolic blood pressure is 120-140 mmHg and a normal range for diastolic blood pressure is 70-90 mmHg.

[64] Toward the end of the direct examination, the evaluating officer confirmed his opinion that, based on what he had observed during the evaluation, Mr. Joyce's ability to operate a motor vehicle had been impaired by a drug or drugs within the class of central-nervous-system stimulants, and that this drug-impaired condition was evident at the time of the roadside stop. The officer's relating of his opinion back to the last time of driving was amply supportable, given Mr. Joyce's erratic driving, slurred speech, groggy affect, situational unawareness, and actual possession of methamphetamine, all as observed roadside.

[65] Based on that opinion, the evaluating officer had made a demand of Mr. Joyce to provide a sample of his urine, as authorized in para. 254(3.4)(a) of the *Code*, and Mr. Joyce complied. With the consent of defence, the prosecution tendered through the evaluating officer a certificate of an "analyst", as defined in sub-s. 254(1) of the *Code*; this certificate was admissible under para. 258(1)(e) of the *Code*, and confirmed the presence in Mr. Joyce's urine of a pharmacopeia of potentially impairing CNS stimulants: methamphetamine,

amphetamine and pheniramine. According to the analyst, any one of these drugs was capable of impairing a person's ability to operate a motor vehicle.

[66] On cross-examination, the evaluating officer acknowledged that he had not encountered Mr. Joyce before, and was not familiar with his manner of speaking or his level of mobility, disability or dexterity. The officer confirmed that Mr. Joyce had been wearing large footwear during the evaluation which might have affected his stance. However, the officer made clear that the evaluation procedure required him to consider all observed traits and not focus on any one in isolation. He remained very clear about his safety concerns because of Mr. Joyce's gross imbalance and the risk of him falling over. Cross examination did not reveal any steps missed by the officer in the evaluation procedure, any errors in carrying out the evaluation, any mistakes made by the evaluating officer in recording his observations, or any unsupported conclusions reached by the officer based on his observations made during the evaluation process.

Testimony of Mr. Joyce

[67] Mr. Joyce gave evidence. His recollection of events seemed to have to do more with him having consumed an array of drugs and possibly not having understood their in-combination impairing effect. Yet, Mr. Joyce

acknowledged on cross that he knew about the long-lasting and impairing effect of methamphetamine, which he freely admitted consuming prior to driving.

Conclusion

[68] The evidence presented to the court by the prosecution satisfies the court beyond a reasonable doubt that Mr. Joyce operated a motor vehicle after having consumed voluntarily one or more drugs; the evidence of the evaluating officer satisfies me beyond a reasonable doubt that Mr. Joyce's ability to operate a motor vehicle was impaired to a substantial degree by one or more of those drugs at the time he was stopped by police. There is no evidence that the evaluation was carried out incorrectly, that the officer skipped over any steps, that the officer's recorded observations of Mr. Joyce during the evaluation process were inaccurate, or that the officer reached an opinion unsupported by the regulatory evaluation procedure. The officer reasonably related his opinion regarding Mr. Joyce's impairment back to the time Mr. Joyce was pulled over. The officer's opinion as to the class of drugs in Mr. Joyce's system—CNS stimulants—was confirmed by the certificate of the analyst. Indeed, the certificate satisfies me that Mr. Joyce actually had drugs in his body, and that they were capable of impairing his ability to operate a motor vehicle. The evidence of Mr. Joyce does not leave the court in a state of reasonable doubt

that would rebut the *mens rea* presumption in *King*. In fact, I accept much of Mr. Joyce's evidence: he does not dispute that it was he who was driving, that he had consumed drugs before driving, and that his manner of driving and performance during the evaluation procedure were much as described by the evaluating officer.

[69] The prosecution has discharged the substantial burden of proving each element of the offence beyond a reasonable doubt, and I find Mr. Joyce guilty as charged. Sentencing will be adjourned for a presentence report.

[70] I am grateful to counsel for the thorough conduct of the prosecution and defence.

JPC