PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v. Rowe*, 2022 NSPC 15

Date: 20220401
Docket: 8440928
Registry: Sydney

Between:

HER MAJESTY THE QUEEN

v.

MATTHEW B. ROWE

Judge:	The Honourable Judge Peter Ross,
Heard:	7 December 2021 and 11 January 2021, in Sydney, Nova Scotia
Decision	April 1, 2022
Charge:	Section 320.14(a) of the Criminal Code
Counsel:	Oge Egereonu, Nova Scotia Legal Aid, for the Accused Darcy MacPherson, PPS, for the Crown

By the Court:

Introduction

[1] The charge before the court is a single count of drug-impaired driving. The Crown's case rests on the result of a drug evaluation and the resulting opinion evidence of the evaluating officer. There is no driving or toxicological evidence.

[2] Section 320.28(2) of the Criminal Code states:

> If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by a drug or by a combination of alcohol and a drug, or has committed an offence under paragraph 320.14(1)(c) or (d) or subsection 320.14(4), the peace officer may, by demand, made as soon as practicable, require the person to comply with the requirements of either or both of paragraphs (a) and (b):
>
> > (a) to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person's ability to operate a conveyance is impaired by a drug

[3] An "evaluating officer" is defined in s.320.11 to be a peace officer who has the required qualifications as prescribed by Regulation. The term "drug recognition expert" is sometimes used interchangeably with "evaluating officer". One sometimes sees mention of the "DRE officer". Hereafter, I will employ the term "evaluating officer" (EO) to refer to the person.

[4] The *measure* authorized in ss.(a) above is often called a "drug recognition evaluation" (DRE), referring to the process.

The credentials of the evaluating officer

[5] Cst. Brennan Martin of the Cape Breton Regional Police was the Crown's chief witness. He was both the arresting officer and the person who conducted the drug evaluation of the accused. His opinion constitutes the only significant evidence of driving impairment. It is the crux of the Crown's case.

[6] S.320.31(5) states that the EO's opinion about impairment, by the type of drug that they identified, is admissible evidence without formally qualifying the witness as an expert.

[7] The only potential bar to admissibility raised by the Defence involved the currency of Martin's certification. It pointed to the omission of dates in some of the tendered documentation. Defence at no time suggested that he lacked special expertise by virtue of his training.

[8] The following points emerged from Martin's testimony at trial:

1. He was first certified in 2018.
2. He was given 31120 as his unique number, noted on the evaluation sheets he prepared.
3. He had done 22 evaluations as of the date in question
4. A drug recognition expert is re-certified every two years if they do a minimum 4 evaluations in that time.
5. Omission of dates in his certification cards was supplied and corrected *viva voce*
6. His current certification is due to expire 15 March 22
7. He believed and stated that he was an evaluating officer acting according to Regulation on 9 October 2019.

[9] I conclude that Cst. Martin was properly trained and certified on the date in question. Consequently Martin's opinion about the accused's impairment is received, subject to weight.

<u>The evidence of Cst. Martin</u>

[10] Cst. Martin was working a police checkpoint that had been set up on Spar Road in Sydney on October 9, 2019 at 7:00 p.m. Mr. Rowe drove up a short time later in a Jeep Cherokee. He was the driver and sole occupant. Through the opened window Martin smelled cannabis. Mr. Rowe produced his driving papers - all were valid. Martin observed that he was slow in his movements and fumbled somewhat when retrieving this paperwork.

[11] Martin directed him to a nearby parking lot for further investigation. No unusual driving was observed. Rowe displayed glossy red eyes and droopy lids. He

told Martin he had consumed cannabis for years. With the smell, and these observations, Martin demanded and performed a roadside Standard Field Sobriety Test (SFST). This test began at 19:38 (7:38 p.m.).

[12] Mr. Rowe failed the SFST. This failure supported the grounds for the later drug evaluation which lies at the heart of the witness's evidence. While details of the accused's performance on the SFST are not important, Cst. Martin's explanations of the nystagmus, walk-and-turn and one-leg-stand tests helped me understand his evidence on the subsequent evaluation, which includes these same components. Cst. Martin both articulated and physically demonstrated in the courtroom how these tests were conducted. Despite the overlap in some of the tests, no results from the SFST were imported into the DRE facesheet; rather, the tests were conducted a second time. The "facesheet" tendered as Ex.#7 is a real-time recording of Mr. Rowe's performance on the drug evaluation.

[13] The DRE began at 20:38 (8:38 p.m.). The basic components of the examination are outlined in, and may be understood from decisions in other cases, noted below. These are often referred to as the "12 step evaluation". (See, for example, 2017 NSPC 81 at par.58)

[14] As alcohol was not suspected, no breath test was performed. Indeed, cannabis use was observed by Martin and acknowledged by the accused. He was also taking naproxen, a common pain medication, but it is clear that cannabis was the only substance of concern in his system.

[15] The preliminary examination was unremarkable. The accused was described as cooperative and relaxed but I note that in cross-examination Martin said he did not have a good recollection of the extent of Mr. Rowe's anxiety. The accused told Martin that he had a pre-existed back condition, but this was not followed up in any way. In particular, there seems to have been no conversation about whether this might impact on the accused's ability to perform some of the tests. I do not fault either party for this – perhaps Martin should have explored it further, perhaps the accused should have said more on his own behalf, then and there. The significance of the back injury to the resulting opinion arises from the accused's testimony at trial.

[16] Mr. Rowe's pupil dilations were normal, his pulse rate was within average range and there was nothing of note in the nystagmus tests but for the fact that he could not "converge" on one side, i.e. he could not cross his eyes. However, about a third of the adult population, according to Martin, cannot do this.

[17] Mr. Rowe had no vertical nystagmus (uncontrolled eye movement). Martin said that an experienced drug user may not display this, but a first-time user with the same amount of drug in their system probably would.

[18] In the "one leg stand" test, the accused was able to balance well on his left leg but performed poorly on his right. The four indicators of impaired ability on this test are swaying, hopping, using arms to balance, and having to put the other foot down to maintain balance. When trying to balance on his right leg, the accused put his foot down three times in 30 seconds, and continuously extended his arms, airplane-style.

[19] At this point in the test, and elsewhere, Martin observed that the accused had "uncontrollable" body and eyelid tremors which he considered indicators of a person under the effects of cannabis. When the accused had his eyes closed, Martin could see his eyes moving under his lids. He also swayed back and forth by about one inch.

[20] The accused's estimation of time was poor. He guessed that 30 seconds was 20. In Martin's view his "internal clock" was off.

[21] The accused was instructed to touch the tip of his nose with the tip of his finger. Instead, on five of six attempts, he used the pad (between the tip and first knuckle) of his finger, and touched partly on the bridge, rather than the very tip, of his nose. On one of the six attempts, he touched his left cheek adjacent his nose. Martin said the errors "have to be quite obvious" before he would note them. Later, in his running notes, Martin recorded that the accused *had* touched the tip of his nose, making no reference to the bridge. The Crown acknowledged this discrepancy. The running notes themselves, prepared later, were not put into evidence. This is a small discrepancy, but does, very slightly, diminish the importance which Martin ascribes to these near misses.

[22] On the "walk and turn" test Mr. Rowe performed well. He raised his arms once, thus giving one of a possible eight "clues" for impaired function.

[23] Mr. Rowe's blood pressure was somewhat high. His body temperature was normal. His pupils were normal except that he showed "rebound dilation", i.e, they reacted to light by shrinking but grew larger again rather than staying small. Martin relates this to certain categories of drug. On physical examination some leafy substance was found in Rowe's teeth, consistent with his admitted and recent use

of cannabis at approximately 7:00 p.m. His muscle tone was normal. There were no injection marks. Nothing else of note was gleaned from the 12-point procedure.

[24] Martin then explained how the various results pointed to certain categories of drugs. He said that cannabis was in a category of its own. To Martin the results were associated with Rowe "having cannabis on board". He concluded, from a summation and overall assessment of Mr. Rowe's performance on the battery of tests and observations, that Mr. Rowe's ability to drive was impaired by cannabis.

[25] As an aside I note that here the type of drug was apparent at the start. In a given case this might lead to some confirmation bias. But in this case it is the impairment *per se*, not the causative agent, which is in issue.

[26] In cross-examination Martin said "there could be other things that cause eyelid tremor but the only time I've seen it is with cannabis use." He did not dispute that fatigue could "be an issue" or that stress and nervousness might account for certain of his observations. However he pointed out "this is why I go through the entire test before drawing conclusions." In regard to Rowe's alleged back injury, Martin said "I have stopped tests based on an injury that was disclosed."

[27] Here, and subsequently in the more comprehensive and formal evaluation, Cst. Martin presented his evidence clearly, displayed good memory, took good notes, and by all appearances treated the accused with the utmost fairness. He did nothing to exacerbate the stress that a detained person would naturally experience. His explanations of how to perform the tests were given in clear terms both to the court and to the accused. His explanations of how he made and noted passive observations of the accused were equally clear. He said that minor deviations from expected results did not influence his opinion; rather, he was looking for and recording what he considered clear and obvious failures to meet the expected standard of performance. He showed that he was sensitive to things besides impairment which might affect or account for a person's performance. Any doubt I have about the reliability of Cst. Martin's conclusions do not arise from carelessness or lack of competence on his part.

<u>The evidence of the accused</u>

[28] Mr. Rowe is the owner of a Tattoo business in Sydney. He says the work requires intense focus for prolonged periods of time. He said "at the end of the day

my eyes are tired, my brain is tired . . . everything about me is exhausted." He had worked six or seven hours before closing shop on the date in question.

[29] The accused says he suffered a back injury in 2010 when working for an auto glass company. In September 2018 he was prescribed cannabis for the sciatica he experiences. He is prescribed four grams per day. His doctor recommended consuming the sativa strain during the day, the indica strain at night. He said "Whenever I'm sore, I smoke." He recalls having smoked about half his daily allotment just prior to leaving work, which he estimates to be about 45 minutes before being stopped. He says his driving was "the same as any other day." He says he was extremely nervous when approached by the police officer – "I've never had more than a ticket before; this was the first time I was ever asked to exit my car." In regard to the tests he says "I was shaking like a leaf the entire time. My anxiety level was through the roof."

[30] In regard to the balance tests, Mr. Rowe says he does not have much balance on one leg because of his earlier back injury. In regard to the finger-to-nose test he believes he obeyed instructions, and says he assumed (using his finger to show the court) that he was using the "tip" of his finger. He says he thought at the time that he could cross his eyes but now realizes, having tested himself subsequently, that he cannot. He describes the police officer as friendly and calming but says this did not "take down my level of anxiety."

[31] In cross-examination Mr. Rowe freely acknowledged that he is "stoned around 90% of the time, including at work." He says this has no impact on the quality of his work. He sometimes uses less than the prescribed amount of marijuana, and also, at times, smokes socially. He admits he had cannabis on him when stopped and says he received a ticket under the Cannabis Control Act for "illegally transporting" it, but he says that being found in possession did not make him nervous; rather, it was being detained and subjected to the sobriety tests which had him flustered.

[32] Mr. Rowe took no issue with the observed results. He did not question the accuracy of Martin's observations. He says "I don't think I was stoned when I went through the checkpoint – I have very high tolerance – it does not arrect me like it would a casual smoker." I take this to mean, in the context of the questioning, that he did not think he was *impaired.* When he earlier described being "stoned" as commonplace for him I took that to mean, in context, that he was often under the pain-reducing effects of cannabis.

[33] The subjective opinion of a person about their own state of sobriety, or about their psychomotor skills, or (to the point) about their ability to operate a motor vehicle, is notoriously unreliable. Many people have gotten behind the wheel of a car mistakenly believing they were safe to drive. The fact that someone is prescribed a medication for a given condition does not give them licence to drive while impaired. As difficult as it may be, if a drug required to treat a medical condition also brings on impaired motor skills, the person may have to forego driving while under the effects of the medication. It is also the case that if a person knows they are fatigued they have to consider how that tiredness will combine with the effect of any drug they may be taking. Consuming a drug when tired may exacerbate it's impairing effect. That said, I cannot entirely discount the fact that when Mr. Rowe was driving his car on the day in question he was in a mental and physical state which was very familiar to him. He would have driven many hours and kilometers while under the influence of his prescribed medication.

[34] Mr. Rowe was responsive to questions; he was not evasive in his answers. I did not detect any shaking or tremors, although he claimed to be very anxious about testifying, as he was about being evaluated.

Further comment on the evidence

[35] On the "walk and turn" test the accused did well. He did better than he had on the same test during the SFST which he undertook a short time before. His only flaw was in raising his arms once, presumably to maintain balance.

[36] The accused may well have been more nervous that Martin supposed. This might affect a person's understanding of instructions, for example which part of the index finger should and should not be used to touch the nose. Although the accused was "wrong" in using the pad, he was consistently wrong.

[37] The accused's high blood pressure may also have been due to stress. Martin acknowledges as much in cross-examination. His red, glossy eyes may have been partly due to his day's work.

[38] Notably the accused's poor performance on the balance test might be a manifestation of impairment by pre-existing injury as much as impairment by drugs.

[39] I had the benefit of more information about Mr. Rowe's back injury and use of cannabis and degree of anxiety than did Cst. Martin. So-called *Brown v. Dunn*

principles were observed by defence counsel in cross-examining Cst. Martin on these points. Perhaps, in some cases, it would be useful for the EO to hear subsequent testimony from an accused and be given an opportunity to supply rebuttal evidence. Exclude-witness orders notwithstanding, experts are frequently given permission to listen to testimony which bears on their opinion. On a number of points I have uncontradicted evidence from the accused, given in an apparently forthright fashion.

[40] There is little to nothing in Mr. Rowe's behavior before the tests which was indicative of impairment. There is no driving evidence, and no other evidence about the accused's mental or physical state at or near the time of driving.

[41] I am mindful of the admonition against examining evidence piecemeal. The criminal burden of proof should not be applied to each factual component, thus eliminating that evidence from the more general assessment which is subsequently undertaken. I must consider, as the EO did, the importance of one bit of evidence to another. Evidence may be mutually supportive, and inferences should be drawn accordingly.

Matters not in issue

Before turning to a discussion of live issues I will briefly note three non-contentious points.

(i) connection of observed impairment on test to time of driving.

[42] Relating observed impairment to the time of driving can be an issue in some cases. Here the evaluation was quite soon after the observed driving, and the use of cannabis quite soon before. Making the temporal connection is not an issue here.

(ii) experience of the evaluator

[43] Martin had done 21 evaluations prior to Mr. Rowe's. In R. v. Stipo 144 O.R. (3d) 145 (ONCA), Watt, J.A. dealt with the potential importance of the "rolling log" of the evaluator, saying at par.107 that where the Crown asserts that an EO's opinion is reliable evidence, the prior experience of that EO in conducting evaluations is relevant. As of the date of trial Martin had done 39 evaluations. Experience in the field is a relevant consideration when assessing the weight of expert opinion. While his acumen may continue to grow, I do not consider experience (or lack thereof) to be a factor affecting weight.

(iii) impartiality of the EO

[44] Ideally an EO would not be the arresting officer, or any officer who dealt with the accused prior to administration of the drug evaluation. This would ensure that the EO had no preconceptions which might colour his or her reading of the test results. Here Cst. Martin did a one-person investigation, from start to finish. That said, I do not think partiality or confirmation bias operated here in so far as the evaluation of impairment is concerned.

The legal framework

[45] A police officer investigating a possible impaired driving may engage in a series of measures, ultimately procuring evidence which can prove the offence. A simple visual observation in a brief encounter may justify a roadside screening demand, or roadside "standard field sobriety tests" (SFST). Failure here may lead to a breath demand or, in the case of drugs, an evaluation by an EO. The latter, in turn, may identify a certain category of drug which permits a demand for urine or blood. The results of that analysis may be paired with the opinion which preceded it to create a presumption that any such drug disclosed by toxicological analysis is the cause of the observed impairment – s.320.31(6).

[46] Section 320.38 (f) says that Regulations may be made **"**prescribing the tests to be conducted and procedures to be followed during an evaluation under paragraph 320.28(2)(a) and the forms to be used in recording the results of the evaluation". This is the so-called 12 step evaluation utilized by Cst. Martin to assess Mr. Rowe's level of impairment. The "facesheet" he employed is in the prescribed form.

[47] In this case no sample of bodily fluid was obtained. There is no toxicological evidence about the precise amount of drug in the accused's system. In some cases an expert will speak about a given level of THC (the active ingredient in cannabis) in a person's system and connect it to psychomotor ability, although this is not a legal requisite to proving impairment. Here there is little doubt that cannabis is the one intoxicating substance in play. I have only the EO and the accused to speak to its effects.

[48] The scheme enacted by Parliament is an effort to provide a more objective basis for an opinion on impairment than a police officer or other lay person could otherwise give. It formulates a method and standard by which a person's impairment may be assessed. S.320.12(d) declares such evaluation to be "a reliable

method of determining whether a person's ability to operate a conveyance is impaired by drug . . ." Courts must accept that these standards and procedures have been studied and endorsed. Courts cannot "go behind" these measures. In this sense, deference must be shown to Parliament. Courts must accept that the drug evaluation procedure which is applied to the person suspected of impaired driving, is *prime facie* valid and reliable. However, courts should not regard the results as determinative of the ultimate issue. In R. v. Bingley at par.32 the Court gave examples of things which might diminish the value of the EO's opinion.

[49] The drug evaluation scheme and evaluation process are described in R. v. LeBlanc [2020] M.J. No.29 (Q.B.):

> 56 Sections 254(2) to 254(3.1) (which are substantially the same as the current sections 320.27 to 320.28) of the *Criminal Code*, together with the *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, SOR/2008-196 (*Regulations*), outline how an evaluating officer is to test a driver for impairment by drugs or alcohol. The *Regulations* provide specifically for the three tests that the officer performed as the SFST and all of the tests performed at the West District Station as the 12-step drug recognition evaluation.
>
> 58 The evaluation process used by the officer has been approved by Parliament through the *Criminal Code* and the *Regulations* to assess impairment. The 12-step drug recognition evaluation in particular has several different tasks to test different things. The officer testified that the psychophysical tests (for example, the walk-and-turn test, the one-leg stand test, the modified Romberg balance test) are meant to examine the driver's ability to multitask and to concentrate. As any driver knows, multitasking and concentration are essential to driving a vehicle.
>
> 59 The trial judge was entitled to rely on the officer's expert evidence given the particular training and experience he received as a qualified evaluating officer. It was still the trial judge's responsibility to assess the officer's conclusions, based on the evidence before him. This was recognized by the Supreme Court of Canada in *Bingley*.

[50] In R. v. Allingham [2018] N.J. No.240 the court also discusses basic principles and provides a summary of the 'test' for impaired driving (par.86 to 92) which I take to be a correct statement of the law.

[51] The opinion of an unbiased EO who properly conducts the prescribed drug recognition evaluation is entitled to considerable weight. The subjective opinion of

the actual subject should be met with considerable skepticism. None the less, the evidence in a given case may give rise to reasonable doubt about whether the expert opinion proves impairment to the criminal standard.

The 12-step evaluation

[52] In the following comments I do not mean to discount the scheme enacted into law, merely to recognize its inherent limitations.

[53] Conclusions drawn by evaluating officers are not infallible. Doctors also draw conclusions about a patient's physical state. One presumes these are based upon medically sound and agreed-upon (though not statutorily blessed) criteria. However, there is a subjective component to an observation made by a human mind, as opposed to a mechanical or electronic instrument. There are penalties in various sports (basketball, soccer, etc.) defined in terms of certain movements, behaviors, etc. In baseball it is possible to define in precise terms where a strike zone is. But, when determinations are made by human umpires and referees, differences in observers may affect what is determined to be a penalty, or a ball or strike. Consistency is sought, and consistency is usually achieved through training and experience, but in "close calls" it is quite possible that different referees would draw different conclusions.

[54] Arguably, a more objective approach, although certainly not feasible in practical terms, would be to give an accused the same 12-step test when s/he is *not* under the influence of any substances, and then to compare results. Would this accused have obtained a perfect score if not under the influence? Is every person not under the influence expected to score perfectly? Might an impaired ballet dancer do better on a one-leg-stand than a sober judge? Are Mr. Rowe's results repeatable – i.e. would he perform the same way if, the next day or week, he were again given the test while under the influence of the same drug in the same quantity?

[55] One might ask how a subject would perform on a given test if it were given twice during the evaluation, if the subject had a practice run, so to speak. I note that Mr. Rowe did poorly on the walk-and-turn test during the SFST, yet he did well on the same test an hour later during the DRE.

[56] It seems an EO will try to account for extraneous reasons why a person might fail a particular aspect to the test (physical limitations, etc). Despite an EO's

best efforts, however, reasons might emerge later which bear on the subject's performance.

[57] Cst. Martin referred to results in certain tests as "validated clues". It was not entirely clear what that suggested about other observations. Does this imply that other tests are not so well validated by observation and study?

[58] To repeat, I am not attempting to 'second guess' the drug evaluation tests developed by law enforcement and adopted in the Regulations, but merely to consider some inherent limitations. I note again that this particular EO was scrupulous, careful, and fair. And it goes without saying that there is a pressing need for law enforcement measures to combat impaired driving.

Nature and scope of the evaluating officer's opinion

[59] In any case involving expert opinion, it is critical to define the proper scope of the witness's expertise and limit their opinion accordingly. Generally the party calling the witness, and the witness themselves, will define the scope of their expertise. However, the admissibility and effect of evidence may be prescribed by statute. The Criminal Code does this at sections 320.31 to 320.35 in Part VIII.1 entitled 'Evidentiary Matters'. The specific drug evaluation procedures are set out in Regulation. These all inform the proper scope of an EO's proffered opinion.

[60] In *Bingley* the SCC said at par.10

> It is undisputed that the DRE receives special training in how to administer the 12-step drug recognition evaluation and in what inferences may be drawn from the factual data he or she notes. It is for this limited purpose that a DRE can assist the court by offering expert opinion evidence.

[61] If, after the drug evaluation, the evaluating officer has reasonable grounds to believe that the subject is impaired, the officer *must* then (in the case of drug impairment) identify the type of drug responsible. The officer will choose between one or more of the drug categories set out in s.328.28(5) This permits a demand for a blood or urine sample. If the toxicology report later confirms the type of drug earlier identified, it is presumed by s.320.31(6) to be the cause of the observed impairment.

[62] The Criminal Code thus grants the EO the ability to give an opinion about (i) impairment - as that is revealed by performance in the prescribed tests and (ii)

identification - the type of drug which is potentially present in the subject's system. If a blood or urine sample is obtained which matches the EO's previous identification, that drug is then presumed to be the cause of the impairment. Non-drug causes such as fatigue or medical condition are eliminated. Assuming impairment is ultimately proven at trial, the trier of fact is told what conclusion to draw on causation.

[63] None of this endows an evaluating officer with the credentials or expertise to give opinion evidence on the symptomatology of drug impairment outside the parameters of the regulatory-approved test, or about toxicology more generally. A one or two week course is well short of the training required of toxicologists. Cst. Martin's training involved SFST courses at the Atlantic Police Academy, followed by a one-week "DRE school". This sufficed for him to be certified as a "drug recognition expert" under the Regulations. He himself eschews the word "expert" to describe what he does. He prefers the term "drug recognition evaluator".

[64] A criminal statute should be strictly construed. General freedoms should restricted, and people penalized, only in accordance with clearly defined terms. Additionally, the general law of evidence requires courts to be circumspect in defining the scope of opinion evidence. It follows that the scope of an EO's opinion should be carefully circumscribed. Courts should guard against "expert creep" if you will.

[65] Where I experience difficulty is with observations of the EO which form part of testimony but which are not explicitly set out in the prescribed tests and the accompanying form, or "facesheet". What am I to make of the observation that Mr. Rowe had "tremors"? Does this describe something akin to the trembling which a nervous person may exhibit? Tremors have nothing to do with performance on the tests, although perhaps they assist in identifying the type of drug. Are "body tremors" somehow connected to the observation that Rowe's eyeball could be seen moving under his eyelid (for they were mentioned together)? Where does it say, and why is it, that experienced drug users tend not exhibit vertical gaze nystagmus whereas a first-time users do? Many of the things stated by the EO are favourable to the accused, for instance the statement that some people's eyes are always red, or the claim that 30% of the Canadian population cannot cross their eyes. I do not mean to suggest that the witness is necessarily biased, simply to voice concern about opinion evidence getting "smuggled in".

[66] It may be prudent for courts to ensure that a s.320.31(5) opinion on impairment is grounded in the training which led to the EO's certification, or his or her subsequent experience administering the test, and to ensure also that any "factual data" from which "inferences may be drawn" (per Bingley) is integral to one of the 12 steps in the prescribed tests.

[67] I note here that nothing prevents the EO from giving non-expert opinion about impairment based on observations made outside, and unconnected with, the prescribed tests. In this sense the EO may testify as would any police officer, or lay witness.

[68] I note as well that just as courts must look at the totality of evidence on impairment, and not artificially segregate each component for piecemeal analysis, an EO should likewise be permitted, indeed required, to look at a subject's overall performance on the tests when drawing an inference on impairment. Here, Cst. Martin did take such an approach to his task.

[69] Over time, the scope and reliability of EO opinions may become clearer and proofs more predictable. Greater and greater experience of the individual EOs, and increasing exposure of the courts to such evaluations, may bring consistency in the application of the relevant provisions.

Caselaw

[70] Counsel did not refer me to any cases. I offer the following for illustrative purposes only. I recognize that this may not be a good sampling, in the sense that 'not guilty' verdicts may more often be accompanied by published reasons than convictions. Nor is this intended to be an exhaustive summary of similar cases.

[71] In R. v. Abasi-Rad [2016] O.J. No. 4601 the accused was stopped for a missing taillight, suspected of cannabis use, and given a DRE demand. The arresting officer noted that the accused's movements were slow. In the DRE examination it was revealed that the accused had pre-existing leg and back injuries. Only one of his eyes converged on the convergence test. On the "modified Romberg test" he estimated 30 seconds to be 38, three more than the average margin of error, according to the evaluator. On the "heel to toe" test he took one fewer step than instructed and raised his arms 4 times to maintain balance. On the "finger to nose" test he used the pad of his finger instead of the tip on certain attempts and once missed his nose entirely. He performed badly on the "one-legged stand" test.

[72] Mr. Abasi-Rad had unremarkable blood pressure and pulse, and nothing of note came from the eye pupil examination. His muscle tone was normal, he had no injection sites. He told the DRE he had taken prescription opioid medication earlier in the day, and smoked marijuana in the evening.

[73] Mr. Rowe's performance on the drug evaluation was very similar. Mr. Abasi-Rad was also a licensed medical user of marijuana.

[74] Judge Kenkel noted at par.18 that "some of the deficiencies noted by the DRE officer were slight." This may also be said of Mr. Rowe's performance. At par.20 the judge states, referring to the performance on the walking and standing tests, that "the accused's balance issues must be considered in context given his injuries from a prior accident." The slowness of movements was consistent with fatigue, given that Mr. Abasi-Rad was arrested late at night. As in the present case, there was no evidence of bad driving. Unlike the present case, there *was* evidence of normal driving from the accused. Like Mr. Rowe, the accused there was able to converse, take instructions and respond appropriately to the police officer. The trial judge discusses the implications of this at par. 25 to 28, and in the end concludes that the evidence did not serve to prove, to the required criminal standard, that the accused's ability to drive was impaired by drug.

[75] In R. v. Desjardins [2020] O.J. No.5588 the accused admitted to crack cocaine use 15 hours prior, confirmed by the presence of cocaine in his blood. There was no driving evidence. The accused professed to be sleepy and fatigued (having been awakened behind the wheel). He said he had poor balance because of his weight. His pupils were large and his blood pressure high. His interactions with police were normal. He had no difficulty walking (outside the test procedure itself). As I read the decision there were more indicators of impairment in the drug evaluation than found for Mr. Rowe. Despite this, the accused was found not guilty.

[76] In R. v. Dittmer [2021] S.J. No.76 the accused testified that he did not function well under stress because of bi-polar disorder. He indicated that the Seroquel prescribed to treat it affected his balance. (I note that this does not afford a defence). The factors weighing on the OE's conclusion that Mr. Dittmer was impaired to drive are summarized at par.16. The accused, a "regular user" of cannabis, was found not guilty. One difference from the facts before me is that Dittmer's consumption occurred 4 to 5 hours earlier; Mr. Rowe's consumption was

much closer to the time of his evaluation (although I have no evidence on how this might affect the degree of impairment)

[77] In R. v. Manaigre [2015] M.J. No.301 the judge was satisfied that the accused had consumed marijuana and was feeling the effects at the time of driving but had reasonable doubt about whether his ability to drive was thereby impaired. There had been no signs of unusual driving, and the accused was cooperative and responsive. On the 12-point evaluation, his pulse rate and blood pressure was quite high. He displayed lack of convergence on the eye tests and was noted to have red conjunctiva (par.24). He estimated time well on the Romberg test (par.25). He performed worse in the balance test than did Mr. Rowe (par.27, 28). His finger-to-nose test showed about the same results as with Mr. Rowe (par.29,30). As with Mr. Rowe, there were no indications of difficulty with motor skills outside the ambit of the tests, nor any sort of mental confusion. In *Manaigre* there was expert toxicology evidence about the psychological and physiological effects of marijuana. This gave the judge the understanding that some of the test results could be evidence of consumption, but not impairment (par.79). The court was satisfied that the accused consumed cannabis, and felt the effects, but could not conclude beyond a reasonable doubt that there was an impaired ability to drive, even to a slight degree.

[78] In R. v. LeBlanc [2020] M.J. No.29 (Q.B.) is a decision confirming a finding of guilty on a charge of drug-impaired driving. At par.56 to 62 he considers the reasonableness of the trial judge's verdict where the accused had difficulties with the "psychophysical 12-step drug recognition evaluation." The accused had admittedly smoked cannabis 50 minutes before being pulled over. The results of each stage of the evaluation are described at par.5 to 21. However, it appears to me that Ms. LeBlanc performed worse than Mr. Rowe on the "walk and turn" test, the "finger to nose" test and in pupil size. In other respects these two accused showed similar results.

[79] In R. v. Joyce, 2017 NSPC 81 at par.28 to 33 the court summarizes various constituents of impaired driving and discusses means by which it may be proven. I take this as a correct summary of the prevailing law. Further in the judgement the drug-evaluation scheme is discussed, along with the proper approach to the evidence of a Drug Evaluation Officer. Judge Atwood explains why the court should not take a piecemeal approach to interpretation of evidence generally (par 19 to 23). I think the logic applies equally to how a court views the DRE test results. It suffices to say that Mr. Joyce's performance on the 12 point test was far

worse than Mr. Rowe's. Although there was evidence of bad driving and of impaired behavior outside the parameters of the test, the evaluation alone was enough to discharge the burden of proof (par.68). The accused was found guilty.

[80] I realize that these cases afford only rough analogies. The results, as described, are not amenable to precise comparison with the facts before me, and it is trite to say that every case must be judged on its particular facts.

Conclusion

[81] In this case the outcome hinges on whether the evidence of the evaluating officer is itself of sufficient value and force to displace the presumption of innocence. This is the proverbial "close case".

[82] The testimony of the accused leads me to think that there may have been explanations for his poor performance in certain tests besides impairment by cannabis. The pre-existing back injury, given rather short shrift during the evaluation, may indeed give this accused poor balance control. His evidence of extreme nervousness cannot be discounted, which may explain some of the shaking. Nervousness may have resulted in a failure to grasp the instruction to touch his nose with the very tip of his finger, as opposed to the pad. Some of the legs upon which the evaluating officer's opinion rests appear, after trial, to be somewhat shaky and I detect resulting unsteadiness in the conclusions.

[83] I have some reasonable doubt on the element of impaired ability to drive. Accordingly, Mr. Rowe is found not guilty.

Dated at Sydney this 1st day of April, 2022

Ross, A. Peter, JPC