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<u>High and Dry: Practical Issues with the *Cannabis Act*, Bill C-46, and *Bingley*</u>

In February 2017, the Supreme Court of Canada held that Parliament recognized drug recognition experts ("DREs") as experts "for the purpose of applying the 12-step evaluation and determining whether that evaluation indicates drug impairment for the purposes of s. 254(3.1)". (1) As such, a common law *Mohan* inquiry to qualify individual DREs as experts at trial is unnecessary at. On October 17, 2018, possession and sale of recreational cannabis was legalized in Canada. (2) Roughly two months later, new, more severe impaired driving legislation came into effect. (3) Amongst other things, this legislation introduced a new statutory presumption whereby a <u>blood</u> sample—as opposed to a urine sample— demonstrating the presence in a person's body of a drug that a DRE identified as impairing the person's ability to drive allows the court to infer that the cause of impairment on proof of the person's impairment while driving was the drug detected. (4)

While these legal developments are temporally discrete, they have a complex, singular relationship to one another. Canadians may now legally consume cannabis. The boundaries within which such conduct may occur, however, are not yet properly delineated in the roadside context. This is the case, in part, because deficiencies with DRE training create major evidentiary issues at trial where the prosecution cannot avail itself of the new statutory presumption, and evidence of impaired ability to drive outside the DRE tests is weak or equivocal. Thus, we are caught in a perfect storm of legal unintelligibility since defining impaired ability to drive by cannabis is, in many cases, likely to be a futile exercise.

During a DRE test, a DRE officer conducts four psychophysical tests, which include (1) the Modified Romberg Test, (2) the Walk-and-Turn Test, (3) the One-Leg Stand Test, and (4) the Finger-to-Nose test. (5) The results of these tests form the DRE officer's opinion of impairment, along with other general observations. The DRE officer then determines the cause of impairment by matching vital signs with a drug category through a drug symptomology matrix. (6) If the DRE officer forms reasonable grounds of impairment by drug, the DRE officer may demand a bodily fluid sample from the test subject for toxicological analysis. With respect to cannabis, toxicological analyses of urine samples typically detect Carboxy-THC, which has no correlation with observations of impairment. (7)

A major issue here is the apparent absence of an interpretive or analytical basis for the DRE officer's opinion. While a DRE officer is trained to recognize particular mistakes a subject makes during the psychophysical tests, the DRE training does not indicate when mistakes on given test move from procedurally acceptable to procedurally abnormal. Unlike a standard field sobriety test, which is scored, DRE tests are notionally assessed in the "totality of the circumstances." (8) In many cases, however, the "totality of the circumstances" for the DRE is functionally tantamount to the totality of deviations observed. For the viewpoint of basic propositional logic, the DRE officer makes conclusions of impaired ability to drive based on a minor premise but no major premise to govern *a priori* interpretations.

This fact is salient if we remind ourselves that DRE officers are experts. An expert should be able to articulate and explain the assumptions underlying their conclusions. (9) If I called an expert to provide an opinion as to whether my client was impaired by cannabis, it would be insufficient for her to declare my client was unimpaired because traits "XYZ" were present or

absent; rather, she would need to articulate **_why_** the absence or presence of traits "XYZ" is consistent with non-impairment for her opinion to have significant probative value. Indeed, deficiencies in knowledge should go to weight. (10) The DRE training indicates neither:

(1) Why particular deviations from instructions, in the totality of the circumstances, amount to impairment;

(2) Why slight deficiencies on a test outweighs otherwise proper performance;

(3) How to account for confounding factors such as fatigue or nervousness on test performance; nor

(4) The circumstances in which exculpatory observations or innocent explanations for mixed or poor performance may be discounted.

In other words, the DRE officer is an expert who cannot speak to the very things that a similar expert would be expected to explain.

Moreover, DRE officers cannot provide opinion evidence extrapolating DRE test results to the time of driving. (11) In cases where the statutory presumption is unavailable, little meaningful relationship can be drawn between the DRE officer's opinion of impairment and the time of driving where little evidence of erratic driving is adduced. (12) Since, by design, a DRE officer is unable to speak to the foregoing, the probative value of her opinion should, in theory, be diminished as a matter of course. Otherwise, we would risk introducing a presumption of impaired ability to drive in these cases, which an accused person would be forced to rebut using his or her own expert—an outcome with possible implications under ss 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*.

Ultimately, in my view, we are dealing with a system of empty investigations and prosecutions when the above conditions are in play, which is not uncommon. The DRE officer is typically called in impaired driving by drug cases to establish the *actus reus* of the offence by way of expert opinion evidence. This is particularly true in "borderline" cases where, from a lay opinion, indicia of impairment may be largely consistent with indicia of consumption. In some sense, then, the *actus reus* of the offence is unknowable in borderline cases; by legislative design, it exists outside common understanding, hence the need for the DRE officer. As long as this continues, Canadians are deprived of proper notice as to how far they must go in restraining themselves before legal conduct becomes illegal. Thus, Canadians are on thin ice anytime they smoke cannabis and drive.

1. *R v Bingley,* 2017 SCC 12 at para 27.

2. *Cannabis Act,* SC 2018, c 16.

3. 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, 2018.

4. *Criminal Code*, RSC, 1985, c C-46, s 254(3.6).

5. The International Association of Chiefs of Police and the National Highway Traffic Safety Administration, "*Instructor Guide: Drug Evaluation and Classification (Preliminary School)*", 2015, online: < https://www.wsp.wa.gov/breathtest/docs/dre/manuals/pre-school_dre/2015_pre_dre/instructor_pre_oct2015.pdf >; The International Association of Chiefs of Police and the National Highway Traffic Safety Administration, "*Instructor Guide: Drug Recognition Expert Course*", 2015, online: < https://www.wsp.wa.gov/breathtest/docs/dre/manuals/pre-school_dre/2015_pre_dre/instructor_pre_oct2015.pdf>; The International Association of Chiefs of Police and the National Highway Traffic Safety Administration, "*Participant Manual: Drug Evaluation and Classification (Preliminary School)*", 2015, online: <

https://www.wsp.wa.gov/breathtest/docs/dre/manuals/pre-school_dre/2015_pre_dre/student_pre_oct2015.pdf>; The International Association of Chiefs of Police and the National Highway Traffic Safety Administration, "*Participant Manual: Drug Recognition Expert Course*", 2015, online: <

https://www.wsp.wa.gov/breathtest/docs/dre/manuals/7day/2015/student_7day_oct2015.pdf>.

6. *Ibid*

7. *Ibid*

8. *Ibid*

9. *R v Neil*, [1957] SCR 685; *R v Grandinetti*, 2003 ABCA 307.

10. *R v Chan*, 1993 ABCA 383.

11. *R v Abbasi-Rad*, 2016 ONCJ 542.

12. *Ibid*