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Drug-Impaired Driving in Canada by Nathan Baker

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Abstract

In anticipation of federal legalization of cannabis in Canada, Nathan Baker provides an excellent overview and a detailed account of how the federal and provincial governments propose to detect, investigate, and prosecute drug-impaired driving to ensure the safety of the public on its roads. Drug-impairment tests, such as Drug Recognition Evaluations (DRE) and Standardized Field Sobriety Testing (SFST) have been statutorily embedded in our criminal justice system for over ten years. However, the need for heightening awareness of these testing procedures, training for police officers who administer these tests, and education on the accuracy, validity, and credibility of drug detection technologies has been brought to the forefront of criminal law discussions as a result of legalized cannabis use. The author's goal is to "provide a better understanding of the science and how it should relate to the creation and interpretation of the law in Canada surrounding impaired operation by drugs." As such, Baker provides in-depth detail surrounding the efficacy of drug-impairment testing.

Book Review

Drug-Impaired Driving in Canada
by Nathan Baker¹KENECA PINGUE-GILES²

IN ANTICIPATION OF FEDERAL LEGALIZATION of cannabis in Canada, Nathan Baker provides an excellent overview and a detailed account of how the federal and provincial governments propose to detect, investigate, and prosecute drug-impaired driving to ensure the safety of the public on its roads. Drug-impairment tests, such as Drug Recognition Evaluations (DRE) and Standardized Field Sobriety Testing (SFST) have been statutorily embedded in our criminal justice system for over ten years. However, the need for heightening awareness of these testing procedures, training for police officers who administer these tests, and education on the accuracy, validity, and credibility of drug detection technologies has been brought to the forefront of criminal law discussions as a result of legalized cannabis use.³ The author's goal is to "provide a better understanding of the science and how it should relate to the creation and interpretation of the law in Canada surrounding impaired operation by drugs."⁴ As such, Baker provides in-depth detail surrounding the efficacy of drug-impairment testing.

With eleven years of experience as a criminal lawyer, Baker has dedicated his practice to driving offences, focusing on impaired-driving matters. In addition to his private practice, Baker is a standing agent for the Public Prosecution Service of Canada, where he prosecutes matters under the *Controlled Drugs and*

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1. (Irwin Law, 2018).
 2. JD Candidate 2021, Osgoode Hall Law School.
 3. Baker, *supra* note 1 at xi.
 4. *Ibid* at xv.

Substances Act (CDSA).⁵ Further demonstrating his knowledge and keen interest in impaired-driving, Baker has received accreditation to conduct DRE and SFST training for police officers, and has completed the National College for DUI Defence's "Mastering Scientific Evidence" seminar. By virtue of these credentials, Baker exhibits his ability to distill, in a very straightforward manner, the requisite information needed to educate legal practitioners on the connection between performance on physical coordination tests and impairment that can give rise to a conviction under the *CDSA*.

Most notably, in addition to the main purpose of the book, Baker also concisely and effectively discusses the *Charter* issues that may arise during the investigative stages of impaired-driving cases. The fundamental rights and freedoms engaged in Baker's analysis include the right to be secure against unreasonable search or seizure,⁶ the right to be secure against arbitrary detention,⁷ and the right to retain and instruct counsel.⁸ This analysis has the potential to benefit both prosecution and defence practitioners alike; it provides best practices that a prosecutor may want to employ in order to have as much admissible evidence as possible to secure a conviction, while providing the defence with perspective regarding common pitfalls to be mindful of in police investigatory practices to ensure that their client puts forward the best defence possible.

Moreover, this book is also extremely informative for law students, law enforcement officers, legal counsel, and the judiciary. The interplay between science and the law is eloquently explained in an accessible manner for those with or without experience in this particular area of criminal law.

Baker begins by discussing the different physical testing methods that are available to police officers in drug-impaired driving cases. He provides a thorough overview of a DRE and SFST by referencing applicable laws and accompanying regulations, noting the distinction between SFST and DRE training.⁹ Officers trained to perform the three legislated SFST tests, namely the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test, do not require formal accreditation.¹⁰ In contrast, to conduct DRE tests, an officer "must be a certified drug recognition expert accredited by the International Association

5. SC 1996, c 19.

6. *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

7. *Ibid*, s 9.

8. *Ibid*, s 10(b).

9. Baker, *supra* note 1 at 10-11.

10. *Ibid* at 28-29.

of Chiefs of Police [IACP].¹¹ Part of this certification process requires the completion of a minimum of twelve DRE tests, which range from breath alcohol tests, divided attention tests, eye examinations, to toxicological examinations. Alerting the reader to this distinction so early in the book is imperative in order to situate the ensuing case law involving drug-impaired driving that is analyzed later on.

Additionally, the distinction between DRE and SFST training speaks to the *Charter* issues that arise with police investigation of drug-impaired driving cases. An officer that only has training to conduct SFST cannot require a suspect to administer DRE testing as they do not have the statutorily required accreditation.¹² Without proper accreditation, an officer will not know what cues to look for while a suspect is performing the requested tests. In addition, it is likely that the evidence acquired by the suspect's performance will be deemed inadmissible, as it may be considered to have been unlawfully collected. Even if the evidence is admissible, the officer's opinion on whether or not the suspect was, in fact, impaired will be given little to no weight by the trier of fact.¹³

Baker provides a detailed account of the training that is required of officers who want to be accredited DRE evaluators.¹⁴ Through this account, Baker is able to highlight the science that goes into approving the DRE tests in order to demonstrate their efficacy in determining impairment, and to justify the weight given to the opinion of DRE officers who are able to adequately apply their training in the field.¹⁵ For the layperson with little knowledge on the topic, or for the legal professional looking to increase their knowledge in the area, this discussion is easily accessible and sheds light on the complexities of drug-impaired driving cases based on the requisite training required and the specific tests that need to be requested and performed. It plainly demonstrates why drug-impaired driving in Canada can be difficult to prosecute, and why further research, testing, and analysis is needed to ensure that the proper tools are in place to obtain a conviction free of *Charter* infringement.

Baker devotes an entire chapter to discussing the existing chemical testing for drugs in Canada and the science behind that testing. Similar to DRE testing, chemical testing of bodily fluids for drugs is statutorily permitted by section 254(3.4) of the *Criminal Code*:

11. *Ibid* at 28.

12. *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, SOR/2008-196, s 1.

13. Baker, *supra* note 1 at 30, 63-64.

14. *Ibid* at 28-29.

15. *Ibid*.

If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe, based on the evaluation, that the person's ability to operate a motor vehicle, a vessel, an aircraft or railways equipment is impaired by a drug or by a combination of alcohol and drug, the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable,

A sample of either oral fluid or urine that, in the evaluating officer's opinion, will enable a proper analysis to be made to determine whether the person has a drug in their body; or

Samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine whether the person has a drug in their body.¹⁶

Baker discusses the utility of each of the three bodily fluids that can be used for chemical testing (saliva, urine, or blood). He covers some of the advantages and disadvantages of each, including the rate of false positives and false negatives, whether current technologies can effectively detect drugs using any of the three fluids, and the speed at which tests can be conducted.¹⁷ For testing saliva, Baker discusses the commonly used immunoassay test, where the oral fluid reacts to an enzyme to give a digital reading.¹⁸ Although that sounds simple enough, Baker also highlights the drawbacks of this form of testing.

It is noted that this type of testing is "prone to false positives" and "can only detect a class of drug and not a particular drug."¹⁹ At the time Baker's book was published, the Centre for Forensic Sciences in Ontario did not have the methods in place to detect drugs in oral fluid. However, in mid-2019, pursuant to section 320.39(b) of the *Criminal Code*,²⁰ the Attorney General made an Order approving drug screening equipment: the Dräger DrugTest® 5000 and the SoToxa™, along with their respective cartridges and sample collection devices.²¹ Both screening devices detect the presence of tetrahydrocannabinol (THC) in a person's body, but the Dräger DrugTest® 5000 can also detect cocaine.²²

With approved drug screening equipment, enforcement agencies no longer have to rely on urine and blood samples, which are more invasive to collect and

16. *Ibid* at 31.

17. *Ibid* at 32-33.

18. *Ibid* at 32.

19. *Ibid*.

20. RSC, 1985, c C-45 [*Criminal Code*].

21. SOR/2019-23, s 1.

22. Rachel Aiello, "Feds set to approve second roadside drug detection device" *CTV News* (25 April 2019), online: <www.ctvnews.ca/politics/feds-set-to-approve-second-roadside-drug-detection-device-1.4394549>.

can lead to an array of *Charter* issues if the sample is not collected in a timely manner, if improper equipment is used for the collection, or if a suspect's dignity and privacy are not observed.²³

Throughout the book, Baker highlights concerns over potential *Charter* rights infringements. In the chapter titled "*Charter* Considerations," Baker expertly outlines the common concerns surrounding drug-impaired driving prosecutions by analyzing Canadian case law from all levels of court. Specifically, he focuses on issues relating to disclosure, police notes and recordings, right to counsel and voluntariness, reasonable suspicion, making demands as soon as practicable, and remedies.²⁴ In each of these areas, he summarizes the jurisprudence so as to ensure that the reader has all the relevant facts and understands the points of contention for both the prosecution and the defence. He provides advice to defence counsel regarding when DRE testing participation has been improperly demanded, ensuring that they advise their clients of when to decline to answer questions during the testing, so as to "exercise their right to silence,"²⁵ and to comply with the demands for a bodily sample.²⁶ In fact, it seems at times that he focuses heavily on best practices for defence counsel, while ignoring what prosecutors' best practices might be. This may be an oversight, or it may stem from Baker's background and experience as a criminal law practitioner. However, near the end of the book, he dedicates an entire chapter to "useful cases" that do not favour the prosecution or the defence, but rather provide beneficial information about current case law on the topic.²⁷

The first two weaknesses of the book, in my view, are in Baker's discussion and analysis of amendments made to the *Criminal Code* after the legalization of cannabis.²⁸ Here, he walks the reader through specific provisions of Bill C-46, and highlights the relevant changes made that affect how evaluations and investigations of drug-impaired driving cases are to be conducted.²⁹ He notes that:

the changes to the *Criminal Code* affect both alcohol and drug-impaired driving and set up the legislative scheme for testing, as well as a number of evidential burdens that will be shifted to the accused to disprove in order to maintain innocence if certain preconditions are met by the state.³⁰

23. See also *ibid* at 44-46.

24. *Ibid* at 80-95, 104.

25. *Ibid* at 79.

26. *Ibid* at 80.

27. *Ibid* at 147-170.

28. *Ibid* at 106-22.

29. *Criminal Code*, *supra* note 20, ss 320.11-320.36.

30. Baker, *supra* note 1 at 106.

Although there are some important differences, most of the information in this section reiterates existing scholarship about approved sample collection containers, the role and purpose of the opinion of a DRE-evaluating officer, and the requirement to provide a blood or urine sample upon a lawful demand to do so. Although some practitioners may find this section helpful for their practice, a more specific focus on the amendments that address cannabis use would be more beneficial to interpreting this area of law for legal practitioners.

The book's second weakness is found in Baker's discussion on new impairment detection systems. In this section, Baker discusses only alcohol-impaired driving.³¹ Although driving while under the influence of alcohol is of great concern to the criminal justice system and the public at large, it seems to deviate from Baker's stated intention. At the outset, Baker makes it clear that investigating drug-impaired driving and understanding the science behind its detection and testing is important because of the legalization of cannabis, a drug that has not been sufficiently tested or regulated in the context of motor vehicle regulation.³² He ultimately states that the failure to include alcohol with other drugs, through successive revisions to the *Criminal Code*, shows a parliamentary intent to deal with it separately.³³ In my view, focusing on alcohol in this section, when the title of the book is "*Drug-Impaired Driving in Canada*," does not satisfactorily contribute to the literature or research on drug-impaired driving in Canada as a whole. However, Baker does make amends near the end of the book by dedicating an entire chapter to studies and further readings on the broad topic of drug-impairment and driving while under the influence of drugs.³⁴

Overall, *Drug-Impaired Driving in Canada* is a descriptive and informative read for anybody interested in cannabis regulation and motor vehicle regulation. Baker succinctly describes what would otherwise be, for most readers, inaccessible scientific research, and applies it to impaired-driving legislation in Canada. His analysis of *Charter* issues throughout the book and his summaries of relevant case law will undoubtedly be beneficial to criminal law practitioners. Baker effectively achieves his goal of educating his audience on the science behind specific

31. *Ibid* at 135-36.

32. *Ibid* at xi-xii.

33. *Ibid*.

34. *Ibid* at 171-209. Most of the studies provided and summarized are scientific in nature, although there are some that are qualitative, taking a deeper look at DRE evaluations. Of important note are the dates of the studies provided. Although most are relatively recent, ranging from 2012 to 2017, there are a few studies that date as far back as 1985 and 1986. Readers should be mindful of these dates when reading such studies, as science and technology in this area have advanced considerably since the late 1980s.

drug-impaired driving tests, while also alerting readers to advancements in the area. As the study of drug-impaired driving in Canada improves, I am confident that scholars in the area will turn to this book for high-level and detailed information concerning drug-impaired driving in Canada.

