

ONTARIO COURT OF JUSTICE

DATE: 2014-03-27
COURT FILE No.: Halton 11-002551

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Daniele BIAGI

Before Justice Sheilagh O'Connell
Heard on March 22, May 3, July 29, September 9, 2013, December 9, 2013
Reasons for Judgment released on March 27, 2014

Amanda Camara counsel for the Crown
Russell Allegrafor the defendant Daniele Biagi

O'CONNELL J.:

INTRODUCTION

[1] Daniele Biagi is charged with the following offences:

1. operating a motor vehicle while his ability to do so was impaired by alcohol or a drug, contrary to section 253 (1) (a) of the *Criminal Code*;
2. operating a motor vehicle in a manner that was dangerous to the public, contrary to section 249 (1) of the *Criminal Code*;
3. unlawful possession of oxycodone, lorazepam, and morphine, contrary to section 4(1) of the *Controlled Drugs and Substances Act*; and
4. driving his motor vehicle while his driver's license was suspended, contrary to section 53 of the *Highway Traffic Act*.

[2] Mr. Biagi submits that during their investigation and arrest, the police violated his

rights under ss. 8, 9, and 10(b) of the *Charter of Rights and Freedoms*. He submits as a result of these breaches, certain evidence obtained during the course of the police investigation should be excluded.

[3] Mr. Biagi also submits that the Crown has failed to prove beyond a reasonable doubt that he is guilty of the offences charged. The trial proceeded with a blended *voir dire* on the *Charter* issues.

THE ISSUES:

[4] The issues are as follows:

1. Did the police have reasonable and probable grounds to arrest Mr. Biagi and make the breath, drug evaluation and urine demands? If not, were his sections 8 and 9 *Charter* rights breached?
2. Did the police comply with their obligation to implement Mr. Biagi's right to consult counsel? If not, were Mr. Biagi's section 10(b) *Charter* rights breached?
3. If Mr. Biagi's *Charter* rights were breached, should the evidence obtained from his vehicle and the urine samples be excluded pursuant to s. 24(2) of the *Charter*?
4. Even if I conclude that the above evidence should not be excluded, has the Crown established beyond a reasonable doubt that Mr. Biagi committed the offences for which he was charged?

[5] On December 9, 2013, in a brief oral decision, with written reasons to follow, I acquitted Mr. Biagi on all charges. What follows are my reasons.

OVERVIEW:

[6] On Sunday, May 22, 2011 at approximately 3:00 p.m., police officers responded to a call from dispatch about a "possible impaired" driver travelling on the Queen Elizabeth Way. A civilian witness had called 911 and reported erratic driving.

[7] A number of police officers travelling in separate vehicles initiated a "rolling block" whereby Mr. Biagi was moved to the right-hand side of the road without incident. Once Mr. Biagi's vehicle was stopped, the arresting officer, P.C. Bryan approached Mr. Biagi, who was sitting in the driver's seat. She testified that Mr. Biagi had glossy and red eyes and that she detected an odour of alcohol on his breath. P.C. Bryan further noted that Mr. Biagi had droopy eyelids and that he fumbled once when reaching for his wallet.

[8] P.C. Bryan questioned Mr. Biagi, who admitted to having a beer earlier that day. Sergeant Briggs arrived at Mr. Biagi's vehicle at the same time as P.C. Bryan. He also ob-

served that Mr. Biagi had red and glossy eyes and an odour of alcohol on his breath.

[9] P.C. Bryan did not make an approved screening device (ASD) demand at the roadside, nor did she conduct the Standard Field Sobriety Test. Instead, on the basis of the above factors, and the reports that she received regarding Mr. Biagi's driving, she formed the opinion that Mr. Biagi's ability to operate a motor vehicle was impaired by alcohol and made an Intoxilyzer demand. She arrested Mr. Biagi at 3:11 p.m., read the breath demand to him at 3:33 p.m., and then transported him to the nearest police detachment for breath samples to be taken.

[10] A search incident to arrest was conducted of Mr. Biagi's vehicle. The police found three separate unidentified bottles containing a number of different pills, later identified to be oxycondine, lorazepam and morphine. The officers found these bottles in a zipped fanny pack located in the front console between the driver's and passenger's seats.

[11] At the police station, a qualified breathalyzer technician took two breath samples from Mr. Biagi at approximately 4:00 p.m. The breath samples were significantly below the legal limit and indicated 22 milligrams of alcohol in 100 millilitres of blood and 16 milligrams of alcohol in 100 millilitres of blood.

[12] Upon Mr. Biagi passing the breath test, P.C. Bryan then formed the opinion that Mr. Biagi's ability to operate a motor vehicle was impaired by a drug. She read the drug evaluation demand to Mr. Biagi at 4:37 p.m. and cautioned him. Mr. Biagi was once again advised of his right to counsel and Mr. Biagi spoke to duty counsel a second time at approximately 4:40 p.m.

[13] P.C. Bryan is a qualified Drug Recognition Expert ("DRE") so she conducted the drug evaluation after determining there was no other DRE available to do so. She started the drug evaluation at approximately 5:07 p.m. and completed it at 6:15 p.m. Upon conclusion, she formed the opinion that Mr. Biagi's ability to operate a motor vehicle was impaired by drug, namely a central nervous system depressant and a narcotic analgesic.

[14] Officer Bryan then made the urine sample demand to determine whether Mr. Biagi had drugs in his body. It is not disputed that she did not provide Mr. Biagi with a further right to counsel before making the urine demand.

[15] Mr. Biagi provided the urine sample shortly thereafter. Upon Mr. Biagi's release, Office Bryan charged Mr. Biagi with dangerous driving, driving a motor vehicle while his ability to do so was impaired by a drug and/or alcohol, driving while his license was suspended and for the unlawful possession of controlled substances.

[16] The urine sample was provided to the Centre for Forensic Sciences, which later identified morphine, oxycodone, and lorazepam in the urine, as well as some metabolites or breakdown products of these ingested drugs, and drug often found in 'over the counter' medications such as cough suppressants and decongestants.

SUMMARY OF THE RELEVANT EVIDENCE:

[17] The Crown's evidence consisted of arresting Officer Bryan, also the qualified DRE, Officers Rideout and Briggs, Sergeant Marquis, the breathalyzer technician, and Ms Patricia Solbeck, a toxicologist from the Centre for Forensic Sciences. The civilian witness did not testify. The Defence called Mr. Biagi and Dr. David Rosenbloom, a pharmacologist and professor in the department of medicine at McMaster University. The videotape of Mr. Biagi in the breath room was also entered into evidence.

Provincial Constable Corry Rideout:

[18] P.C. Rideout has been a police officer since January of 2009. On the day of the alleged offences, he was working alone in his cruiser when he received the traffic complaint from dispatch regarding a possible impaired driver. Dispatch also reported erratic driving. Once he received this information, he ramped on to the QEW northbound from Highway 20 to find the vehicle.

[19] He testified that he thought he saw Mr. Biagi's vehicle, based on the vehicle model and identification, but he was not certain, so he held back until other police cruisers in front of him activated their emergency lights. He then activated his rear lights to stop traffic from passing and a rolling block was initiated. Police cruisers on all sides of the Mr. Biagi's vehicle then escorted it to the right shoulder of the Burlington Skyway without incident.

[20] P.C. Rideout followed Mr. Biagi's vehicle for approximately two kilometres before it was pulled over. He testified that Mr. Biagi was travelling approximately 100 kilometres per hour but it could have been up to 120 kilometres per hour, which was the usual travelling speed for that highway. P.C. Rideout did not observe Mr. Biagi shifting within in his lane nor did he observe anything erratic or unusual in Mr. Biagi's driving. He testified that if he had noticed anything erratic or unusual he would have put that in his notes.

[21] P.C. Rideout observed Constable Bryan place Mr. Biagi under arrest and escort him to the back of her vehicle. He did not notice or make any observations about any indicia of impairment while Mr. Biagi was walking to the police car.

[22] P.C. Rideout then assisted Sergeant Briggs with the search of Mr. Biagi's vehicle. During the search, he found a black leather fanny pack in the centre console of the vehicle, which he recalled was probably closed. Upon opening the fanny pack, he observed three medication sized pill bottles. He testified that he gave the fanny pack and the pill bottles to Sergeant Briggs. He did not find anything else in the search, including the permit for the motor vehicle.

Sergeant Dan Briggs:

[23] Sergeant Briggs has been a police officer for twelve years. He was alone in his cruiser and working in a uniformed capacity when he received a radio call at 2:57 p.m. that there was a possible impaired driver and that the speed the vehicle was travelling was over

150 kilometres per hour. The dispatch also described damage to the front end of the vehicle and that a civilian witness had called 911 to report erratic driving.

[24] Sergeant Briggs proceeded to catch up with the vehicle at Centennial Parkway in the City of Hamilton. At this point, he observed Mr. Biagi's vehicle travelling in the left lane of the QEW and he decided to wait for additional units while making observations. He observed the vehicle passing from the left lane to the right lane without using his signal and then passing back to the left lane while using his signal. He was able to keep up with the vehicle for a distance of approximately one kilometre. According to Sergeant Briggs, the vehicle's speed, which did not increase or decrease, was approximately 130 kilometres per hour. He further observed the vehicle drifting within its own lane and that at one point it was following another vehicle at less than a car length away.

[25] Sergeant Briggs testified that he followed Mr. Biagi for approximately four to five kilometres in total when he was pacing him at the speed that he measured. He acknowledged in cross-examination that other than Mr. Biagi drifting within his lane, and the fact that he was speeding at 130 kilometres on the highway, he did not see anything that would indicate unusual or erratic driving. He testified that this was not the worst driving he had seen by any means. He acknowledged that when he observed the drifting within the lane, Mr. Biagi was on the Burlington Skyway, a very windy bridge, which could have caused the drifting within the lane. Sergeant Briggs had no evidence that Mr. Biagi had been involved in a collision or an accident.

[26] Once Sergeant Briggs was aware that there were other police units in a position to conduct a rolling block, he pulled up along Mr. Biagi's driver's side and made eye contact with him. He observed that Mr. Biagi's eyes appeared to be glossy. Mr. Biagi then pointed at his chest and mouthed the word, "me?" in determining if he should pull over. Sergeant Briggs nodded affirmatively and pointed to the right shoulder and Mr. Biagi pulled over without incident to the right shoulder.

[27] Sergeant Briggs approached Mr. Biagi's vehicle at the same time as Constable Bryan approached. At the driver's window, Sergeant Briggs observed Mr. Biagi to have glossy eyes and slow motions. He was sitting in the driver's seat. When the demand for his licence was made he fumbled while pulling the licence out of his wallet which then fell to the floor. He was then able to pick the licence up off the floor and hand it to Officer Bryan.

[28] In cross-examination, Sergeant Briggs agreed that Mr. Biagi pulled over very quickly and without incident. He also agreed that he jumped out of his car and went straight towards Mr. Biagi's driver's side in a somewhat aggressive manner and that the average person is usually quite nervous when a police officer approaches his or her vehicle. He agreed that some people fumble with their wallets and drop them because they are nervous, however he testified that he did not think Mr. Biagi looked as worried as he would have expected.

[29] Sergeant Briggs also detected the odour of alcohol coming from Mr. Biagi as he spoke. He then overheard Constable Bryan advise Mr. Biagi that he was under arrest for impaired operation of a motor vehicle and he was directed back to her police cruiser. Sergeant

Briggs observed Mr. Biagi being escorted out of his vehicle.

[30] Sergeant Briggs did not observe any of other indicia of impairment during that time. Mr. Biagi was quiet and that there were no issues when he was handcuffed, searched and placed in the rear of Constable Bryan's police cruiser.

[31] Sergeant Briggs then searched the vehicle as an incident to the arrest. He testified that he did not locate any evidence towards alcohol impairment, but he did locate a black bag in the console which he opened and found three pill bottles containing what appeared to be a mixture of different pills. Contrary to the evidence of P.C. Rideout, he testified that it was he who found the bag.

Provincial Constable Marie Bryan:

[32] P.C. Bryan has been a police officer for nineteen years. She is also a certified Drug Recognition Expert (DRE). On the day in question, she was dispatched to observe and intercept a possible impaired driver coming from the Niagara Falls area at approximately 3:07 p.m. Dispatch reported that the vehicle was initially observed by a civilian witness and that other police officers from the Niagara area were trying to get into position to stop it. P.C. Bryan positioned herself on the QEW near the Skyway Bridge in the City of Burlington waiting for the vehicle to pass by her location.

[33] Sergeant Briggs then provided information to P.C. Bryan that Mr. Biagi's vehicle was approaching her location. She had stopped on the right shoulder of the highway of the Skyway bridge. The police had already made plans that they were going to use a rolling block to stop Mr. Biagi's vehicle and a number of police officers were in position.

[34] After the rolling block was initiated, P.C. Bryan observed that Mr. Biagi stopped his vehicle on the right shoulder just north of the Northshore Boulevard exit on the Skyway Bridge without difficulty. P.C. Bryan observed Mr. Biagi's vehicle moving on the highway for a short period prior to that, and she did not observe anything unusual or out of the ordinary regarding his driving.

[35] After the vehicle came to a stop, P.C. Bryan attended to the driver's door and spoke with Mr. Biagi. She requested his driver's licence and insurance. While P.C. Bryan was speaking with Mr. Biagi, she observed that his eyes were red and glassy and she also noted that his eyelids were "droopy". She further detected the odour of an alcoholic beverage on his breath. Mr. Biagi admitted to her that he had been drinking earlier.

[36] P.C. Bryan testified that Mr. Biagi was able to provide his driver's licence to her however he was fumbling with his documents. She observed him eventually locating and then dropping the document, not on the floor but having a hard time holding on to it before giving it to her.

[37] P.C. Bryan testified that after Mr. Biagi provided his driver's licence to her, she formed the opinion that he was impaired by the consumption of alcohol and arrested him for impaired operation of a vehicle at 3:11 p.m.

[38] Mr. Biagi was still seated in his vehicle when he was arrested. P.C. Bryan then directed him to exit the vehicle and he was handcuffed, searched and then placed in the rear of her police car. P.C. Bryan then read Mr. Biagi his rights to counsel.

[39] P.C. Bryan testified that she arrested Mr. Biagi at that time because of the signs of impairment that she observed and the information received from a civilian witness and other police officers of the erratic driving. She formed the opinion that he had been drinking and that he was impaired based on this information.

[40] In cross-examination, P.C. Bryan testified that she did not observe anything unusual about the way Mr. Biagi was driving when she first observed him on the north end of the Skyway Bridge. She did not estimate what speed he was travelling at that time.

[41] Officer Bryan did not see any civilian witness or interview any civilian witness on the scene. She testified that she received information that Mr. Biagi was driving erratically from dispatch and from Sergeant Briggs. She acknowledged that there was nothing in her notes that Sergeant Briggs specifically told her that he had witnessed erratic driving.

[42] She acknowledged that the glassy, bloodshot eyes and droopy eyelids that she observed could have been caused by fatigue, smoking or allergies. However based on the information she had, she formed the opinion that Mr. Biagi was impaired by alcohol.

[43] After arriving at the police station and being processed, Mr. Biagi spoke in private with duty counsel until 4:00 p.m. P.C. Bryan then brought Mr. Biagi into the breath room. Prior to so doing, she provided the grounds for the arrest to Sgt. Marquis, the qualified breathalyzer technician.

[44] Sgt. Marquis subsequently provided P.C. Bryan with the two breath samples which were significantly below the legal limit, at 22 milligrams and 16 milligrams of alcohol in 100 millilitres of blood.

[45] At that point, P.C. Bryan believed that there were drugs in Mr. Biagi's body given her view that the signs of impairment were greater than the amount of alcohol in his body. She then read the drug evaluation demand to Mr. Biagi at 4:37 p.m. She made a number of phone calls to contact any local or other Drug Recognition Experts who may be in the area to provide the drug evaluation. She also placed a second call to duty counsel and Mr. Biagi was again placed in contact with duty counsel at 5:04 p.m.

[46] P.C. Bryan testified that she tried to find another independent DRE to conduct the evaluation because she was concerned about conducting the evaluation herself given that she was the investigating and arresting officer. However, as no other DREs were available locally, she conducted the evaluation.

The DRE Evidence:

[47] The Crown sought to tender the evidence of Officer Bryan as an expert witness on the ultimate issue as to whether Mr. Biagi's ability to operate a motor vehicle was impaired

by a drug. The Crown submitted that the legislative scheme in place under the *Criminal Code* permits a DRE, as qualified under the regulations, to conduct a drug evaluation under section 254 (3.1) to determine whether the accused's ability to operate a motor vehicle is impaired by a drug or a combination of alcohol and a drug without first qualifying the DRE as an expert under a *voir dire* using the *Mohan* criteria.

[48] While the Defence counsel agreed that a *voir dire* was not necessary to qualify the DRE as an expert, it submitted that the DRE's opinion regarding impairment by a drug is only intended to permit the DRE to then make the demand for a urine sample pursuant to section 254(3.4) of the *Criminal Code* and should not be permitted for any other purpose.

[49] During the trial, I ruled that a *Mohan voir dire* was not required to receive opinion evidence from the DRE on the issue of impairment, given the legislative scheme set out under section 253 of the *Criminal Code*. However, this did not mean that the Defence was not entitled to challenge the qualifications and experience of the DRE, the weight to be given to her opinion, particularly given the subjective nature of some of the testing involved, the methodology used, the lack of video-taped evidence of the testing, and the number of alternate explanations for some of the test results or conclusions of the DRE. I reserved my right to make a further ruling on the issue of whether the DRE's opinion went to the ultimate issue of impairment by a drug while operating a motor vehicle. This issue will be addressed in these reasons.

[50] P.C. Bryan has been accredited as a DRE (a drug recognition expert) by the International Association of Chiefs of Police since 2009. She attended a course that was conducted by the RCMP in November of 2009 and successfully completed her training in drug evaluation classification training, preliminary drug evaluation classification training, and the standard field sobriety testing course. Prior to that, she attended a practical session in Arizona in April of 2009, where she conducted evaluations on subjects and made determinations on whether or not they were impaired or had consumed drugs. She also wrote a final examination at that time and successfully completed her certificate training as a DRE.

[51] Since Officer Bryan has been qualified as a DRE, she had been involved in fifteen drug evaluations and investigations. In March of 2011, she was qualified as an expert witness in drug recognition and evaluation in the Ontario Court of Justice.

[52] Constable Bryan testified that the drug evaluation she conducts is comprised of a twelve step program established by the regulations under the *Criminal Code*. Based on the evaluation conducted, she forms an opinion on whether or not the individual is impaired by a particular drug while operating a motor vehicle.

[53] She testified that the first of the twelve steps is to interview the investigating officer to find out the details of the incident. In this case, as she was the investigating officer, she had that information already. She then conducts a preliminary examination which involves talking to the accused and completing a drug influence evaluation form. She then goes through a series of tests which include the following:

- a) examination of the pupil size;
- b) eye examination which consists of the “horizontal gaze nystagmus” test and the “vertical gaze nystagmus” test;
- c) a series of physical coordination tests which consists of the “Romberg balance test”, the “walk and turn” test, the “one-leg stand” test, the “finger to nose test”, and;
- d) an examination which consists of measuring blood pressure, body temperature, pulse, pupil size under various light levels, an examination of muscle tone and a visual examination of the arms, neck and legs for evidence of injection sites.

[54] P.C. Bryan testified that the drug evaluation and the tests above are not videotaped. During the testing of Mr. Biagi, she observed that Mr. Biagi’s attitude was polite, his coordination was relaxed, there was an odour of alcohol on his breath and she further observed that his speech was slurred. She testified that this was consistent with what she observed at the scene at the roadside, although she did not observe slurred speech at the roadside, nor were there any notations regarding slurred speech in her notebook.

[55] Constable Bryan evaluated the tracking of Mr. Biagi’s eyes in which she asked Mr. Biagi to focus on and follow a pen with his eyes without moving his head, and she observed that his eyes followed the pen in an equal and smooth manner. She observed that his pupil sizes were equal, that his eyes were bloodshot and watery and that he admitted to his vision being bad.

[56] P.C. Bryan also noticed that horizontal nystagmus was present both of Mr. Biagi’s eyes which she described as “a jerky movement in the eyes”. She testified that she would not expect to see this jerky movement of the eyes in someone who does not have any drugs in their system. She also noticed that his eyelids were droopy. She did not observe vertical nystagmus.

[57] Officer Bryan further conducted an examination to see if Mr. Biagi’s eyes could converge by having him follow a stimulus starting from a circle. The stimulus is a pen which is then brought close to the bridge of his nose to see if his eyes would cross. She observed that his eyes did not cross. They came together but one eye looked straight ahead and the other went off to the side. She testified that some people can converge and some people cannot.

[58] She then conducted the Romberg balance test in the hallway of the police station. This is a test where the subject must stand with his heels and toes together away from the wall with his arms to his sides. When instructed to do so the subject must then tilt his head back, close his eyes and estimate the passage of thirty seconds. When he feels that the passage of time is completed he is then told to drop his head forward, open his eyes and say “stop”.

[59] Officer Bryan observed that Mr. Biagi was very rigid when he was conducting this test and that his eyelids were fluttering and he estimated 30 seconds to be 20 seconds. She testified that the fluttering of eyelids is an indication of a drug and that the rigid appearance is also an indication of the presence of a drug.

[60] For the 'walk and turn' test, P.C. Bryan has the subject stand with his heels and toes together and his arms to his sides, she then instructs him to put his left foot in front of his right foot with his left heel touching his right toe and with his arms to the sides he is told to stand there and hold that position. While holding that position he is then directed to take nine heel to toe steps down the line, turn around and take nine heel to toe steps back.

[61] She testified that she noticed that Mr. Biagi was trembling while he was holding the position and that on two occasions he could not keep his balance. On one occasion he started before she told him to start. She further observed that when he did turn after the first nine steps he did this properly. She testified that he did not have any trouble communicating with her during the tests and that he appeared to understand what she was asking him to do.

[62] For the 'one leg stand', the subject must stand on both the left and then the right leg while holding the other leg straight with toe pointed approximately six inches above the ground counting out loud – 1001, 1002, 1003, until he is told to stop. He is asked to hold the leg straight out to keep his eyes on his toes and to count out loud.

[63] Constable Bryan observed that Mr. Biagi was trembling when he was doing this test and that while standing on his right leg he swayed and lost his balance. She further observed that he hopped on two occasions.

[64] For the 'finger to nose' test, the subject is asked to stand with his heels and toes together, his arms to his sides, he is then asked to tilt his head back and close his eyes while clenching his hands and extending his index fingers. He is then directed to touch tip of his nose with the tip of his index finger with whatever hand directed to.

[65] Constable Bryan observed that Mr. Biagi performed this with very slow and careful movements and that he missed the tip of his nose on third and sixth attempts by touching the side of his nose and not the tip.

[66] P.C. Bryan took three readings of Mr. Biagi's pulse throughout the evaluation and found it to be within the normal range.

[67] Constable Bryan also conducted the vital sign test and observed that Mr. Biagi's blood pressure was below the normal range, although his temperature was normal. She did not observe any normal physical problems with muscle tone or other concerns of the physical examination.

[68] When she conducted the dark room examination of Mr. Biagi's pupil size, P.C. Bryan observed that his pupils were the same size in both eyes but they were below the normal range and constricted in the darkness, which is an indication of drugs in his system. There was also no reaction when she sprayed a light into the pupils.

[69] After conducting these series of tests, it was her opinion that Mr. Biagi was impaired by alcohol and a narcotic analgesic and that he was unable to operate a motor vehicle safely. She determined that it was a narcotic analgesic because his pupil size was constricted and although his pulse rate was fine, his blood pressure was down and he had horizontal nys-

tagmus in his eyes.

[70] When asked whether or not people who are heavier and perhaps overweight would have some difficulty with the balancing tests that are conducted, acknowledged that some of the tests may be easier or could be easier for someone slimmer, although a fit overweight person should be able to perform the tests.

[71] P.C. Bryan agreed that Mr. Biagi did well on some of the tests that were conducted. She acknowledged that his pulse was normal, his muscle tone was normal and that when she sprayed light into his eyes his reaction was normal and that he followed the pen in a smooth and equal manner within the normal range. She further acknowledged that he conducted some of the physical tests properly.

[72] She further acknowledged in cross-examination that in her experience different people react differently to these tests and that some people will have not had any drugs or alcohol in their system and still not do so well on these tests. However, it was still her opinion that Mr. Biagi's results on the evaluation were positively affected by the influence of drugs.

Sergeant Karen Marquis:

[73] Sgt. Marquis is a qualified breathalyzer technician who conducted the breath tests on Mr. Biagi. She testified that Constable Bryan provided her with the grounds for the arrest for impaired operation which were as follows: erratic driving, civilian witness to the driving, bloodshot, glassy, droopy eyes, and slurred speech. She further advised that the driver had fumbled and dropped his driver's licence and that there was an odour of alcohol on the driver's breath and that there had been an admission to consumption.

[74] Sgt. Marquis testified that she noticed during the conducting of the breath tests that Mr. Biagi's speech fluctuated between "somewhat normal and slurring". She observed his attitude to be polite and cooperative and that his eyes appeared to be glassy and bloodshot.

Ms. Patricia Solbeck:

[75] Ms. Solbeck is a forensic toxicologist at the Centre for Forensic Sciences. She has been employed there since April 2003. On consent, Ms. Solbeck was qualified as an expert in toxicology, to give opinion evidence with respect to the absorption, distribution, and elimination of alcohol and drugs in the human body and the effects of alcohol and drugs in the human body as well as the drug and alcohol analysis of Mr. Biagi's urine. The Report from the Centre for Forensic Sciences regarding Mr. Biagi's urine sample was filed as an exhibit at trial.

[76] Ms Solbeck identified three different classes of drugs in Mr. Biagi's urine, specifically oxycodone and morphine in the opiate grouping, lorazepam in the benzodiazepine grouping, and dextropropion, found in over the counter medications. She also identified well as a number of other drugs which are described as metabolites or breakdown products of the ingested drugs noted. Cannabinoid and cocaine and their metabolites were not detected by

the testing.

[77] Ms. Solbeck candidly testified that the presence of a drug in a urine sample indicates only that the drug has been ingested sometime prior to that urine sample but it is not possible to say when that drug was taken and it is not possible to say how much of that drug was taken, based on a urine sample.

[78] Ms. Solbeck clearly explained that the urine sample provides limited interpretation. It allows her to determine that the drug was taken (or the parent drug was taken if a metabolite is detected) but she cannot provide an opinion regarding whether any effects from the drug were being exerted at the time in question in this trial.

[79] Ms Solbeck also acknowledged that urine samples cannot be used to determine the effects, including impairment, of a drug on an individual at a given time since they do not necessarily mean that at the time of the incident there was a blood concentration of the particular drug.

[80] Ms Solbeck described in detail the side effects or potential side effects of some of the drugs found on Mr. Biagi's urine, particularly the morphine and oxycontin. The side effects of morphine and oxycontin include dizziness, drowsiness, sedation, and loss of coordination. All of these side effects can appear when a person takes a drug either at the initiation of their therapy or in a manner that exceeds the tolerance that they have developed to the drug.

[81] She further testified that the body has the ability over a period of time to develop a tolerance to the narcotic analgesic class of drugs (morphine and oxycontin) as well as the benzodiazepine class (lorazepam) and that a person can develop tolerance to the combined effect of all of these drugs with continued use. Before tolerance develops, adding two or more drugs that have a similar mechanism of action would cause an increased affect. She further testified that, subject to the tolerance of all of these drugs and a combination leading to tolerance, alcohol would have an additive effect.

[82] Ms Solbeck explained that the effect of a drug on a person's ability to operate a motor vehicle is going to depend largely on the tolerance of that individual to the drug in question or the combination of drugs.

[83] According to Ms Solbeck, when drugs such as morphine and oxycodone are being taken in individuals who have developed a tolerance to these drugs, there is not a significant driving impairment observed. However she cautioned that not all of these drugs have been tested in real driving situations.

[84] Ms Solbeck testified that there is statistical evidence confirming a correlation between increased crash risk at the commencement of a new prescription or an increase in a dose two or three weeks following the initiation of that medication. She further testified that a drug being taken for a therapeutic use such as morphine and oxycodone have a half-life ranging of about two to six hours, so the effects of these drugs can last up to four to six hours. After four to six hours, the effects of the drugs would then begin to wear off.

[85] When asked whether she was able to advise with any degree of accuracy what it takes to become tolerant to a specific drug or to any of these drugs over time, Ms. Solbeck testified that the development of tolerance would be variable. It would depend on the pattern of administration and the dose that would be administered over time.

[86] With respect to the over the counter medication drugs (a cough suppressant and decongestant), Ms Solbeck explained that higher than therapeutic doses can cause some hallucinogenic side effects, sedation, lack of coordination and dizziness.

[87] The last grouping of drugs found in the urine sample, of the class benzodiazepine, are a part of a class of central nervous system depressants that can reduce the brain's activity. These drugs, which include lorazepam, can produce profound drowsiness, dizziness and lack of coordination.

[88] Finally, Ms Solbeck testified that it is possible that drugs can affect the size of the pupils. For example, a classic sign of opioid use or narcotic analgesic would be constricted pupils. She also explained that a person can develop tolerance to the opioid drugs and still have constricted pupils.

Mr. Daniel Biagi:

[89] Mr. Biagi is 47 years old. He is self-employed with his own company known as Wellcom Corporation. He provides concrete and asphalt work for commercial and residential properties. He is approximately 254 pounds, however he indicated that he weighed significantly more at the time of the alleged offences. He has two dated criminal convictions; mischief, for which he received a suspended sentence, and in 1986, driving while impaired, for which he received a \$400.00 fine and a one year driving prohibition.

[90] Mr. Biagi testified that on the afternoon of May 22, 2011, he was driving home from the Fallsview Casino in Niagara Falls where he had been gambling. He had planned the trip to the casino, so he went to bed early the night before (6:00 p.m.) and awoke in the early hours of the morning. He left his home in Woodbridge at approximately 2:00 a.m. and arrived at the casino at approximately 3:30 a.m. He then played baccarat at the casino for approximately eight to ten hours.

[91] Mr. Biagi testified that he had two beers at the casino at approximately 11:30 a.m. and that he did not ingest any drugs while he was at the casino or afterwards.

[92] Mr. Biagi testified that prior to departing for the casino that morning, he ingested 80 milligrams of ocycontin (one tablet) with his coffee at approximately 2:00 a.m. Mr. Biagi suffers from chronic back and shoulder pain and he has been taking oxycontin for more than ten years to manage the pain. He took one lorazepam pill before going to bed the evening before so that he could get a good night sleep and awake early. He testified that he did not take any other medication.

[93] Mr Biagi left the casino between approximately 1:00 or 2:00 p.m. on the afternoon in question. He testified that he decided to leave the casino at that point because he was feel-

ing tired and he “had had enough”. He testified that he was feeling sober and fine while driving, other than feeling tired.

[94] While travelling along the highway heading home, Mr. Biagi described encountering another driver who appeared enraged behind him, and seemed to follow him when he was changing lanes. He stated that he tried to get out of this person’s way because he looked quite angry.

[95] Mr. Biagi testified that he first observed a police officer pull up beside him on the Burlington Skyway. The officer yelled at him and gestured to pull over. Once they reached the end of the bridge, Mr. Biagi pulled over immediately as far as he could onto the right shoulder. He testified that he did not know why the officer wanted him to pull over, and he could not pull over on the bridge, as there is no shoulder. He estimated that this all happened very quickly, in a matter of seconds.

[96] Mr. Biagi estimated that there were about five police cruisers present and that he was “pretty much encircled”. Once he had pulled over and stopped, the female police officer immediately approached him and said “I smell alcohol.” Mr. Biagi admitted to having a beer. Mr. Biagi provided his driver’s license, ownership and insurance and he was then advised that he was being arrested for driving while impaired due to alcohol. He described this all happening within minutes of pulling over.

[97] While being transferred to the police car, Mr. Biagi observed his truck being searched but he stated that he was not concerned. He testified that he had no knowledge of the pills found in the console. He was driving his work truck, which he frequently permits his workers to use for transporting supplies and materials. Mr. Biagi explained that had recently fired a worker because he discovered that he was selling street pills such as oxycontin to other workers. He believes that the pills found in the vehicle were left by that worker.

[98] Mr. Biagi disagreed with the officer’s testimony that his red eyes indicated impairment. He testified that he was very tired, and that he frequently has red and bloodshot eyes, given his field of work and that he is a smoker. He was also driving with the window open. He also disagreed with the breathalyzer technician’s evidence that his speech was slurred. He testified that he was speaking in a low tone that was not slurred.

[99] After he passed the breath tests, the police escorted Mr. Biagi back to his cell where he states that he fell asleep for approximately twenty minutes. P.C. Bryan then advised him that she wanted to test him for impairment by drugs because the police had found the oxycodone in his vehicle. Mr. Biagi testified that this was the first time that he was advised the police had found pills in his vehicle. He was then hand-cuffed and taken to a dark room for the tests to commence.

[100] Mr. Biagi described being very tired during the testing. He described having bright lights flashed into both of his eyes just after waking up. He testified that P.C. Bryan made him walk a thin line on the floor that he could barely see and that he had great difficulty walking because he was only in his socks. Mr. Biagi testified that he kept tripping on his

socks and requested his shoes, however P.C. Bryan refused this request. He thought that he was doing the finger to nose correctly, but the officer corrected him and asked him to change what he was doing, to which he complied.

[101] After P.C. Bryan completed the testing, she asked for a urine sample. He was taken back to his cell to provide the sample. After the sample was obtained, Mr. Biagi was charged with driving while impaired by drug, dangerous driving, unlawful possession, and driving while his license was suspended.

[102] Mr. Biagi testified that he had no idea that his license was suspended and was surprised when P.C. Bryan informed him. He did not believe it at first. He explained that between August of 2010 and May of 2011, he and his wife had undergone a temporary separation and he was living with his mother at a different address. He stated that he did not receive any mail from the Ministry of Transportation during that period, as it would have gone to his wife's address.

[103] When asked in cross-examination why he did not notify the Ministry of his change of address, he testified that he did not think the separation would be that long. Mr. Biagi and his wife did reconcile, however, he testified that he did not receive the notification from the Ministry when he returned to the family home.

[104] Mr. Biagi admitted in cross-examination that he did not have a prescription for the oxycodone and morphine that he takes for his back pain. He previously had a prescription for the oxycodone and had been taking oxycodone prescribed by his family doctor since approximately 2001. He had started at 10 milligrams but by 2005, he was taking 80 milligrams of oxycodone twice a day to manage his pain, which consisted of two 80 milligram pills a day.

[105] When his family doctor left practice, Mr. Biagi's new family doctor would not prescribe the oxycodone for him, as he will not prescribe narcotics. He started buying oxycodone or morphine on the street approximately two years before the date of the arrest. He testified that there were a couple of people that he usually bought the drug from. On occasion, when he was not able to obtain oxycodone, he would purchase morphine. He would purchase a number of pills at a time so he did not run out.

[106] Mr. Biagi testified that he stayed on the regime of two 80 milligrams pills per day and did not increase the dose even though he admitted that he was building a tolerance to this dosage. However, he testified that the dosage was high enough that it kept him going. He denied taking more than two oxycodone pills each day. However, Mr. Biagi admitted that oxycodone is very addictive and he testified that he would never have started taking it if he had known the addictive effects from the beginning.

[107] Mr. Biagi did not recall when he had last taken morphine prior to the day of his arrest. He denied taking it to supplement his oxycodone, but only when he had run out of the oxycodone and there was none available.

[108] At the time of trial, Mr Biagi had stopped taking oxycodone and testified that he

had stopped less than one year ago. He is now taking a prescribed medication to stop his addiction to the oxycodone and the morphine.

[109] Mr. Biagi had a prescription for lorazepam and took it as needed and not on a regular basis. He could not recall the last time that he had taken lorazepam before the evening of his arrest. He did not recall when he had taken Gravol or the allergy medication, which he takes occasionally, and which was found in his urine. He did not recall taking any allergy medication on the day of his arrest, although he does take Sinutab for his sinuses.

[110] Mr. Biagi acknowledged that he was aware that with any medication, one should not combine alcohol, however he testified that he consumed the beer several hours after he had taken the oxycodone pill so he did not feel that he would be impaired, given his understanding of the time release nature of the oxycodone. Mr. Biagi also testified that he never mixed the medications together and that he took the lorazepam many hours before he took the oxycodone. He testified that the physician who prescribed the lorazepam was aware that he was taking oxycodone.

[111] In cross-examination, Mr. Biagi testified that he did not have an address or contact information for the worker he suspected leaving the pills in the truck. He testified that he frequently hires temporary workers for short periods of time and he does not keep a record of their address or telephone number. He testified that most of the people he hires are contract workers who do their own taxes.

[112] Mr. Biagi does not recall when he fired this worker, nor did he recall when the worker was driving his truck. He explained that numerous workers use the truck throughout the day. He testified that he never looked into the console after the worker was gone, nor did he see the fanny pack. He said after he fired him, the worker got something from the back of the truck and received his pay cheque, but never asked to retrieve anything from the front of the truck. When questioned why he would fire this worker for selling drugs when he himself was buying pills on the street, Mr. Biagi testified that even though he was in a bad position, he would not tolerate drugs being sold on the work-site to his workers.

[113] Mr. Biagi admitted that “it looked bad” that the unmarked pills found in the console were the same drugs found in his urine, however, he repeatedly denied under vigorous cross-examination that he owned the pills or that he knew they were even in the console. He testified that he never had reason to look in the console as he did not put anything in it.

[114] Regarding the officer’s testimony about his driving, Mr. Biagi denied that he was speeding at 130 kilometres per hour, or that he was tailgating. He admitted that it was possible that he was shifting in his lane, as his truck does shake when it is windy and when he is trying to avoid a pothole. He further admitted that he sometimes changes lanes without using his signal when there is a lot of space in front of him.

[115] Mr. Biagi acknowledged that he was provided his right to counsel on two separate occasions, and he spoke to duty counsel prior to giving his breath samples and prior to doing the drug evaluation. He testified that although P.C. Bryan did not offer the opportunity to

speaking to counsel prior to providing his urine sample, he did not request this. However, he thought that if the officer needed to offer him the right to counsel, then she would have offered again.

Dr. David Rosenbloom:

[116] Dr. Rosenbloom is a clinical professor of neurology in the department of medicine at McMaster University. He is a doctor of pharmacy and has treated patients, conducted clinical research and has published a number of research papers in the area of pharmacology. He has been qualified as an expert in pharmacology on a number of occasions.

[117] The defence initially sought to call Dr. David Rosenbloom as an expert to challenge the scientific validity of drug evaluation program and the premises underlying the DRE testing to demonstrate impairment by a drug. In his reports, Dr. Rosenbloom critiqued the scientific basis of a number of the tests conducted by the DRE, which he states are based on the false premise that the tests for determining the effects of alcohol are valid and can also be applied to drugs. Further, the tests are administered without addressing any underlying medical conditions or physical differences in the subject. It is Dr. Rosenbloom's opinion that the tests administered by DRE officers are not scientifically valid for drugs other than alcohol and as he puts it, the drug evaluation scheme under the Criminal Code is essentially "junk science".

[118] The Crown objected to this evidence and submitted that Dr. Rosenbloom's opinion and report was a constitutional attack on the drug evaluation regime established under section 254 by Bill C-2, which amended the legislative scheme for drug impaired driving in 2008. As such, notice of a constitutional question should have been served on the Attorney General.

[119] After a mid-trial ruling on this issue, counsel agreed to limit the scope of Dr. Rosenberg's expert testimony to address the clinical effects of drugs on people and the research methods in determining those effects, including any alternate explanations for some of the effects noted by the DRE. On consent, Dr. Rosenbloom was qualified as an expert to give opinion evidence on the clinical effects of drugs on people and the research methods in determining those effects.

[120] In preparation for his testimony, Dr. Rosenbloom reviewed the report of the DRE officer, the report from the Centre for Forensic Sciences and spoke to Mr. Biagi about his medical history as well as the events leading to his arrest, in addition to a reviewing the Crown disclosure.

[121] Dr. Rosenbloom agreed with the opinion of Ms. Solbeck, the Crown's toxicologist, that urine findings cannot be used to determine the effects, including impairment, on an individual at a given time, since they do not necessarily mean that at the time of the incident there was a blood concentration of a drug, or drug effects.

[122] When asked what the clinical effects of regularly taking 80 milligrams of oxycontin would be on driving, Dr. Rosenbloom testified that when people are taking 80 milligrams of

oxycontin in a sustained release form on a regular basis, then they do develop a tolerance so that it is not affecting their driving. He testified that if an individual was on 80 milligrams of oxycontin for at least five years, as was Mr. Biagi, then a tolerance would have developed which would not impair the ability to drive.

[123] Dr. Rosenbloom further testified that based on Mr. Biagi's evidence of the time that he took the oxycontin, which was approximately 12 to 13 hours before the alleged driving offence, the drug would have been largely eliminated from his blood stream, even if not from his urine, at the time of his arrest. With respect to the lorazepam, Dr. Rosenbloom testified that the effects of the drug would also have worn off by the time that Mr. Biagi was driving, given the 'half-life' of that particular drug.

[124] In discussing the clinical effects of certain drugs, Dr. Rosenbloom explained that although pupil constriction can be a sign of opiate use in "drug naïve" patients, tolerance develops to this pupil constriction in chronic opiate patients such as Mr. Biagi, so that pupil constriction is not necessarily a clinical effect of chronic opiate use. He further testified that although narcotics like oxycodone can constrict pupils, tolerance to pupil constriction will develop. He further disagreed with the DRE's opinion of what was considered a normal range of pupil constriction.

[125] Dr. Rosenbloom also explained that "horizontal nystagmus" is not necessarily a clinical effect caused by drugs. He testified that approximately 30 percent of the population have horizontal nystagmus when they are not on drugs. Horizontal nystagmus is generally present with high amounts of alcohol, not the amount of alcohol present in Mr. Biagi's blood.

[126] Dr. Rosenbloom also testified that the drugs that Mr. Biagi had ingested do not affect the cerebellum, the part of the brain that controls balance. The Romberg test that was conducted by the DRE is a neurological test regarding balance and if Mr. Biagi did poorly on it, as the DRE testified, then it was not because of the drugs that he had taken, as difficulty with balance is generally not a clinical effect of the drugs in issue. Further, he testified that the amount of alcohol that Mr. Biagi had in his blood would not have caused him to do poorly on Romberg test. However, he acknowledged in cross-examination that drugs such as oxycodone and morphine also have a potential dizzying effect on individuals which would cause them to do poorly on the Romberg test.

[127] Dr. Rosenbloom further agreed that the clinical side effects of morphine and oxycodone could also include drowsiness, sedation and loss of coordination. However, he testified that if an individual had developed a tolerance to these drugs then these clinical effects would disappear. He further agreed that drowsiness is a clinical side effect of lorazepam and that the side effects of the over the counter drugs found in Mr. Biagi's urine can include a lack of coordination, sedation, and some dizziness.

[128] Dr. Rosenbloom agreed in cross-examination that if someone who has developed a tolerance to certain therapeutic dosage of oxycodone or morphine then increases that dose or the amount taken, then the clinical side effects described above, including pupil constriction could reappear. He further acknowledged that constricted pupils could be a sign of high dos-

es of drugs such as oxycodone or morphine in a person's system if the individual has not developed a tolerance to the drug in question or has increased the dosage beyond the tolerance that they have developed.

[129] When asked by the court to comment on the combined effect of taking the lorazepam, the oxycontin and the two beers, at the times and amounts to which Mr. Biagi testified, Dr. Rosenbloom testified that there would be very little impact on the driving ability at the time that Mr. Biagi was driving. According to Dr. Rosenbloom, most of the lorazepam would have gone out of the body with no remaining clinical effect if it was taken the night before. The oxycontin lasts for approximately 12 hours, so the effects start dropping off towards the end of 12 hours. The alcohol can have an additive effect, but given the amount, there is very little impact of the drugs and the alcohol on the driving at the time in question, according to his testimony.

THE LAW AND GOVERNING PRINCIPLES

1. **Did the police have reasonable and probable grounds to arrest Mr. Biagi and make a breath and subsequent urine demand? If not, were his section 8 and section 9 *Charter* rights breached?**

[130] The court must first determine whether Officer Bryan had reasonable and probable grounds to arrest Mr. Biagi for operating his motor vehicle while his ability to do so was impaired by alcohol. The pills in the vehicle and the breath and urine samples were obtained as a result of a warrantless search. In order to establish that the seizure of the above evidence was authorized, the onus is on the Crown to satisfy the court on a balance of probabilities that the seizures were made in accordance with a lawful demand.

[131] For the demand to be lawful, the police must have made the demand based on reasonable and probable grounds that Mr. Biagi had operated his vehicle while his ability to do so was impaired by alcohol or a drug or a combination thereof during the preceding three hours, contrary to section 254 of the *Criminal Code*. See *R. v. Haas*, (2005), 76 O.R. (3rd) 737 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 423.

[132] Whether or not reasonable and probable grounds exist has both a subjective and objective element. The subjective component amounts to an actual and honest belief that the suspected committed the offence. The grounds must also be justifiable from an objective point of view, that is, whether the officer's opinion is supported by objective facts.

[133] The governing legal principles are set out by Justice Bruce Durno sitting *ad hoc*, in the Ontario Court of Appeal decision of *R. v. Bush*, 2010 ONCA 554 at paragraphs 36 to 40:

“Drinking and driving prosecutions involve a continuum of findings, beginning with a reasonable suspicion the driver has alcohol in his or her body, the standard for an Approved Screening Device (roadside) demand pursuant to s. 254(2) of the *Criminal Code*. At the other end of the continuum, is the standard for conviction, proof beyond a reasonable doubt that the operator's ability to operate a mo-

tor vehicle was impaired by the consumption of alcohol or that the driver's blood alcohol concentration was over the legal limit.

Between suspicion and proof beyond a reasonable doubt lies reasonable and probable grounds. Section 254(3) of the *Criminal Code* authorizes peace officers to demand *Intoxilyzer* breath samples provided the officer "has *reasonable and probable grounds* to believe that a person is committing or at any time within the preceding three hours has committed" the offence of impaired operation or driving 'over 80.' (emphasis added) Reasonable and probable grounds does not amount to proof beyond a reasonable doubt or to a *prima facie* case: see *Censoni* at para. 31 and *R. v. Shepherd* 2009 SCC 35 at para. 23.

Reasonable and probable grounds have both a subjective and an objective component. The subjective component requires the officer to have an honest belief the suspect committed the offence: *R. v. Bernshaw*, [1995] 1 S.C.R. 254 at para. 51. The officer's belief must be supported by objective facts: *R. v. Berlinski*, [2001] O.J. No. 377 (C.A.) at para. 3. The objective component is satisfied when a reasonable person placed in the position of the officer would be able to conclude that there were indeed reasonable and probable grounds for the arrest: *R. v. Storrey*, [1990] 1 S.C.R. 241 at p. 250.

In *Storrey v. The Queen*, *supra* at 323, Cory J. articulated the overarching context of drinking/driving investigations - the need for reasonable balance between the individual's rights to liberty and the need for society to be protected from the menace of impaired drivers. Every year, drunk driving leaves a terrible trail of death, injury, and destruction: *The Queen v. Bernshaw*, *supra* at 204; *Regina v. Saunders* (1988), 41 C.C.C. (3d) 532 (Ont. C.A.) at 537, 539, 541 per Cory J.A. (as he then was). [emphasis added]

In *Storrey*, Cory J. addressed the importance of the requirement that officers have reasonable grounds as follows at p. 249-250:

The importance of this requirement to citizens of a democracy is self-evident. Yet society also needs protection from crime. This need requires that there be a reasonable balance achieved between the individual's right to liberty and the need for society to be protected."

[134] The determination of reasonable and probable grounds is highly fact driven and requires an assessment of the totality of the relevant and reliable information. This includes information that supports the officer's belief as well as information that may undermine it. However, the court should not lose sight of the fact that police officers in these cases must make quick, but informed decisions.

Analysis:

[135] Applying these principles to the facts of this case, P.C. Bryan observed Mr. Biagi's vehicle moving on the highway for a short period but she did not observe anything unusual or out of the ordinary regarding his driving. She stated that she relied upon the reports of

other officers that Mr. Biagi was driving erratically. However, the other two officers testified that they did not observe unusual or erratic driving and there is nothing in P.C. Bryan's notes that this was reported to her by the officers.

[136] P.C. Rideout observed Mr. Biagi to be driving within the speed limit while on the highway and did not observe any unusual or erratic driving. He was following Mr. Biagi for approximately two kilometres. He also observed Mr. Biagi to pull over to the side of the road immediately and without incident when the rolling block was initiated.

[137] Sergeant Briggs observed Mr. Biagi driving 130 kilometres per hour in a 100 kilometre zone for approximately four kilometres. He also observed him to shift within his lane for a short period of time on the Burlington Skyway, a bridge which he acknowledged to be windy. Other than the speeding and the shifting within the lane, he did not observe any unusual, dangerous or erratic driving.

[138] There was no evidence of a collision or any damage to the vehicle. There was no direct information from the civilian witness who made the report to dispatch and P.C. Bryan did not interview the civilian witness. Both P.C. Bryan and Sergeant Briggs also observed Mr. Biagi pull over to the side of the road without incident when asked to do so.

[139] P.C. Bryan observed that Mr. Biagi's eyes were red and glossy and noticed an odour of alcohol on his breath. Mr. Biagi admitted to her that he had a beer earlier. She did not observe slurred speech or stumbling or swaying. She did observe him to fumble once when he was getting his driver's license from his wallet. Sergeant Briggs also observed the fumbling with his wallet and the odour of alcohol on his breath. P.C. Bryan did not observe or note any slurred speech at the roadside yet later testified that she observed slurred speech at the police station. I have difficulty with this evidence, particularly given that this directly contradicts the evidence of the other officers and it is not supported by the videotaped evidence of Mr. Biagi in the breath room.

[140] None of the officers observed any other indicia of impairment such as swaying or stumbling when he was walking to the police cruiser. They observed him to be quiet and cooperative. There was no indication that he had any difficulty in getting out of his car or in communicating with the police officers.

[141] I find that the totality of the circumstances relied upon by P.C. Bryan were insufficient to objectively establish reasonable and probable grounds to arrest Mr. Biagi for the impaired operation of a motor vehicle. At best, the circumstances gave rise to a reasonable suspicion or hunch that he had alcohol in his body. However, the available information falls well short of the credibility-based probability or reasonable belief.

[142] It is difficult to understand why P.C. Bryan did not use an approved screening device at the roadside before immediately arresting Mr. Biagi for impaired driving. Had she done so, Mr. Biagi's results would clearly have registered that the alcohol in his body was below the legal limit prescribed by the *Criminal Code*, given the results of the breath samples. She could then have considered requiring Mr. Biagi to perform physical coordination

tests under s. 254(2) of the *Code*, which authorises a demand for a standard field sobriety test at the roadside on the reasonable suspicion that he had been driving within the previous three hours with a drug in his body. These are important roadside investigative tools for police officers and it appears that, in my respectful view, an improper shortcut was taken by P.C. Bryan. The differing standards for making an ASD demand and for arresting an individual to obtain breath samples are important and should be well known to police officers.

[143] As I have concluded that P.C. Bryan did not have reasonable and probable grounds to believe that Mr. Biagi's ability to drive was impaired by alcohol, the arrest was unlawful and violated section 9 of the *Charter*. As Mr. Biagi had a reasonable expectation of privacy in his vehicle, the seizure of the pills in the console of his vehicle was not a valid search incident to arrest and infringed Mr. Biagi's right to be secure against an unreasonable search and seizure, contrary to section 8 of the *Charter*.

[144] In light of my conclusion on the issue of the arrest, I also find that P.C. Bryan did not have reasonable and probable grounds to make a lawful drug evaluation demand under section 254 (3.1) of the *Criminal Code* because she lacked the reasonable grounds to believe that Mr. Biagi had committed the offence of impaired driving "as a result of a drug or a combination of alcohol and a drug" once the breath samples indicated that Mr. Biagi's blood alcohol content was well below the legal limit.

[145] P.C. Bryan testified that once she received the breath samples, she believed that Mr. Biagi's ability to operate a motor vehicle was impaired by drugs because she believed that the signs of impairment were greater than the small amount of alcohol found in his blood. However, she did not observe any further or additional signs of impairment when she made the drug evaluation demand.

[146] In cross-examination Constable Bryan acknowledged that at the time that she made the evaluation demand for the drug test, Mr. Biagi was not exhibiting any new indicia of impairment but was showing the same signs of impairment that she observed when she arrested him for impaired operation by alcohol. She acknowledged that there was nothing unusual with the way he was walking and that the signs she observed were the droopy, bloodshot, glassy eyes, as well as the odour of alcohol.

[147] I had the opportunity to watch the video evidence of Mr. Biagi in the breath room and I have carefully considered it. The video does not show any evidence of unsteady walking, poor coordination, swaying back and forth, or slurred speech. Mr. Biagi was attentive and responsive to the officer's questions and he was polite and cooperative. He had no difficulty sitting or standing. It is not possible to have a close view of Mr. Biagi's eyes in the video to determine whether they were red and glassy (although he did provide a possible explanation for this physical symptom). Mr. Biagi exhibits no signs of impairment on the video of the breath room and is more consistent with Mr. Biagi's evidence that he was *not* impaired.

[148] For these reasons and the reasons set out earlier, I conclude that the officer did not have reasonable and probable grounds to then make the drug evaluation demand once Mr. Biagi passed the breath tests.

2. Did the police comply with their obligation to implement Mr. Biagi's right to consult counsel? If not, were Mr. Biagi's section 10(b) *Charter* rights breached?

[149] The onus is on Mr. Biagi to establish on a balance of probabilities that his rights were violated.

[150] The purpose of s. 10(b) of the *Charter* is to "inform the detainee of his rights and provide the detainee with an opportunity to get legal advice on how to exercise them." See *R. v. Sinclair*, 2010 SCC 35 (S.C.C.) In order to ensure that a detainee's s. 10(b) rights have been satisfied, the police must inform him of his right to retain and speak with a lawyer and if he wishes to exercise that right, the police must provide the accused with a reasonable opportunity to do so. These two obligations are referred to as the informational and the implementation obligations.

[151] The implementational duty under section 10(b) includes an obligation to provide a detainee with a reasonable opportunity to consult counsel again where a change of circumstances makes this necessary to fulfill the informational purpose of s. 10(b). See *R. v. Sinclair*, 2010 SCC 35 (S.C.C.), at paragraphs 53 and 65.

[152] P.C. Bryan provided Mr. Biagi with an opportunity to speak to counsel before he provided his breath samples and then a second opportunity before he submitted to the drug evaluation. It is not disputed that Mr. Biagi spoke to counsel privately on those two separate occasions, the second occasion clearly triggered by the change in his circumstances once P.C. Bryan determined that he was impaired by a drug. Although the officer did not provide him with a further opportunity to speak to counsel after he completed the drug evaluation and prior to obtaining the urine samples, Mr. Biagi did not request to speak to counsel on a third occasion.

[153] There is no evidence that Mr. Biagi was *not* informed by counsel during his second private consultation before the drug evaluation that a DRE may demand a urine sample upon completion of the drug evaluation, and the consequences of refusing same.

[154] As the onus here is on Mr. Biagi to establish that his right to counsel has been violated, he has not discharged that burden on a balance of probabilities.

3. Given my findings that Mr. Biagi's *Charter* rights were violated under sections 8 and 9, should the evidence obtained from Mr. Biagi be excluded under section 24(2) of the *Charter*?

[155] Section 24(2) of the *Charter* provides that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[156] In *R. v. Grant*, [2009] 2 S.C.R. 353 (S.C.C.), the Supreme Court of Canada devel-

oped a more flexible, comprehensive and balanced test that courts must apply to determine when a *Charter* breach would bring the administration of justice into disrepute. At paragraph 71 of that decision, the majority directed courts to assess and balance three lines of inquiry:

“When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute.”

The Seriousness of the Breach(es):

[157] The arrest of a person without reasonable and probable grounds is a serious breach of a person's rights under the *Charter*. There needs to be strict compliance with the *Criminal Code* provisions in impaired driving cases, given that Parliament has given the police the power to arrest and detain someone without a warrant and requires that person to provide self-incriminating evidence.

[158] Officer Bryan is a very experienced officer and she was acting in good faith but her testimony did not articulate the reasonable grounds for Mr. Biagi's arrest. The requirement of reasonable and probable grounds is not just a statutory requirement but an essential part of the constitutionality of the entire two step scheme under section 254 of the *Criminal Code*. See *R. v. Au-Yeung*, [2010] O.J. No. 1579 (Ont. S.C.J), citing *R. v. Shepherd*, [2009] 2 S.C.R. 527 (S.C.C.).

[159] Further, in this case, there were at least two breaches, thus increasing the seriousness of the Charter infringing conduct.

The Impact on Mr. Biagi's Charter Protected Interests:

[160] Mr. Biagi was arrested, placed in the back of a police cruiser, and driven to a police station where he was detained for approximately five hours before he was released. He was not mistreated in any way, however a five hour detention is a sufficiently serious interference with Mr. Biagi's liberty.

[161] After he provided his breath samples, he then had to undergo a further battery of physical and medical tests, including providing urine samples, which in my view, is significantly more invasive. He has had to pay a private lawyer to defend this prosecution, which was no doubt costly and which has been very lengthy given the shortage of continuous trial dates in this jurisdiction. Mr. Biagi was charged almost three years ago.

[162] Although I recognise that in the post-*Grant* era, conscriptive evidence is given less emphasis, it is still an important consideration, given that it would not have been discovered in any other way than by means of the *Charter* breaches. In this case, I have found more

than one *Charter* breach and I have found the unlawful search and seizures to be more invasive than simply obtaining breath samples.

Society's Interest in the Adjudication of the Criminal Charge on its Merits:

[163] There is no question that our society has a very strong interest in adjudicating an impaired driving case on its merits, given the seriousness of this offence and the potentially devastating consequences. However, our society also has a strong interest in having a justice system that is administered properly, particularly when an accused's liberty is at stake.

[164] In this case, there were no apparent signs of impaired driving and very little signs of impairment. There was no accident or collision. In fact, Mr. Biagi's blood alcohol level was well below the legal limit when the breath samples were ultimately obtained.

[165] Once that was ascertained, the further series of tests and urine samples that Mr. Biagi had to undergo were, in my view, not at all conclusive that his driving was impaired by drug or a combination of alcohol and drug, as I will address later in these reasons. Mr. Biagi was polite, cooperative and responsive throughout his arrest and detention of several hours.

[166] In balancing all of the above factors, including the seriousness of the *Charter* breaches, Mr. Biagi's loss of liberty, the fact that there were no apparent signs of impaired driving and little signs of impairment, the evidence of the pills found in Mr. Biagi's vehicle, the urine samples obtained, and the drug evaluation should be excluded under section 24(2) of the *Charter*.

4. Even if conclude that the above evidence should be admitted and considered on its merits, has the Crown established beyond a reasonable doubt that Mr. Biagi is guilty of the offences charged?

[167] If I am wrong in my analysis of the *Charter* issues, in my view, on the totality of all of the evidence, the Crown has not met its burden of proving beyond a reasonable doubt that Mr. Biagi is guilty of the offences charged.

[168] The Supreme Court of Canada has commented on the principle of proof beyond a reasonable doubt in several cases. In *R. v. Lifchus* (1997), 118 C.C.C. (3d) at para 24, Cory J. stated:

“Ordinarily even the most important decisions of a lifetime are based upon carefully calculated risks. They are made on the assumption that certain events will in all likelihood take place or that certain facts are in all probability true. Yet to invite jurors to apply to a criminal trial the standard of proof used for even the important decisions in life runs the risk of significantly reducing the standard to which the prosecution must be held.”

[169] Later on in the *Lifchus* case above, Justice Cory explains that the meaning of proof beyond a reasonable doubt is as follows: “the standard of proof is higher than...a balance of probabilities yet less than proof to an absolute certainty”. In *R. v. Starr* (2000) 147 C.C.C. (3d) 449 (S.C.C.), the Court confirmed that in order to convict, something less than absolute

certainty and something more than probable guilt is required, but that the standard falls much closer to absolute certainty than to proof on a balance of probabilities.

The impaired driving charge:

[170] The *Criminal Code* does not prescribe any specific test for determining impaired driving. The leading case on this issue is the Ontario Court of Appeal's decision in *R. v. Stellato* (1993) 43 M.V.R. (2d) 120 (Ont. C.A.). Before convicting an accused of impaired driving, a trial judge must be satisfied, beyond a reasonable doubt, that the accused's ability to operate a motor vehicle was impaired by alcohol or drug.

[171] If the evidence establishes beyond a reasonable doubt any degree of impairment, the offence has been made out. The Crown is not required to prove that the accused's conduct demonstrated a marked departure from that of a normal person. As Justice Labrosse states at paragraph 14 of the decision:

“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 fragile 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.”

[172] In assessing the evidence of impairment and applying the test set out in *Stellato*, and *R. v. Andrews* [1996] A.J. No. 8 (Alta. C.A.), and other cases, the judge should not just look at each item of evidence in isolation, but must look at the totality of the evidence, to determine whether the Crown has proved the impairment alleged. It may be that certain features of the evidence have possible explanations other than impairment, but the trial judge must still determine whether, on the whole of the evidence, all of those factors present in the same case, along with any unexplained observations, still leave a reasonable doubt as to whether the accused's ability to operate a motor vehicle was impaired as alleged.

[173] In *R. v. Palanacki*, (2001). 22 M.V.R. (4th) 104, [2001] O.J. No. 5194 (S.C.J.), Justice Durno states the following regarding the analysis that must be undertaken by the trial judge:

“I agree with the Chief Justice that when the physical symptoms alone would not support a conviction, a trial judge must examine not only the driving pattern, but all of the evidence, including evidence of non-impairment, in assessing whether the Crown has satisfied the onus. This is consistent with the judgment of Hill J. in *R. v. Elvikis* (1997), 25 M.V.R. (3d) 256 (Ont. Ct. Gen. Div.), relied upon by the Crown, where His Honour found:

Circumstantial evidence as to impairment, advanced by the Crown, whether driving conduct, physical symptomology or physical test results, or some combination thereof, will have probative value on the issue of impairment ability to drive a motor vehicle, more or less, depending upon the nature and strength of the evidence adduced. Items of circumstantial evidence are not to be viewed in isolation but *the entirety of the evidence*

must be considered in determining whether the prosecution has discharged the burden of proof.” [Emphasis added]

[174] In this case, we have the following evidence which could indicate impairment:

- a) The odour of alcohol on Mr. Biagi’s breath;
- b) The bloodshot and “glossy” or glassy and “droopy” eyes;
- c) Mr. Biagi’s admission of the consumption of alcohol and to ingesting lorazepam, and oxycontin on the evening before and the morning of his arrest for impaired driving;
- d) Mr. Biagi’s fumbling to produce his driver’s license at the roadside;
- e) The pain killers and sleeping pills (oxycodone, morphine and lorazepam) found in Mr. Biagi’s vehicle at the time of his arrest;
- f) The results of Mr. Biagi’s drug evaluation conducted by the Drug Recognition Expert and her opinion that Mr. Biagi’s ability to operate a motor vehicle was impaired by certain drugs;
- g) The evidence of the above drugs in Mr. Biagi’s urine samples.

[175] We also have the following evidence which is contraindicative of impairment:

- a) Other than speeding, there was no evidence of bad, erratic or unusual driving whatsoever by Mr. Biagi, who immediately pulled over without incident when requested to by the police;
- b) There was no evidence of any accident or collision;
- c) Mr. Biagi was polite, cooperative and responsive both at the roadside and at the police station;
- d) There was no evidence that Mr. Biagi was swaying, stumbling or falling at the roadside or the police station, nor was his speech slurred;
- e) Officers Rideout, Bryan and Briggs did not observe slurred speech at the roadside or make any notations of slurred speech in their notes. I reject the evidence of the breathalyzer technician that she observed slurred speech, having carefully reviewed the videotape of the breath room and not observing slurred speech;
- f) The breath samples obtained demonstrated that Mr. Biagi’s blood alcohol level was well below the legal limit at 16 mg and 22 mg respectively;
- g) The evidence of both the Crown’s forensic toxicologist, Ms Solbeck, and the defence expert, Dr. Rosenbloom, that urine findings cannot be used to deter-

mine the effects, including impairment, on an individual at a given time since the presence of the drug in the urine does not mean that there was a blood concentration of the drug in the body at the time of the incident;

- h) The evidence of Dr. Rosenbloom that the effects of the drugs taken by Mr. Biagi, based on his tolerance level and the times and amounts taken, would have worn off by the time of the driving, and that the combined effect of taking the one lorazepam, the one oxycontin and the two beers, at the times and amounts to which Mr. Biagi testified, would have little or no impact on his driving ability.
- i) The evidence of Mr. Biagi, who testified that he was not impaired and that he took one oxycontin for his neck and shoulder pain when he woke up that morning, approximately 12 hours before he was arrested, and one lorazepam the evening before at approximately 6:00 pm, approximately 20 hours before he was arrested.

[176] The opinion of the Drug Recognition Expert regarding impairment by drug must be scrutinized carefully. I accept that P.C. Bryan is qualified as an evaluating officer for the purpose of a drug evaluation under s. 254 (3.1) of the *Criminal Code*. I have concluded that the Crown may elicit the expert opinion of the certified drug recognition expert regarding the accused's ability to operate a motor vehicle while being impaired by drug without the necessity of a *Mohan* voir dire so long as it is established that the witness is a certified drug recognition expert as specified in the regulations under this section. I adopt the reasoning of Justice R. LeDressay in his recent decision, *R. v. McCarthy*, [2014] O.J. No. 35 at paragraph 19.

[177] However, this does not mean that the expert opinion can be determinative of the ultimate issue. It is well settled law that the expert is not permitted "to usurp the functions of the trier of fact." See *R. v. Mohan*, [1994] 2 S.C.R. 9 at paragraph 20. The Supreme Court of Canada has repeatedly cautioned that expert evidence must not be allowed to usurp the role of the trier of fact and that the trier of fact alone is responsible for deciding the questions on issue at trial. See also the recent decision of the Supreme Court of Canada in *R. v. Sekhon*, 2014 SCC 15 at paragraph.

[178] As Justice LeDressay states in *R. v. McCarthy*, *supra*, at paragraphs 20 and 22 of that decision, when discussing the opinion evidence of a D.R.E.:

"As in the case of any expert evidence the evaluating officer's methodology and /or the underlying factual basis of the opinion may be challenged as well as the evaluating officer's conclusion regarding drug impairment. It is the court that must evaluate the strength of the expert evidence proffered by an evaluating officer.

In the case of *R. v. Abbey*, [2009] O.J. No. 3534, Justice Doherty made it clear that judges should be vigilant with respect to expert evidence and to be careful not to allow expert evidence to "swallow whole the fact-finding function of the court." He noted the following at paragraph 71:

It is fundamental to the adversary process that witnesses testify to

what they saw, heard, felt or did, and the trier of fact, using that evidentiary raw material, determines the facts. Expert opinion evidence is different. Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases.”

[179] Even if I accept that the D.R.E. conducted her evaluation carefully and accurately, and there is no evidence to suggest otherwise, in my view, the D.R.E.’s opinion evidence must be considered in the context of all of the evidence before the court and weighed accordingly, particularly given the highly subjective nature of her evaluation.

[180] This evidence does not carry the same weight as the evidence of the breathalyzer technician obtaining breath samples. Parliament did not stipulate the conclusions that must be reached once a certain result was obtained on the evaluation tests for impairment by drug. There are no presumptions included in this part of the legislation like there is in the sections related to over 80 charges where a breathalyser test is administered and results are achieved. See *R. v. McCarthy, supra*, at paragraph 27.

[181] Regrettably, there is no video evidence of the drug evaluation tests performed by P.C. Bryan. Given the subjective nature of these tests, the results of which are almost entirely based on the D.R.E.’s observations, it would be helpful to have these evaluations routinely videotaped, although I recognise that it may be difficult to videotape some of the tests (the eye tests in the darkened room, for example).

[182] P.C. Bryan candidly acknowledged that Mr. Biagi did well on a number of the tests that she conducted. On some of the tests that he did poorly on, she acknowledged that his heavy weight may be a factor, or that there may be other explanations such as the difficulty of performing the tests in socks in a darkened room. She further agreed that some people who do not have any drugs in their system can still not do well on some of the physical tests.

[183] Dr. Rosenbloom’s evidence directly challenged a number of the D.R.E.’s findings. He testified that pupil constriction was not necessarily a clinical effect when tolerance to an opiate develops, such as in Mr. Biagi’s case and that the particular drugs that Mr. Biagi ingested do not affect the part of the brain that controls balance.

[184] Dr. Rosenbloom also disagreed with the D.R.E.’s opinion regarding what was considered a normal range of pupil constriction. He further testified that the horizontal nystagmus that the D.R.E. observed is not necessarily a clinical effect caused by drugs, and in fact, thirty percent of the population have horizontal nystagmus when they are not on drugs.

[185] In my view, having carefully considered all of the evidence, the totality of the evidence does not establish beyond a reasonable doubt that Mr. Biagi’s ability to operate a motor vehicle was impaired by alcohol and or drugs.

The dangerous driving charge:

[186] Regarding the charge of dangerous driving, it is well established that in order to prove the offence of dangerous driving, the *actus reus* is driving in a manner that is dangerous to the public, having regard to all of the circumstances, including the nature, condition and use of the place at which the vehicle was being operated, including the amount of traffic reasonably expected at the time. The *mens rea* is that the degree of care exercised by the accused was a *marked* departure from the standard of care that a reasonable person would observe in the accused's circumstances.

[187] It is well settled law that the care exhibited while driving must be a marked departure from the norm and serious enough to merit criminal punishment. See *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49.

[188] The evidence regarding Mr. Biagi's driving on that Sunday afternoon falls well short of the standard set out above. Other than the speeding and the one instance of tailgating less than a car length, only observed by Sergeant Briggs for a very short period of time, (which Mr Biagi disputes), there was no evidence of unusual, erratic or reckless driving in a manner that was dangerous to the public. As Sergeant Briggs candidly acknowledged in cross-examination, this was not the worst driving he had seen by any means.

The unlawful possession charge:

[189] Mr. Biagi testified that he had no knowledge of the oxycodone, lorazepam and morphine pills in the zipped fanny pack in the console of his work vehicle. His explanation that the pills were most likely left by an employee who he had recently fired for selling street drugs to other employees during work hours was suspicious, however, he testified in a straightforward and credible manner and his testimony was not shaken during cross-examination.

[190] It was not disputed that he routinely let his employees use his work truck to transport material and he hired many employees on a casual basis given the nature of the work. He further testified that he does not use the console and has no need to look inside of it. He testified that he was not concerned or nervous when the police searched his truck after his arrest because he had nothing to hide. However, the fact that the pills found in the console were the same pills that Mr. Biagi admitted to using and were present in his urine certainly undermines his explanation.

[191] Even if I had not excluded the drugs found in the truck because of the unlawful search and seizure, I cannot say that I am convinced beyond a reasonable doubt that Mr. Biagi was in possession of the pills found in the console of his work vehicle. On a balance of probabilities, this may very well be the case, but the standard of proof in a criminal trial is significantly higher.

The *Highway Traffic Act* charge:

[192] The offence of "driving while suspended" created by section 53(1) of the *Highway*

Traffic Act is a strict liability offence. See paragraph 22 of Justice David Fairgrieve's decision in *R. v. Bellomo*, [1995] O.J. No. 313, 14 M.V.R. (3d) 63, citing *R. v. MacDougall* [1982] 2 S.C.R. 605, 18 M.V.R. 180, 142 D.L.R. (3d) 216, which considered the equivalent similarly worded provision of the *Nova Scotia Motor Vehicle Act*. This was not disputed in this trial.

[193] As such, the proper test is whether the defence left the court in a state of reasonable doubt as to whether the accused was aware of the driving license suspension. See *R. v. Bellomo*, *supra* at paragraph 58. Applying this test to the facts of this case, Mr. Biagi's testimony that he was not aware that his driver's licence was suspended was credible. He was not living at the address to which the notice of suspension had been sent and he was surprised when P.C. Bryan advised him of the suspension. He testified in a straightforward manner on this issue and withstood cross-examination without having his credibility diminished.

CONCLUSION:

[194] As stated earlier, even if the impugned evidence is not excluded as a result of the *Charter* breaches, having carefully considered all of the evidence, I find that the Crown has not established the guilt of the Mr. Biagi beyond a reasonable doubt as required by law on any of the charges against him. He is therefore acquitted on all charges.

[195] I wish to thank both counsel for their professionalism throughout and their very helpful submissions and case law provided, for which I am indebted.

Released: March 27, 2014


Signed: "Justice Sheilagh O'Connell"