

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Bingley, 2017 SCC 12, [2017] 1 S.C.R. 170 | **Appeal heard:** October 13, 2016  **Judgment rendered:** February 23, 2017  **Docket:** 36610 |

Between:

Carson Bingley

Appellant

and

Her Majesty The Queen

Respondent

- and -

Criminal Lawyers’ Association (Ontario) and

Canadian Civil Liberties Association

Interveners

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 35)  **Dissenting Reasons:**  (paras. 36 to 60) | McLachlin C.J. (Abella, Moldaver, Côté and Brown JJ. concurring)  Karakatsanis J. (Gascon J. concurring) |

R. *v.* Bingley, 2017 SCC 12, [2017] 1 S.C.R. 170

v.

Her Majesty The Queen Respondent

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**Indexed as: R. *v.*** Bingley

2017 SCC 12

File No.: 36610.

2016: October 13; 2017: February 23.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

on appeal from the court of appeal for ontario

*Criminal law — Evidence — Expert evidence — Admissibility — Drug recognition evaluation — Drug recognition expert certified under statutory scheme determining accused driving while drug impaired — Whether s. 254(3.1) of Criminal Code provides for automatic admissibility at trial of opinion evidence of such expert — If not, whether that testimony admissible as expert opinion pursuant to common law rules of evidence — Criminal Code, R.S.C. 1985, c. C‑46, s. 254(3.1) — Evaluation of Impaired Operation (Drugs and Alcohol) Regulations, SOR/2008‑196.*

B was observed driving erratically, pulling into a parking lot and striking a car. The police arrived and noted signs of impairment. Therefore, the officer conducted a roadside screening device test for alcohol, which B passed. The officer then requested a roadside sobriety test conducted by a drug recognition expert (“DRE”)certified under the *Criminal Code* and the *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations* (“Regulations”). B failed the sobriety test, and was arrested for driving while drug impaired. He was taken to a police station where the DRE conducted a 12‑step drug recognition evaluation. During the evaluation, B admitted that he had smoked cannabis and taken two alprazolam in the previous 12 hours. An urinalysis revealed the presence of cannabis, cocaine and alprazolam. B was acquitted at his first trial, but the acquittal was overturned and a new trial ordered. At the second trial, contrary to the first, the judge held that s. 254(3.1) of the *Criminal Code* does not allow for the automatic admissibility of the DRE’s evidence and that a *voir dire* is required at common law under *R. v. Mohan*, [1994] 2 S.C.R. 9. On that *voir dire*, however, the judge determined that the DRE’s evidence was inadmissible as expert or lay opinion evidence and therefore, acquitted B. The summary conviction appeal judge held that s. 254(3.1) renders a DRE’s evidence automatically admissible and that in any event, it would be admissible lay opinion. Finally, the Court of Appeal held that DRE evidence is automatically admissible without a *voir dire* and ordered a new trial.

*Held* (Karakatsanis and Gascon JJ. dissenting): The appeal should be dismissed and the order for a new trial confirmed.

*Per* McLachlin C.J. andAbella, Moldaver, Côté and Brown JJ.: Section 254(3.1) of the *Criminal Code* does not provide for the automatic admissibility at trial of DRE opinion evidence. Section 254(3.1) gives the police investigative tools to enforce laws against drug‑impaired driving; however, it does not dictate whether evidence obtained through the use of those investigative tools will be admissible. When Parliament intends to make evidence automatically admissible, it says so expressly. Because s. 254(3.1) does not speak to admissibility, the common law rules of evidence apply.

Under the common law rules for admissibility, the expert evidence analysis is divided into two stages. At the first stage, the evidence must meet the four *Mohan* factors: relevance, necessity, absence of an exclusionary rule, and special expertise. At the second stage, the trial judge must weigh potential risks against the benefits of admitting the evidence. Because of concessions made by B, the only issue in this case is whether a DRE has special expertise.

While the trial judge would normally determine whether an expert has special expertise at a *voir dire*, s. 254(3.1) of the *Criminal Code* and the legislative and regulatory scheme that accompanies it conclusively answer the question. A DRE is a “drug recognition expert”, certified as such for the purposes of the 12‑step evaluation. By reason of his training and experience, a DRE undoubtedly possesses expertise on determining drug impairment that is outside the experience and knowledge of the trier of fact. He is thus an expert for the purpose of applying the 12‑step evaluation and determining whether that evaluation indicates drug impairment. His expertise has been conclusively and irrebuttably established by Parliament. Knowledge of the underlying science is not a precondition to the admissibility of a DRE’s opinion. Such knowledge is required only where the science is novel. The purpose of the special rule for novel science is to ensure that the reliability of the evidence is established by precedent, evidence or statute. In this case, the reliability of the 12‑step evaluation comes from the statutory framework itself.

Where, as here, the four *Mohan* threshold requirements for admissibility are met and there is no question that the probative value of the evidence outweighs its prejudicial effect, the trial judge is not obliged to hold a *voir dire* to determine the admissibility of the evidence. Because the DRE’s evidence is admissible as expert evidence, it is unnecessary to consider whether it could also be admissible as lay opinion.

*Per* Karakatsanis and Gascon JJ. (dissenting): Parliament has not determined that the 12‑step DRE evaluation is sufficiently reliable to be admitted as evidence of drug impairment at trial. Parliament has simply endorsed the reliability of the 12‑step evaluation as an investigative tool, but not as an evidentiary shortcut at trial. Without the ability to test the reliability of the scientific foundation of a DRE evaluation, the trial judge — acting as gatekeeper — will be unable to assess the probative value of such evidence, and the trier of fact will be unable to assess the weight of such evidence. Courts retain discretion to require — through precedent or evidence on a *voir dire* — confirmation that the science behind DRE evaluations meets a basic threshold of reliability before admitting the evidence at trial.

Given the unsettled nature of the case law and the relatively recent reception of DRE evidence into Canadian courts, it was open to the trial judge in this case to treat the proposed testimony as an opinion based on novel science. Although he recognized the DRE’s special expertise in administering the 12‑step evaluation for the purpose of requesting a bodily sample and thereby advancing the police investigation, the trial judge found that the DRE was not trained on the reliability of the 12‑step evaluation. Because the Crown did not call a different expert for this purpose, there was a lack of evidence about the reliability of the regime. The trial judge was therefore entitled to exclude the DRE’s evidence.

**Cases Cited**

By McLachlin C.J.

**Applied:** *R. v. Mohan*, [1994] 2 S.C.R. 9; **referred to:** *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *R. v. J.‑L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272.

By Karakatsanis J. (dissenting)

*R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. J.‑L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Béland*, [1987] 2 S.C.R. 398; *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 254(3.1), (3.4), 258(1)(c), 723(5), 729(1).

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

**Authors Cited**

Canada. House of Commons. Legislative Committee on Bill C‑2. *Evidence*, No. 3, 2nd Sess., 39th Parl., October 31, 2007, pp. 7‑8.

Canada. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*, No. 72, 1st Sess., 39th Parl., May 30, 2007, pp. 1‑2.

APPEAL from a judgment of the Ontario Court of Appeal (Cronk, Gillese and Huscroft JJ.A.), 2015 ONCA 439, 126 O.R. (3d) 525, 20 C.R. (7th) 351, 325 C.C.C. (3d) 525, 335 O.A.C. 328, 80 M.V.R. (6th) 1, [2015] O.J. No. 3171 (QL), 2015 CarswellOnt 8987 (WL Can.), affirming a decision of McLean J., 2014 ONSC 2432, [2014] O.J. No. 2468 (QL), 2014 CarswellOnt 6888 (WL Can.), setting aside the acquittal entered by Frazer J., [2013] O.J. No. 6277 (QL), 2013 CarswellOnt 18815 (WL Can.), and ordering a new trial. Appeal dismissed, Karakatsanis and Gascon JJ. dissenting.

Trevor Brown and Eric Granger, for the appellant.

Joan Barrett, for the respondent.

Mark C. Halfyard and Breana Vandebeek, for the intervener the Criminal Lawyers’ Association (Ontario).

Jasmine T. Akbarali and Stuart A. Zacharias, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Abella, Moldaver, Côté and Brown JJ. was delivered by

1. The Chief Justice — The issue on this appeal is narrow: Can a drug recognition expert (“DRE”) testify about his or her determination under s. 254(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46, without a *voir dire* to determine the DRE’s expertise? I conclude that in this case a *voir dire* was not required. I would therefore dismiss the appeal and confirm the order of the Ontario Court of Appeal for a new trial.
2. Facts
3. The appellant, Carson Bingley, was observed driving erratically, pulling into a parking lot, and striking a car. The police were called. Constable Jennifer Tennant arrived and interviewed Mr. Bingley. She testified that his eyes were “glossy” and bloodshot, and that he stumbled and slurred his words. She conducted a roadside screening device test, which Mr. Bingley passed. Constable Tennant then called for a field sobriety test. Constable Tommy Jellinek, a certified DRE under the *Criminal Code*,conducted the standard field sobriety test. Mr. Bingley failed the test, and was arrested for driving while impaired by a drug. Constable Jellinek took Mr. Bingley to a police station and conducted a drug recognition evaluation. During the evaluation, Mr. Bingley admitted he had smoked marijuana (cannabis) and taken two Xanax (alprazolam) in the previous 12 hours. Constable Jellinek concluded that Mr. Bingley was impaired by a drug. Based on his conclusion that Mr. Bingley was impaired, Constable Jellinek ordered a urinalysis under s. 254(3.4), which revealed the presence of cannabis, cocaine and alprazolam.
4. At trial, the Crown called Constable Jellinek to explain the results of his drug recognition evaluation as evidence of Mr. Bingley’s impairment. The Crown relied on s. 254(3.1) of the *Criminal Code* as establishing the admissibility of Constable Jellinek’s testimony, and argued that no *voir dire* was required.
5. Relevant Statutory Provisions
6. The relevant subsections of s. 254 of the *Criminal Code* are as follows:

**Evaluation**

**(3.1)** If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under paragraph 253(1)(a) as a result of the consumption of a drug or of a combination of alcohol and a drug, the peace officer may, by demand made as soon as practicable, require the person to submit, as soon as practicable, to an evaluation conducted by an evaluating officer to determine whether the person’s ability to operate a motor vehicle, a vessel, an aircraft or railway equipment is impaired by a drug or by a combination of alcohol and a drug, and to accompany the peace officer for that purpose.

. . .

**Samples of bodily substances**

**(3.4)** 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 railway equipment is impaired by a drug or by a combination of alcohol and a drug, the evaluating officer may, by demand made as soon as practicable, require the person to provide, as soon as practicable,

* + - * 1. 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
        2. 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.

1. Judgments Below
2. The judge at the first trial allowed Constable Jellinek to testify as an expert regarding the results of the drug recognition evaluation without a *voir dire*, but acquitted Mr. Bingley. On appeal, the acquittal was overturned and a new trial ordered (2012 ONSC 1186). The Crown again sought to admit Constable Jellinek’s evidence pursuant to s. 254(3.1). At the second trial, the judge held that s. 254(3.1) did not allow for the automatic admissibility of Constable Jellinek’s evidence. He then considered whether Constable Jellinek’s evidence was admissible as expert opinion evidence pursuant to *R. v. Mohan*, [1994] 2 S.C.R. 9. He held that Constable Jellinek could not be qualified as an expert because he was not trained in the science underlying the drug recognition procedure. He also concluded that the evidence was not admissible lay opinion. He acquitted Mr. Bingley. The Crown successfully appealed the second acquittal. The summary conviction appeal judge held that s. 254(3.1) rendered a DRE’s opinion automatically admissible and that in any event, it would be admissible lay opinion (2014 ONSC 2432).
3. The Court of Appeal held that Constable Jellinek’s opinion evidence was admissible without a *voir dire*. Section 254(3.1) allows a DRE “to determine” whether an individual is impaired due to a drug or a combination of drugs and alcohol. It is implicit that this determination is automatically admissible as opinion evidence, the court opined. Parliament created a detailed regime and satisfied itself of the science of the drug recognition evaluation prescribed by the *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, SOR/2008-196 (“Regulations”); this suffices to determine admissibility. The Court of Appeal accordingly ordered a new trial (2015 ONCA 439, 126 O.R. (3d) 525).
4. Issues
5. The admissibility of Constable Jellinek’s opinion evidence depends on the answers to three questions. First, does s. 254(3.1) of the *Criminal Code* provide for the automatic admissibility of DRE opinion evidence? Second, if it does not, is Constable Jellinek’s testimony admissible as expert opinion pursuant to the common law rules of evidence? Third, if Constable Jellinek’s evidence is not admissible expert opinion evidence, is it admissible as lay opinion evidence?
6. Analysis
7. Driving while impaired by drugs is a dangerous and, sadly, common activity, prohibited by the *Criminal Code*. Parliament long ago established a regime to enforce the law against alcohol-impaired driving, with breathalyzer testing and analyst certification at its centre. Enforcing the offence of drug-impaired driving was more elusive.
8. To meet the need to enforce the law against drug-impaired driving, Parliament set up a regime to test for drug impairment in 2008. The centrepiece of the regime is a 12-part evaluation for drug impairment, established by the Regulations, to be administered by police officers called DREs.[[1]](#footnote-1) DREs receive special training and certification. Section 254(3.1) of the *Criminal Code* provides law enforcement, for the first time, with the power to compel a person to submit to a drug recognition evaluation when there are reasonable grounds to believe that a person has driven while impaired by drugs or by a combination of drugs and alcohol. If the 12-step evaluation administered by a DRE provides him or her with reasonable grounds to believe that the person is impaired by a drug, s. 254(3.4) allows the police to take tests of oral fluid, urine or blood, to determine whether the person in fact has drugs in his or her body.
9. The Crown argues that s. 254(3.1) has supplanted the common law and that a DRE’s determination is admissible at trial against the accused as evidence of impairment by drug. Mr. Bingley contends that the determination is only admissible if the DRE is established as an expert on a *voir dire*, pursuant to *Mohan*. To put it succinctly, the central issue on this appeal is whether s. 254(3.1) makes the DRE’s opinion evidence *automatically admissible* (the Crown’s position) or whether a *special hearing is required to determine admissibility*, as required at common law under *Mohan* (Mr. Bingley’s position). In the alternative, the Crown argues that Constable Jellinek’s evidence should be admitted as lay opinion evidence.
   1. Have the Common Law Rules of Evidence Been Displaced?
10. Clear and unambiguous language is required to displace common law rules, including rules of evidence: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1077; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 29-30. The Crown argues that the words “to determine” in s. 254(3.1) are clear enough to do this. I do not agree. Section 254(3.1) calls on the DRE to form an opinion about whether a person is impaired by drug. It does not follow that the opinion will be automatically admissible at trial.
11. The purpose of s. 254(3.1) confirms that a DRE’s opinion is not automatically admissible at trial. Section 254(3.1) gives the police investigative tools to enforce laws against drug-impaired driving. It does not dictate whether evidence obtained through the use of those investigative tools will be admissible at trial. When Parliament intends to make evidence automatically admissible, it says so expressly: see, e.g., *Criminal Code*, ss. 723(5) (hearsay evidence) and 729(1) (analyst certificate on conditional sentence breaches). As section 254(3.1) does not speak to admissibility, the common law rules of evidence apply.
    1. Is the Evidence Admissible Expert Opinion?
12. The modern legal framework for the admissibility of expert opinion evidence was set out in *Mohan* and clarified in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. This framework guards against the dangers of expert evidence. It ensures that the trial does not devolve into “trial by expert” and that the trier of fact maintains the ability to critically assess the evidence: see *White Burgess*, at paras. 17-18. The trial judge acts as gatekeeper to ensure that expert evidence enhances, rather than distorts, the fact-finding process.
13. The expert evidence analysis is divided into two stages. First, the evidence must meet the four *Mohan* factors: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge must weigh potential risks against the benefits of admitting the evidence: *White Burgess*, at para. 24.
14. If at the first stage, the evidence does not meet the threshold *Mohan* requirements, it should not be admitted. The evidence must be logically relevant to a fact in issue: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 82; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 47. It must be necessary “to enable the trier of fact to appreciate the matters in issue” by providing information outside of the experience and knowledge of the trier of fact: *Mohan*, at p. 23; *R. v. D.D.*,2000 SCC 43, [2000] 2 S.C.R. 275, at para. 57. Opinion evidence that otherwise meets the *Mohan* requirements will be inadmissible if another exclusionary rule applies: *Mohan*, at p. 25. The opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25. In the case of an opinion that is based on a novel scientific theory or technique, a basic threshold of reliability of the underlying science must also be established: *White Burgess*, at para. 23; *Mohan*, at p. 25.
15. At the second stage, the trial judge retains the discretion to exclude evidence that meets the threshold requirements for admissibility if the risks in admitting the evidence outweighs its benefits. While this second stage has been described in many ways, it is best thought of as an application of the general exclusionary rule: a trial judge must determine whether the benefits in admitting the evidence outweigh any potential harm to the trial process: *Abbey*, at para. 76. Where the probative value of the expert opinion evidence is outweighed by its prejudicial effect, it should be excluded: *Mohan*, at p. 21; *White Burgess*, at paras. 19 and 24.
16. The expert opinion admissibility analysis cannot be “conducted in a vacuum”: *Abbey*, at para. 62. Before applying the two-stage framework, the trial judge must determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized: see *Abbey*, at para. 62; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.
17. The only issue in this case is whether Constable Jellinek has special expertise as required by the fourth *Mohan* factor. Mr. Bingley concedes that the proposed evidence is logically relevant, necessary, and not subject to any other exclusionary rule. Nor does Mr. Bingley argue that the evidence should be excluded because its prejudicial effect outweighs its probative value. On the facts of this case, these were appropriate concessions.
18. The basic requirement of expertise for an expert witness is that the witness has expertise outside the experience and knowledge of the trier of fact. The question is whether Constable Jellinek, the DRE in this case, met this requirement. In my view, he did.
19. The DRE, literally, is a “drug recognition expert”, certified as such for the purposes of the scheme. It is undisputed that the DRE receives special training in how to administer the 12-step drug recognition evaluation and in what inferences may be drawn from the factual data he or she notes. It is for this limited purpose that a DRE can assist the court by offering expert opinion evidence.
20. While a DRE’s evaluation certainly has an investigative purpose, their application of the 12-step drug recognition evaluation and determination of impairment is relevant evidence and can assist the trier of fact. The DRE’s opinion is based on his or her specialized training and experience in conducting the evaluation. By reason of this training and experience, all DREs undoubtedly possess expertise on determining drug impairment that is outside the experience and knowledge of the trier of fact.
21. This conclusion is not negated by the fact that a DRE is not trained in the science underlying the development of the 12-step evaluation. The test for expertise is merely knowledge outside the experience and knowledge of the trier of fact. Knowledge of the underlying science is not a precondition to the admissibility of a DRE’s opinion. The scope of a DRE’s expertise is in the application of the prescribed 12-step evaluation, not in its scientific foundation. Expert witnesses are not barred from assisting the court with their special knowledge simply because they are not trained in the underlying science of the field. Such knowledge is required only where the science is novel.
22. In his analysis, the trial judge focused on the reliability of the underlying science and determined that, as novel science, the DRE opinion evidence could not be admitted without a witness being able to explain the scientific validity of the evaluation. The purpose of the special rule for novel scientific evidence is to ensure that the reliability of the underlying technique or procedure used in forming the opinion has to be established by precedent, evidence, or statute.
23. In this case, the reliability of the 12-step evaluation comes from the statutory framework itself. Parliament has determined that the 12-step evaluation performed by a trained DRE constitutes evidence of drug impairment. It may not be conclusive, but it is evidence beyond the experience and knowledge of the trier of fact.
24. My colleague concludes that as s. 254(3.1) and the Regulations do not “clearly designat[e]” DRE opinion evidence admissible in evidence, reliability must be otherwise established. I cannot agree. It is true that s. 254(3.1) and the Regulations do not provide for the automatic admissibility of DRE opinion evidence. But that does not end the inquiry. The Regulations set out a uniform evaluative framework that a DRE must follow in order to reach a conclusion regarding drug impairment for the purposes of s. 254(3.1). Parliament is entitled to establish such a framework, and in doing so, establish that the 12-step drug evaluation is sufficiently reliable for the purposes of determining impairment. No further evaluation of the reliability of the steps mandated by the Regulations is required. Any challenge to the underlying effectiveness of the evaluation would require a challenge to the legislative framework itself.
25. Allowing a DRE to give relevant opinion evidence outside the experience and knowledge of the trier of fact is not “an unqualified endorsement of the underlying science” of the 12-step drug evaluations, as my colleague suggests (para. 46). Reliability is not assessed in a vacuum. Parliament has established, through the adoption of the Regulations, that the 12-step drug evaluation is sufficiently reliable for the purpose of a DRE’s determination of impairment under s. 254(3.1). The scope of a DRE’s expertise is limited to that determination, and it is only for the purpose of making that determination that Parliament has established the 12-step drug evaluation’s reliability.
26. Mr. Bingley conceded that all the *Mohan* requirements other than special expertise were met and does not argue that the evidence should be excluded under the second stage of the admissibility analysis. Parliament has established the required expertise. It follows that the DRE’s evidence is admissible in this case. To put it another way, the only purpose of a *voir dire* in this case would be to determine whether Constable Jellinek has expertise over and above an ordinary person. Normally, the judge determines this on evidence adduced at the *voir dire*. But s. 254(3.1) and the legislative and regulatory scheme that accompanies it conclusively answer the question of expertise. The DRE is established by Parliament to possess special expertise outside the experience and knowledge of the trier of fact. He is thus an expert for the purpose of applying the 12-step evaluation and determining whether that evaluation indicates drug impairment for the purposes of s. 254(3.1). His expertise has been conclusively and irrebuttably established by Parliament.
27. This compels the following conclusion. In the case at bar all the threshold requirements for admissibility of *Mohan* are established. Where it is clear that all the requirements of a common law rule of admissibility are established (the four *Mohan* threshold requirements for admissibility are met and there is no question that the probative value of the evidence outweighs its prejudicial effect), the trial judge is not obliged to hold a *voir dire* to determine the admissibility of the evidence. To so require would be otiose, if not absurd, not to mention a waste of judicial resources.
28. It is important to reiterate that a DRE’s s. 254(3.1) determination is a result of administering the prescribed evaluation. That is the only expertise conferred on a DRE. The trial judge has an “ongoing duty to ensure that expert evidence remains within its proper scope”: *Sekhon*, at para. 46. If opinions beyond the expertise of a DRE are solicited, a *Mohan voir dire* to establish further expertise may be required.
29. The statutory framework does not undermine a trial judge’s important role as gatekeeper to safeguard the trial process and ensure that it is not distorted by improper expert opinion evidence. The trial judge always maintains residual discretion to exclude evidence if its probative value is outweighed by its prejudicial effect. Limitations, such as the absence of a standardized approach to weighing the various tests in reaching a determination, may affect the probative value of a DRE’s opinion evidence. A DRE may be unable to explain how he or she made the determination based on the application of the 12-step evaluation. If the probative value of an individual DRE’s evidence is so diminished that the benefits in admitting the evidence are outweighed by the potential harm to the trial process, a trial judge retains the discretion to exclude that evidence. I reiterate here that the focus of the analysis must be on the DRE’s administration of the evaluation, not on the reliability of the steps underlying the evaluation, which have been prescribed by Parliament.
30. It is also important to note that the determination of the DRE is not conclusive of the ultimate question of whether the accused was driving while impaired by a drug. The DRE’s task is to determine whether the evaluation indicates drug impairment. The DRE’s evidence does not presume the ultimate issue of guilt; it is merely one piece of the picture for the judge or jury to consider.
31. That Parliament has established the reliability of the 12-step drug evaluation by statute does not hinder the trier of fact’s ability to critically assess a DRE’s conclusion of impairment or an accused person’s right to test that evidence. Cross-examination of the DRE may undermine his or her conclusion. Evidence of bias may raise doubt about the officer’s conclusion. The officer may fail to conduct the drug recognition evaluation in accordance with his or her training. A DRE may draw questionable inferences from his or her observations. Bodily sample evidence obtained under s. 254(3.4) may refute the DRE’s assessment, as may evidence of bystanders or other experts. It will always be for the trier of fact to determine what weight to give a DRE’s opinion. Any weight given to a DRE’s evidence will necessarily respect the scope of the DRE’s expertise and the fact that it is not conclusive of impairment.
32. The trial judge correctly found that the DRE in this case was an expert for purposes of administering the 12-step evaluation and determining whether Mr. Bingley was driving while impaired for the purpose of requiring further testing. He erred, however, in concluding that because the officer was not an expert in the scientific foundation of the various elements of the test, none of his opinion evidence was admissible. The DRE’s expertise is not in the scientific foundation of the test but in the administration of the test itself. As the other criteria for admissibility are not in issue, Constable Jellinek’s opinion evidence should have been admitted.
    1. Lay Opinion Evidence
33. Given my conclusion that Constable Jellinek’s opinion evidence is admissible in this case, it is unnecessary to consider whether it could also be admissible as lay opinion. I say only this: Constable Jellinek formed his opinion through the application of specialized training and experience in performing a prescribed drug recognition evaluation. In those circumstances, his evidence cannot be characterized as lay opinion.
34. Conclusion
35. I would dismiss the appeal and confirm the order for a new trial.

The reasons of Karakatsanis and Gascon JJ. were delivered by

Karakatsanis J. (dissenting) —

1. Overview
2. Expert opinion evidence can provide judges and juries with important, sometimes vital knowledge. But it can also risk complicating the trial process and potentially distort the truth-seeking function of the court. At its worst, dubious expert evidence has contributed to wrongful convictions. To guard against these dangers, the common law has developed the analytical framework first set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, to ensure that the risks of admitting expert testimony do not outweigh its benefits.
3. I agree with the Chief Justice on a number of fronts. Like the Chief Justice, I do not believe that s. 254(3.1) of the *Criminal Code*, R.S.C. 1985, c. C-46,has displaced the ordinary common law requirement for a *voir dire* on admissibility of expert opinions. I also agree with her that as a gatekeeper, the trial judge must evaluate whether the opinion should be admitted according to the *Mohan* criteria. Finally, I agree with the Chief Justice that the Drug Recognition Expert (DRE) is an expert only for the limited purpose of administering the 12-step evaluation. In this limited sense, the DRE possesses expertise beyond the ordinary knowledge of the trier of fact.
4. I cannot agree, however, that Parliament has determined that the 12-step evaluation, when properly administered, is sufficiently reliable to be admitted as evidence of drug impairment at trial. In my view, it was open to the trial judge to refuse to admit the proposed opinion in the absence of evidence on the reliability and validity of the science underlying the 12-step evaluation.
5. As the Crown submits, evaluations performed by DREs pursuant to s. 254(3.1) of the *Criminal Code* rely on a science-based regime. As the DRE in this case acknowledged in cross-examination, the reliability of his opinion depends on the validity of the various tests and the reliability of the inferences he has been taught to draw from the results. Many of the “clues” and “cues” DREs rely on when making their overall determination would not obviously indicate impairment to a lay person. Tests such as the horizontal gaze nystagmus test or the lack-of-convergence test, which involve looking for irregularities in eye movements, are only reliable indicators of drug impairment if the science on which they are based is valid.
6. Parliament has endorsed the reliability of the 12-step evaluation as an investigative tool, not for the purpose of an evidentiary shortcut at trial. Without the ability to test the reliability of the scientific foundation of the evaluation, the trial judge — acting as gatekeeper — will be unable to assess the probative value of such evidence, and the trier of fact will be unable to assess the weight of such evidence. In my view, courts retain discretion to require — through evidence or precedent — confirmation that the science behind DRE evaluations meets the necessary level of reliability before admitting the evidence at trial. I would allow the appeal and reinstate the acquittal.
7. Analysis
   1. The Mohan Criteria
8. Expert evidence based on novel science or on science used for a novel purpose is subject to special scrutiny: *Mohan*, at p. 25; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 33 and 35-36. Such evidence must meet a basic threshold of reliability before it can be admitted: *Mohan*, at p. 25. Caution is warranted because it can be difficult for triers of fact to effectively assess the frailties of specialized expert evidence. As Sopinka J. warned in *Mohan*,at p. 21:

Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.

1. Scientific techniques may still be considered novel even where their use is well established outside of the courtroom: *J.-L.J.*, at para. 35. Techniques that are reliable enough for one purpose, such as measuring improvements in a therapeutic setting, may still not be reliable enough to be used as a diagnostic tool in court proceedings: *ibid.*; *R. v. Trochym*,2007 SCC 6, [2007] 1 S.C.R. 239, at para. 37.
2. In order to admit expert opinions based on scientific techniques or knowledge into evidence, trial judges must have assurance that the underlying science is sufficiently reliable. Where its use in court proceedings is well established, judges will often be able to rely on a history of prior admissibility: *Trochym*, at para. 31.In contrast, a basic threshold of reliability of evidence based on novel science must be established on a *voir dire* because the reliability and validity of its underlying premises cannot be assumed.
   1. The DRE Statutory Scheme
3. I agree with the Chief Justice that opinions based on novel science are subjected to special scrutiny to ensure that reliability has been established by precedent, evidence, or statute. I cannot conclude, however, that the statutory scheme contains such an endorsement of the 12-step evaluation.
4. Like the Chief Justice, I see the purpose of s. 254(3.1) as being to provide police with further investigative tools to enforce laws against drug-impaired driving. When read together with s. 254(3.4), the subsection permits an evaluation that can provide the DRE with reasonable grounds, and the authority, to request a sample of bodily fluid to “enable a proper analysis to be made”.
5. Clearly, Parliament views DRE evaluations as reliable enough for this investigative purpose. However, I remain deeply uncomfortable with the notion of extending this purpose, grounded in enhancing police *investigative* tools, to include an unqualified endorsement of the underlying science when the Crown seeks to enter DRE evaluations as *evidence* in court.
6. Not all expert opinions formed on the basis of valid police investigative tools are admissible into evidence. Polygraph evidence, for example, is not admissible: *R. v. Béland*, [1987] 2 S.C.R. 398, at pp. 416-19. Despite recognition that polygraph examinations are far from infallible, polygraphs remain valid police investigative tools: *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at paras. 95 and 100.
7. Concerns about the reliability of the underlying science are particularly heightened when, as here, the scientific foundation is not self-evident and the proposed expert evidence goes to key elements of the crime before the court. Although there is no longer an absolute bar on opinions on the ultimate issue before the trier of fact, the closer the expert evidence approaches the ultimate issue, the greater the need for special scrutiny: *Mohan*, at p. 25; *J.-L.J.*, at para. 37.
8. Thus, absent statutory language that clearly designates DRE evaluations as admissible evidence, a basic threshold of reliability of the tests must be established through precedent or evidence on a *voir dire*.
9. Even otherwise admissible evidence may be excluded at a second discretionary gatekeeping step, where a trial judge evaluates the potential benefits and risks of the proposed expert evidence before admitting it at trial: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 24. “[R]elevance, reliability and necessity” must be weighed against the dangers of “consumption of time, prejudice and confusion”: *J.-L.J.*, at para. 47.
10. The probative value of the evidence necessarily involves an assessment of the reliability of the underlying science: *Trochym*, at para. 28. Without evidence relating to the science, or the ability to cross-examine the expert about the science, how does the gatekeeper critically assess the probative value against the potential prejudice of the evidence, to ensure that it enhances, rather than distorts, the fact-finding process? (See *White Burgess*, at paras. 17-18.)
11. And without the ability to test its scientific foundation, how will the trier of fact ultimately assess the weight of the evaluation? The evidence has the potential to be highly prejudicial. In the context of a jury trial for impaired driving causing death, for example, there is a real danger that an opinion, coming from a police officer certified as a “Drug Recognition Expert”, about whether the accused was impaired by a drug, would be given undue weight.
12. Nor can cross-examination of DREs effectively assist in understanding the probative value of the evidence and the strength of the inference that should be drawn from the opinion. Because a DRE’s area of expertise is limited to administration of the prescribed evaluation rather than the scientific knowledge necessary to explain its effectiveness, cross-examination is unlikely to leave triers of fact with a real understanding of the weight that should be attached to the evidence.
13. Accused persons have a right to test the strength of the evidence against them. For those charged with alcohol-impaired driving, s. 258(1)(c) of the *Criminal Code* clearly designates breath sample results as “conclusive proof” of an accused’s blood alcohol level (provided certain preconditions are met). Since there is no equivalent provision for DRE determinations, accused persons should not have to bring a constitutional challenge in order to question the strength of the 12-step evaluation.
14. The Chief Justice recognizes that Parliament has not displaced the common law rule requiring a *voir dire* on the admissibility of expert evidence. One important reason for this rule is to ensure that any novel science underpinning the expert’s opinion is reliable. And yet, my colleague’s reasons dispense with any inquiry into the reliability and validity of the 12-step evaluation. This displaces an important safeguard in our common law rule, without clear language to this effect. It effectively leads to the automatic admissibility of the evaluation upon proof it was properly administered. In my view, there is no clear indication that this was Parliament’s intent.
    1. The Insufficient Evidence of Reliability Before the Trial Judge
15. The Crown relies on a reference by a witness at a parliamentary committee hearing to a study finding that DRE evaluations are 98.6 percent reliable. But proposed expert testimony based on novel science is subject to a more searching assessment of reliability: see *J.-L.J.*, at para. 33. If the evaluation techniques are in fact highly reliable, then I expect that it would not be long before the reliability of the underlying scientific regime would be well established through precedent and a *voir dire* on this issue would rarely be required. However, we are not there yet.
16. Given the unsettled nature of the case law and the relatively recent reception of DRE evidence into Canadian courts, it was open to the trial judge to treat the proposed testimony as an opinion based on novel science. Although he recognized the DRE’s special expertise in administering the 12-step evaluation for the purpose of requesting a bodily sample (i.e., advancing the police investigation), the trial judge found the DRE lacked the necessary qualifications to offer an opinion on impairment in court. The trial judge’s reasons indicate that neither threshold reliability nor the adequacy of the officer’s qualifications were conceded.
17. As the DRE was not himself trained on the reliability of the 12-step evaluation, the Crown could have called a different expert for this purpose. As it did not, there was a lack of evidence about the reliability of the regime. The trial judge was therefore entitled to exclude the DRE’s opinion on the results of his evaluation.
18. In my view, the reliability of the tests, and the trial judge’s discretion to exclude the evidence, were key issues before the trial judge and live issues before this Court. The trial judge had the discretion to require — through evidence or precedent — confirmation that the science behind DRE evaluations met the basic threshold of reliability before admitting the evidence at trial.
19. Conclusion
20. Accordingly, I would allow the appeal and reinstate the acquittal.

*Appeal dismissed,* Karakatsanis *and* Gascon JJ. *dissenting.*

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1. The Regulations are based on the procedure set out by the International Association of Chiefs of Police (“IACP”), and DREs must be accredited by that organization: Regulations, s. 1. The procedure set out by the IACP was referred to in legislative debates that led to the adoption of s. 254(3.1) of the *Criminal Code* as the intended drug evaluation scheme: see House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, No. 72, 1st Sess., 39th Parl., May 30, 2007, at pp. 1-2; House of Commons, Legislative Committee on Bill C-2, *Evidence*, No. 3, 2nd Sess., 39th Parl., October 31, 2007, at pp. 7-8. [↑](#footnote-ref-1)