



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## **Bill C-46– *Impaired Driving Act***

**CANADIAN BAR ASSOCIATION  
CRIMINAL JUSTICE SECTION**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Criminal Justice Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Criminal Justice Section.

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# Bill C-46 – *Impaired Driving Act*

## I. INTRODUCTION

The Criminal Justice Section of the Canadian Bar Association (CBA Section) is pleased to comment on Bill C-46, *Impaired Driving Act*, which would change Canada's impaired driving legislation and related offences under the *Criminal Code*. The Bill is divided into two parts. Part 1 would add new sections for driving while under the influence of drugs. Part 2 would replace all provisions for driving offences in the *Code* with a new regime and would come into effect 180 days after Part 1 received Royal Assent.

Road safety is a matter of national concern. Impaired driving, whether by drugs or alcohol, is a significant problem and too often results in serious injury or death. Canadian law must offer effective enforcement mechanisms to address proven hazards associated with impaired driving, while simultaneously upholding applicable constitutional standards. An effective law must comply with the *Charter*, with demonstrated results on this serious issue.

Impaired driving is also one of the most extensively litigated areas of the criminal law. Every aspect of the present legislative scheme has been subject to intense constitutional scrutiny. Whether or not that litigation is ultimately successful, its volume alone has enormous implications for the justice system in terms of cost, delay and uncertainty in the law while cases are pending. The recent *R. v. Jordan* decision has put pressure on courts to adhere to time limits set by the Supreme Court of Canada.<sup>1</sup> Any increase in litigation as a result of the changes in Bill C-46 could exacerbate this problem and risk more charges being dismissed for delay. We have and continue to urge a cautious and practical approach to any legislative change in this area.<sup>2</sup>

Drug impaired driving is a major concern to Canadians and the CBA Section commends efforts to deal with any problems or omissions. With the proposed legalization of marijuana in Canada,

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<sup>1</sup> [2016] 1 SCR 631.

<sup>2</sup> Recent examples include CBA submissions on Bill C-226, *Impaired Driving Act* (Ottawa: CBA, 2016); *Proposal to Lower the Blood Alcohol Concentration* (Ottawa: CBA, 2017); *Impaired Driving — Modernizing Transportation Provisions of the Criminal Code* (Ottawa: CBA, 2010).

it is timely that the government is now proposing measures to improve detection and prosecution of drug impaired driving.

## **II. REVISING EXISTING PROVISIONS**

Part 1 of the Bill proposes amendments that deal specifically with drug offences, and Part 2 would completely revise the existing *Criminal Code* sections dealing with driving offences. Eventually, Part 2 would repeal and replace all existing driving provisions in the *Code*, including the amendments proposed in Part 1.

Part 2 significantly resembles Private Members' Bill C-226, introduced in February 2016, with some minor revisions. The CBA Section wrote to the House of Commons Committee on Public Safety and National Security during its review of Bill C-226, following frequent discussions about the proposals in that Bill with Justice Canada officials over recent years. We have, throughout, expressed significant concerns about the constitutionality of several aspects of the Bill. We also stressed that the new sections would bring a substantial amount of uncertainty into an area of well-established, heavily litigated law. Rather than improving efficiencies, our daily experience in Canada's courts leads us to suggest that this uncertainty will significantly increase and prolong litigation, further burdening our criminal justice system at a time when system delays have become critical.

The Public Safety Committee's report on Bill C-226 said:

While the intent behind Bill C-226 is commendable, the Committee has concluded, based on the evidence provided during its study, that the legal problems with the Bill far outweigh the potential salutary effects. The impaired driving provisions are the most heavily litigated in the Criminal Code. As such, changes of this magnitude require a comprehensive and balanced approach to be effective. Based on testimony and briefs from witnesses including the Privacy Commissioner of Canada, the Canadian Bar Association, and Mothers Against Drunk Driving, the Committee is not convinced that the majority of the measures proposed in Bill C-226 are either balanced or effective. With the exception of random breath testing, Mothers Against Drunk Driving told the Committee that "Even if all these measures are upheld under The Canadian Charter of Rights and Freedoms, they would not have a major impact on impaired driving and related crashes, injuries and deaths."

In addition, the Committee heard from a number of witnesses that the provisions for stricter mandatory minimum penalties and random breath testing may violate the Canadian Charter of Rights and Freedoms. As this was submitted as a private member's bill, it was not subject to the usual constitutional review conducted by the Department of Justice under the Department of Justice Act. The Committee heard from several expert witnesses who raised concerns about the constitutionality of the legislation, including the Criminal Lawyers' Association who testified that "there are

sections of the bill that are unquestionably unconstitutional.” The Committee therefore cannot say with any degree of certainty that the majority of the provisions included in Bill C-226 would pass constitutional muster.

The Committee therefore requests the Government introduce robust legislative measures to reduce the incidence of impaired driving at the earliest opportunity, however, pursuant to Standing Order 97.1, the Committee recommends that the House of Commons not proceed further with Bill C-226, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts.

In May, 2017, the Committee’s report was accepted by the House and, after Vote 260, the Bill was declared dead.

Bill C-46 is not identical to Bill C-226. Most notably, increased mandatory minimum sentences have been removed, specific indicia as grounds for roadside screening were taken out and proposed restrictions on the use of statements are now confined to compelled statements. Still, Part 2 of Bill C-46 and the old Bill C-226 are much the same. Given the fate of Bill C-226 at the Commons Committee on Public Safety and National Security, Bill C-46 may suffer a similar fate when the Committee studies it.

We see the merit and need for Part 1 of Bill C-46, but believe that Part 2 jeopardizes any potential benefit from the Part 1 amendments. We recommend that Part 2 be omitted and Part 1 proceed as its own Bill, and offer more detailed analysis below.

## **RECOMMENDATION**

- 1. The CBA Section recommends that Part 2 of Bill C-46 be omitted and Part 1 proceed as its own Bill.**

### **III. PART 1**

#### **A. Offences relating to Transportation – Drugs**

The CBA Section recognizes the need to detect and prosecute drug impaired drivers. Currently the main investigative technique available to the police is an evaluation by a Drug Recognition Expert (DRE). If the DRE officer has the requisite grounds following the evaluation, a demand may be made for a sample of bodily fluid. However the analysis of that fluid will only confirm whether a particular class of drug is present (rather than impairment).

Unlike alcohol, where an accused may be charged with the offence of having more than 80 milligrams of alcohol in their system, there are no set limits for drugs. Instead, the Crown must always prove impairment. Part 1 seeks to remedy this by establishing three separate offences depending on level of drugs or combination of drugs and alcohol in a person's system. The Bill would amend section 253 of the *Criminal Code* by adding:

- (3) Subject to subsection (4), everyone commits an offence who has within two hours after ceasing to operate a motor vehicle or vessel or after ceasing to operate or to assist in the operation of an aircraft or of railway equipment or after ceasing to have the care or control of a motor vehicle, vessel, aircraft or railway equipment
- a) a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulations;
  - b) a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation and that is less than the concentration prescribed for the purposes of paragraph (a); or
  - c) a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

Proposed new section 253.1 authorizes the Governor in Council to make regulations prescribing acceptable concentrations for the purposes of paragraph 253(3)(a)(b) and (c). The penalty sections proposed for sections 253(3)(a) and 253(c) are the same as for impaired driving or driving with a alcohol level over 80 milligrams. Proposed section 253(3)(b) would be a straight summary offence with a maximum penalty of \$1000.

It seems that the intent is for section 253(3)(b) to be a less serious offence committed where the drug level is not as high as the amount regulated for section 253(3)(a) but above the level set for section 253(3)(b). However, the wording in section 253(3)(b) is confusing as the first reference to regulation does not specify which concentration level would apply. The CBA Section recommends rewording the section as follows:

a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is *prescribed by regulation for the purposes of this paragraph* but is less than the concentration prescribed for the purposes of paragraph (a); or

#### **RECOMMENDATION**

2. **The CBA Section recommends rewording section 253(3)(b) to read “a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is *prescribed by regulation for the purposes of this***



***paragraph but is less than the concentration prescribed for the purposes of paragraph (a)***".

Introducing these blood drug concentrations would give an objective standard for penalizing a person. However, linking impairment to a given blood drug concentration may be problematic. For alcohol consumption, experts can testify that everyone will be impaired to some degree at a certain level, regardless of the observable indicia. This is not necessarily the case with drugs.

At a Marijuana Impairment Detection Technologies Workshop held in Quebec in September 2016, experts from Canada and the United States confirmed that the impairment of someone consuming marijuana cannot be reliably gauged by a set quantum. An experienced user may not be legally impaired at 5 nanograms, while a casual user or novice may be legally impaired at a much lower amount. If legislation sets the blood drug concentration for section 253(3)(a) at 5 nanograms of marijuana and the level for section 253(3)(b) at 3 nanograms, the non-impaired habitual user would be convicted while the impaired casual user would have not committed an offence unless the Crown proves impairment and proceeds under section 253(1)(a).

This dilemma must be recognized. The preamble to Bill C-46 states that "dangerous driving and impaired driving are unacceptable at all times and in all circumstances" and that "it is important to deter persons from driving while impaired by alcohol or drugs". The example above shows that set limits for blood drug levels may not actually identify impaired drivers and may penalize non-impaired ones.

## **RECOMMENDATION**

### **3. The CBA Section recommends that the federal government base any measurement of blood drug concentration on proven scientific evidence that links the concentration to impairment.**

People on prescription medication should also be considered. If a person's impairment cannot be reliably established on the basis of a given blood drug level, the justification for penalizing someone who is driving having lawfully used a prescribed drug should be carefully considered.

Proposed section 253(4)(b) offers a defence to those who have exceeded blood drug levels if they consumed the alcohol or drug after ceasing to drive, if, after ceasing to drive, they had no reasonable expectation that they would be required to supply a sample of bodily fluid. This reasonable expectation to supply a sample is a new concept for the impaired driving regime. In

our response to Bill C-226, the CBA Section expressed concern that this requirement would lead to increased litigation and delays in court proceedings.

Proposed section 254(2)(c) would offer a mechanism for a police officer to demand a sample of bodily substance for analysis by way of an approved screening device. The basis for the demand is that the officer has reasonable grounds to suspect that the person has alcohol or drugs in their body and was operating a motor vehicle or vessel within the preceding three hours. Under the current law the officer is limited to making a demand for a breath sample. The proposed law would extend this to a requirement for a bodily substance.

The CBA Section understands the merit and necessity of giving the police appropriate tools to deal with drug detection. A breath sample cannot supply an analysis of drugs. Technological advances have progressed to the point that roadside screening devices for drugs are a reality. It is important for the federal government to employ effective testing methods to deal with impaired driving.

Parliament must be careful to ensure any approved devices are scientifically valid and involve minimal intrusion, given the low threshold for a roadside demand and the absence of right to counsel. These shortcomings were justified in the context of a breath demand because the roadside breath screening device is minimally invasive and taken in circumstances where the delay in contacting counsel would defeat the purpose of the section. In contrast, obtaining a bodily substance is likely to be more intrusive and potentially involve seizing substances that contain more information than just the level of drugs in a person's system. The testing device must be able to be administered easily and quickly, and give accurate and swift results.

#### **RECOMMENDATION**

- 4. The CBA Section recommends that Parliament ensure that any approved devices are scientifically valid and involve minimal intrusion, given the low threshold for a roadside demand and the absence of right to counsel.**

## **IV. PART 2**

### **A. Recognizing and Declaring Certain Facts**

Proposed *Criminal Code* section 320.12 would “recognize and declare” certain findings of fact and law. It states that:

- a) operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that includes licensing, the observation of rules and sobriety;
- b) the protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;
- c) the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration
- d) an evaluation conducted by an evaluating officer is a reliable method of determining whether a person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

We take no issue with statement (a). Statement (b) focuses solely on deterrence. While deterrence is certainly a valid and important principle of sentencing, it is not the *only* relevant sentencing factor. *Criminal Code* sections 718, 718.1 and 718.2 reference concepts such as rehabilitation, promoting a sense of responsibility, proportionality, and that "an offender should not be deprived of liberty" if less restrictive sanctions may be appropriate. Any amendments that ignore these factors and focus only on deterrence and denunciation will be scrutinized against established jurisprudence stating that other factors must also be considered in sentencing.

Statement (c) proposes a comprehensive finding of fact best left to individual trial judges. The current state of the law is that an 'approved instrument' used properly and properly maintained, gives the Crown the benefit of a presumption that the accused's blood alcohol level is above the legal limit. Statement (c) would curtail this analysis by the trial judge and would be vulnerable to constitutional scrutiny for over breadth.

Prior to the Supreme Court of Canada decision in *R. v. Bingley*,<sup>3</sup> the proposition in statement (d) was in dispute. Some courts held that a DRE officer was not qualified to give an expert opinion and courts were further conflicted as to whether a *Mohan* inquiry had to be held. In *Bingley*, the Court ruled that a DRE is an expert and can give expert evidence on whether their evaluation indicated drug impairment without the necessity of a *Mohan* inquiry. To that extent, statement (d) is merely a codification of the case law. However, the Court in *Bingley* specifically cautioned that the DRE's opinion was "merely one piece of the picture" for the trier of fact to consider. Statement (d) should be read in this context.

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<sup>3</sup> 2017 SCC 12.

## B. Impaired Operation and ‘Over .08’

Proposed section 320.14 would create the offence of impaired operation and operation over .08. Proposed section 320.14(1) would create four offences. Sections 320.14(1)(a) and (b) are a restatement of the offences proposed in private members’ Bill C-226, while sections 320.14(c) and (d) include aspects of Part 1 of Bill C-46. Section 320.14 reads that everyone commits an offence who:

- a) operates a conveyance while the person’s ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;
- b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 ml of blood;
- c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or
- d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

Currently, section 253(1)(a) makes it an offence to operate a motor vehicle while impaired, without referring to the degree of impairment that must be established. The generally accepted test is in *R. v. Stellato*,<sup>4</sup> which says that if the evidence establishes any degree of impairment, the offence is made out. Including the qualifier “to any degree” in proposed section 320.14 appears to codify this interpretation.

Proposed section 320.14(b) defines the prescribed limit of blood alcohol as “equal to or over 80.” This contrasts with the current law that creates the offence only if the readings “exceed 80”.

The proposal to reword “over 80” to “equal to or exceeding 80” seems intended to address the practice of rounding down blood alcohol concentration (BAC) results in some jurisdictions. Rounding down is sometimes done by the measurement instrument internally, without a technician knowing the actual BAC. In addition, every instrument has some margin of error, which is also factored into the decision as to whether to proceed with a prosecution.

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<sup>4</sup> *R. v. Stellato*, [1994] 2 SCR 478.

There have been different practices in different parts of Canada about rounding down. The proposed change would address this situation. Greater consistency is certainly desirable, but independent study documenting the extent of the problem may be advisable before moving forward.

The offence in proposed section 320.14(1)(b) is subject to proposed section 320.14(5), which offers a defence. The accused will not have committed an offence under section 320.14(1)(b) if:

- a) they consumed alcohol after having ceased to operate the conveyance,
- b) after having ceased to operate the conveyance, they had no reasonable expectation that they would be required provide a sample of breath or blood, *and*
- c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with *Criminal Code* section 320.31(1) or (2),<sup>5</sup> and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.

Section 320.14(1)(b) and section 320.14(5) target what is often referred to as a bolus drinking defence – a situation where an accused drinks an abnormally large amount of alcohol after driving, producing readings on the approved instrument in excess of the limit but consistent with readings below the legal limit at the time of driving. The combined operation of the two proposed new sections removes the ability of defence counsel to argue bolus drinking.

While the CBA Section takes drinking and driving seriously, we believe that the bolus drinking defence should remain available to ensure the law targets only those actually driving while impaired. An accused relying on the current defence still has the evidentiary burden of showing bolus drinking and judges still have to assess the veracity of witnesses in determining whether the totality of the evidence raises a reasonable doubt. From our experience, judges generally reject the defence when there is no air of reality to it. If there is evidence that an accused engaged in post-offence drinking only to thwart the course of justice, the *Criminal Code* offence in section 139, obstruction of justice, already applies. Rather than risk criminalizing legal drinking, that offence should be charged where an accused willfully engaged in behavior to skew breath test results.

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<sup>5</sup> Proposed sections 320.31(1) and (2), the new ‘presumption back’ rules, are addressed later in the submission.

The case law has imposed significant requirements for use of this defence. For example, the Ontario Court of Appeal<sup>6</sup> has held:

The “No Bolus Drinking” Assumption

27 “Bolus drinking” is generally meant to describe the consumption of large quantities of alcohol immediately or shortly before driving: see Grosse, at p. 788; R. v. Hall (2007), 83 O.R. (3d) 641 (Ont. C.A.), at para. 14. See also Phillips at pp. 158-162, for a description of the “relatively rare” phenomenon, although not by the “no bolus drinking” name.

28 In establishing that an accused has not engaged in bolus drinking, the Crown is in the unenviable position of having to prove a negative. But how does it meet that onus in circumstances where — as is likely in many cases — it has no statement or evidence from the accused as to his or her drinking pattern at the relevant time and no other witnesses or evidence to shed any light on that issue? That is the dilemma posed, principally, by the Lima appeal.

29 At one level, the answer is straightforward: the Crown need do very little. The toxicologist's report is premised — amongst other things — on there being no bolus drinking. In the absence of something on the record to suggest the contrary, on what basis could a trier of fact conclude there was bolus drinking? This Court has answered the question posed by concluding that triers of fact may resort to a common sense inference in such circumstances, namely, that people do not normally ingest large amounts of alcohol just prior to, or while, driving: see Grosse, Hall, and R. v. Bulman, 2007 ONCA 169 (Ont. C.A.). As noted above, bolus drinking has been said to be a “relatively rare” phenomenon: Phillips, at pp. 158-162. “No bolus drinking” is therefore largely a matter of common knowledge and common sense about how people behave.

32 I would frame the rationale for this approach as the imposition of a practical evidentiary burden on the accused, not to persuade or convince the trier of fact that there was bolus drinking involved, *but to point to something in the evidence (either in the Crown's case, or in evidence led by the defence) that at least puts the possibility that the accused had engaged in bolus drinking in play. The imposition of a practical evidentiary burden to come forward with evidence is simply another way of explaining the invitation to draw a common sense inference which puts the accused in essentially the same spot if he or she cannot point to some evidence to overcome either hurdle.*

37 For the reasons explained above, applying the common sense inference where there is no evidence of bolus drinking in circumstances where the Crown is required to prove the negative (i.e., no bolus drinking) is simply an example of the Schwartz notion of an evidential burden, in my view. It does not involve attaching an onus of proof to the accused or the creation of a presumption or deeming provision in the sense forbidden in Grosse. *On that basis, it would be more straightforward, it seems to me, to refer to this evidentiary exercise as a shift in the practical evidentiary burden on the basis of which — absent something to put bolus drinking in play — an inference may (but not must) be drawn. [emphasis added]*

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<sup>6</sup> R v. Paszczenko, 2010 ONCA 615 (CanLII).

Given the current case law, any benefit offered by the proposed changes is unclear. Section 320.14(b) may penalize individuals who were not driving while impaired, simply because they cannot meet the requirements of the section. Further, the new concept of having a “reasonable expectation of being required to provide a sample” would invite litigation and introduce uncertainty into the law, not a productive use of public resources.

#### **RECOMMENDATION**

- 5. The CBA Section recommends that the bolus drinking defence should remain available.**

#### **C. Refusal Causing Bodily Harm**

Proposed sections 320.15(2) and 320.15(3) would create two new offences if a person unlawfully refuses to provide a breath or blood sample where the driver knows or is reckless as to whether the operation of the motor or other vehicle caused an accident that resulted in bodily harm or death. Pursuant to proposed sections 320.2 and 320.21, the punishments for either offence are equal to offences under sections 320.14(2) and 320.14(3).

This appears intended to remove any incentive for unlawfully refusing to provide a sample in cases of death or bodily harm. The approach in proposed section 320.24(11) must be considered in light of the existing adverse inference in such circumstances under section 258(3). There may be more proportionate responses to the problem, such as to strengthen the inference against an accused refusing to provide a sample or to increase available penalties. However, making the maximum penalties for refusal equal to those where impairment actually plays a causal role in death or bodily harm is excessive, and may elicit constitutional scrutiny.

#### **RECOMMENDATION**

- 6. The CBA Section recommends that section 320.24(11) of Bill C-46 be reconsidered to provide a more proportionate response to refusal to provide a sample in cases of death or bodily harm.**

#### **D. Mandatory Minimum Penalties**

The CBA Section appreciates that Bill C-46 would not increase the mandatory minimum penalties for impaired driving, as was proposed in Bill C-226. However, the Bill still contains mandatory minimums.

The CBA Section continues to dispute the efficacy or fairness of mandatory minimum penalties. In our experience, trial judges are best placed to fashion appropriate sentences considering all circumstances at hand.<sup>7</sup> Requiring judges to impose mandatory minimum penalties without judicial discretion to balance all sentencing objectives in each case does not, in our view, promote justice, fairness or, ultimately, public respect for the administration of justice.

## **RECOMMENDATION**

- 7. The CBA Section recommends that the mandatory minimum penalties in Bill C-46 be removed in favour of relying on judicial discretion in sentencing of offenders.**

### **E. Exception to Mandatory Minimum Penalties**

Currently, *Criminal Code* section 255(5) allows a person convicted of impaired operation or over .08 to seek a curative discharge if the court considers that the person needs curative treatment for alcohol or drugs, and that treatment would not be contrary to the public interest. Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan, Yukon and the Northwest Territories have enacted these provisions.

In appropriate circumstances, the curative discharge rules are an incentive for habitual offenders to seek treatment to avoid incarceration. If shown to be an alcoholic in need of treatment, and that treatment is reasonably likely to succeed, the accused can avoid the mandatory minimum penalty that typically means incarceration for repeat offenders. The current practice is that the accused makes the application and the judge decides if it is appropriate in the circumstances. There is no requirement that the regional prosecutor consent.

Proposed section 320.23 supplies a similar mechanism. With the consent of the Attorney General, the court may delay sentencing to allow the offender to attend a treatment program approved by the province or territory where the offender resides. If the accused successfully completes the treatment program, the court is not required to impose the mandatory minimum penalty. However, the accused would not be entitled to a discharge under section 730.

The CBA Section appreciates the rationale for these proposed changes but can also identify some problems. We disagree with requiring consent of the prosecutor to make an application.

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<sup>7</sup> See, for example, *Justice in Sentencing*, Resolution 11-09-A.



While Crown prosecutors have a quasi-judicial role in Canada's justice system, it is an adversarial system and the Crown should not have to consent. This proposal removes discretion from trial judges in crafting sentences, transferring that discretion to the Crown.

In addition, the lack of and variation in available treatment facilities across the country would result in significant inconsistencies in the application of the law.

## F. Mandatory Alcohol Screening

Proposed section 320.27 outlines procedures dealing with approved screening devices (ASDs).

The Mandatory Alcohol Screening in proposed section 320.27(2) would go further than the current law so a police officer with an ASD could make a demand without any grounds. In Bill C-226 this proposed section was entitled 'Random Testing.' The revised title does not change its essence and it remains a random test that can be administered without any grounds. Police now must have a reasonable suspicion that the person has alcohol in their system before making a demand, and even that is a low threshold.

In our experience, current legislative powers for police to deal with drinking and driving are adequate. What would actually make streets and highways safer are additional resources for police forces. Random breath testing (RBT) is likely to lead to more *Charter* litigation, absorbing significant system resources without substantial results. The Supreme Court of Canada has consistently upheld some degree of *Charter* infringement to combat impaired driving, using a section 1 analysis in the interest of promoting highway safety.<sup>8</sup> However, a law must be narrowly circumscribed to achieve its goals and also minimize the impact on the *Charter* right it is infringing, so Bill C-46 may well be held to go too far:

[O]nce a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted *must be carefully designed to achieve the objective in question*. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. *Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. *Third, there must be a proportionality between the*

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<sup>8</sup> *R. v. Orbaniski, R. v. Elias* [2005] 2 SCR 3.

effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".<sup>9</sup> [emphasis added]

Currently, to make an ASD demand, an officer need only suspect that a person has operated a motor vehicle in the preceding three hours with alcohol in their body. The Ontario Court of Appeal has held that the smell of alcohol is sufficient and an officer need not believe that a driver has committed an offence to make the demand. An officer may make an ALERT demand where the officer reasonably suspects that a person operating a motor vehicle has alcohol in that person's body (section 254(2) of the *Criminal Code*). There need only be a reasonable suspicion and that reasonable suspicion need only relate to the existence of alcohol in the body. The officer does not have to believe that the accused has committed any crime. There is no need to put a gloss on the wording of section 254(2). The fact that there may be an explanation for the smell of alcohol does not take away from the fact that there is a reasonable suspicion in the meaning of the section.<sup>10</sup>

This low threshold of suspicion for detaining a driver, denying the right to counsel and demanding a breath sample (subject to prosecution for failing to comply) infringes the *Charter*, but has been upheld as a justifiable limit on the right under section 1.<sup>11</sup> In *Ladouceur*, the Court held:

The means chosen was proportional or appropriate to those pressing concerns. The random stop is rationally connected and carefully designed to achieve safety on the highways and impairs as little as possible the rights of the driver. It does not so severely trench on individual rights that the legislative objective is outweighed by the abridgement of the individual's rights. Indeed, stopping vehicles is the only way of checking a driver's licence and insurance, the mechanical fitness of a vehicle, and the sobriety of the driver.<sup>12</sup>

Most of those subjected to the RBT demand are likely law-abiding drivers. Stopping the occasional driver to make a demand only if the requisite suspicion exists is far different than setting up a roadside check point where motorists might be lined up to blow into the ASD. Moving to a random test and removing the minimal requirement that an officer form a suspicion may well not meet the test of minimal impairment, or the proportionality

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<sup>9</sup> *R. v. Oakes*, [1986] 1 SCR 103 at para.70.

<sup>10</sup> *R. v. Lindsay* (1999), 150 CCC 3d 159 (ON CA) at para 2.

<sup>11</sup> *Supra*, note 8.

<sup>12</sup> *R. v. Ladouceur*, [1990]1 SCR 1257.

components of the *Oakes* test.<sup>13</sup> It also could raise concerns about a disproportionate focus on, or targeting of particular populations. For serious collisions involving bodily harm and death and the increased jeopardy to the accused as a result, the interpretation of unconstitutionality may be even more likely.

In sum we believe that random breath testing as a general screening tool would be unwise and impractical, given the constitutional litigation that would certainly result.

## **RECOMMENDATION**

### **8. The CBA Section recommends that mandatory breath testing as a general screening tool be deleted from Bill C-46.**

The CBA Section has previously stressed<sup>14</sup> a cautious approach to legislative change for the impaired driving sections of the Code, given the litigation those sections have and are likely to continue to attract. Any changes will involve years of litigation as decisions make their way through the courts. Until courts of appeal rule, there is likely to be significant variation in the lower courts' decisions and uncertainty in the law. Even after appellate rulings, there will be variations between jurisdictions on the legality of the provisions. The costs of litigating appeals on the proposed RBT will be significant, as will the impact on the administration of justice.

## **G. Breath Demands**

Proposed section 320.28 is the basic breath demand section, analogous to current section 254(3) of the *Criminal Code*. The proposed changes include:

[R]emoving the requirement that the police officer believed the accused had committed the offence within the proceeding three hours. (The police officer now has only to believe the person operated a conveyance while their ability to do so was impaired, without reference to the time of driving in relation to the demand).

Removing the three hour time requirement is problematic. An officer could legitimately make a demand with reasonable and probable grounds to believe the accused committed an offence some days prior. Again, this will likely attract *Charter* challenge.

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<sup>13</sup> *Supra*, note 9.

<sup>14</sup> *Impaired Driving — Modernizing Transportation Provisions of the Criminal Code* (Ottawa: CBA, 2010).

## H. Blood Demands

Amendments to the *Criminal Code* in 2008 introduced the concept of an evaluating officer, defined as someone qualified under regulations to conduct evaluations to determine if a person's ability to operate a vehicle is impaired by a drug. To qualify, evaluating officers must complete a training program to assess impairment by drugs.

A person may be given a demand to comply with an examination by an evaluating officer if a police officer has reasonable grounds to believe the person's ability to operate is impaired by a drug or combination of drugs and alcohol. If, after completing the tests, the evaluating officer has reasonable grounds to believe the person's ability to operate is impaired, the evaluating officer may then demand a sample of either oral fluid, urine or blood. Importantly, the evaluating officer's ability to make a demand under the current legislation crystallizes on completion of the evaluation, and must be based on it.

Section 320.28(4) in the proposed regime is similar. If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe that a person's ability to operate is impaired by drugs or a combination of drugs and alcohol, the evaluating officer may demand a bodily substance. Under current legislation, that demand must be based on the evaluation. Proposed section 320.28(4) does specify that the grounds are to be formed on completion of the evaluation, but not that the grounds must be based on the evaluation.

The rationale for a formal evaluation by a specially trained officer before a demand can be made for a bodily substance appears to recognize that taking these samples is more intrusive than a simple breath sample. Accordingly, more judicial scrutiny of the grounds for these demands can be anticipated.

Section 320.28(2)(a) in Bill C-46 would permit a police officer to either demand that a person submit to an evaluation by an evaluating officer or, under section 320.28(2)(b), to directly demand the person to give a blood sample to determine their blood drug concentration. The procedure in both current and proposed legislation is consistent in requiring the evaluating officer to conduct a formal evaluation before requesting a bodily substance. However, proposed section 320.28(b) in Bill C-46 would permit a police officer to bypass the evaluating officer and go directly to a blood demand. Less qualified officers would have authority to make a blood demand on reasonable grounds, while more formally qualified evaluating officers would have to complete a formal evaluation before formulating grounds to make the same demand. This is illogical and should be remedied.

## **RECOMMENDATION**

### **9. The CBA Section recommends that:**

- a) proposed section 320.28(4) be amended to provide that DRE officers must base their grounds for a sample on the results of the evaluation, and**
- b) section 320.28(2)(b) be deleted.**

### **I. Warrant to Obtain Samples**

Proposed section 320.29 would authorize a justice to issue a warrant for blood where there are reasonable grounds to believe the person operated a conveyance within the preceding eight hours and was involved in an accident that resulted in bodily harm to themselves or another person, or death to another person. Pursuant to section 320.29(b), there must also be reasonable grounds to suspect that the person has alcohol or a drug in their body.

Under the current regime, a police officer can request a warrant under section 256 where the accused has committed an offence under section 253 that involved in an accident resulting in death or serious bodily harm. The officer must have the grounds to believe an offence was committed within the previous four hours.

The CBA Section is concerned that section 320.29 allows the sample to be taken so long after the time of driving. The time delay in obtaining the order and having medical personnel take the blood sample could result in the sample itself being taken well after eight hours have passed. We question whether any analysis would yield meaningful results after such a long time.

Proposed section 320.29 would authorize a warrant in circumstances where there is no allegation that an offence has been committed, which the CBA Section finds particularly objectionable. In contrast, the current section 256 requires the officer to have reasonable ground to believe an offence has been committed under section 253 before applying for a blood warrant. Under the proposed section, an officer need only have reasonable grounds to believe that a person was operating a conveyance within the preceding eight hours, was involved in a car accident resulting in death or body harm, and that there are ground to suspect the person has alcohol or drug in their body. Nothing in the proposed legislation would link the alcohol or drug to the accident. In fact, in a plain reading of the section, the alcohol or drug need not even have been present at the time of the accident.

Even a perfectly sober driver involved in an accident, taken to the hospital and treated with medication, including pain pills, could potentially be subject to a blood warrant under this section. It would also apply to any driver involved in an accident who is taking validly prescribed drugs.

Without linking the presence of alcohol or drugs to the commission of an offence, this section will almost certainly attract *Charter* scrutiny. Not only does it authorize taking a sample under circumstances where the time delay may call into question the validity of the sample from an evidentiary perspective, it also purports to authorize taking blood based on a suspicion that drivers have alcohol or a drug in their system, without any connection between that suspicion and a criminal offence.

#### **RECOMMENDATION**

**10. The CBA Section recommends that proposed section 320.29 be deleted and replaced with wording similar to that in existing section 256, requiring the officer to believe an offence has been committed as a prerequisite to requesting the warrant.**

#### **J. Definition of Drugs**

Proposed section 320.28(5) would define which drugs could be subject to a bodily seizure through a DRE. The section is vaguely written. For example ‘an inhalant’ could be interpreted as asthma medicine, and ‘a stimulant’ could include coffee or tea.

There is no reason to use imprecise language, as the *Controlled Drugs and Substances Act* (CDSA), Schedule I – VIII, outlines the exact chemical composition of all prohibited substances. For example, if Parliament wishes to include marijuana in the impaired driving regime, it could adopt Schedule II of the CDSA, or whichever part it deemed appropriate.

#### **K. Presumptions regarding Breath Samples**

Proposed section 320.31 deals with evidentiary presumptions affecting impaired driving litigation, analogous to existing section 258(1)(c). The proposed section has no definition of ‘evidence to the contrary’. From our extensive experience, this has resulted in significant litigation since the 2008 amendments to the Code.

Section 320.31(5) proposes that if the samples were taken over two hours from the time of the offence, the person's blood alcohol concentration is presumed to be what was stated by the approved instrument, plus an additional five mg of alcohol in 100 ml of blood for every 30 minutes over those two hours.

This presumption would eliminate the need for the Crown to call an expert toxicologist when the sample is taken after two hours. Current *Criminal Code* section 657.3 allows the Crown to adduce scientific evidence without calling a toxicologist, and the trial judge must grant leave to cross-examine the expert. As gatekeepers of the evidence, trial judges are in a position to determine when it is necessary to call a toxicologist. The proposed legislation should not eliminate the need to call an expert.

### **RECOMMENDATION**

**11. The CBA Section recommends that proposed section 320.31(5) be deleted and that Bill C-46 retain the current presumptions which require the crown to adduce scientific evidence to extrapolate the readings back if they are taken two hours after driving.**

The 2008 impaired driving amendments were largely a reaction to the 'evidence to the contrary' rules, or the so-called last drink defence. The intent was to limit this defence, with legislative guidance to courts on what constitutes valid evidence to the contrary. Proposed sections 320.31(3) and (7) apply similar language for both blood and drug analyses, but there is no corresponding section for breath samples. Removing these sections would turn back the clock on the *Carter* defence<sup>15</sup> and revert to common law rules.

### **L. Statements by the Accused**

Proposed section 320.31(9) states that a statement made by the accused to a police officer, including a statement compelled under provincial statute, indicating that they operated the conveyance, is admissible for the purpose of justifying a breath demand.

This proposal appears to go against section 7 of the *Charter*. In *R v White*,<sup>16</sup> the majority of the Supreme Court of Canada held:

(1) The Need for an Honest and Reasonably Held Belief

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<sup>15</sup> *R. v. Carter*, [2015] 1 SCR 331.

<sup>16</sup> (1999) 2 SCR 417.

74 A declarant under s. 61 of the *Motor Vehicle Act* will be protected by use immunity under s. 7 of the *Charter* only to the extent that the relevant statements may properly be considered compelled. Accordingly, the driver has an interest in knowing with some certainty precisely when he or she is required to speak, and when he or she is permitted to exercise the right to remain silent in the face of police questioning. Conversely, the ability of the state to prosecute crime will be impaired to the extent of the reporting requirement under s. 61 of the *Motor Vehicle Act*. Thus the public, too, has a strong interest in identifying with some certainty the dividing line between the taking of an accident report under s. 61, on the one hand, and ordinary police investigation into possible crimes, on the other. When will a driver's answers to police questioning cease to be protected by the use immunity provided by s. 7 of the *Charter*?

75 The Court of Appeal below did not discuss this issue in detail. I would like to elaborate briefly on the legal definition of a compelled statement under s. 61. In my view, the test for compulsion under s. 61(1) of the *Motor Vehicle Act* is whether, at the time that the accident was reported by the driver, the driver gave the report on the basis of an honest and reasonably held belief that he or she was required by law to report the accident to the person to whom the report was given.

76 The requirement that the accident report be given on the basis of a subjective belief exists because compulsion, by definition, implies an absence of consent. If a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements. The declarant would then be speaking to police on the basis of motivating factors other than s. 61 of the *Motor Vehicle Act*.

77 The requirement that the declarant's honest belief be reasonably held also relates to the meaning of compulsion. The principle against self-incrimination is concerned with preventing the abuse of state power. It is not concerned with preventing unreasonable perceptions that state power exists. There is no risk of true oppression of the individual where the state acts fairly and in accordance with the law, but the individual unreasonably perceives otherwise. It is true that the individual who unreasonably believes that he or she is compelled to speak may produce an unreliable confession, but this result will have flowed from concerns that are outside the scope of the principle against self-incrimination: see *Hodgson, supra*, at para. 34, per Cory J. *The requirement that an honest belief be reasonably held is an essential component of the balancing that occurs under s. 7. The application of the principle against self-incrimination begins, and the societal interest in the effective investigation and prosecution of crime is subordinated, at the moment when a driver speaks on the basis of a reasonable and honest belief that he or she is required by law to do so.* [emphasis added]

Someone arguing the constitutionality of proposed section 320.31(9) might say that any breach is minor in nature and can be justified under section 1 of the *Charter*. The importance of detecting and deterring impaired drivers was accepted as section 1 justification by the Supreme Court of Canada in *R. v. Orbanski*,<sup>17</sup> upholding the authority of police to question and

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<sup>17</sup> *Supra*, note 8.



administer sobriety tests to drivers suspected of impaired driving. However, *Orbanski* and related cases deal with evidence obtained at a roadside screening where complying with section 10(b) counsel rights was problematic. Statutorily compelled statements are often made at a later date when reports are filled out, not at the initial detention. Further, statutory compulsion could vary from region to region in accordance with motor vehicle legislation.

### **M. Service**

Proposed section 320.32 deals with the service of the certificate of analysis. Section 320.32(3) is similar to current section 258(6) of the *Criminal Code*, in that the accused has the right to compel cross-examination of the person who swore the certificate. However, proposed sections 320.32(4) and (5) create several procedural hurdles for the accused. Notably, the hearing cannot take place during the trial, and 30 days' notice of the hearing must be given.

This proposed change will cause delays with no particular benefit. In metropolitan areas, justice system resources may be greater than in more isolated parts of Canada. While courts commonly sit every day in big cities, this is uncommon in smaller centres. In some parts of Saskatchewan for example, courts sit only once a month. This overly detailed section will be cumbersome to apply consistently throughout Canada. It would be best to leave these matters to provincial or territorial rules of court that are better positioned to identify reasonable notice and how best to use scarce court resources.

### **RECOMMENDATION**

**12. The CBA Section recommends that proposed sections 320.32(4) and (5) be deleted.**

### **V. CONCLUSION**

The CBA Section urges a cautious approach to legislative change to the impaired driving portions of the *Criminal Code*. Delays in criminal courts are of such serious concern that they were recently reviewed by the Senate Committee on Legal and Constitutional Affairs and by the Supreme Court of Canada in *R. v. Jordan*.<sup>18</sup>

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<sup>18</sup> Standing Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice* (Ottawa: Senate of Canada, 2016); *R. v. Jordan*, *supra*, note 1.

We suggest a balanced approach considering both the impact of costly, extensive litigation on litigants and the system overall, and any potential benefits to public safety. Constitutional jurisprudence on impaired driving should play a central role in this balancing.

The CBA Section recognises the need for additional tools to deal with drug impaired driving and supports the goal of Part 1 of Bill C-46 to the extent that new measures are supported by science. However, Part 2 of the Bill suffers the same flaws as its predecessor, Bill C-226, and should not be brought into law.