



**HOUSE OF COMMONS
CANADA**

ENDING ALCOHOL-IMPAIRED DRIVING: A COMMON APPROACH

Report of the Standing Committee on Justice and Human Rights

**Ed Fast, MP
Chair**

JUNE 2009

40th PARLIAMENT, 2nd SESSION

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THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS

has the honour to present its

TENTH REPORT

Pursuant to its mandate under Standing Order 108(2), the Committee has undertaken a comprehensive review of matters related to impaired driving and has agreed to report to the House as follows:

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ENDING ALCOHOL-IMPAIRED DRIVING: A COMMON APPROACH

INTRODUCTION

In exercising its jurisdiction over criminal law, Parliament has enacted measures in the *Criminal Code* to prohibit and punish impaired driving. The *Criminal Code* also sets out the procedures to be followed to obtain the evidence necessary for prosecution of these offences. In addition to the measures taken by the federal government, the provinces and territories use their authority to regulate driver licensing and highways to impose provincial licence suspensions. Some provinces impound the vehicles of repeat impaired drivers and they impound cars being driven by persons who are prohibited from driving pursuant to the *Criminal Code* or have had their licence suspended by the province. The provinces are also responsible for prosecuting and implementing many provisions of the *Criminal Code*, as part of their jurisdiction over the administration of justice.

The *Criminal Code* prohibits driving while one's ability to operate a vehicle is impaired by alcohol or drugs. It is also an offence to drive with a Blood Alcohol Concentration (BAC) in excess of 80 mg of alcohol in 100 ml of blood. There are mandatory minimum penalties upon conviction for these offences with escalating penalties for repeat offenders. Furthermore, impaired driving causing bodily harm or death carries a significantly greater penalty. The *Criminal Code* enables police to demand a breath or blood sample where they have reasonable grounds to believe that a driver is impaired. Failure or refusal to provide a sample is an offence carrying the same penalty as driving with a BAC over the legal limit.

The provinces and territories have instituted administrative penalties or controls that allow immediate action to be taken against suspected impaired drivers. One example of such measures is an automatic licence suspension that takes effect following failure or refusal of a breath test. This suspension is not dependent on there being a *Criminal Code* conviction. All jurisdictions except Québec have also implemented temporary preventive suspensions for drivers with a BAC that is considered elevated but still below the criminal limit set out in the *Criminal Code*. All provinces have adopted zero BAC limits for young or novice drivers as part of graduated driver licensing schemes.

Thus, Canada has in place a three tier system of sanctions, depending upon the level of BAC:

- 0.00 BAC level for young and novice drivers;
- 0.05 BAC, where administrative sanctions apply, such as licence suspensions (0.04 BAC in Saskatchewan); and
- 0.08 BAC, above which level *Criminal Code* sanctions apply.

Another enforcement tool is the seizure and impoundment of vehicles operated by a prohibited or unlicensed driver. In general, therefore, provincial and territorial legislation seems to aim toward a more swift and certain administrative action as a means of reinforcing the criminal penalties available under the *Criminal Code*, which take time to proceed with and which may or may not be implemented even where charges are laid.

On July 2, 2008, new provisions of the *Criminal Code* concerning impaired driving came into force. As a result, there are now nine distinct offences related to impaired driving in the *Criminal Code*. These offences are:

Method of Proceeding	Indictable Offence		Summary Conviction	
	Offence	Minimum	Maximum	Minimum
Operating a motor vehicle while the ability to do so is impaired by alcohol or a drug ¹	\$1,000 fine (1 st offence)	5 years' imprisonment	\$1,000 fine (1 st offence)	18 months' imprisonment
	30 days' imprisonment (2 nd offence)		30 days' imprisonment (2 nd offence)	
	120 days' imprisonment (subsequent offence)		120 days' imprisonment (subsequent offence)	
Operating a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in the blood exceeds 80 milligrams per 100 millilitres of blood ²	\$1,000 fine (1 st offence)	5 years' imprisonment	\$1,000 fine (1 st offence)	18 months' imprisonment
	30 days' imprisonment (2 nd offence)		30 days' imprisonment (2 nd offence)	
	120 days' imprisonment (subsequent offence)		120 days' imprisonment (subsequent offence)	

1 ss. 253(1)(a)

2 ss. 253(1)(b)

Method of Proceeding	Indictable Offence		Summary Conviction		
	Offence	Minimum	Maximum	Minimum	Maximum
Failing to comply with a demand for a sample ³	\$1,000 fine (1 st offence) 30 days' imprisonment (2 nd offence) 120 days' imprisonment (subsequent offence)	5 years' imprisonment	\$1,000 fine (1 st offence) 30 days' imprisonment (2 nd offence) 120 days' imprisonment (subsequent offence)	18 months' imprisonment	
Driving while impaired by alcohol or a drug causing bodily harm ⁴	\$1,000 fine (1 st offence) 30 days' imprisonment (2 nd offence) 120 days' imprisonment (subsequent offence)	10 years' imprisonment			
Operating a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in the blood exceeds 80 milligrams per 100 millilitres of blood causing bodily harm ⁵	\$1,000 fine (1 st offence) 30 days' imprisonment (2 nd offence) 120 days' imprisonment (subsequent offence)	10 years' imprisonment			

3 s. 254(5)

4 s. 255(2)

5 s. 255(2.1)

Method of Proceeding	Indictable Offence		Summary Conviction	
	Offence	Minimum	Maximum	Minimum
Failing to comply with a demand for a sample causing bodily harm ⁶	\$1,000 fine (1 st offence) 30 days' imprisonment (2 nd offence) 120 days' imprisonment (subsequent offence)	10 years' imprisonment		
Operating a motor vehicle while the ability to do so is impaired by alcohol or a drug causing death ⁷	\$1,000 fine (1 st offence) 30 days' imprisonment (2 nd offence) 120 days' imprisonment (subsequent offence)	Life imprisonment		
Operating a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in the blood exceeds 80 milligrams per 100 millilitres of blood causing death ⁸	\$1,000 fine (1 st offence) 30 days' imprisonment (2 nd offence) 120 days' imprisonment (subsequent offence)	Life imprisonment		

6 s. 255(2.2)

7 s. 255(3)

8 s. 255(3.1)

Method of Proceeding	Indictable Offence		Summary Conviction		
	Offence	Minimum	Maximum	Minimum	Maximum
Failing to comply with a demand for a sample causing death ⁹	\$1,000 fine (1 st offence)	Life imprisonment			
	30 days' imprisonment (2 nd offence)				
	120 days' imprisonment (subsequent offence)				

PREVALENCE OF IMPAIRED DRIVING

Witnesses who appeared before the Committee made it clear that impaired driving remains the number one criminal cause of death in Canada. The Canadian Police Association indicated that, despite our collective best efforts and intentions, it is apparent that the problem of impaired driving is worsening in Canada and we are losing ground in our efforts to eliminate the problem. Mothers Against Drunk Driving stated that, since 1999, the progress in Canada on impaired driving has stalled.

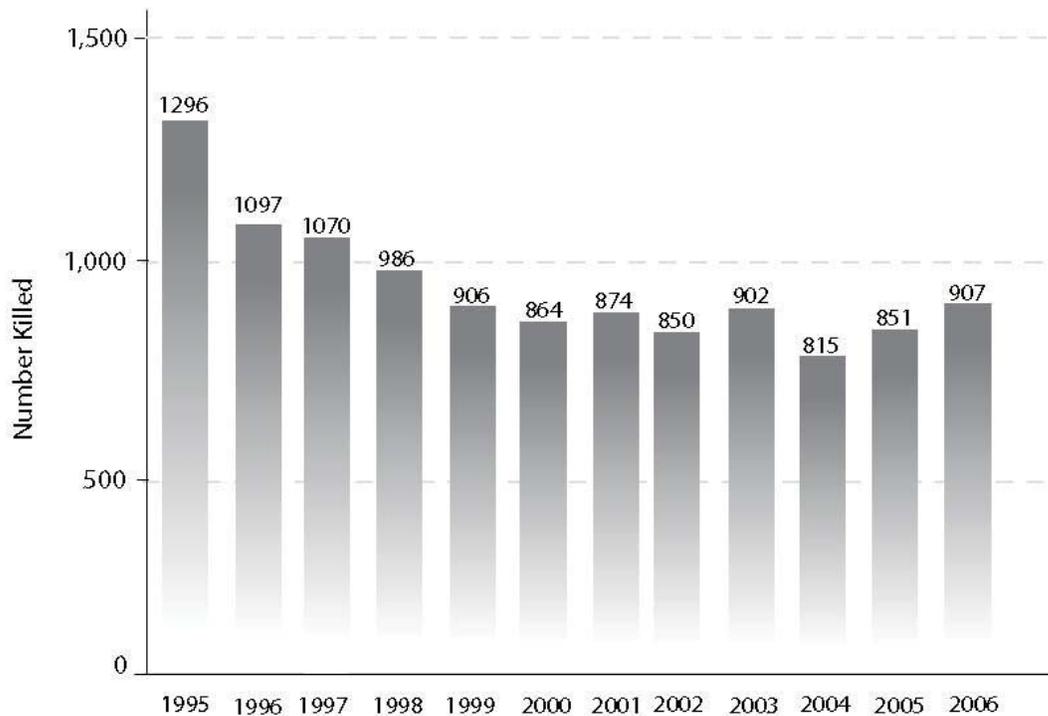
The scale of the problem of impaired driving is reflected in a survey of Canadians which indicated that almost one quarter (22.3%) of them — an estimated 7.5 million — know of a family member or close friend who has been the victim of a drinking and driving collision that they did not cause.¹⁰ An estimated 5.4 million Canadians (16.5%) stated that they know of a family member or friend who was drinking and driving and caused a collision where they were at fault. The impact on the lives of Canadians includes serious physical and psychological injuries and the attendant health care costs, as well as the loss of family members and friends.

In 2006, the most recent year for which data is available, 907 Canadians were killed in a traffic crash involving a drinking driver.¹¹ This represents a decrease from the 1,296 Canadians killed in 1995 but the number has been increasing since 2005. The data indicate that the decrease in the number of fatalities largely took place in the 1990s but the 2005 and 2006 data suggest that any progress that may have been made has since halted.

9 s. 255(3.2)

10 Traffic Injury Research Foundation, *The Road Safety Monitor 2008: Drinking and Driving National*, http://tirf.ca/publications/PDF_publications/rsm2008_dd-nat_web.pdf

11 Ibid.



Source: Traffic Injury Research Foundation, *The Road Safety Monitor 2008: Drinking and Driving National*, http://tirf.ca/publications/PDF_publications/rsm2008_dd-nat_web.pdf

Another suggestion that progress in the fight against drinking and driving has halted is the result of a survey of Canadians on the issue. 18.1% of Canadians admitted to driving after consuming any amount of alcohol in the past 30 days in a survey conducted in 2008. This represents an increase from 15.8% in 2003.¹²

When calculating the financial costs of impaired driving, there are three types of questions that can be asked:

- How much will this cost me in real dollars spent? (Real Dollar Estimate)
- How much will this cost me in terms of lost goods, opportunity or productivity? (Deferred Future Earnings)
- How much would I pay for this not to have happened? (Willingness to Pay)

12 *ibid.*

The average cost of impaired driving crashes in Canada from 1999 to 2006 has been calculated using the Real Dollar Estimate as approximately \$1.9 billion per year. This figure is based on money spent, without considering any social costs. The average cost using the Willingness to Pay model is approximately \$11.2 billion per year. This model includes money spent and a broad range of social-related costs.¹³

WHAT THE COMMITTEE HAS DONE

The House of Commons Standing Committee on Justice and Human Rights adopted the following motion on February 9, 2009:

That the Standing Committee on Justice and Human Rights do a full review of the issue of impaired driving including consideration of:

- the advisability of lowering the criminal Blood Alcohol Concentration limits;
- innovative approaches in use in other countries, such as Randomised Breath Testing;
- the implications of advances in technology to enforce the laws; and
- the *Criminal Code* sanctions for impaired driving and how they interrelate with provincial licensing measures.

This motion was a reiteration of a motion first adopted on November 27, 2007 during the 39th Parliament. The dissolution of that Parliament prevented a report from being presented until now.

As part of its study, the Committee heard from witnesses on the following dates: February 7, 2008, February 12, 2008, February 28, 2008, February 23, 2009, February 25, 2009, and March 2, 2009. The witnesses who gave evidence were the following:

- Canadian Police Association
- Louise Nadeau, Full Professor; Research Group on the Social Aspects of Health and Prevention (GRASP)
- Traffic Injury Research Foundation

13 MADD Canada, *Estimating the Presence of Alcohol and Drug Impairment in Traffic Crashes and their Costs to Canadians: 1999 to 2006*, February, 2009, http://www.madd.ca/english/research/estimating_presence.pdf

- Mothers Against Drunk Driving (MADD)
- Canada Safety Council (CSC)
- Centre for Addiction and Mental Health
- Canadian Automobile Association (CAA)
- Thomas Brown, Researcher, Addiction Research Program, Douglas Institute, McGill University
- Canadian Centre on Substance Abuse
- Canadian Council of Motor Transport Administrators (CCMTA)
- Canadian Society of Forensic Science
- Frank Hoskins, Crown Attorney
- Department of Justice, Criminal Law Policy Section
- Canadian Council of Criminal Defence Lawyers
- Association of Canadian Distillers
- Insurance Bureau of Canada
- Criminal Lawyers' Association
- Alcohol Countermeasure Systems Corp.
- Centre of Forensic Sciences, Toxicology Section

BLOOD ALCOHOL CONCENTRATION LEVELS

In 1969, an amendment to the *Criminal Code* made it a criminal offence to drive with a Blood Alcohol Content (BAC) of over 80 milligrams of alcohol per 100 millilitres of blood (0.08). That amendment also authorised the police to demand breath samples from suspected impaired drivers and made it an offence for suspects to refuse. In addition, all Canadian provinces (with the exception of Québec) maintain and enforce roadside

administrative sanctions that immediately take drivers who have been drinking off the road where their BAC is above a certain level (usually 0.05) but below the *Criminal Code* level of 0.08.

The suggestion has been made that the criminal BAC be lowered from 0.08 to 0.05.¹⁴ There was testimony before the Committee to the effect that above the 0.05 level safe driving skills are impaired and collision risks are increased.¹⁵ A lower criminal BAC level may not only reduce alcohol-related crashes and deaths, it may also positively change public attitudes about drinking and driving and make drivers more conscious of their drinking. Before we consider amending the law to reduce the criminal BAC from 0.08 to 0.05, however, we need to be certain that we are using the provincial and territorial administrative frameworks (which generally have a 0.05 BAC level) effectively and efficiently.

While the Committee is eager to see fewer deaths and injuries on the road as a result of impaired driving, it is concerned about the lack of consensus among experts in the field as to whether or not a lower *Criminal Code* BAC limit would achieve greater safety. It is also cognizant of the finite resources available to enforce the laws on impaired driving. In addition, as noted below, there are possible negative effects of lowering the BAC limit in the *Criminal Code*.

The Committee does recognise that impairment of driving ability can occur at BACs below 0.08. A study of alcohol use among fatally injured drivers, however, indicates that the bulk of the impaired driving problem lies with those drivers having a BAC over the current *Criminal Code* BAC limit of 0.08. Among the tested drivers in Canada, 62.9% showed no evidence of alcohol — 37.1% had been drinking, 4.3% had BACs below 0.05, 2.6% had BACs from 0.05 to 0.08, 9.4% had BACs from 0.081 to 0.160 and 20.8% had BACs over 0.160. In other words, 81.5% of fatally injured drinking drivers had BACs over the current limit of 0.08.¹⁶ High-BAC drivers (i.e. those with BACs over 160 mg/100 ml of blood) represent a disproportionate number of fatally injured drinking drivers.

High-BAC drivers represent about one percent of the cars on the road at night and on weekends yet they account for nearly half of all drivers killed at those times.¹⁷ Limited resources would seem to be best deployed to target the 81.5% of the fatally injured drinking drivers that are already above the 0.08 threshold. The worst offenders are already

14 Letter from the Canadian Medical Association, March 4, 2009

15 Centre for Addiction and Mental Health, *Reducing Alcohol-related Deaths on Canada's Roads*, Presentation to the Standing Committee on Justice and Human Rights, February 12, 2008

16 Traffic Injury Research Foundation, *Alcohol-Crash Problem in Canada: 2006*, January 2009

17 Canada Safety Council Presentation to the Standing Committee on Justice and Human Rights: Comprehensive Review of Matters Related to Impaired Driving, February 12, 2008

driving with BACs two or three times the current limit and it would be naive to think they would comply with a lower limit. Drivers with the highest BACs constitute the most significant danger on the roads and they are still the priority.¹⁸

Beyond the scientific evidence, a lowering of the *Criminal Code* BAC level would be difficult to implement at a practical level for a number of reasons. One negative effect of lowering the BAC limit in the *Criminal Code* would be to significantly increase the number of criminal prosecutions in Canada, putting additional stress on an already-burdened police and legal system. The justice system is already struggling to deal effectively with the current volume of criminal impaired driving cases.

Caseloads for Crown attorneys are already substantial and impaired driving cases require a great deal of time to prepare and try due to the complexity of the issues. More than 40% of accused persons plead not guilty and proceed to trial. Plea agreements are less common than in other areas of criminal law for a number of reasons. One is that the conviction rate at trial is rather low (approximately 52% nationwide compared to overall conviction rates two decades ago in excess of 90%).¹⁹ A second reason is that the consequences of a conviction are severe, ranging from having a criminal record to mandatory, lengthy driving prohibitions. A third reason is that automobile insurance, which is usually mandatory, may become more expensive if there is a criminal conviction on one's record. The high number of prosecutions that proceed to trial means that the specific deterrent effect of impaired driving laws is eroded as accused persons are able to continue to drive for substantial periods following arrest and prior to conviction. In other words, there may be no swift and certain punishment when criminal charges are laid.

It is estimated that by lowering the legal BAC an additional 75,000-100,000 impaired driving cases would be added to the current caseload of more than 50,000 criminal cases annually.²⁰ The number of criminal impaired driving cases, therefore, could increase by 100%, requiring immense resources to manage. This would essentially overwhelm the justice system and seriously impair the ability of the Crown and the courts to deal effectively with these cases. This would erode the specific and general deterrent effects of impaired driving laws by further reducing the swiftness with which high-BAC cases are processed as well as the certainty of sanctions being applied. It also raises a question regarding what would happen to all of the provincial programs that are now in place.

A further problem with lowering the *Criminal Code* BAC is that, along with fewer resources being applied to each case, it would take longer to resolve these cases. Aside from reducing the speed of the criminal justice system, there would be no guarantees that the end result would be satisfactory. As a function of coping with the influx of new cases,

18 Louise Nadeau, Brief to the Standing Committee on Justice and Human Rights, February 7, 2008

19 Traffic Injury Research Foundation, *Recommendations for Improving Federal Impaired Driving Laws*, Submission to the House of Commons Standing Committee on Justice and Human Rights, March 2009

20 Ibid.

Crown attorneys may be forced to accept plea agreements that are not appropriate, to plead cases that should proceed to trial, and to lose cases that do go to trial due to a lack of preparation time and other resources. This helps to explain why less than half (40%) of Crown prosecutors support lowering the legal BAC limit.²¹

Based on the evidence presented to it, it appears to the Committee that the potentially negative consequences associated with “net widening” and bringing more impaired drivers into criminal court would likely outweigh any potential traffic safety benefit that may result from a lower *Criminal Code* BAC limit. A risk in reducing the criminal limit to a point where it cannot be enforced in a practical way is that this would damage the specific and general deterrent effects of impaired driving laws and reduce the public’s respect for them. It should also be kept in mind that all provinces except Québec already apply sanctions when a BAC is found to be between 0.05 and 0.08. These provincial measures can be applied such that drivers who have been drinking are removed from the road immediately. This is in contrast to the 2 to 3 hours required to process a criminal impaired driving arrest, along with the many months before any criminal sanction is imposed.

The potential lowering of the BAC level in the *Criminal Code* was examined by this Committee in its 1999 report entitled *Toward Eliminating Impaired Driving*.²² At that time, the Committee rejected proposals to lower the *Criminal Code* BAC limit to 0.05. The Committee concluded that a legal BAC of 50 mg/100 ml of blood could result in a loss of public support, since scientific evidence suggested that not everyone would be impaired at that level. In addition, the Committee found that a legal level of 0.05 would be difficult for police to enforce, given the lack of overt signs of intoxication at BAC levels below 80 mg/100 ml of blood. The Committee was also cognizant of the fact that the provinces would bear the additional enforcement burdens, as well as the practical consequences, that would flow from such a policy shift. This Committee shares these concerns with lowering the *Criminal Code* BAC level. It believes that what is needed is to increase the perception of apprehension, and to improve the system’s efficiency and effectiveness in dealing with impaired offenders.

Short-term suspensions are not necessarily a severe sanction, but they are applied swiftly and with certainty at the time of the offence — factors deemed essential to effective deterrence. They also eliminate the potential danger of having a drinking driver on the road. Criminal sanctions may be more severe but they are often so far removed from the behaviour as to weaken their impact.

21 Ibid.

22 House of Commons Standing Committee on Justice and Human Rights, *Toward Eliminating Impaired Driving*, Ottawa, May 1999

A more aggressive, co-ordinated effort amongst the provinces to strengthen roadside suspension programs would appear to be a cost-effective way of deterring motorists who may consider driving with some level of impairment, allowing the courts to focus time and effort on those cases where much higher levels of impairment were found.

Section 255.1 of the *Criminal Code* states that if an impaired driving offence is committed by someone whose BAC exceeded 0.16 at the time the offence was committed, this will be an aggravating factor on sentencing. This reflects the fact that driving with a high level of impairment (over 0.16 BAC or double the current legal limit) is generally indicative of serious problems. Even if a driver with this level of impairment is being detected for the first time, it is likely that this is a hard-core impaired driver. This is due to the fact that it is rarely the first time they have driven while impaired by alcohol — it is simply the first time they have been arrested for it.²³

The Committee thinks that we can go further in targeting drivers with high BACs by introducing specific penalties for such drivers. The goal of such tiered penalties would be to prevent these drivers from re-offending, since high risk offenders cause a greater number of collisions with higher fatality rates and are more likely to be repeat offenders.²⁴

The Committee also heard testimony about the possibility of introducing a third offence in the *Criminal Code*, namely that of a breath (not blood) alcohol concentration that exceeds 80 milligrams of alcohol in 210 litres of breath. The breath alcohol concentration in the recommendation is the exact equivalent of 80 milligrams of alcohol in 100 millilitres of blood. This is what breath-testing instruments actually calculate and this is then transcribed into a blood alcohol concentration. While this would eliminate many of the defences around variability in what is called the blood-breath ratio, which is that an individual's blood alcohol concentration was greater than 80 mg/100 ml of blood but due to physiological properties they might actually have been below the legal limit, the Committee is not in favour of creating a new offence for two reasons. One is that the *Criminal Code* provisions concerning impaired driving are already complex and do not need the added weight of a new offence. Secondly, the new generation of breath-testing equipment, such as the Intoxilyzer, will hopefully eliminate technical disputes as to whether the breath sample taken provides an accurate measure of the amount of alcohol in the blood.

Recommendation 1:

The Committee recommends that the Blood Alcohol Concentration level in the *Criminal Code* of eighty milligrams of alcohol in one hundred millilitres of blood be maintained.

23 Table québécoise de la sécurité routière, *Improving Road Safety: Initial Report of Recommendations*, June 2007

24 Canadian Automobile Association, *Statement of Policy 2007-2008*, Recommendation 6.3.6

Recommendation 2:

The Committee recommends that the provinces and territories be encouraged to enhance their efforts in intervening at BACs lower than the *Criminal Code* level.

Recommendation 3:

The Committee recommends that tougher sanctions be introduced for repeat impaired drivers.

Recommendation 4:

The Committee recommends that tougher sanctions be introduced for those drivers with a Blood Alcohol Concentration in excess of 160 milligrams of alcohol in 100 millilitres of blood.

RANDOM BREATH TESTING

In Canada, under provincial and territorial legislation, police are allowed to stop a vehicle to check the vehicle's condition, the driver's licence, and condition of the driver, including his or her sobriety. However, police may not request a breath sample using an approved screening device unless the officer reasonably suspects that the driver has alcohol in his or her body. This, however, is not always practical and there are no reliable means of detecting alcohol consumption by observation alone. The detection of alcohol can be a difficult task, especially in a brief interaction at the side of the road. If an impaired driver escapes detection at a checkpoint, it can serve to reinforce drinking and driving behaviour and increase the likelihood of its recurrence.

Random breath testing (RBT) would allow police officers to request a breath sample at any time in the absence of reasonable suspicion or reasonable and probable grounds. This would serve to recognise that driving on Canadian roads is a privilege and not a right. RBT would, therefore, introduce a significant deterrence for people who might otherwise choose to take the chance and drive while impaired.

A number of arguments in support of RBT were made by witnesses who testified before the Committee. One argument was that, although the threshold for suspicion is not high, there is research indicating that many impaired drivers are able to avoid a demand for a breath test when stopped by the police because the officer does not detect the smell of alcohol or symptoms of impairment. Those drivers who do not show signs of impairment and thereby avoid a demand for a breath test would be more likely to be detected by RBT. In other words, the current methods of enforcing the law lead police officers to apprehend only a small percentage of impaired drivers, even at roadside traffic stops designed to detect impaired driving. This also does not speak well for the deterrence effect of Canada's impaired driving laws.

Secondly, it should be kept in mind that only a small fraction of drinking drivers (estimated at between 1/500 and 1/2000) is apprehended.²⁵ The goal of RBT is to increase the probability of an impaired driver coming into contact with the police and, therefore, increase the risk of being caught. Because everyone is required to provide a breath sample under RBT, the perceived risk of detection is much higher than the present situation where the police have to form a suspicion of alcohol in the body. With a higher percentage of impaired drivers being detected, more individuals may be deterred from driving while impaired as the effectiveness of deterrence depends on the perception of the risk of being stopped. With fewer people driving while impaired, fewer people would be injured or killed in impaired driving accidents.

Another argument in favour of RBT is the experience of other countries. RBT came into force in Ireland in July 2006 and was credited by the Road Safety Authority with reducing the number of people killed on Irish roads by 23%.²⁶ A number of Australian states have adopted RBT and various analyses of the programs have shown its worth. One study of the introduction of RBT in New South Wales showed a decrease of 36% in the number of fatally injured drivers with a BAC over the legal limit (0.05) in the first four years of the program. The study also showed a significant decline in the number of people saying they drove while believing they had a dangerous BAC level.²⁷ Publicising RBT programs through the media was found to further enhance the deterrence effect.²⁸

A further argument in support of RBT is that it has the advantage of raising police presence in a region when the program is in place. This police presence has been associated with a corresponding decrease in other criminal behaviour. This is due to the fact that a vehicle is often used in criminal enterprises and so the participants in these activities would wish to avoid police attention.²⁹

In addition to the arguments in support of RBT that were presented to the Committee, it seems that this measure to reduce impaired driving has the support of a majority of Canadians. In a survey commissioned by Transport Canada/MADD Canada, 66% of Canadians agreed that police should be allowed to randomly require all drivers to give a breath test to help detect impaired driving.³⁰

25 Louise Nadeau, Brief to the Standing Committee on Justice and Human Rights, February 7, 2008

26 Department of Justice, *Impaired Driving Issues*, Brief Submitted to the House of Commons Standing Committee on Justice and Human Rights, February 2008

27 MADD Canada, *Reform of the Federal Law Concerning Impaired Driving: The Next Steps*, Submission to the House of Commons Standing Committee on Justice and Human Rights, March 2, 2009

28 Insurance Bureau of Canada, Submission to the House of Commons Standing Committee on Justice and Human Rights, February 27, 2009

29 The Canadian Council of Motor Transport Administrators (CCMTA) Submission to the Standing Committee on Justice and Human Rights Regarding Impaired Driving, February 2008

30 *Impaired Driving Survey for Transport Canada/MADD Canada*, prepared by Ekos Research Associates Inc., December 2007, <http://www.madd.ca/english/news/pr/TP%2014760%20V2%20E.pdf>

One caveat that must be raised when it comes to the proposed adoption of RBT is the possibility of it being challenged under section 8 of the *Canadian Charter of Rights and Freedoms*, which states that everyone has the right to be secure against unreasonable search or seizure and under section 9, which states that everyone has the right not to be arbitrarily detained or imprisoned. By its very name, random breath testing indicates that it is not based on the reasonable suspicion that a driver has consumed alcohol but is carried out purely at random. At face value, this would appear to be an “unreasonable” search and an “arbitrary” detention, contrary to the Charter.

Thus, a random breath test may have to be justified under section 1 of the Charter, which guarantees that the rights set out in the Charter are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The case of *R. v. Oakes*³¹ set out the tests that should be applied during a section 1 analysis. First, the objective of the law in question must be one related to concerns which are pressing and substantial in a free and democratic society. Secondly, it must be shown that the means chosen are reasonable and demonstrably justified. This second part is described as a proportionality test, which requires the party supporting the law to show three things:

- 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.
- 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.
- There must be a proportionality between the 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". The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

The Committee is aware that there can be no guarantees when it comes to Charter litigation. Such matters often involve a difficult and complex balancing of rights and interests. In the case of RBT, the Committee has been persuaded that the first part of the section 1 test may be satisfied by the abundant evidence showing that impaired driving is a significant health, social and economic problem and that, as outlined previously, progress in reducing the damage caused by impaired driving has stalled. The Supreme Court of

31 [1986] 1 S.C.R. 103

Canada has recognised the role of the criminal law in fulfilling this part of the section 1 test, stating “There is no question that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective.”³²

As for the second part of the test, the evaluations of RBT used in foreign jurisdictions have shown that there is a rational connection between a law to introduce such a program and the objective of reducing alcohol-related road collisions. Rights are impaired as little as possible since the stop and request for breath is brief and non-invasive (unlike, for example, the taking of a blood sample). Finally, in terms of proportionality between the objective and the limitations, the goal of reducing the many types of damage related to impaired drivers is significant and the effort required by drivers to contribute to a solution is minimal.

An additional argument that can be made in the section 1 debate is that drivers on Canadian roads are already subject to random stops and searches under provincial highway traffic laws. This type of random stop has already been examined and approved by the Supreme Court of Canada as a reasonable limit prescribed by law.³³ Given that these searches are meant to determine whether a vehicle is safe to drive, it would not appear to the Committee to be that much more of an extension of the law to allow police to determine if the driver is safe to drive as well.

Recommendation 5:

The Committee recommends that random roadside breath testing be put in place.

ADVANCES IN TECHNOLOGY

Alcohol Ignition Interlock Devices

One of the advances in technology that can help to reduce the incidence of impaired driving is the alcohol ignition interlock device. When this device is installed in a motor vehicle, a driver must provide a breath sample before it will start. If the breath sample shows that the driver has a BAC in excess of a pre-set limit, the ignition will lock and the vehicle cannot be started. The available evidence clearly shows that impaired driving and recidivism are significantly reduced while these devices are installed on an offender's vehicle.³⁴

32 *R. v. Orbanski ; R. v. Elias*, [2005] 2 S.C.R. 3, para. 55

33 *R. v. Ladouceur*, [1990] 1 S.C.R. 1257

34 Centre for Addiction and Mental Health, *Reducing Alcohol-Related Deaths on Canada's Roads*, Presentation to the Standing Committee on Justice and Human Rights, February 12, 2008

Currently, a court may authorise the offender to operate a motor vehicle equipped with an alcohol ignition interlock device during the driving prohibition period if the offender registers in an alcohol ignition interlock device program established by a province or territory. All provinces have established such a program. Section 259 of the *Criminal Code* imposes mandatory driving prohibitions of one year for a first offence, two years for a second offence, and three years for each subsequent offence. In making such an order, however, a court may authorise the offender to operate a motor vehicle equipped with an alcohol ignition interlock device during the prohibition period. Even if such a device is installed, subsection 259(1.2) still requires that there be no reduction in the driving prohibition period below three months (for a first offence), six months (for a second offence) and 12 months (for each subsequent offence). In other words, an alcohol ignition interlock will reduce the length of the driving prohibition period, but not eliminate it altogether.

The evidence presented to the Committee demonstrated the beneficial effects of using alcohol ignition interlocks. Research has shown that the device, which is installed at the offender's expense, can reduce recidivism by 50 to 90%.³⁵ This sanction is more easily enforced than traditional sanctions, such as licence suspensions, while still permitting offenders to remain employed and fulfil family responsibilities. An interlock serves as a constant reminder of the problem behaviour that needs correction because they are both an inconvenience to offenders as well as a cost. Increased use of alcohol ignition interlock devices could enhance public protection while offering meaningful deterrence to individual offenders.

One problem with alcohol ignition interlocks is that there is no national standard for these devices. The Alcohol Test Committee of the Canadian Society of Forensic Science is responsible for approving Approved Screening Devices and Approved Instruments but not ignition interlocks, as those programs are within provincial/territorial jurisdiction. In order to improve national consistency and elevate the technical standard for these devices, it would be beneficial if the Alcohol Test Committee could be given responsibility for approving specific ignition interlock devices as meeting an approved standard, as is the case with Approved Screening Devices and Approved Instruments.

Recommendation 6:

The Committee recommends that the use of alcohol ignition interlock devices be encouraged.

35 Traffic Injury Research Foundation, *Ignition Interlocks: From Research to Practice: A Primer for Judges*, July 2006

Recommendation 7:

The Committee recommends that the Alcohol Test Committee of the Canadian Society of Forensic Science be authorised to approve alcohol ignition interlock systems for use in provincial and territorial programs.

PROVINCIAL/TERRITORIAL MEASURES

As stated earlier in this report, impaired driving is dealt with at both the federal and provincial/territorial levels in Canada, by means of criminal and administrative sanctions, respectively. Section 253 of the *Criminal Code* sets out the federal, criminal law approach to the issue by making it an offence to drive when the concentration of alcohol in the driver's blood exceeds 80 milligrams of alcohol in 100 millilitres of blood. In addition to any other punishment, section 259 of the Code obliges a court to impose a driving prohibition order of at least one year's duration. An exception is made where a province has an alcohol ignition interlock device program, in which case the offender may operate a vehicle equipped with the device while registered in the program, if authorised by the court.

To complement the federal criminal provisions, each province and territory has enacted its own BAC limit with accompanying administrative sanctions, in the form of a driver's licence suspension. The following table provides an overview of the administrative sanctions and BAC levels set by the provinces and territories.³⁶

36 It is important to note that this table deals with the administrative sanctions associated with the provincial or territorial limit established for BAC levels. Some provinces also have particular administrative sanctions associated with .08 BAC levels. Some laws also allow for vehicle seizure in certain cases.

Province	BAC Level for Ordinary Drivers	Penalty	Special BAC Level	Legislation
British Columbia	More than .05 BAC with reverse onus. If a peace officer has reasonable grounds to believe that a driver's ability is affected by alcohol, the peace officer can suspend the licence; but if the driver demonstrates a BAC that does not exceed .05, the licence is to be returned.	24 hour suspension	Drivers with conditional licences cannot have any alcohol in their blood.	<i>Motor Vehicle Act</i> , RSBC 1996, c. 318
Alberta	More than .08 BAC with reverse onus. If a peace officer reasonably suspects that a driver's ability is affected by alcohol, the peace officer can suspend the licence, but if the driver demonstrates a BAC that does not exceed .08, the licence is to be returned.	24 hour suspension	Novice drivers cannot have any alcohol in their blood.	<i>Traffic Safety Act</i> , RSA 2000, c. T-6

Saskatchewan	.04 BAC with reverse onus. If a peace officer reasonably suspects that a driver's ability is affected by alcohol, the peace officer can suspend the licence; but if the driver demonstrates a BAC that is less than .04, the licence is to be returned.	24 hour suspension for a first infraction, 15 days and mandatory DWI course for a second infraction, and 90 days and mandatory alcohol dependence evaluation followed by therapeutic measures for all subsequent infractions (as applicable to infractions committed within 5 years).	New drivers cannot have any alcohol in their blood.	<i>Traffic Safety Act, SS 2004, c. T-18.1</i>
Manitoba	.05 BAC	24 hour suspension	Novice drivers cannot have any alcohol in their blood.	<i>Highway Traffic Act, C.C.S.M., c. H60</i>

Ontario	.05 BAC	3 day suspension for a first infraction, 7 days for a second infraction, and 30 days for all subsequent infractions (as applicable to infractions committed within 5 years).	Novice drivers cannot have any alcohol in their blood.	<i>Highway Traffic Act</i> , R.S.O. 1990, c. H.8
Québec	More than .08 BAC	90 day suspension	Learner drivers cannot have any alcohol in their blood.	<i>Highway Safety Code</i> , R.S.Q., c. C-24.2
New Brunswick	.05 BAC	24 hour suspension	Novice drivers cannot have any alcohol in their blood.	<i>Motor Vehicle Act</i> , c. M-17
Nova Scotia	.05 BAC	24 hour suspension	New drivers cannot have any alcohol in their blood.	<i>Motor Vehicle Act</i> , R.S. 1989, c. 293

Prince Edward Island	.05 BAC	24 hour suspension for a first infraction, 30 days for a second infraction, and 90 days for all subsequent infractions (as applicable to infractions committed within 24 months).	New drivers and drivers who are under 19 cannot have any alcohol in their blood.	<i>Highway Traffic Act</i> , R.S.P.E.I. 1988, c. H-5
Newfoundland and Labrador	.05 BAC	24 hour suspension for the first and second infractions, and suspension for up to 6 months for subsequent infractions committed within 24 months.	Novice drivers cannot have any alcohol in their blood.	<i>Highway Traffic Act</i> , RSNL 1990, c. H-3
Yukon	More than .08 BAC	90 day suspension or until the conclusion of the criminal proceedings (the shorter of the two).	Novice and learner drivers cannot have any alcohol in their blood.	<i>Motor Vehicles Act</i> , R.S.Y. 2002, c. 153.

Northwest Territories	More than .05 BAC with reverse onus. If a peace officer reasonably suspects that a driver's ability is affected by alcohol, the peace officer can suspend the licence; but if the driver demonstrates a BAC that does not exceed .05, the licence is to be returned.	24 hour suspension	Novice drivers cannot have any alcohol in their blood.	<i>Motor Vehicles Act</i> , R.S.N.W.T. 1988, c. M-16
Nunavut	More than .06 BAC with reverse onus. If a peace officer reasonably suspects that a driver's ability is affected by alcohol, the peace officer can suspend the licence; but if the driver demonstrates a BAC that does not exceed .06, the licence is to be returned.	4 to 24 hour suspension		<i>Consolidation of Motor Vehicles Act</i> , R.S.N.W.T. 1988, c. M-16

Source: Canada Safety Council, *Canada's Blood Alcohol Laws — an International Perspective*, March 2006, available at: <http://www.safety-council.org/info/traffic/impaired/BAC-update.pdf> (updated by the author).

One issue that arose among Committee members in discussions of provincial and territorial legislation is that of the minimum age for purchasing and consuming alcohol. Minimum purchase age laws are only effective if they are strictly and consistently enforced in all situations. This is not currently the case in Canada, where Alberta, Manitoba, and Québec set their minimum purchase ages at 18, while the rest of Canada sets the age at 19. The Committee has concluded that harmonising minimum purchase ages across jurisdictions would help reduce certain risky drinking behaviours. One example of such a behaviour is where significant numbers of young people cross provincial or territorial

boundaries to take advantage of less restrictive regulations in neighbouring jurisdictions. This problem can be especially acute at certain border points where alcohol outlets and licensed establishments cluster to meet the demand from cross-border customers.

Recommendation 8:

The Committee recommends that the provinces be encouraged to co-ordinate provincial legal drinking ages to reduce the practice of cross-border drinking and driving.

OTHER RELATED RECOMMENDATIONS

Parliament has the ability to provide principles to guide the courts when they are applying the *Criminal Code* provisions related to impaired driving. A statement of principles might start by emphasising that driving is a privilege and not a right. It could go on to say that it is in the interest of the safety of everyone that those who endanger the lives of others by driving impaired must be subject to swift, certain and severe criminal penalties. The continuing problem of impaired driving is a serious one and must be addressed urgently by the courts. In carrying out their functions, the courts must recognise that there is a direct relationship between impaired drivers and collisions and the severity and risk of collisions increases as the concentration of alcohol in the blood increases. The criminal law has an important role to play in communicating a certain message — impaired driving is unacceptable at all times and in all circumstances.

Recommendation 9:

The Committee recommends that Parliament provide guidance to the judiciary through a legislative preamble or statement of principles, which acknowledges the inherent risks of impaired driving and the importance of meaningful and proportionate consequences for those who endanger the lives of others and themselves.

In 1999, the *Criminal Code* was amended to increase from two to three hours the time period within which the police could demand evidentiary breath and blood samples from suspected impaired drivers. Yet the breath and blood analyses are still only presumed to reflect the suspect's BAC at the time of the alleged offence if the samples are taken within two hours. This time constraint can be problematic for a police officer if the arrest occurred in a rural area or when he or she was quite busy with other tasks such as assisting crash victims or securing an accident scene. A presumption of identity up to three hours would relieve the prosecutor of the time-consuming and costly obligation of calling a toxicologist in each impaired driving prosecution where the samples were taken outside of the time limit.

Recommendation 10:

The Committee recommends that the presumption of identity in subsection 258(1)(c)(ii) of the *Criminal Code* be extended from two to three hours.

APPENDIX A LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
<u>40th Parliament, 2nd Session</u>		
Association of Canadian Distillers Jan Westcott, President and Chief Executive Officer	2009/02/23	4
Canadian Council of Criminal Defence Lawyers Phil Downes, Representative		
Department of Justice Hal Pruden, Counsel, Criminal Law Policy Section Greg Yost, Counsel, Criminal Law Policy Section		
Canada Safety Council Raynald Marchand, General Manager of Programs Emile Therien, Past President	2009/02/25	5
Canadian Police Association David Griffin, Executive Officer Charles Momy, President		
Criminal Lawyers' Association Joseph Di Luca, Vice-President Jonathan Rosenthal, Counsel		
Insurance Bureau of Canada Dennis Prouse, Director, Federal Government Relations Robert Tremblay, Director, Road Safety and Special Projects		
Alcohol Countermeasure Systems Corp. Ian Marples, General Counsel	2009/03/02	6
Canadian Automobile Association Eric Lamoureux, Manager of Government Relations, Public Affairs, National		
Government of Ontario Yvona Buczek, Assistant Section Head, Toxicology, Centre of Forensic Sciences, Toxicology Section, Ministry of Community Safety and Correctional Services		

Organizations and Individuals	Date	Meeting
<p>Government of Ontario Marc Pelletier, Forensic Toxicologist, Centre of Forensic Sciences, Toxicology Section, Ministry of Community Safety and Correctional Services</p> <p>Mothers Against Drunk Driving (MADD) Margaret Miller, National President Andrew Murie, Chief Executive Officer Robert Solomon, Legal Director</p> <p>Traffic Injury Research Foundation Robyn Robertson, President and Chief Executive Officer</p>	2009/03/02	6
<u>39th Parliament, 2nd Session</u>		
<p>Canadian Police Association Tony Cannavino, President David Griffin, Executive Officer</p> <p>Research Group on the Social Aspects of Health and Prevention (GRASP) Louise Nadeau, Full Professor, University of Montreal</p> <p>Traffic Injury Research Foundation Robyn Robertson, President and Chief Executive Officer</p>	2008/02/07	12
<p>Canada Safety Council Raynald Marchand, General Manager of Programs Emile Therien, Past President</p> <p>Canadian Automobile Association Chris White, Vice-President, Public Affairs</p> <p>Centre for Addiction and Mental Health Robert Mann, Senior Scientist, University of Toronto</p> <p>Mothers Against Drunk Driving (MADD) Margaret Miller, National President Andrew Murie, Chief Executive Officer</p>	2008/02/12	13
<p>Canadian Centre on Substance Abuse Douglas Beirness, Manager, Research and Policy</p>	2008/02/28	15

Organizations and Individuals	Date	Meeting
<p>Canadian Council of Motor Transport Administrators</p> <p>Paul Boase, Co-Chair, Strategy to Reduce Impaired Driving</p> <p>Kwei Quaye, Chair, Strategy to Reduce Impaired Driving</p> <p>Canadian Society of Forensic Science</p> <p>Robert M. Langille, Chair, Alcohol Test Committee</p> <p>Department of Justice</p> <p>Hal Pruden, Counsel, Criminal Law Policy Section</p> <p>Greg Yost, Counsel, Criminal Law Policy Section</p> <p>As Individuals</p> <p>Thomas G. Brown, Researcher, Addiction Research Program, Douglas Institute, McGill University</p> <p>Frank Hoskins, Q.C.</p>	2008/02/28	15

APPENDIX B LIST OF BRIEFS

Organizations and Individuals

40th Parliament, 2nd Session

Association of Canadian Distillers

Canada Safety Council

Canadian Automobile Association

Canadian Medical Association

Canadian Police Association

Canadian Vintners Association

Department of Justice

Insurance Bureau of Canada

Mothers Against Drunk Driving (MADD)

Traffic Injury Research Foundation

39th Parliament, 2nd Session

Brewers Association of Canada

Canada Safety Council

Canadian Association of Chiefs of Police

Canadian Automobile Association

Canadian Council of Motor Transport Administrators

Department of Justice

Mothers Against Drunk Driving (MADD)

Research Group on the Social Aspects of Health and Prevention (GRASP)

Traffic Injury Research Foundation

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the Government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings ([40th Parliament, 2nd Session: Meetings Nos. 4, 5, 6, 7, 10 and 30](#) and [39th Parliament, 2nd Session: Meetings Nos. 12, 13, 15 and 18](#)) is tabled.

Respectfully submitted,

Ed Fast, MP

Chair



Standing Committee on Justice and Human Rights

Supplementary Opinion Concerning Impaired Driving

Issued 11 June 2009 on Behalf of Mr. Comartin, M.P. (Windsor-Tecumseh) NDP Justice Critic

INTRODUCTION

The Standing Committee on Justice and Human Rights, in accordance with its mandate to oversee all matters of criminal justice which appear before the House of Commons, has been engaged since February 2008 in an intensive study of issues related to the criminal, social, and human impact of impaired driving in Canada.

Between 7 February 2009 and 2 March 2009, the Justice Committee consulted a broad series of witnesses spanning law enforcement, the Federal Public Service, academia, industry, and victims' advocacy organizations. This diverse series of testimonials brought real insight to the Committee's proceedings, and presented Members and the public with a largely balanced, objective view of the historical and contemporary parameters of impaired driving in Canada.

A strong multi-partisan consensus that impaired driving remains a major concern was discernible throughout the Committee's work. All Members expressed their conviction that strong legislative and regulatory measures were required to address the persistent scourge of impaired driving, whose grim reality was evidenced by the intimate and often heart-wrenching personal tragedies described so compellingly by several witnesses.

The tone of the Committee's work was with few exceptions admirably collegial, and Members from all parties overwhelmingly treated the proceedings with the professionalism they merit.

The majority report ultimately produced by the Committee's investigation contains a number of important recommendations which rightly enjoy the support of all parties, and strike a balance between the competing priorities called for by stakeholders. This minority report is issued in order to address those few shortcomings which might be rectified to ensure that the Committee's final recommendations on this critical public policy issue serve Canadians in the best way possible.

THE CONTEMPORARY CONTEXT OF IMPAIRED DRIVING IN CANADA

The late 1990s witnessed a considerable decline in the prevalence of impaired driving in Canada, and a concurrent drop in the number of associated charges, convictions, and fatalities.¹ While determining the precise cause of this decline is to some extent a politically subjective exercise, it is generally agreed that toughened enforcement by Provincial and Territorial authorities coupled with limited, periodic intensification of *Criminal Code* sanctions over this period represent major contributing factors. In addition the national public education campaign against impaired driving led by groups such as MADD and our police services contributes positively to a change of driving habits while under the influence of alcohol.

Significant evidence exists, however, suggesting authorities at both levels of Government have more recently allowed justifiable pride at this achievement to degenerate into complacency. Excluding a minor decline in 2003/04, fatalities resulting from impaired driving incidents have steadily increased in this decade. It is of note that this resurgence of fatalities has occurred at exactly the time several Provincial/Territorial Governments significantly intensified penalties for impaired driving violations and new *Criminal Code* provisions have created entire new classes of offenses, explicitly targeted recidivist drunk driving, and eliminated technical loopholes whose effect was to unduly insulate offenders from timely conviction.² While definitive statistics are not yet available for 2007 or 2008, it is apparent the increase has continued unabated.

Consultations with numerous organizations representing Canada's law enforcement personnel and the broader legal community reveal that the number one flaw in our national framework for addressing impaired driving has always been and remains material. Under increasing budgetary pressure, Federal and Provincial Governments have too often adopted the counterproductive practice of toughening penalties while underfunding the police, prosecutors, and judges required to translate tough penalties into convictions.

Where a monitoring-intensive area of law enforcement practice like impaired driving is concerned, even the toughest sentencing imaginable will be of little effect if police are too scarce and their coverage too diluted to adequately enforce law, or the Crown and court system are inundated with an unmanageable case load, as is demonstrably the case in several Provincial jurisdictions today.

1 JURISTAT statistics on number of impaired driving-related fatalities in Canada, 1995-2006
2 Majority Report of the Standing Committee on Justice and Human Rights, *June 2009*

THE BENEFITS OF A NATIONAL .05 BLOOD ALCOHOL CONCENTRATION (BAC) STANDARD

Canada's national impaired driving standard is outlined by Section 253 of the *Criminal Code*, which sets 0.08 BAC as the maximum criminal limit of intoxication when operating a motor vehicle. Provinces enjoy wide autonomy in establishing stronger restrictions on impaired driving, but the 0.08 benchmark represents the statutory national standard.

At the Provincial level, impaired driving laws are defined by a loose and ineffective patchwork system. The differing approaches of Provinces are reflected both in terms of different license suspension policies, which range widely from relatively menial 24-hour suspensions for any BAC up to the 0.08 legal limit under Alberta's *Traffic Safety Act* to a comparatively strict 3 day suspension for 0.05 BAC under Ontario's *Highway Traffic Act*, and even more divergent practices where the interplay between Provincial regulations and the *Criminal Code* are concerned.³ In recent years a number of Provinces have taken inconsistent steps towards stricter penalties for repeat offenders, who are statistically more likely to exceed BAC limits by large margins and be involved in dangerous incidents. Certain Provinces and regions, notably Québec and rural Canada, are documented as having drastically lower levels of enforcement and arrest-conviction ratios in impaired driving cases.

While Canada's Constitutional framework is sufficiently unique that direct comparisons with the Federal systems of other nations are problematic. The persistent severity of Canada's impaired driving challenge compels us to send the strong and unequivocal message of national scope, one that cannot be attained by a mere Provincial patchwork response. Only a tightened national standard can compel recalcitrant Provincial authorities to act.

As numerous witnesses suggested, under current *Criminal Code* provisions Canada effectively permits among the highest BAC levels in the world. This problem is particularly acute when one considers the fact that our courts have routinely accorded defendants generous margin-of-error mitigations in assessing impaired driving cases. This means that the technical 0.08 BAC requirement is usually a *de facto* 0.1 limit when it comes to prosecution and conviction.

Countless reputable organizations have shown that jurisdictions around the world which implement a 0.05 BAC benchmark for summary offence consistently enjoy notable reductions in both arrests and fatalities associated with impaired driving. The 0.05 BAC has been successfully implemented in virtually every OECD country, including the most advanced EU economies, without either subjecting the judicial

3 *Ibid.*

system to unmanageable strain or being declared constitutionally invalid. Almost without exception, there has been a direct correlation between the permissiveness of BAC laws and the prevalence of criminal impaired driving incidents.⁴

Medical science in Canada and abroad has definitively determined that 0.05 BAC represents the threshold at which the ability of a human being to operate a motor vehicle, subject to the normal variations based on body mass, gender, dietary, and hydration factors, becomes sufficiently impaired to present an imminent danger to themselves and others.⁵

RESPONDING TO CRITICISMS OF 0.05 BAC

Logistical Pressure on the Judicial System

The Majority opinion argues that changing the *Criminal Code* in order to lower the BAC limit will result in a huge influx of criminal prosecutions, putting additional strain on an already overburdened system.⁶ While the present volume of impaired driving cases may be overwhelming, changes made to the *Criminal Code*, specifically the ``Evidence to the Contrary`` section will help mitigate this concern.

Currently 40% of defendants charged with impaired driving plead not guilty.⁷ Defendants choose to proceed to trial for various reasons, high among them has been the availability of ``Evidence to the Contrary`` section in the *Criminal Code*, commonly known as the Two-Beer Defence. Under this defence, the accused had the ability to challenge the presumption of a BAC test with over the limit results by presenting evidence to the contrary, showing that in fact, the accused was not over the limit. Clearly, the more defendants who plead not-guilty and proceed to trial has a direct impact on the utilization of resources and the amount of case- and workload being put into the system. As of July 2008, this defence is no longer available, having been rescinded by way of amendments to the *Criminal Code*.

Although statistics for 2007 and 2008 are currently unavailable, the elimination of the Two-Beer Defence is almost certain to cause a significant drop in the number of non-guilty pleas for impaired driving charges. It follows that resources will be freed up thereby relieving the system of the common congestion seen before the *Criminal Code*

4 Professor Robert Solomon and Professor E. Chamberlain, *Reforming the Federal Impaired Driving Legislation: Next Steps*. Submission to the Standing Committee on 2 March 2009.

5 Letter from Mr. Robert Ouelett, M.D., F.R.C.P.C., President of the Canadian Medical Association, to Mr. Ed Fast, M.P., Chair of the Standing Committee on Justice and Human Rights, 4 March 2009.

6 Majority Report of the Standing Committee on Justice and Human Rights, June 2009

7 Traffic Injury Research Foundation, *Recommendations for Improving Federal Impaired Driving Laws*, Submission to the House of Commons Standing Committee on Justice and Human Rights, March 2009

was amended to eliminate the Two-Beer Defence. As a result, lowering the BAC level will not cause further congestion, in large part due to the elimination of a defence commonly exploited by the impaired driving accused.

Effective Standard

Section 253(1)(b) of the *Criminal Code* clearly states that a person who registers a 0.08 BAC while driving is operating while impaired. While the federal limit is clearly 0.08 BAC, the fact is that prosecutions are not made against impaired drivers when the BAC registers lower than 0.1. Therefore, although the legal limit is 0.08 the reality is that there is an effective limit in place in Canada, .02 points higher than the current legal limit.

The effective limit has come into place through a general belief in human and machine error. That is, there is a margin of error when testing the BAC of a suspected impaired driver, and rather than prosecute a defendant who can show evidence of error, it is more efficient and prudent to prosecute the impaired driver who registered at a 0.1 BAC because the margin of error would still place them within the legally unacceptable BAC limit. The use of this type of effective limit is clearly dangerous, since a severe degradation of skills used in driving occurs at 0.05 BAC, half the amount of the effective limit.

If Canada is to enjoy a transparent and authentic justice system, courts must accurately reflect the *Criminal Code* and current legislation. The utilization of a practice implementing an effective limit does not do this, rather it erodes public trust in the criminal justice system, and empowers those who seek to defy the laws of Canada and operate a motor vehicle while intoxicated.

If Parliament is satisfied that 0.08 BAC limit should remain the law within Canada, the most prudent course of action is to lower the legal limit to 0.05 BAC in order for the effective limit to meet the 0.08 BAC level. Effectively, the legal limit would be lowered, however with the continued utilization of the effective limit based on the margin of error prosecutions would not be made for less than 0.08 or 0.07.

RECOMMENDATIONS

The Committee minority therefore recommends:

Recommendation 1:

Contrary to the primary recommendation of the Majority Report, Canada should amend the *Criminal Code* to adopt a national standard of 0.05 BAC.

Recommendation 2:

The Federal Government should honour all previous commitments to support Provincial administration of justice and law enforcement, and undertake whatever financial or organizational support is necessary to enable the rapid, cost-effective implementation of Recommendation 1.