Department of Justice Canada | Ministère de la Justice Canada

DISCUSSION PAPER

Modernizing the Transportation Provisions of the *Criminal Code*

On June 18, 2009, the Standing Committee on Justice and Human Rights tabled its report "Ending Alcohol-Impaired Driving: a Common Approach" and made 10 recommendations with respect to impaired driving. The Government response tabled on October 19 stated:

> The Government accepts the Committee's recommendations in principle. The Government notes that this area of the law has become excessively complex. The breath-testing provisions, for example, are now 40 years old, and they have been repeatedly amended in response to technological advances and court decisions. Considerable work has been done by federal, provincial and territorial officials on simplifying and modernizing the impaired driving provisions of the Criminal Code. The Government will consult on a priority basis with the provinces, territories, law enforcement, prosecutors and other stakeholders on the implementation of the recommendations made by the Standing Committee with a view to developing a comprehensive set of reforms.

The attached consultation paper outlines options and includes 20 questions to help frame your comments including:

- Legislatively expressing the purposes of the transport offence legislation
- Linking minimum fines for first impaired driving offenders to BAC
- Random breath testing
- Eliminating the "bolus drinking" defence and restricting the intervening drink defence
- Placing limits on disclosure
- Eliminating or limiting the right to counsel prior to an Approved Instrument test.

Responses to the specific consultation questions posed in this paper, as well as more general comments, are welcome until **Friday April 30, 2010**. Responses can be submitted via email to ID-consultation-FA@justice.gc.ca , or by mail to:

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We thank you in advance for your participation in this important consultation, and look forward to receiving your views.

BACKGROUND

In 2009, the House of Commons Standing Committee on Justice and Human Rights conducted a full review of the issue of impaired driving. The Standing Committee made 10 recommendations of which eight are addressed to the federal government. The Government has accepted these recommendations in principle.[1] Beyond this, the Government believes that the time has come to consider a comprehensive set of reforms. This paper sets out options for responding to the recommendations made by the Standing Committee that would require federal legislation and it raises further options for legislative changes.

Collisions involving automobiles kill and injure thousands of Canadians annually. Although vessels, railway equipment and air planes are also involved in collisions, the vast majority of deaths and injuries are caused by motor vehicle collisions and impairment by alcohol or a drug is a major contributing factor to the ongoing carnage.

Licensing drivers and establishing rules of the road for motor vehicles are provincial responsibilities. The provinces have developed various administrative responses to the problem of impaired driving, notably roadside license suspensions for persons with a Blood Alcohol Concentration (BAC) between 50 and 80 mg of alcohol per 100 ml of blood (mg%) and 90 day suspensions for those with a BAC over 80.

Parliament, using its constitutional power for criminal law, has enacted offences to punish those who act so irresponsibly that their conduct deserves criminal sanctions. Currently, sections 249 to 261 of the *Criminal Code* deal with transportation-related offences. However, the impaired driving, over 80 and refusal provisions involving motor vehicles account for more than 95% of charges under these provisions. While this paper deals primarily with impaired operation of motor vehicles, the options that are discussed also have implications for rail, vessel and aircraft modes of transport.

COMPLEXITY OF THE LAW

In 1921, Parliament made it an offence to drive while intoxicated. In 1925, it criminalized driving while impaired by narcotics. There was a major change in 1969 when Parliament made it an offence to drive with a BAC over 80 and provided for BAC to be determined by approved instruments (AI). In 1979, Parliament authorized the use of approved screening devices (ASD) at the roadside to facilitate the detection of impaired drivers. There was a major revision of the impaired driving provisions in 1985. Further amendments were made in 1992, 1994, 1995, 1997, 1999 (two Acts), 2000, 2001, 2006 and 2008 (two Acts). Parliament has also amended the *Criminal Code* to address the dangers caused by street racing and flight from the police.

These many amendments have created a part of the *Criminal Code* that is very difficult to understand. Indeed, the Law Reform Commission in its Report on Recodifying Criminal Procedure, in 1991 wrote that some of the provisions had even then, “become virtually unreadable”.

The impaired driving sections have been subject to such extensive litigation that it is difficult in some cases to understand how they operate on the ground from simply reading the text. For example, *Martin's 2010 Annual Criminal Code* has 21 pages of cases on section 254, which deals with making a breath demand, and 17 pages of cases on section 258, which deals with making an analysis of a breath or blood sample.

Rather than making yet another series of amendments to integrate the Standing Committee's recommended changes into the existing provisions of the *Criminal Code* which would add to the existing complexity, it may be preferable to recast them within a new Part of the *Criminal Code* that addresses all transportation-related offences and is written in simpler language, with the following structure:

- Purpose and declarations
- Offences
- Penalties
- Prohibitions
- Investigatory powers
- Evidentiary - proof of alcohol concentration
- General

The recommendations of the Standing Committee that pertain to amendments to the *Criminal Code* will be discussed as they arise in this paper.

PURPOSE AND DECLARATIONS

> 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."

Parliament has on several occasions included statements of the purposes of adopting legislation and the principles or factors that are to guide the courts, including with respect to impaired driving. For example, *The Tackling Violent Crime Act*, included seven clauses in the Preamble explaining the intention of the legislation including: "Whereas driving under the influence of drugs or alcohol can result in serious bodily harm and death on Canada's streets..."

In the *Criminal Code*, sections 718, 718.1 and 718.2 set out the purpose and principles of sentencing. Also, s. 276 deals with the evidence of the complainant in a sexual assault trial and includes seven factors the judge is to take into account in deciding whether the complainant should be questioned regarding her sexual history.

An advantage of express legislative provisions is that they can be more accessible to the courts, prosecutors, defence counsel and the accused because they are placed in the *Criminal Code* among provisions to which they apply and do not have to be "found" elsewhere. Whatever method is chosen, the following subject areas should be considered in any legislation in this regard.

Seriousness of the offence: The fundamental purpose of the *Criminal Code* transportation offences is to contribute to the safety of all Canadians.

Assisting investigations: The investigatory and procedural provisions are designed to assist the police in enforcing the law and to assist the courts in coming to a just verdict by focusing the trial on the elements of the offence. This is particularly important in cases where BAC is in issue.

Penalties: To make the law effective, it is also necessary that the penalties for those who break the law reflect the gravity of their conduct and are a significant deterrent.

Public safety: It is also important that Parliament set out clearly the parameters that it believes should guide the courts. Driving a car is a privilege and is subject to limits in the interests of public safety that include licensing, observance of the rules and sobriety.

Scientifically sound: While impaired driving law is exceedingly complex and technical, it must be remembered that the fundamentals of the system are sound. The law is based on the scientific advice that has been provided over the years by the Alcohol Test Committee (ATC) and the Drugs and Driving Committee of the Canadian Society of Forensic Science.

Random Breath Testing: Finally, Random Breath Testing (RBT) would represent a major reform and Parliament should indicate this is so, if it chooses to implement RBT. (How RBT could be implemented is discussed later in this paper)

Possible wording of the "purposes" could be:

Purposes
The purposes of this Part are:
(a) to contribute to the safety of all Canadians
(b) to assist law enforcement in the investigation of transport-related offences;
(c) to provide simple and effective means of enforcing the provisions of this Part; and
(d) to harmonize the penalty and prohibitions structure for transportation offences to reflect the harm that they cause and the risk of harm that they pose.

Declarations
It is recognized and declared that:
(a) operating a conveyance is a privilege and not a right and is subject to limits regarding licensing, observance of the rules governing the operation of the conveyance including sobriety.
(b) transportation offences, especially operating while impaired by alcohol or drugs, represent a significant contributing factor to collisions and pose a serious threat to the life, health and safety of Canadians.
(c) approved instruments operated by qualified technicians provide reliable and accurate results of blood alcohol concentration.
(d) the early and certain detection of alcohol impaired drivers by the random breath testing of drivers, a program that has contributed greatly to traffic safety in other free and democratic

countries, will greatly assist in the protection of the public by removing more impaired drivers from the road.

Your views are sought on the benefits of statutory provisions expressing the purposes of the transport offence legislation.

OFFENCES

The general approach of the criminal law has been to create a new offence to account for the greater harm caused by the same conduct (e.g. impaired driving, impaired driving causing bodily harm, impaired driving causing death) or to respond to particularly egregious conduct (e.g. dangerous driving (flight from police) and dangerous driving (street racing)). An alternate approach would be to have the only underlying offences with increased penalties for causing bodily harm or death.

Impaired and over 80
The reason that Parliament made driving with a BAC over 80 a criminal offence is that there is a scientific consensus that the ability to drive of every person at that BAC is impaired compared to when they are sober. Of course, 80 is not a red line with everyone at 79 being sober. In fact, some individuals are impaired at BACs well below 80 and they can be charged with impaired driving. However, a person cannot be convicted of both impaired driving and driving over 80 for the same occurrence.

Parliament might wish to consider reducing the number of offences to 7:

- Criminal negligence (including street racing)
- Flight from police
- Dangerous operation
- Impaired (including BAC equal to or over 80)
- Refuse
- Leave the scene
- Drive disqualified

Instead of creating separate offences where there is bodily harm or death, these could be addressed by increased penalties.

Currently, it is an offence to have a BAC that is <u>over</u> 80. It has been the practice to round down the BAC number produced by the approved instrument so that a reading of 89 would be rounded down to 80 in which case the person would not be prosecuted. Moreover, the result that is used in court is the lower of two results so that a person who, for example, blew 93 and 89 would not be prosecuted. Changing the offence to "<u>equal to or exceeding</u> 80" would result in these cases being prosecuted. There is no injustice to the driver since approved instruments report results conservatively.

What are your views on reducing the number of transportation offences to seven and setting the criminal BAC offence at 80?

PENALTIES

The current penalties in the *Criminal Code* for offences involving vehicles have many anomalies. Only the impaired driving offences have mandatory minimum penalties of a fine for first time offenders and imprisonment for repeat offenders. Some driving offences causing bodily harm are punishable by up to 10 years imprisonment and others by up to 14 years. Dangerous driving causing death is punishable by up to 14 years while all other transportation offences causing death are punishable by up to life imprisonment.

The Standing Committee made two recommendations with respect to penalties:

> 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.

Repeat Offenders
In *The Tackling Violent Crime Act*, the mandatory prison terms for repeat impaired, over 80 and refuse offences were increased from 14 days to 30 for a second offence and from 90 days to 120 days for a third offence. These provisions came into force on July 2, 2008.

Parliament could be asked to increase the penalties for repeat offenders by:

- Making all transportation offences previous offences for one another rather than just the three impaired driving offences. For example, a person with a previous dangerous driving conviction would be treated as a second time offender if the person was previously convicted of an impaired driving offence and vice versa.
- Making the mandatory minimum term of imprisonment one year for a fourth offence and two years for a fifth offence
- Explicitly making repeat offenders eligible for Long Term Offender designation.

Death and bodily harm - maximum
Where there is a death all offences would have a maximum penalty of life and where there is bodily harm all offences would have a maximum penalty of 14 years.

Criminal negligence
Criminal negligence is the most egregious behaviour as it shows wanton and reckless disregard for the lives and safety of others. At present, there is no driving offence of criminal negligence unless it has caused bodily harm or death. A new *simpliciter*[2] criminal negligence offence would reflect circumstances such as a driver going through stop signs and red lights at high speed. It would be "straight indictable" with a maximum of 10 years imprisonment, so that there would be no option for the charge to be prosecuted summarily. Unlike other offences, there would be no minimum but it is to be expected that the courts would impose higher penalties on those convicted of this offence than they would on persons convicted of the lesser and included of dangerous driving which can be prosecuted either on indictment or by summary conviction..

Over 160
The Standing Committee was concerned by the problem of the high BAC driver. It wrote:

> 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.

To respond to the Standing Committee's recommendation, Parliament could be asked to set the minimum penalties for impaired driving for a first time offender as follows:

- BAC 80 to 119 - $1,000 (the current minimum)
- BAC 120 to 159 - $1,500
- BAC 160 or more - $2,000.

There should be no advantage for a person who refuses to provide a breath sample so the minimum penalty for a refusal offence should be set at $2,000. Repeat offences would continue to be punished by mandatory terms of imprisonment; therefore, there is no need to have a higher minimum penalty linked to BAC in those cases.

Aggravating factors
With respect to aggravating factors in sentencing, the factors set out in s. 718.2 of the *Criminal Code* are not relevant to driving offences as they deal with hate motivation, abuse of a spouse etc. There is only one legislated aggravating factor with respect to sentencing for impaired driving: s. 255.1 makes it an aggravating factor to have a BAC in excess of 160. If the proposal to link tiered penalties to BAC were adopted, this aggravating factor would be relevant in determining the appropriate sentence for repeat offenders and offenders who have caused bodily harm or death.

In addition to BAC, there are many other aggravating factors which are already applied by courts when determining a just sentence for an offence involving the operation of a conveyance. The

following aggravating factors could be set out in the *Criminal Code* to ensure that they are not overlooked in an appropriate case:

- BAC of 120
- Multiple victims
- Child passenger
- Conveying passengers for hire e.g. bus or taxi
- Operating a large conveyance e.g. a semi-trailer
- Operating an emergency conveyance e.g. an ambulance
- Property damage
- Operating without a license.

Your views are sought on the proposals to:

- **Increase penalties for repeat offenders**
- **Make the maximum penalty for all death cases life imprisonment and 14 years for all bodily arm cases**
- **Create a new offence of criminal negligence simpliciter**
- **Linking minimum fines for first impaired driving offenders to BAC**
- **Lowering from 160 to 120 the BAC as an aggravating factor**
- **Listing other behaviours as aggravating.**

DRIVING PROHIBITIONS

There is no consistency underpinning the current prohibitions on operating a mode of transportation. Some of the most harmful offences have only discretionary prohibitions, while prohibitions for some less serious offences are mandatory. The rationale may have been to leave discretion in the court for situations of lengthy incarceration where, presumably, the offender would be off the road for a long period of time and a driving prohibition might not have been seen as needed upon release.

There are two offences related to street racing that, on a second offence involving bodily harm or death, have a mandatory lifetime prohibition yet no such prohibition is required for a person with two offences of impaired driving causing bodily harm. The impaired driving offences do have mandatory prohibitions but they are the same for *simpliciter* and for offences involving bodily harm or death.

Parliament could be asked to standardized the prohibitions for *simpliciter*, causing bodily harm and causing death cases each having its own set of prohibitions. The prohibition periods could be:

Simpliciter offences:

- First offence - 1 to 3 years
- Second offence - 2 to 10 years
- Third offence - 3 years to lifetime

Bodily harm offences:

- First offence - 2 to 10 years
- Subsequent offences - 3 years to lifetime

Death offences:

- First offence - 3 years to lifetime
- Subsequent offences - 5 years to lifetime

Your views are sought on setting uniform minimum prohibition periods.

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

Currently, offenders convicted of alcohol-impaired driving can reduce the length of their prohibition if they are accepted into a provincial/territorial ignition interlock program. So long as the offender is operating an ignition-interlock equipped vehicle in accordance with the conditions of the provincial program, he or she will not be committing an offence. Currently, the *Criminal Code* does not allow a person to enter an ignition interlock program until three months have elapsed for a first offence, six months for a second offence and one year for a third offence.

One option to encourage the use of ignition interlock would be to set no minimum period of prohibition for a first offender. Each province/territory would determine whether and when it would admit the offender into its ignition interlock program. However, there would be no early admittance of persons who have a previous impaired, refusal or over 80 convictions. A second option would be to reduce the waiting period for admittance to the ignition interlock program so there would be the possibility of having an ignition interlock immediately upon a first conviction, after 3 months for a second conviction and after 6 months for a third or subsequent conviction. A third option would be to allow provinces to admit all offenders (first and repeat) to the ignition interlock programme after 3 months of prohibition.

Your views are sought on when an offender may drive with the use of an ignition interlock device.

The Standing Committee also recommended that "the Alcohol Test Committee (ATC) of the Canadian Society of Forensic Science be authorised to approve alcohol ignition interlock systems for use in provincial and territorial programs."

It is important that equipment which can be used to allow a person to drive a car during a prohibition period be reliable. However, the situation is different than in the case of instruments and screening devices, which simply analyze a breath sample for alcohol. The ignition interlock system must also be able to shut the car down and it must have safeguards to ensure that it is not easily circumvented. The ATC does not have the expertise to evaluate how well the ignition interlock system works once it has detected alcohol.

The ATC could be asked to establish criteria jointly with another body that has the expertise to evaluate the non-alcohol detection aspects of the system. The *Criminal Code* could specify that the ignition interlock system had to meet the criteria of the joint body. The provinces would then have to conduct the evaluations. Another option would be to have the *Criminal Code* specify that the provincial program would have to use approved interlock equipment. The joint body would make recommendations to the Attorney-General of Canada who could then approve the system by way of a Minister's order.

What are your views on setting criteria for ignition interlock devices to be used by impaired driving offenders?
What are your views on the role of the ATC in setting criteria?
What are your views on having the AG approve interlock systems for use in Canada?

INVESTIGATORY POWERS

Random Breath Testing (RBT):

> Recommendation 5: The Committee recommends that random roadside breath testing be put in place.

With respect to many driving offences, the evidence is relatively simple to gather and present to a court. A dangerous driving charge will be based on the police having observed someone driving very fast or crossing the centre line and the court will have to decide whether that conducts amounts to dangerous driving. A drive disqualified charge is often based on the police having stopped someone, for example, because a taillight was not working and a check of their name revealed that they are disqualified from driving.

It is much more difficult to prove impairment by alcohol or a drug. The observations of the police are always subject to challenge. Therefore, Parliament placed the issue of impairment by alcohol on a scientific basis by creating the separate and distinct over 80 offences and instituting a breath testing regime in 1969. The breath testing scheme is a unique instance in our criminal law where a person can be found guilty of an offence based on a factor (BAC) that can only be proven by requiring the suspect to provide a breath or blood sample for analysis. To encourage the person to provide a sample for analysis, it is a criminal offence to refuse to provide the sample, without reasonable excuses, where the police have the requisite grounds for making the demand.

The use of ASDs at the roadside has greatly assisted the police in developing the reasonable and probable grounds necessary to make an AI demand. Instead of having to form an opinion based only on subjective observations, the police officer can require the person to provide a breath sample on an ASD if the officer suspects that there is alcohol in the driver's body. It is not a criminal offence to fail the ASD test and a failure on the ASD only constitutes the reasonable and probable grounds needed by police prior to demanding that the detainee provide a breath sample on the AI. The criminal charge can only be proven in court on the basis of an AI test carried out by a qualified technician.

Although the threshold in the *Code* for the police to make an ASD demand is relatively low, some studies have shown that many drivers with illegal BACs succeed in getting through roadside checks. In order to detect such drivers, several countries require all drivers to provide a screening device test whenever demanded by the police, without any suspicion that there is alcohol in the driver's body. This procedure is known as Random Breath Testing.

RBT has been in use in Australian states, New Zealand and some European countries for many years. RBT has had such remarkable results that in 2004 the European Union recommended that it be a part of every EU nation's traffic safety measures. According to the European Transport Safety Council, RBT is now in use in 22 European states. It should be noted, however, that there are different models of RBT. In Ireland, RBT is only used as part of an organized checkpoint whereas in Australian states, any police officer can require any person that the officer has reasonable cause to believe was driving a motor vehicle to provide a breath sample. (Annex 1 has a summary of research into the safety effects of RBT.)

The Supreme Court of Canada noted, when it upheld in *Ladouceur* random checks for drivers licenses, registration, mechanical fitness and sobriety:

> To recognize the validity of the random routine check is to recognize reality. In rural areas it will be an impossibility to establish an effective organized program. Yet the driving offences in these areas lead to consequences just as tragic as those that arise in the largest urban centres. Even the large municipal police force will, due to fiscal constraints and shortages of personnel, have difficulty establishing an organized program that would constitute a real deterrent.[3]

RBT and collisions:

There is also the question of persons involved in collisions, particularly those that cause bodily harm or death. Often, the police are fully occupied ensuring medical care to the injured and securing the area so the cause of the collision can be properly investigated. In these circumstances, if the police do not have an ASD at hand, Parliament could be asked to give police the authority to detain drivers for a reasonable time until an ASD arrives and, if the police cannot be certain who was the driver, to sample everyone who might have been the driver. Clearly, laying a charge will require that there be reasonable grounds to believe one of the persons so tested was the driver. Such evidence may not however be available for some time because the police often must interview witnesses and victims.

ASD in non-RBT situations:

The current provision authorizing police to demand an ASD sample based on reasonable suspicion would continue for non-death and non-bodily harm cases where the police do not have an ASD at hand.

Possible RBT provisions:

Mandatory screening
(1) Where a person is operating a motor vehicle, a peace officer who has an approved screening device may, by demand, require the person to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of that device and, if necessary, to accompany the peace officer for that purpose.

Screening – collision
(2) If a peace officer has reasonable grounds to suspect that a person has operated a motor vehicle that was involved in a collision resulting in the death of another person, or in bodily harm to any person, the peace officer may, by demand, require that person to provide as soon as practicable a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.

Collision - multiple potential drivers
(3) For greater certainty, if a peace officer cannot determine under subsection (2) which person operated the motor vehicle, the peace officer may demand a sample of breath from every person who the peace officer reasonably suspects may have operated the motor vehicle and, if necessary, to accompany the peace officer for that purpose.

Your views are sought on the random breath testing options.

Reasonable suspicion:
Currently, the Code requires that the police have reasonable grounds to suspect that a driver has alcohol in the body to demand an ASD test but must have reasonable grounds to believe that a person is committing an impaired or over 80 offence before demanding that a person submit to an approved instrument (AI) test. It is only the AI test that can be used to prove the offence in court.

The Ontario Court of Appeal in *R. v. Stellato*[4] held that if the evidence establishes any degree of impairment ranging from slight to great, the impaired driving offence has been made out. However many trials have turned on whether the police had reasonable grounds to suspect the person was impaired based upon a minute examination of their observations of the accused's appearance, speech, steadiness on his or her feet and ability to find registration papers, etc.

Although RBT would assist by ensuring that the person must submit to the test where the police officer has an ASD at hand, the question of reasonable suspicion for an ASD demand will arise in cases where the ASD was not at hand. Therefore Parliament could be asked to consider

specifying in the *Code* that in assessing whether the police had reason to suspect the person had alcohol in their body prior to demanding an ASD or Standard Field Sobriety Test (SFST), the court shall take into consideration the results of the AI test.

Your views are sought on specifying that a court must consider the BAC result on the AI when assessing reasonable suspicion to make an ASD demand.

PROOF OF ALCOHOL CONCENTRATION

As noted earlier, many transportation offence cases are relatively simple to investigate and prove in court. However, over 80 trials have become extremely complex. In 2008, Parliament addressed the most urgent problem in *The Tackling Violent Crime Act* when it restricted the defences to the over 80 charge by eliminating the so-called *Carter* or "two beer" defence.

Proof of BAC:
The Minister of Justice has always been guided in determining which instruments and screening devices should be approved for use in Canada by the Alcohol Test Committee of the *Canadian Society of Forensic Science* which applies rigorous standards that are published in the *Journal of the Canadian Society of Forensic Science*, to determine the accuracy and reliability of equipment. Modern AIs have sophisticated electronic self-tests built in so that they will not do the analysis if the instrument is not functioning properly.

Parliament recognized in *The Tackling Violent Crime Act* the reliability and accuracy of modern AIs. Quite simply, if the AI properly analyzes blank air and the standard alcohol solution before each sample is taken, it is not scientifically possible for the AI to produce inaccurate readings in the analysis of the accused's breath. There are no gremlins that mysteriously falsify the breath test results of the accused but get the blank air and standard alcohol solution checks right. Therefore, *The Tackling Violent Crime Act* amendment requires that there be evidence of either instrument malfunction or operator error in using the instrument before the BAC can be questioned through evidence of low alcohol consumption.

The courts have found these AIs to be highly reliable:

> The sum of the tests and checks leaves no room for a reasonable doubt to be held, absent some evidence of malfunction or error. In particular, the calibration check answers any concerns about the approval process or the self testing of the machine. It provides an external independent verification that the actual instrument in question was properly functioning immediately before the subject tests. Scenarios posited to undermine the value of this check are highly speculative. The two sample requirement (to say nothing of the internal detectors) answers concerns about transient conditions such as mouth alcohol or radio frequency interference. No credible hypothesis has been suggested whereby an undetectable error could escape detection with all of these checks in place.[5]

It is therefore proposed to further reform the rules regarding the proof of BAC by making the BAC at the time of testing produced by an AI irrefutable if a qualified technician ascertained the

AI to be in proper working order, followed proper procedures and took two breath samples at least 15 minutes apart.

If it is established that the instrument was in proper operating order, the BAC at the time of testing would be proven for court purposes. The next step is to determine the BAC at the time of the alleged offence. In this regard, the *Criminal Code* currently provides that the BAC at The time of testing is deemed to be the same as at the time of driving if the tests were performed within two hours the driving.

> The Standing Committee recommended that the presumption of identity be extended from two to three hours.

Currently, if the AI tests are not performed within two hours of driving, expert evidence must be called to extrapolate the BAC at the time of testing to the BAC at the time of the alleged offence. The Standing Committee was aware that this time limit can cause problems. It wrote:

> 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.

Even a three hour time limit could also cause difficulties in some cases particularly those involving an accident. It is settled science that:

> If alcohol is consumed on an empty stomach, the blood concentration will usually reach, or be within 20 milligrams per 100 millilitres of, a maximum within approximately 30 minutes, have a variable plateau period, usually within a range of approximately 30 - 60 minutes, and will then decline at a rate generally of 10 to 20 milligrams per 100 millilitres of blood per hour.[6]

There is no reason to incur the expense to call a toxicologist to calculate what is well known science. It is therefore proposed that, if the tests are taken beyond the two hour period, which is well beyond the 30-60 minute plateau period, 5 mg be added to the BAC at time of testing for each completed half hour to determine the BAC at the time of driving. This calculation gives the benefit to the accused because most people eliminate at a rate close to 10 mg per half hour.

Your views are sought on eliminating the time limit for the presumption of identity by specifying that where the test is beyond two hours, 5 mg will be added to the BAC for each completed half-hour.

Bolus or intervening drinking defences:
It is currently a defence for a person to raise a reasonable doubt that their BAC was over 80 at the time of driving by adducing evidence of consumption that is compatible with both the BAC at the time of testing and with a BAC of 80 or less at the time of driving. The defence has been used in the "bolus drinking" scenario where the accused claims to have guzzled several drinks

just before getting into their car so the alcohol was still being absorbed and, consequently, their BAC was under 80 at the time of driving. It has also been used where the driver has consumed alcohol after being stopped by the police or after a collision, supposedly to calm his nerves. It is then argued that this "intervening drink" raised the BAC post-driving and that the driver was actually under 80 at the time of driving.

The bolus drinking defence rewards drinking and dashing, with drivers gambling that they will be able to make it home before their BAC exceeds 80. That is extremely dangerous as any delay could lead to the person being over 80 while still driving. Similarly, the intervening drink, in circumstances where the person should have expected to be required to provide a breath sample, may be an attempt to obstruct justice as the court may not be able to determine beyond a reasonable doubt whether BAC at the time of driving was over 80.

Other jurisdictions have eliminated these defences in legislation by making the BAC at time of testing the offence if that testing occurs within two hours. The ATC suggested, when it appeared before the Standing Committee, that the offence be BAC of 80 at time of testing for this very reason. However, there could be circumstances where the intervening drink defence would be legitimate, for example, where the driver arrived home and takes a drink having no reason to believe that the police will arrive (as a result of a citizen report of erratic driving for example) and demand a breath sample.

Parliament in the *Tackling Violent Crime Act* has restricted the evidence that can be used to raise a reasonable doubt that the BAC as determined by the approved instrument is the BAC at time of testing by providing that consumption evidence alone is not sufficient. Parliament could, as a matter of public policy, eliminate the "bolus drinking" drinking defence and restrict the "intervening drink" defences by excluding from the calculation of BAC at time of driving, any drinking during the hour preceding driving or while driving; or after a collision, or when the driver should have expected to be required to provide a sample for analysis.

Your views are sought on eliminating the "bolus drinking" defence and restricting the alcohol consumption evidence to post driving consumption where there was no reason to anticipate a police demand for a breath sample.

DISCLOSURE REQUESTS

The right of the accused to make full answer and defence is fundamental. Therefore, the police and the prosecution must disclose all the evidence that is relevant to determining whether the accused committed the alleged offence.

In an impaired driving case where the prosecution is relying on the BAC reading, the issues at trial are:

- Was the accused in care and control of the vehicle within the three hours preceding the breath test demand?
- Did the investigating police officer have reasonable and probable grounds to demand that the accused provide a breath sample on an approved instrument?
- Were the breath tests carried out on an approved instrument?
- Was the approved instrument operated by a qualified technician?
- Did the qualified technician ensure that the approved instrument was operating properly?
- Did the qualified technician operate the approved instrument properly?
- Were there 15 minutes between breath tests?
- Were both BAC readings over 80?
- Was the lower BAC reading over 80?

In the overwhelming majority of cases, these questions can be answered by the testimony of the investigating police officer and the certificate or by the viva voce testimony of the qualified technician. For this reason, defence counsel often tries to keep the certificate out of evidence.

Until the changes in *The Tackling Violent Crime Act*, the defence could use the *Carter* or two-beer defence, to have the BAC results simply ignored in favour of the accused's testimony about how much he or she had drunk. Now, there must be evidence of AI malfunction or operator error before a calculation based on the accused's consumption is relevant. Modern AIs will abort the test if they are not within the necessary parameters in order to ensure an accurate analysis, and they also print out the necessary information regarding the test. Instrument malfunction or operator error will rarely, if ever, affect the BAC analysis and the AI will abort or print out the error.

As was pointed out in *R. v. Powichrowski*[7]:

> To have a reasonable doubt one would have to conclude that there is a reasonable possibility that scientific history was made in the testing of the defendant; that the machine passed over 50 internal checks, accurately measured the known alcohol standard and then immediately went inexplicably and unnoticeably haywire in measurement of the defendant's first sample. It then corrected itself for the second calibration test and produced the targeted result but then went inexplicably haywire again for the defendant's second test but despite the malfunction managed to give a result that was in good agreement with the first test! In my view this is fantasy, not reasonable doubt.

In response to the restrictions on the use of consumption evidence, defence counsel has been seeking access to:

- The approved instrument itself
- Software used in the approved instrument
- Cobra/Adams data
- Source codes
- Simulator certification records
- "Certificate" of Annual Maintenance
- Service records
- Usage records
- Maintenance records
- RAM printouts
- Manufacturer's Manual

These disclosure applications implicitly seek to negate the entire ATC AI evaluation and AI approval process and the procedures used to ensure that an AI is functioning properly and is operated properly. There is no reason for repeated disclosure applications regarding things that are not relevant to determining whether the instrument was operating properly at the time the test in question was taken. Typically, none of the information noted above is relevant to that enquiry.

Obviously, the standard alcohol solution test of the AI is vital. However, there are scientifically valid processes that are used to determine that a batch of standard alcohol solution is suitable for use and guidelines on how often the standard alcohol solution once opened and used in testing the AI must be changed. Disclosure should only include the records showing that the standard alcohol solution which was used was from a suitable batch and when the solution was changed.

Parliament could place an onus on the accused to establish the relevance to determining the accuracy of the analysis in question at the trial of what is being sought by way of disclosure.

There could also be a "for greater certainty" clause setting out material that is not relevant including, for example,

- information regarding the calibration and operation of the ASD. (This because the FAIL on the ASD was corroborated by the even more reliable AI readings)
- maintenance records or
- information regarding the internal workings of the AI since the ATC evaluations ensure that the internal processes produce accurate results

Your views are sought on placing limits on disclosure.

RIGHT TO COUNSEL

During the 2009 Standing Committee hearings, the issue of the right to counsel prior to providing a breath sample on an AI was raised in the Department of Justice Issues Paper. The requirement often results in significant delays particularly as the courts have imposed on the police the duty of finding counsel of choice for the driver.

The Supreme Court has upheld requiring a driver to provide a breath sample in an ASD without the result to consult counsel. Failing the ASD constitutes reasonable grounds to demand a breath sample. Parliament has made it an offence to refuse to provide the breath sample without reasonable excuse. Therefore, it is to be expected that the advice from counsel, perforce, will have to be to obey the law.

It is essential to bear in mind that BAC is a physical fact that can only be established by requiring the person to provide a breath or blood sample. ASD and AI breath samples are taken pursuant to statutory authority which has been upheld as constitutional and alcohol in the blood will disappear over time, making obtaining a sample promptly imperative. The BAC as determined by the AI is not self-incriminating in the way that a statement can be. The Supreme Court has recently considered this issue in a series of cases dealing with the exclusion of evidence:

> In most situations, statements and bodily samples raise very different considerations from the point of view of the administration of justice. Equating them under the umbrella of conscription risks erasing relevant distinctions and compromising the ultimate analysis of systemic disrepute. As Professor Paciocco has observed, "in equating intimate bodily substances with testimony we are not so much reacting to the compelled participation of the accused as we are to the violation of the privacy and dignity of the person that obtaining such evidence involves" ("Stillman, Disproportion and the Fair Trial Dichotomy under Section 24(2)", at p. 170). Nor does the taking of a bodily sample trench on the accused's autonomy in the same way as may the unlawful taking of a statement. The pre-trial right to silence under s. 7, the right against testimonial self-incrimination in s. 11(c), and the right against subsequent use of self-incriminating evidence in s. 13 have informed the treatment of statements under s. 24(2). These concepts do not apply coherently to bodily samples, which are not communicative in nature, weakening self-incrimination as the sole criterion for determining their admissibility.[8]

One option would be for the *Criminal Code* to provide that the right to counsel is postponed until after the physical evidence of the AI test has been gathered. As noted, in the USA, many states have prescribed wording that the police are to use when they demand a breath sample. The *Criminal Code* could provide such wording. Further, the *Code* could specify that any statement that was made by the accused prior to consulting counsel would be excluded from the evidence at trial unless the Crown has established that the accused was advised of his right to remain silent and had explicitly waived that right.

Another option would be for the *Code* to specify limits on the time that the accused is given for making the call to counsel and the way in which that right is to be exercised. For example, the *Code* could specify that it is sufficient for the police to have provided the accused with a phone, a list of lawyers who have made their willingness to be called at any time of day or night known to the police, a private place from which to make the call and a reasonable time (perhaps 15 minutes) to place the call. The police would not have to try to contact anyone on behalf of the accused. If the person had not made contact with a lawyer after a reasonable time, the AI breath tests would proceed.

Your views are sought on:

Eliminating the right to counsel prior to an AI test. (Any statement made prior to consulting counsel would be excluded unless this right was explicitly waived) or

Limiting the time to place the call to counsel to 15 minutes.

ISSUES ON WHICH YOUR VIEWS ARE SOUGHT.

Legislatively expressing the purposes of the transport offence legislation

Increasing penalties for repeat offenders

Making the maximum penalty for all death cases life imprisonment and 14 years for all bodily arm cases

Creating a new offence of criminal negligence simpliciter

Linking minimum fines for first impaired driving offenders to BAC

Lowering from 160 to 120 the BAC as an aggravating factor

Listing other behaviours as aggravating factors

Setting uniform minimum prohibition periods.

When an offender may drive with the use of an ignition interlock device

Setting criteria for ignition interlock devices to be used by impaired driving offenders

The role of the ATC in setting ignition interlock criteria

The Attorney General of Canada approving interlock systems for use in Canada

Random breath testing

Specifying that a court must consider the BAC result on the AI when assessing reasonable suspicion to make an ASD demand.

Specifying that where the test is beyond two hours, 5 mg will be added to the BAC for each completed half-hour

Eliminating the "bolus drinking" defence

Restricting the alcohol consumption evidence to post-driving consumption where there was no reason to anticipate a police demand for a breath sample.

Placing limits on disclosure

Eliminating the right to counsel prior to an AI test

Limiting the time to place the call to counsel to 15 minutes.

ANNEX 1

INTERNATIONAL EXPERIENCE WITH RBT

NEW ZEALAND - The introduction RBT in 1993, along with the lowering of blood alcohol limits for drivers under the age of twenty to .03, day-time speed camera enforcement and broader speed reduction campaigns, road safety advertising campaigns, is estimated to have reduced nighttime fatal and serious crashes by 22 % in 1996.
The expanded media campaign and aggressively visible RBT checkpoints while only initiated in the North Island jurisdiction, is estimated to have been responsible for decreasing night-time and fatal crashes nationally by a further 32%. Thus, the cumulative crash reduction from these three major interventions (along with the other interventions mentioned above) was 54%.

It is estimated that the program saved society more than $1 billion in 1997 (1996 dollars). From society's viewpoint, the program returned an estimated $ 26.10 per dollar invested. The government of New Zealand is estimated to have saved almost $80 million. The program returned approximately double its cost.

QUEENSLAND, AUSTRALIA - RBT was introduced in Queensland on December 1, 1988. During the first year of implementation, Queensland experienced a 19% reduction in all serious accidents (789) and a 35% reduction in all fatal accidents (194).

The long-term effects of RBT in Queensland could not be estimated at the time since the data for the years prior to 1986 was inadequate. It should be noted that the study also found an 18% reduction in fatal accidents as a result of the introduction of a .05 BAC limit and a reduction of 15% as a result of enhanced police enforcement through a "Reduce Intoxicated Driving" campaign.

TASMANIA, AUSTRALIA - RBT was introduced on January 6, 1983. During the first year of implementation, Tasmania experienced a 24 % reduction in all serious accidents. This resulted in preventing an estimated 36 accidents during this period.

VICTORIA, AUSTRALIA - RBT was introduced in Victoria in 1976 and was re-structured in 1989. In 1977, 49% of all drivers killed were found to be in excess of .05% BAC. In 1992 that figure was reduced to 21%.

WESTERN AUSTRALIA - RBT was introduced in Western Australia on October 1, 1988. During the first year of implementation, Western Australia experienced a 13 % reduction in all serious accidents. This resulted in preventing an estimated 334 accidents during this period. During the first year of implementation, Western Australia experienced a 28 % reduction in all fatal collisions (72) and a 26 % reduction in all single-vehicle night-time accidents (212). The long-term effect of RBT in Western Australia has been:

- 13 % reduction in all serious accidents.
- 28% reduction of all fatal accidents.
- 26 % reduction in single-vehicle night-time accidents.

NEW SOUTH WALES, AUSTRALIA - RBT was introduced in New South Wales on December 17, 1982. Taking into account, and thereby controlling, factors such as weather information, road usage indicators, time factors and the .05 legislation introduced in December 1980, it was found that RBT is extremely effective.

The initial effect of random breath testing on total fatal accidents was extremely marked, with a drop of 48% that was sustained for a period of 4.5 months. The initial impact on all serious accidents was a 19% decline that was sustained for a period of 15 months. The initial impact on single-vehicle night-time accidents was a 26% decline that lasted a period of 10 years.

The long term impact on all serious accidents was a range of 3-18% reduction that is estimated to have prevented 6,742 serious accidents between 1982 and 1992.
The long term impact on all fatal accidents was a range of 17-42% reduction that is estimated to have prevented 1,487 fatal accidents between 1982 and 1992. The long term impact on all serious accidents was a range of 3-26% reduction that is estimated to have prevented 3,246 accidents between 1982 and 1992.

There was an estimated 12% fewer such accidents for every 1 000 drivers tested, an effect that intensified as levels of RBT enforcement were increased. There was no discernible impact of RBT on non-alcohol related accidents.

The New South Wales program, including media publicity, cost approximately $3.5 million in 1990 Australian currency annually. The random breath testing program is estimated conservatively to save 200 lives each year, with savings to the community of at least $140 million in 1990 Australian currency each year.

IRELAND - RBT came into force in Ireland in July 2006 and was credited by the Road Safety Authority (RSA) with reducing the number of people being killed on Irish roads by almost a quarter (23%) or 80 fewer deaths recorded in the eleven month period since the introduction of RBT compared to the previous eleven month period.

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http://www.rsa.ie/NEWS/News/Mandatory_Alcohol_Testing_Producing_Reduction_in_Road_Deaths.html

[1] The Report and Response are available at: http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4004073&Language=E&Mode=1&Parl=40&Ses=2

[2] Simpliciter means there is no bodily harm or death

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

[4] (1993), 12 O.R. (3d) 90 (affirmed. [1994] 2 S.C.R. 478)

[5] *R. v. Powichrowski*, 2009 ONCJ 490

[6] See the agreed statement of facts in *R. v. Phillips*, [1988] O.J. No. 415

[7] Supra note 5

[8] *R. v. Grant*, 2009 SCC 32