February 16, 1999

Mr. John Maloney, M.P.
Chair, Standing Committee on Justice and Human Rights
House of Commons
180 Wellington St., Room 621
Ottawa, Ontario
K1A 0A6

Dear Mr. Maloney,

RE: Impaired Driving Issues Paper

The National Criminal Justice Section of the Canadian Bar Association has frequently contributed the views of its membership, which includes both Crown and defence counsel from across Canada, to the Standing Committee on Justice and Human Rights. We are pleased to have this opportunity to assist the Standing Committee in its study of the impaired driving provisions of the *Criminal Code*.

Criminal Code penalties go a long way towards reflecting societal attitudes about the seriousness of various offences. In our view, most sentences pertaining to impaired driving are adequate. By prescribing minimum punishments and an upward range of sentences, courts use their discretion to adjust sentences to properly suit the facts of each case. If circumstances require, the current provisions give the judge full authority to hand down a lengthy sentence. In our experience, current trends in sentencing offenders for serious impaired driving cases resulting in an accident, injury or death, are towards imposing significant periods of incarceration. We should not limit judicial discretion in determining these sentences.

Licence prohibitions in excess of 10 years are available for only two offences: criminal negligence causing death and manslaughter. The consequences of other related crimes, including dangerous driving causing death, impaired driving causing death and criminal negligence causing bodily harm, are also devastating. Parliament might consider whether courts should also have the discretion to impose prohibitions in excess of 10 years for those offences, if studies link prohibition with a reduction in the commission of such offences. Administrative licence suspensions now in place in most provinces should run concurrently

with any prohibition imposed by the court and should be taken into account at the time of sentence. We should also recognize that for offenders with serious substance abuse problems, increased sentences may not be the answer, as a loss of permit can provide sufficient deterrence.

Currently, there is a three year 'limit' on the length of a licence prohibition for a repeat offender. Someone convicted of impaired operation (s.253(a) *Criminal Code*) with many prior convictions can therefore receive only a maximum three year driving prohibition. We recommend expansion of the judge's discretion to prohibit someone from driving for longer periods of time, in cases of repeat offenders. We note that some provincial authorities already impose lifetime suspensions for third time offenders.

Our experience is that there is some confusion about the parameters of the limitation under Section 1 of the *Charter*, which allows some infringement of constitutional rights if reasonable and necessary for the public good, when a suspected impaired driver is stopped by police. The present jurisprudence supports this limit when it is used by police to ascertain the status or condition of the driver.[1] In addition, the approved screening device protocol clearly falls within the ambit of a reasonable limit prescribed by law to the right to counsel.[2]
However, variations across Canada on the precise contours of the Section 1 limitation exist. For example, in the absence of operative provincial legislation, can roadside sobriety tests be conducted? (British Columbia - Yes; Alberta - No). Is the police officer entitled to question the suspect in relation to status or condition and use the responses in forming grounds to demand breath samples? (Ontario - Yes; Alberta - No).

We believe that it is inappropriate for a federal law to apply differently depending upon the location of the accused. The *Criminal Code* should also be amended to clarify the scope of the Section 1 limitation on the right to counsel when police 'screen' the dangerously impaired from the innocent drinker. Should it include statutory authorization for practices such as roadside sobriety tests and questioning suspects? Should there be some sanction if the subject elects not to comply with these requests? Should Parliament implement a statutory authorization to obtain breath samples for analysis if the subject refuses?

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1 R.v. Dedman (1985), 46 C.R. (3d) 193 (S.C.C.).

2 R.v. Thomsen (1988), 63 C.R. (3d) 1 (S.C.C.).

In our view, a mandatory requirement that a sample be provided would be too intrusive. If the grounds exist (suspicion for a roadside test), then current provisions allow the necessary testing to occur. The provisions allowing a demand based on reasonable and probable grounds are constitutionally valid and are the least intrusive invasion of rights that could be sanctioned. Two hours is a sufficient period for the presumption that the driver's blood alcohol content is the same at the time of testing as it was when driving to apply, in accordance with the known science. Beyond the two hours, the Crown may still prove its case through expert evidence extrapolating the blood alcohol content back to the time of driving.

It should be clarified that compelled participation in these 'screening' processes does not amount to self-incrimination, but can only be used as grounds to obtain breath or blood samples. We also recommend that a specified time limit for administering these tests be prescribed, rather than only providing police with the vague requirement that the test be conducted "forthwith". Confusion remains over how long the police can wait for the arrival of an approved screening device.

We believe that further police powers for detection of alcohol are not needed. However, there is no *Criminal Code* provision permitting a demand for impairment from drugs alone. In our view, there should be. In developing drug testing, we urge the government to be extremely wary of the privacy concerns involved, and to use appropriate safeguards to protect those rights.

The National Criminal Justice Section does not support lowering the current test for blood alcohol level from .08. In our experience, evidence to the contrary will more readily overcome evidence of the offence at reduced levels. More charges would be laid, but then dismissed or result in acquittals, which would only further clog the justice system without accomplishing the desired objective. Instead of lowering the limit, it may be wiser to establish an administrative procedure to permit those who blow over .05 to have their licences temporarily suspended by police at the roadside, possibly for 48 to 72 hours. This could apply equally to those who refuse to comply with roadside sobriety tests or respond to questions relative to their state of sobriety.

Once bodily substances have been lawfully obtained, police should be authorized to use those substances for any testing related to status or condition. However, we do not support automatic testing of all those involved in a serious accident. Automatically testing in such situations could complicate obtaining emergency medical treatment, as well as violate the presumption of innocence. While it may be offensive to authorize police to compel production of bodily substances after serious accidents, consideration should be given to some method of authorizing police agencies to gain access to existing records in those circumstances.

Mandating an assessment for all impaired drivers would consume inordinate resources and be unworkable. Resources should be made available for a court to order an assessment for repeat offenders and those with apparent alcohol problems, however. An assessment should also be required for those convicted of the more aggravated forms of 'impaired driving'.

The penalty section for impaired driving should be amended to allow greater flexibility in sentencing, so that the punishment can be more aptly tailored to the crime. For example, Québec uses a device that can be fitted to a vehicle, allowing it to start only if the driver's breath contains no alcohol. The ignition interlock device is in use in Alberta as well where it can follow the court-ordered prohibition. Unfortunately, the device is not uniformly available, as the cost of rental, installation and monthly calibration puts it beyond the reach of many. Creative measures such as this could prevent persons from losing their livelihood in relatively less serious cases.

In our experience, graduated penalties already exist, as the fines courts impose generally reflect the blood alcohol content of the particular offender, bearing in mind the other circumstances of the case and the ability to pay. However, codified graduated penalties dependent upon blood alcohol content would be difficult to apply, as other factors, such as physical symptoms and the degree of harm caused, will also be relevant. Fairness requires that courts continue to have the flexibility to impose a sentence that reflects all the facts and the background of the accused. Blood alcohol content, in .08 cases, and the degree of alcohol-related symptoms, in impaired cases, will continue to have an impact as significant factors in sentencing.

If the goal of impaired driving legislation is to protect the public and ensure road safety, then money is more productively spent on rehabilitation and education than putting people in jail. We note that as public awareness about the consequences of drinking and driving has increased, Statistics Canada figures show that charges for impaired driving are steadily and significantly decreasing. In our view, the curative discharge provisions of the *Criminal Code* should be uniformly available in all provinces as a means of assisting persons with alcohol problems, and might be expanded to allow the courts to impose additional penalties. Currently, some provinces do not use these provisions because of insufficient resources for treatment. We also note an incongruity in the curative discharge provisions, which permit a discharge if treatment is required. Therefore, an alcoholic may benefit from this section, whereas a first offender without an alcohol problem, who commits an isolated offence in particular circumstances, may not.

In our view, there is not enough in the *Code* pertaining to treatment and rehabilitation of impaired drivers. While we recognize the devastating consequences to the victim's family, it is fair to say that impaired driving causing death or serious bodily harm is generally a

significant event in the life of the offender, as well, and something that will be with that individual for life. We believe a commitment to undergo serious treatment should be a mitigating factor in sentencing. Unlike most other crimes, a substance abuse problem is often underlying these offences. While a lenient disposition combined with treatment may be inappropriate, repeat offenders should not be disqualified from benefitting from treatment while still receiving an otherwise fit and proper sentence. In addition, the court should be authorized to compel treatment in appropriate cases.

The Section does not believe that provincial courts should have absolute jurisdiction over impaired driving offences. If the Crown must make a case for impaired driving causing death, for example, serious penalties can result. Given this possibility, the accused should have the right to a preliminary inquiry and to elect a jury trial. As 90% or more cases are now handled in provincial court in any case, no amendment is required.

Once again, we appreciate this opportunity to express our views on the subject of impaired driving to the Standing Committee on Justice and Human Rights. We trust that these comments will be helpful, and look forward to elaborating on them further in our appearance before the Committee.

Yours very truly,

Isabel J. Schurman
Chair
National Criminal Justice Section