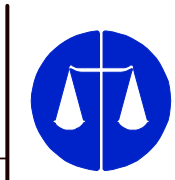

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

The Voice of the Legal Profession

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Bill C-32 – *Criminal Code* amendments (impaired driving)

NATIONAL CRIMINAL JUSTICE SECTION
Canadian Bar Association

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865 Carling Avenue, Suite 500, Ottawa, Ontario K1S 5S8
Tel/Tél: 613 237-2925 Toll free/Sans frais: 1 800 267-8860 Fax/Télécop: 613 237-0185
Home Page/Page d'accueil: http://cba.org/abc E-mail/Courriel: info@cba.org

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

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

Bill C-32 – *Criminal Code* amendments (impaired driving)

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section) appreciates the opportunity to comment on Bill C-32, *Criminal Code* amendments (impaired driving). The CBA Section members include Crown and defence lawyers from every jurisdiction in Canada.

Bill C-32 would introduce a new legislative scheme for drug impaired driving to provide police with additional investigative tools, create several new offences, change the existing penalty and driving prohibition provisions, and significantly limit the scope of applicable defences. Impaired driving, whether by drugs or alcohol, is a significant problem, and too often results in serious injury or death. Any effective legislative response must comply with the *Charter*, and result in real and demonstrated progress to deal with this serious issue.

Impaired driving is one of the most extensively litigated areas of the criminal law. Every aspect of the present legislative scheme has been subject to intense constitutional scrutiny. Anecdotal evidence suggests that impaired driving litigation accounts for 30 to 40% of the caseload in Canada's trial courts[1]. Regardless of whether or not that litigation is ultimately successful, its volume alone has enormous implications in terms of cost, delay and uncertainty in the law while cases are pending. In our view, proposals that raise new constitutional questions should be very carefully considered, and we will highlight many such questions throughout our review of Bill C-32. Any new avenues for challenge may not only undermine the effectiveness of the specific

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[1] Canadian Council of Motor Transport Administrators, "Eliminating the Impaired Driving: the Road Ahead" National Workshop Proceedings, May 2001, available at http://www.ccmta.ca/english/pdf/impaired_driving_workshop_proceedings_may01.pdf, page 55

proposals, but significantly increase both caseload and delay in trial and appellate courts across the country. All reasonable steps should be taken to avoid that result.

II. NEW INVESTIGATIVE POWERS

Bill C-32 would give police additional powers to investigate drug impaired driving. In 2003, the CBA Section responded to a similar proposal in a Justice Canada consultation document, and we again commented on the issue in response to Bill C-16 in 2005[2]. We stressed that,

> physical coordination tests and the taking of bodily samples clearly engage the constitutional interests of liberty, security of the person (section 7), the right to be secure against unreasonable search or seizure (section 8), and the right not to be arbitrarily detained (section 9). It is, therefore, essential that any proposed law operate so that detention is as brief as practical, so that dignity of a detained individual is preserved, so that an individual is compelled to participate in an investigation through participating in physical coordination tests or compelled to provide bodily samples only when the requisite constitutional standards exist, and that the privacy interests associated with the information compelled from an individual be protected[3].

Regulations accompanying new legislation would describe the nature of the qualifications and training for drug evaluation officers, physical coordination and screening tests proposed at the roadside and tests to be conducted during the evaluation, presumably at the police station. A detailed analysis of any proposed regulations is critical to assess the efficacy of any new scheme and to determine if it would survive *Charter* scrutiny. Without the accompanying regulations, we are significantly limited in our ability to comment on vital aspects of the legislative scheme.

We also reiterate our reservations[4] about the subjective interpretation of physical tests performed at the roadside, and later in the evaluation process. While not scientific experts, we are aware that proper interpretation and application of specified testing continues to be controversial. For example, a survey of scientific literature by the United States National

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2 National Criminal Justice Section, Submission on Drug Impaired Driving (Ottawa: CBA, 2003) and Submission on Bill C-16, Drug Impaired Driving (Ottawa: CBA, 2005).

3 *Ibid*, CBA Section (2005) at 3-4.

4 *Ibid.*

Highway Traffic Safety Administration commented as follows:

> The study indicated that the DREs' [Drug Recognition Experts] ability to distinguish between subjects who were impaired and subjects who were not impaired was, in the words of the authors, "moderate at best." The DREs' ability to identify the drug class causing the impairment varied from "moderate" (for alprazolam) to "lower" (for cannabis and codeine) to "not better than chance" (for amphetamine). Further, the DREs' relied on just one or two "pivotal" symptoms in making their diagnoses, rather than utilizing all of the information they had available as recommended by the DEC [Drug Evaluation and Classification] manual[5].

One way to ameliorate the dangers associated with subjective interpretation would be to require video and audio recording of the testing, both at the roadside and later in the evaluation process.

While Bill C-32 would permit recording of tests, in our view, such recording should instead be mandatory. This would enable an objective review of both the testing process and the results.

RECOMMENDATION:

The CBA Section recommends mandatory video and audio recording of tests for drug impairment, both at the roadside and later in the evaluation process.

In many jurisdictions, police forces can now routinely videotape roadside interactions[6], providing a clear, compelling and objective record. This evidence can streamline the trial process by narrowing the issues and even obviate the need for a trial altogether. Videotaped records have been recommended for other important interactions, such as recording out-of-court eyewitness identification or police interviews with suspects[7]. The need for such a record is particularly compelling where the subjective evaluation of evidence by an officer is as critical as contemplated by Bill C-32. Regulations, rather than training materials or manuals,

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5 "State of Knowledge of Drug Impaired Driving", available at http://www.nhtsa.dot.gov/PEOPLE/injury/research/StateofKnwlegeDrugs/StateofKnwlegeDrugs

D. Shinar, E.Schechtman and R.P.Compton, *Signs and symptoms predictive of drug impairment* (2000), from 15th International Conference on Alcohol, Drugs & Traffic Safety (Stockholm, Sweden: May 22-26, 2000).

6 See for example, *R. v. Quon*, [2007] Carswell Ont 1031 (Ont. C.J.), *R. v. Sorenson*, [2006] Carswell BC 1491, (B.C.Prov. Ct.), *R. v. Winzer*, [2003] Carswell Yukon 72 (Y.T.T.C.).

7 See for example the recommendations contained in the F/P/T Heads of Prosecution Committee Report of the Working Group on the Prevention of Miscarriages of Justice, Chapters 5-6, available at http://www.justice.gc.ca/en/dept/pub/hop/p6.html#s66

should establish detailed, explicit and binding guidance about the administration and interpretation of the tests, given the need to monitor compliance. This would help to ensure greater national consistency and transparency.

RECOMMENDATION:

The CBA Section recommends that given the need to monitor compliance, regulations, rather than training materials or manuals, should provide detailed, explicit and binding guidance about the proper administration and interpretation of the tests for drug impairment.

Proposed section 254(2)(a) stipulates that the physical coordination tests administered at the screening stage be "prescribed by regulation". No such restriction appears in section 254(3.1), which simply mandates that an individual submit to an evaluation as demanded by an evaluating officer. While the term "evaluating officer" is defined and proposed section 254.1(c) provides that the tests to be conducted and procedures followed during an evaluation are to be the subject of regulation, section 254.1(3.1) contains no explicit reference to the regulations. To be consistent throughout the legislative scheme, we suggest the same approach be employed in both subsections.

RECOMMENDATION:

The CBA Section recommends that consistent language referencing the regulations should be used throughout the legislative proposals.

There are also unresolved technological limitations on the accuracy and suitability of screening devices used to measure the presence or absence of several drug metabolites. For example, a recent European Union sponsored international study of saliva based roadside testing devices in Belgium, Finland, Norway, Germany, Spain and the United States concluded that none of the devices met the criteria for specificity or accuracy specified in the first phase of that study[8]. Technological limitations may have a significant impact on the ultimate efficacy and fairness of the proposed legislative scheme, not to mention its vulnerability to constitutional challenge.

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[8] Alain Verstraete and Elke Raes, *Roadside Testing Assessment Study* (ROSITA – 2) - Project Final Report (March 2006), available at http://www.rosita.org

At the roadside, threshold determinations for further investigation of drug impaired driving will depend on the subjective interpretation of physical tests. This is in contrast to the objective, approved screening devices used to investigate alcohol impairment. In our view, subjective evidence based on an individual officer's interpretation may be less compelling than instrument based testing, and would consume significantly more trial time to adduce and examine.

Bill C-32 may authorize more invasive or intrusive testing than presently used for alcohol impairment. For example, the techniques for drug evaluation described in Justice Canada's 2003 consultation document include physical examinations to check vital signs, pulse, blood pressure, muscle tone and an examination for injection sites[9]. The potential intrusiveness of such tests has significant *Charter* implications. Again, a careful *Charter* analysis is impossible without examining the proposed regulations clarifying the exact nature of the tests and the procedures to be used.

For alcohol testing, section 254(3)(b) requires that an officer have reasonable and probable grounds to believe that, by reason of any physical condition, the individual may either be incapable of providing a breath sample, or it would be impracticable to do so before a blood sample can be taken. However, the proposed requirement for a blood sample pursuant to 254(3.3)(b) of Bill C-32 contains no such limitation.

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The CBA Section shares concerns about drug-impaired driving, and recognizes that objective and scientifically credible evidence is required to enforce existing prohibitions. However, the subjective nature of many of the proposed physical tests and evaluations and the significant technological limitations of existing screening devices and instruments need to be thoroughly addressed. These factors would pose serious constraints on the effectiveness of the proposed measures for investigating drug impaired driving. Coupled with the need for careful constitutional scrutiny of the proposed testing qualifications, regimes and protocols as may be developed in subsequent regulations, we recommend a cautious approach to new legislative proposals. A new law that does not materially advance the legitimate objective of road safety but

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[9] *Supra*, note 2.

imposes significant and lasting burdens on courts across the country would clearly not be a positive development.

RECOMMENDATION

The CBA Section recommends careful review of any new legislative proposals pertaining to impaired driving, to ensure that the legitimate objective of road safety is advanced while new areas for litigation and the ensuing significant and lasting burdens on courts across the country are minimized.

III. NEW OFFENCES

A. Unlawful Possession of Drugs in a Motor Vehicle (s.253.1)

Bill C-32 would create a new offence prohibiting the unlawful possession of a drug in any part of a specified vehicle. Unlike analogous sections in provincial liquor or highway traffic legislation, there is no requirement that the prohibited substance be in the passenger area of the vehicle or otherwise accessible to the driver or passenger[10]. Without that linkage, it is difficult to understand the relationship between this provision and the existing prohibition for possessing illegal drugs in section 4 of the *Controlled Drugs and Substances Act* (CDSA). Depending on the nature of the substance in question, penalties under the CDSA could actually be higher than those proposed in this Bill — maximum periods of incarceration ranging from six months to seven years, contrasting with a proposed maximum period of incarceration of not more than five years, or as an offence punishable by summary conviction.

Amendments to section 259(1) and (1.1) propose a mandatory driving prohibition for this offence. A driving prohibition where the elements of the proposed offence do not include language similar to that used for the provincial offences cited above would be problematic. In the absence of an element of the offence giving rise to an increased risk of impaired driving, such as easy access to the unlawful substance by a driver or passenger, the rationale for a driving prohibition is unclear.

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[10] See for example *Liquor License Act,* R.S.O. 1990, c. L-19, s. 32; *Liquor Control Act,* R.S.M. 1988, c. L 160, s.117.

In addition, the proposed offence provides a lower penalty structure than available for the applicable possession offences under the CDSA. Further, transportation of such substances in a vehicle may be regarded as an aggravating factor in appropriate circumstances[11]. For these reasons, we are of the view that the proposed new offence would not assist in combating drug impaired driving, and may instead undermine the efficacy of existing provisions in relation to drug possession.

RECOMMENDATION

The CBA Section recommends that the new offence for unlawful possession of drugs in a motor vehicle be deleted from Bill C-32.

B. BAC over .08 Causing Death or Bodily Harm

The Bill proposes two new offences for operating a motor or other specified vehicle with a blood alcohol level over the proscribed limit and causing an accident resulting in bodily harm or death. The maximum penalties for these offences would correspond to existing penalties for impaired driving causing bodily harm or death.

We have two concerns about the relationship of these offences to the current offences of the impaired driving causing bodily harm or death in sections 255(2) and (3). Under the current provisions, the element of causation has been interpreted as requiring that alcohol impairment must be a contributing cause in the resulting bodily harm or death. This causal relationship has been described in a variety of ways, including that the impaired driving was "a real factor" in the bodily harm or death, or that it be "at least a contributing cause outside the *de minimus* range"[12]. Suggested jury instructions for these offences describe this element as "at least a contributing cause of what happened... it must be more than an insignificant or trivial cause"[13].

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[11] Similar reservations were expressed at the committee hearings in relation to this proposal in Bill C-16 on November 3, 2005.

[12] *R. v. Ewart* (1989), 53 C.C.C. (3d) 153 (Alta. C.A.), *R. v. Andrew* (1994), 91 C.C.C. (3d) 97 (B.C.C.A.), *R. v. Laprise* (1996), 113 C.C.C. (3d) 97 (Que.C.A.).

[13] Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, Final 253(B) at 566-7.

Evidence of elevated blood alcohol readings alone, without evidence linking those readings to the actual cause of the injury or death, has been insufficient[14].

In contrast, the proposed offences appear to provide the same penalty as for impaired driving causing death or bodily harm where there is *no* evidence that the elevated blood alcohol levels actually contributed to the harm or death. In our view, such an approach is problematic.

In one case, an individual operating a motor vehicle with an elevated blood alcohol level tragically struck and killed an impaired pedestrian, who happened to be wearing dark clothing and lying in the middle of the road. The accused was convicted of the section 253(b) offence, but acquitted of impaired driving causing death[15], as even a sober driver would not have been able to avoid the pedestrian. If the proposed offence under section 255(2.2) would result in subjecting this driver to the same maximum punishment as a driver whose impairment is a contributing cause of death or bodily harm, it may be vulnerable to a *Charter* challenge, as the degree of moral fault or blameworthiness is clearly not equivalent. While an elevated penalty may be appropriate for an impaired driver who causes an accident where death or bodily harm results, an equivalent maximum penalty to that of a driver whose alcohol impairment plays a causative role in the death or bodily harm could well be disproportionate.

Further, in cases where there are elevated blood alcohol readings, the new offences will make little, if any, difference. There is a consensus among expert witnesses that impairment occurs for all individuals at blood alcohol levels over 100 mg in 100 mL of blood. At these levels, absent unusual circumstances, causation will be proven. As a result, the new offences would have little practical impact in such cases.

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14 See for example, *R. v. Fisher* (1992), 13 C.R. (4th) 222 (B.C.C.A.).

15 *R. v. Giardin*, [1998] Carswell Ont 3136 (Ont. C.J.).

C. Refusal in Cases Involving Death or Bodily Harm

The Bill proposes two new offences if a person unlawfully refuses to provide a breath or blood sample in cases where the driver "*knows or ought to have known"* that the operation of the motor or other vehicle caused an accident resulting in death or bodily harm. The penalties for these offences would be equivalent to those for the existing offences of impaired driving causing bodily harm or death, and the proposed offences described above.

This proposal appears to be aimed at removing any incentive for unlawfully refusing to provide a sample in cases of death or bodily harm. The proposed approach must be considered in light of the existing adverse inference in such circumstances under section 258(3) of the *Criminal Code*. We suggest that there may be more proportionate responses to this problem, such as strengthening the inference against an accused refusing to provide a sample or increasing available penalties. However, equating the maximum penalties available for refusal with those where impairment actually plays a causative role in death or bodily harm may well elicit constitutional scrutiny.

Finally, we are concerned about the proposed mental element in the language, "knows *or ought to have known"*. The use of an objective mental element has already been the subject of extensive *Charter* challenge elsewhere in the *Criminal Code*. For example, use of this phrase in sections 21(2), and 22(2) where parties form a common intention to commit an offence, or who counsel the commission of an offence, was subject to challenge. In *R. v. Logan*, the Supreme Court of Canada declared that this phrase was inoperative in relation to offences with a constitutionally mandated subjective mental element[16]. We are of the view that the terminology proposed in Bill C-32 is likely to elicit *Charter* challenge, especially in situations where the parties may be injured or in shock as a result of the accident. While not every offence has a constitutionally required subjective mental element, it may be required in light of the proposed maximum penalty of life imprisonment.

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16 *R. v. Logan*, [1990] 2.S.C.R. 731, paras 17-34.

D. Increased Penalties

Bill C-32 would increase the penalties for driving offences, including the mandatory minimum penalties for several offences. The CBA Section has frequently disputed the efficacy of mandatory minimum penalties. In our experience, trial judges are best placed to fashion appropriate sentences considering all circumstances at hand[17]. Requiring judges to impose mandatory minimum sentences without allowing the exercise of judicial discretion to balance all sentencing objectives in each individual case does not, in our view, promote justice, fairness or ultimately, public respect for the administration of justice.

IV. NEW RESTRICTIONS ON DEFENCES

Various evidentiary presumptions are used to assist in prosecuting cases of impaired driving and driving with a blood alcohol level over the proscribed limit. Since 1959, these presumptions, with varying formulations, have been used to bridge evidentiary gaps or other difficulties. In *R. v. Boucher*, the Supreme Court of Canada recently summarized the existing presumptions. To paraphrase:

a. According to section 258(1)(g), where breath samples are taken pursuant to a demand under section 254(3), it is to be presumed that the results of the analysis of these samples are an accurate determination of the accused person's blood alcohol level at the time of testing.

b. Section 258(1)(c) establishes that the accused person's blood alcohol level at the time of apprehension is the same as the level at the time of testing.

c. Pursuant to section 258(1)(d.1) it is presumed that if the blood alcohol level exceeds 80 mg at the time of testing, it also exceeds 80 mg at the time of the alleged offence. The majority judgment of the Court described this as reinforcing the presumption of identity[18].

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17 See, for example, National Criminal Justice Section, Submission on Bill C-10, *Criminal Code* amendments (mandatory minimum sentences for firearm offences) (Ottawa: CBA, 2006).

18 *R. v. Boucher*, [2005] S.C.C. 72 at para. 22.

Each of these presumptions has been the subject of thorough constitutional scrutiny[19]. The function and scope of what are referred to as “evidence to the contrary" defences has been a significant feature in that analysis. The interpretation and scope of these presumptions is presently before the Supreme Court of Canada[20].

A 1999 report from the Standing Committee on Justice and Human Rights concluded:

> [It was] suggested that Parliament might consider placing limits on the interpretation of "evidence to the contrary," to eliminate some of the more "spurious arguments" that can arise under that heading.
>
> On the other hand, the Criminal Lawyers Association of Ontario pointed out that it would hardly be within the capability of an accused person to demonstrate, several months after the fact, the accuracy or inaccuracy of a machine that is in the possession of the police. That argument is particularly persuasive in light of the fact that Criminal Code sections mandating the provision of a breath sample to the accused have never been proclaimed in force, due to the lack of an "approved container" for the purpose. This is in contrast to the presumption of accuracy for a blood alcohol reading, which requires that an additional sample be made available so that the accused can conduct his or her own analysis.
>
> The Committee understands the frustration expressed by justice system personnel over time-consuming defenses that, at least on the surface, may appear frivolous. However, given that the accused would have no effective means of checking the accuracy of a breath analysis machine, the Committee agrees that limiting the interpretation of "evidence to the contrary" in such a manner as recommended could effectively amount to the creation of an absolute liability criminal offence. Such a result would run the risk of interfering with an accused person's rights guaranteed by the Canadian Charter of Rights and Freedoms. In present circumstances, therefore, the Committee does not support amendments to the Criminal Code that would limit the interpretation of "evidence to the contrary"[21].

The CBA Section fully agrees with this conclusion, and suggests that it should serve as a powerful indication of the magnitude of constitutional risk involved in limiting the nature and scope of these defences.

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19 See for example, *R. v. Gilbert*, [1994] Carswell Ont 44 (Ont.C.A.), *R. v. Phillips* , [1988] Carswell Ont 65, *R. v. Ballem*, [1990] Carswell PEI 1 (P.E.I.S.C.C.A.).

20 *R. v. Gibson*, [2006] S.C.C.A. No. 274, [2006] N.S.J. No. 178, *R. v. MacDonald*, [2006] S.C.C.A. No. 338, [2006] A.J. No. 706 (Alta. C.A.) These appeals are to be heard jointly. They are tentatively scheduled for October 15, 2007.

21 Report of the Standing Committee on Justice and Human Rights, *Toward Eliminating Impaired Driving* (Ottawa: May 1999).

As noted, the present provisions contain two related temporal presumptions, that the lowest reading of blood alcohol level at the time of testing is identical to that level at the time of driving, and that if the blood alcohol level was over the legal limit at the time of testing, it was also over that limit at the time of driving. Each of these presumptions applies either in the "absence of evidence to the contrary" or in the "absence of evidence tending to show" that the results were different, or under the legal limit. These exceptions are often referred to as "evidence to the contrary".

Bill C-32 would have the effect of limiting the scope of "evidence to the contrary" in at least two ways. First, the proposed changes to sections 258(1)(c), and 258(1)(d) define evidence to the contrary as evidence tending to show *both* that the approved instrument was malfunctioning or was operated improperly (for breath samples), or that the analysis was performed improperly (for blood samples) *and* that the concentration of alcohol in the accused blood would not have exceeded the legal limit at the time of the offence.

Second, the proposed section 258(1)(d.01) defines evidence tending to show that the approved instrument was malfunctioning, was operated improperly, or the blood analysis was performed improperly as excluding evidence of the amount of alcohol consumed by an accused, the rate at which the accused absorbed and eliminated alcohol and any calculations based on evidence.

The addition of this new first element, relating to instrument malfunction, operator error, or improper analysis is problematic. First, as noted by this Committee's report, it would be particularly difficult for an accused to raise a reasonable doubt based on instrument malfunction given that the instrument is in custody of the authorities. It would not be feasible to propose an application or attempt by an accused to gain access to the instrument for anything approaching contemporaneous testing.

Again, there are advantages in a complete audio and video recording of the calibration, testing and use of the approved instrument. This contemporaneous record would have all the advantages noted in relation to testing for drug impairment. A mandatory protocol of approved instrument maintenance, testing and operation, and the evidentiary consequences of failing to comply with the protocol should be established.

RECOMMENDATION

The CBA Section recommends that a mandatory protocol of approved instrument maintenance, testing, and operation be established, including the evidentiary consequences of failing to comply with that protocol.

Given the increased importance of demonstrating instrument malfunction or operator error under Bill C-32, a mandatory protocol would give an appropriately transparent and consistent mechanism to enhance the accuracy and reliability of forensic alcohol testing. This would differ from the present recommended protocols established by the Forensic Science Alcohol Test Committee[22].

Second, the relationship between the proposed changes to sections 258(1)(c) and 258(1)(d.1) is unclear, and could potentially give rise to contradictory results. Currently, there is no potential incongruity between these sections with respect to evidence to the contrary. The relevant portion of sections 258(1)(c), and (d.1) simply refer to a presumption "in the absence of evidence to the contrary" or "in the absence of evidence tending to show that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed did not exceed [the legal limit]". The Supreme Court of Canada has described the effect of section 258(1)(d.1) as "expanding the presumption of identity... not to change the type of evidence needed to rebut presumption ... but to reinforce [it]"[23].

However, the proposed changes to sections 258(1)(c) and (d) in Bill C-32 would require evidence tending to show machine malfunction, operator or analytical error. Proposed subsection (d.1) does not refer to this element, but rather requires evidence tending to show that the accused's consumption of alcohol was consistent both with a concentration of alcohol in the blood not exceeding the legal limit at the time of the offence and with the concentration of blood alcohol as revealed in the analysis of breath or blood.

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22 "Recommended Standards and Procedures of the Canadian Society of Forensic Science Alcohol Test Committee" (2003) 3-36 Can. Soc. Forens. Sci. J. 101 at 101–127.

23 *Boucher, supra*, note 18 at para. 22.

The relationship between these two new provisions is unclear. Both relate to a similar temporal presumption – either that the blood alcohol at the time of driving is the same as the lowest shown on the certificate (section 258(1)(c)), or that if the blood alcohol level exceeded the legal limit at the time of testing, it also exceeded that limit at the time of the alleged offence. While section 258(1)(c) refers to breath samples, section 258(1)(d) to blood, and the proposed section 258(1)(d.1) to both, the requirements for evidence to the contrary in relation to the temporal presumptions are different.

The following example may highlight one of the difficulties that this may cause. An accused consumes a large amount of alcohol immediately prior to driving. He is arrested very shortly thereafter, before he has metabolized the alcohol. He is under the legal limit at the time of driving. However, he is absorbing the alcohol, and by the time he is tested his blood alcohol level is over the legal limit. This evidence appears to displace the presumption articulated in proposed section 258(1)(d.1). However, it would not displace the presumption in either section 258(1)(c), or (d) in the absence of additional evidence showing instrument, operator or analytical error.

This example may give rise to a further problem if proposed sections 258(1)(c) or (d) were clarified to prevail over the related provisions in section 258(1)(d.1). In that instance, an accused could raise a reasonable doubt that blood alcohol level was over the legal limit at the time of driving, but still be convicted in the absence of evidence tending to show instrument or operator error. This may cause constitutional problems, particularly as the doubt arises independent of any concern or issue about the operation of the approved instrument or analysis. While previous versions of these presumptions have been found constitutionally sound, it is far from clear that that would be the result in the circumstances described, given reasonable doubt as to impairment at the actual time of driving.

Finally, the impact of the proposed changes on the status of the remaining presumption of accuracy as described by the Supreme Court of Canada in *R. v. Boucher* is unclear. That presumption combines the effect of section 258(1)(g) of the *Criminal Code* and section 25 of the *Interpretation Act*. The presumption – that the results of the analysis of samples are an accurate determination of blood alcohol level at the time of testing – has an obvious relationship to the issues of instrument malfunction or operator error. While proposed section 258(1)(d.01) excludes certain kinds of evidence relating to demonstrating instrument malfunction or operator error, the Bill does not clarify the relationship between this provision and the presumption of accuracy arising from the combined effect of the sections referred to above.

V. CONCLUSION

We know from daily experience that the impaired driving sections are complex, and among the most heavily litigated in the *Criminal Code*. This area of the law consumes a disproportionate amount of court time and justice system resources. While an impaired driving case winds its way through the appellate courts, related cases are often affected by the legal uncertainty as a result. The interrelationships between the interpretation and operation of all aspects of any new legislative proposals should be thoroughly scrutinized to avoid exacerbating this existing reality. Given that this Committee itself expressed very similar concerns as recently as 1999, we urge very careful review of Bill C-32.

In our view, there are significant and palpable *Charter* concerns in the provisions of Bill C-32. Thorough discussion and debate should be permitted to clarify the constitutional status of the Bill's proposals. Every effort should be made to avoid a torrent of litigation and the consequent significant negative impact on the administration of criminal justice, as well as vastly increased demands on court resources that we anticipate should Bill C-32 be passed in its current form.