Impaired Driving

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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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.

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I. INTRODUCTION

The National Criminal Justice Section (CBA Section) consists of a balance of Crown and defence lawyers from every part of Canada. The CBA Section appreciates the opportunity to provide our views on Justice Canada's February 2010 Discussion Paper, "Modernizing the Transportation Provisions of the Criminal Code" (Discussion Paper). Our response is organized according to the headings in the Discussion Paper, with the specific topic for comment in bold under each heading.

II. GENERAL CONCERNS

The CBA Section has urged a particularly cautious approach to legislative change to the impaired driving provisions of the *Criminal Code*. Based on our daily experience as lawyers in criminal courts across the country, we know that those provisions are amongst the most heavily litigated of any *Code* provisions, and already consume a disproportionate amount of court time. Any legislative amendments are likely to attract the same constitutional scrutiny and justice system resources.

We are particularly concerned that some proposals in the Discussion Paper would infringe basic constitutional rights in ways previously determined not to be legitimate, prudent or defensible. This applies especially to proposals to limit the right to counsel, the right to full answer and defence (through limits on disclosure), and to a somewhat lesser degree, to implement random breath testing. While the Supreme Court of Canada has allowed some violation of *Charter* guarantees in the area of impaired driving based on a section 1 analysis, we believe that these proposals go significantly further than has been accepted in existing jurisprudence. The CBA Section provides more detailed comments below, but we wish to state at the outset our general observation and concern about setting out on a path of eroding constitutional guarantees.

III. OFFENCES

Reduce the number of transportation offences to seven

The CBA Section recognizes the potential advantages to simplifying the *Criminal Code* by streamlining the number of transportation offences to seven. However, the current offences have been tested by the courts, resulting in established precedents and a degree of certainty in the law. Any changes will mean renewed litigation, with corresponding demands on resources, so the proposal may not result in more efficient trials or quicker resolution of cases.

We note that reducing the number of offences could impact the electronic record-keeping by the Canadian Police Information Centre (CPIC). Unless CPIC is changed to reflect the aspects of "cause death" or "bodily harm", more serious offences might not be reflected for the purpose of criminal record searches or when applying for pardons.

Setting the criminal BAC offence at 80

The proposal to reword the "over 80" provisions to state "equal to or exceeding 80" seems intended to address the outcome of "rounding down" BAC results in some jurisdictions. Rounding down is sometimes done by the measurement instrument internally, without a technician even knowing the actual BAC, which is presumably what the Discussion Paper means by saying that instruments "report results conservatively." In addition, every instrument will have some margin of error, which is also factored into the decision of whether to proceed with a prosecution.

Different provinces have difference practices. Quebec, for example, does not round down at all. New Brunswick does, so even a person with a BAC of 99 might not be prosecuted. First, the BAC would be rounded down to 90. Then, the BAC would be considered as actually 80, to allow a 10 point margin of error in the instrument. As the current law requires a BAC of "over 80", the Crown would likely not proceed based on the final calculation of exactly 80. The proposed change would address this situation. Certainly, greater consistency across the country is desirable, but we suggest independent study documenting the extent of this problem is required before moving forward.

IV. PENALTIES

Increase penalties for repeat offenders

Linking minimum fines for first impaired driving offenders to BAC

The CBA has supported lengthy periods of incarceration and license suspension for impaired driving, in appropriate cases.[1] However, we have consistently opposed mandatory minimum sentences, as they result in numerous inequities in the justice system by restricting judicial discretion to consider the individual circumstances of each case.[2] We do not believe they should be expanded.

On the specific recommendation of imposing minimum financial penalties (between $1000-$2000) for first time offenders depending on BAC, we note that minimum fines work best on the average person, who needs a drivers licence to work but also feels the pinch of a $1000 fine. In general, we note that a system of fines can also produce inequities. The same fine will have a harsher impact on low-income people, including their families, and a less pronounced impact on high-income people. Those convicted of impaired driving offences are already subject to a minimum fine of $1000. The CBA Section is opposed to rendering even more severe the system of minimum fines for first time offenders, based on tiered BAC.

Create a new offence of criminal negligence *simpliciter*

New offences, including a new indictable offence of criminal negligence *simpliciter* are unnecessary. The Crown has the option of proceeding by indictment (thereby exposing the accused to a greater penalty) in any dangerous driving case. The present provisions of the *Code* are more than adequate to deal with the danger caused by serious misconduct in driving.

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1 See, CBA Resolution 83-01-A, for example.

2 Mandatory minimum sentences can lead to simply warehousing people, with multiple negative consequences to them, their families and their communities. The personal, economic, social impacts can be grossly disproportionate to the gravity of the offence, negatively impacting the reputation of the administration of justice. On the other hand, when sentencing judges use discretion, they can design an individualized response based on the circumstances of each offence, offender and the relevant community interests. Certain offences might begin with a presumption as to sentence, or ultimately result in sentences that will be equivalent or greater than the existing or suggested mandatory minimums, but allowing for judicial discretion can ensure that is based on the right response to the particular case.

Lowering from 160 to 120 the BAC as an aggravating factor

Listing other behaviours as aggravating

The CBA Section does not support adding aggravating factors that must be considered in sentencing, again tending to limit judicial discretion. Judges are capable of recognizing aggravating factors and do so on a daily basis. Permitting flexibility and discretion to judges leaves a wide range of possible factors for consideration by judges, based on the evidence and circumstances of each individual case.

In our view, a suitable sentencing regime ought also to provide for curative treatment discharge, to take into account the facts and circumstances of the offence, the offender and long-term protection of society.

V. DRIVING PROHIBITIONS

Minimum prohibition periods

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

Our comments about minimum fines or mandatory periods of incarceration for more serious driving offences apply equally to mandatory minimum driving prohibitions. Mandatory minimum prohibitions can also fail to consider variations in the circumstances of offences and offenders. There can be wide discrepancies in a case; important factors include the BAC, manner of driving, impact on employment, acceptance of responsibility, steps taken at rehabilitation and the impact of driving prohibitions on offenders in cities versus rural or remote communities.

Discretionary driving prohibitions would permit proper balancing of the circumstances of the offence, interests of justice and protection of the public. A nation-wide alcohol ignition interlock device program would go a long way to addressing potential injustices from mandatory driving prohibitions. We urge the federal government to work with the provinces and territories to coordinate implementation of a national ignition interlock program.

VI. INVESTIGATORY POWERS

Random Breath Testing

The CBA Section believes that the present legislative powers for police to deal with drinking and driving are adequate. What is required to make our streets and highways safer are additional resources for police forces. In our view, random breath testing (RBT) runs the risk

of spawning significant litigation under the *Charter* and using system resources without significant result. We recognize that the SCC has consistently upheld some infringement of the *Charter* to combat impaired driving, using a section 1 analysis in the interest of promoting highway safety.[3] However, this proposal may go too far. Under *R. v. Oakes*, a law must be narrowly circumscribed to achieve its goals but also minimize the impact on the *Charter* right it is infringing.[4]

> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd*., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. *Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".*[5] (emphasis added)

Currently, an officer need only suspect that a person has operated a motor vehicle within the preceding three hours with alcohol in his or her body to make an Approved Screening Device (ASD) demand. Further, the Ontario Court of Appeal has held that a smell of alcohol alone is sufficient to form these grounds, and an officer need not believe that a driver has committed an offence to make the demand.[6]

> The trial judge accepted the officer's evidence that she smelled alcohol on the respondent's breath. This observation led her to suspect that the respondent had alcohol in his body and she made the ALERT demand accordingly. An officer may make an ALERT demand where she reasonably suspects that a person who is operating a motor vehicle has alcohol in his or her body (s. 254(2) of the *Criminal Code*). There need only be a reasonable suspicion and that reasonable suspicion need only relate to the existence of alcohol in the body. The officer does not have to believe that the accused has committed any crime. We see no need to put a gloss on the words of s. 254(2). The fact that there may be an explanation for the smell of

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3 *R v. Hufsky, R v. Ladouceur, R v. Wilson, R v. Dedman*. However, clear limits have also been established (see, *R v. Mellenthin*).

4 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.) at para. 70.

5 *R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.) at para. 70.

6 *R. v. Lindsay* (1999), 150 C.C.C. 3d 159 (Ont. CA.) at para 2.

> alcohol does not take away from the fact that there exists a reasonable suspicion within the meaning of the section.[7]

This low threshold of suspicion for detaining a driver[8], denying the right to counsel and demanding a breath sample (subject to prosecution for failing to comply), has been acknowledged to infringe the *Charter*. Still, it has been upheld as a justifiable limit on the right under section 1.[9]

In *Ladouceur,* the Court held to the effect:

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

In contrast, the vast majority of those subjected to the RBT demand as proposed in the Discussion Paper would be law-abiding users of the highway. Stopping the occasional driver to make such a demand only if the requisite suspicion exists is far different than setting up a roadside check point where motorists might be simply lined up to blow into the ASD. By moving to a purely random test and removing even the minimal requirement that an officer must first have a suspicion (fulfilled simply by noting the smell of alcohol), we believe that the new provisions would not conform to the minimal impairment and the proportionality components of the *Oakes* test.[10] For this reason, we believe that random breath testing as a general screening tool would be unwise and impractical, given the constitutional issues it would raise.

When collisions involve bodily harm and death, there will be increased jeopardy to the accused upon a finding of guilt. We question whether courts might be even more likely to find that a random test, without any suspicion that there was alcohol in the driver's body, would offend the minimal impairment and proportionality components of the *Oakes* test.

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7 *R. v. Lindsay* (1999), 150 C.C.C. 3d 159 (Ont. CA.) at para 2.

8 *R. v. A.M.*, 2008 S.C.C. 19.

9 *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411 (S.C.C).

10 *Ibid.*

ASD demands can be made up to three hours after a driver has relinquished care and control of a motor vehicle, giving police three hours from the time of the accident to determine who the driver was in cases where there are multiple possibilities. Authorizing multiple random breath tests would be unlikely, in our view, to "minimally impair" the rights of those involved.

We have previously stressed[11] that a cautious approach to legislative change is critical for the impaired driving sections of the *Code*, given the amount of litigation those sections have and will likely continue to attract. Any changes will involve years of litigation as decisions make their way through the courts in various provinces. Until Courts of Appeal rule on the provisions, there is also likely to be significant variation in the lower courts' decisions on these cases. Even after appellate rulings, there will be variations between jurisdictions on the legality of the provisions. The costs of litigating the appeals related to RBT through various levels of court will be significant, as will the impact on the administration of justice.

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

The CBA Section does not support this recommendation. Relying on the results of the Approved Instrument could be considered tantamount to "boot-strapping", a term coined by the SCC in *R. v. Boucher*.[12] The CBA Section does not support requiring a court to consider the BAC result on the Approved Instrument when assessing the officer's reasonable suspicion to make an ASD demand.

VII. PROOF OF ALCOHOL CONCENTRATION

Eliminating time limit for the presumption of identity by specifying that where test is beyond two hours, 5 mg will be added to the BAC for each completed half-hour

We do not recommend a change to the time limit for the presumption of identity. This presumption eliminates the need for the Crown to call an expert toxicologist when the conditions set out in section 258(1)(c) of the *Code* are present. Where they are not, the *Criminal Code* already enables the Crown to adduce scientific evidence without calling a toxicologist under section 657.3. Leave to cross-examine the expert must be sought from the

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11 See, for example, *Bill C-32, Impaired Driving* (Ottawa: CBA, 2007) and *Submission on Bill C-16, Drug Impaired Driving* (Ottawa: CBA, 2005).

12 2005, 202 C.C.C. (3d) 34 (S.C.C.).

trial judge. As gate keepers of the evidence, trial judges are in a position to determine when it will be necessary to call a toxicologist. We do not believe that the legislation should simply eliminate the need to call an expert.

Eliminating the bolus or intervening drinking defences

While the CBA Section takes drinking and driving very seriously, we believe that the bolus drinking defence should remain available to ensure the law targets only those actually driving while impaired. An accused relying on this defence would still have to discharge an evidentiary burden to show bolus drinking and judges would still have to assess the veracity of witnesses in determining whether, at the end of the day, the totality of the evidence raises a reasonable doubt. Judges would certainly reject the defence if there is no air of reality to it.

If there is evidence that an accused engaged in post-offence drinking only to thwart the course of justice, the *Criminal Code* provides an offence under section 139, obstruction of justice. Rather than risk criminalizing legal drinking, that offence should be charged where an accused willfully engaged in behavior to skew breath test results.

VIII. DISCLOSURE REQUESTS

Placing limits on the right to disclosure.

As stated in our general concerns at the beginning of this submission, the CBA Section believes that there is no justification for limiting disclosure. The right to full answer and defence is fundamental to our justice system, and disclosure is an essential part of this right. We strongly oppose any erosion of the right to full disclosure.

In *R. v. Stinchcombe*[13], Sopinka, J. said that the arguments in favour of a duty to disclose all relevant information are "overwhelming" and

> the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to ensure that justice is done.[14]

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13 (1991) 68 C.C.C. (3d) 1 (S.C.C.).

14 *Ibid.* at 7.

This is the appropriate standard in dealing with disclosure demands. Further, good faith and high professional ethical standards in making and fulfilling disclosure demands are required and are essential under *Codes of Professional Conduct*, for both Crown and defence.

A person is not entitled to each and every piece of possibly or tangentially relevant disclosure. The Crown is not required to produce that which is irrelevant, nor is the defence entitled to make overly expansive demands.[15] We do not see a general problem of undue demands being placed on the Crown as a tactic to have cases dismissed, which tactic would undoubtedly fail in any case.[16] If the Crown does not produce requested disclosure, the defence can bring a motion to a court to order compliance, in which case defence will need to show that the requested materials are likely relevant to an issue in the case.[17] Only if that standard is met will a court make an order against the Crown.

The two types of drinking and driving offences are quite different, requiring different disclosure. An impaired driving, or care or control charge will usually turn on the direct observations of witnesses. For example, a police officer who stopped a vehicle will testify that the accused smelled of alcohol, was unsteady on his feet, had slurred speech and so on. There is no need for scientific evidence as these cases are straightforward. They present minimal disclosure demands.

"Over 80" cases are more demanding. Defence lawyers have been forced to seek additional disclosure precisely because of recent amendments that require the accused to prove a machine was faulty and limit what evidence could be used to point to machine error. Under the old provisions, the defence to "over 80" charges relied on the evidence of the accused and corroborating witnesses or documents plus a toxicologist to calculate the BAC of the accused at the time of driving. This did not require exacting disclosure about the approved instrument, although that was sometimes done. Experience demonstrates that the defence was advanced

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15 *R. v. Kovacs-Tatar*, 2004 CanLii 42923 (Ont. C.A.); *R. v. Girimonte*, (1997) 121 C.C.C. (3d) 33 (Ont. C.A.).

16 See for example *R. v. Bjelland*, 2009 S.C.C. 38 in regard to remedies for late disclosure.

17 *R. v. McNeil*, [2009] S.C.C. 3.

and the defence toxicologist usually conceded that the approved instrument was reliable. It did not place special disclosure demands on the Crown.[18]

Courts and appellate courts determine what is and is not relevant in terms of disclosure. The CBA Section opposes any amendments designed to limit disclosure. Based on the impact of recent amendments to the *Code*, and the new burden on accused persons wishing to present a defence to "over 80" charges, any attempt to limit disclosure is likely to spawn more litigation and use more justice system resources. Even more important, it would limit the constitutional right to full answer and defence.

IX. RIGHT TO COUNSEL

Eliminating the right to counsel prior to an AI

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

Like the right to full answer and defence, the right to counsel is fundamental to our justice system. The CBA Section does not support limiting the right to counsel as proposed. In our view, no narrowing of the right to counsel prior to the AI is justifiable.

While time pressures may be a concern, duty counsel are not always able to call back immediately. Lawyers must be able to inform themselves and fully advise their clients without time constraints. The right to counsel is more important than rushing a test. Any limit on the right to counsel before the AI could be expected to be subject to significant *Charter* scrutiny, as the result of the AI will appear on the certificate used as evidence against the accused. As self-incriminatory evidence that the state can compel from the accused, it is particularly essential that all constitutional safeguards, including the right to counsel, remain fully available.

The discussion paper seems to justify the erosion of the right to counsel on the fact that the only advice that counsel can give when called prior to an AI test is to comply with the demand. This oversimplifies the role and importance of counsel. For example, a suspect being detained

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[18] See *R. v. Gubins*, 2009 ON.C.H.J. 80 where Pringle, J. ordered disclosure of approved instrument calibration records and maintenance logs, which were described as readily available, due to the need to focus on the approved instrument as a potential source of error because of the legislative amendments. These records were described by the Alcohol Test Committee as essential to the integrity of the breath testing program and the Centre for Forensic Sciences recognized them as having evidentiary value. This recognition appears to be contrary to the discussion paper statement that certain disclosure demands were simply not relevant to the working of the machine.

by the police is entitled to consult counsel to be in a position to fully understand the legal context of the situation, including the nature of the potential charges as well as the jeopardy he or she is facing. Counsels' role is not simply to advise the suspect to "blow" or "not blow".

X. CONCLUSION

Based on our knowledge and experience in criminal courts on a daily basis, we believe that a credible response to the serious harm to society from impaired driving, properly leaving discretion in sentencing in the hands of the judiciary, would likely lead to sentences much like those now routinely imposed for most of these offences. A flexible approach and a broad range of sentences combined with judicial discretion permits appropriate sentences for both minor and exceptional cases, and also where required to advance the interests of justice.

We strongly urge avoiding the proposals set out in the Discussion Paper that would begin on a path of eroding established and important constitutional protections. If such proposals are to be advanced, we suggest that consideration be given to first referring them to the Supreme Court of Canada.