THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Bill C-226 – *Impaired Driving Act*

CANADIAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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 CBA Criminal Justice Section, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Criminal Justice Section.

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Bill C-226 – *Impaired Driving Act*

I. INTRODUCTION

The Criminal Justice Section of the Canadian Bar Association (CBA Section) is pleased to comment on Bill C-226, a private members' bill to change Canada's impaired driving legislation and related offences under the *Criminal Code*. The proposed changes would represent major amendments to the *Criminal Code*. The range of existing impaired driving provisions would be removed from the *Code* and replaced with a new regime.

Road safety is a matter of national concern. Impaired driving, whether by drugs or alcohol, is a significant problem and too often results in serious injury or death. Canadian law must provide effective enforcement mechanisms to address proven hazards associated with impaired driving, while simultaneously maintaining and upholding applicable constitutional standards. Any effective law must comply with the *Charter*, and result in 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. Regardless of whether that litigation is ultimately successful, its volume alone has enormous implications for the justice system in terms of cost, delay and uncertainty in the law while cases are pending. For these reasons, we urge a cautious and practical approach to any legislative change in this area, and recommend that Bill C-226 not be adopted.

II. PREAMBLE

The Preamble to the Bill would assist trial courts in interpreting Bill C-226's proposed changes to the *Criminal Code*. It says that:

a. Dangerous driving and impaired driving injure or kill thousands of people every year

b. Dangerous driving and impaired driving are always unacceptable in all circumstances

c. It is important that sentences should be severe enough to reflect the risk to the public by dangerous driving and impaired driving

d. It is important to simplify the law relating to proof a blood alcohol concentration
e. It is important to deter people from consuming alcohol after they have driven a conveyance when it is reasonable to think they may have to provide a breath or blood sample
f. Is important for Canada to deter the commission of offences relating to impaired driving and dangerous driving.

The Preamble states that sentences should be 'severe enough' to reflect the risk to the public, and that Parliament should use them to deter impaired driving. Deterrence and denunciation are certainly valid principles of sentencing, but not the *only* valid sentencing factors. *Criminal Code* sections 718, 718.1 and 718.2 make specific reference to concepts such as rehabilitation, promoting a sense of responsibility, proportionality, and that "an offender should not be deprived of liberty" if less restrictive sanctions may be appropriate. Any amendments that ignore these factors and focus only on deterrence and denunciation will be scrutinized against established jurisprudence stating that other factors must also be considered in sentencing.

The Bill also has the potential to criminalize consuming alcohol after a person is no longer driving a motor vehicle, when there is no risk to the public. Whatever marginal benefits might be expected to come from this addition, they are significantly outweighed by the deleterious effects. Specifically, they expand the reach of the law to conduct that is essentially non-criminal, and by doing so, would lead to needless litigation with no obvious benefit to Canadians.

III. 'RECOGNIZING AND DECLARING' CERTAIN FACTS

Proposed *Criminal Code* section 320.12 would 'recognize and declare' certain findings of fact and law. Specifically, it states that:

a. operating a conveyance is a privilege that is subject to certain limits
b. the protection of society is well served by deterring persons from operating conveyances dangerously or while impaired
c. the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood-alcohol concentration
d. evaluating officers are qualified to evaluate whether a person's ability to operate a conveyance is impaired by a drug or alcohol.

We take no issue with statement (a). Statement (b) focuses solely on deterrence, and our comments about the need to consider deterrence with other valid sentencing factors apply.

Statement (c) proposes a comprehensive finding of fact best left to individual trial judges. The current state of the law is that an 'approved instrument' used properly, and properly maintained, gives the Crown the benefit of a presumption that the accused's blood-alcohol level is above the legal limit. Statement (c) would curtail this analysis by the trial judge, and would be vulnerable to constitutional scrutiny for over breadth.

Similar concerns apply to statement (d). It again would usurp a finding of fact that appropriately rests with the trial judge. In Canada, the law is clear that one need not be an expert to testify as to intoxication by alcohol. For example, it is assumed that most indicia of impairment can be testified to by a non-expert witness. All people, whether civilian or police officer, can testify that "I thought that the accused look very intoxicated" without first being qualified as an expert. This is because alcohol consumption is a relatively common phenomenon in our culture. Conversely, consuming illegal narcotics such as cocaine or heroin is significantly less common, and it is less commonly known whether and how it affects one's ability to operate a motor vehicle. While drugs can lead to impairment, it is not, to most people, as obvious or familiar as impairment by alcohol consumption.

Currently, a trial judge will hear evidence and then make a finding of fact as to whether the accused's ability to operate a motor vehicle was impaired by alcohol or drugs. For alcohol consumption, this is relatively straightforward. For drugs, the test is largely the same, but there is no assumption that all people are familiar with the effects of drugs. For either alcohol or drugs, it is highly problematic to take this function from the trial judge and delegate it to an evaluating officer, as suggested in Bill C-226. This is not to say that an evaluating officer's experience and testimony would not be valuable evidence for a trial judge to consider, but the officer's testimony should not replace the judge's role in the trial process.

IV. IMPAIRED OPERATION AND 'OVER .08'

Proposed section 320.14 would create the offence of impaired operation and operation over .08. Proposed section 320.14(1) would create two offences:

a. operation of a conveyance while the person's ability to operate it is impaired to any degree by alcohol or drug.
b. having a blood-alcohol concentration which is equal to or exceeds 80 mg of alcohol in 100 mL of blood within two hours of ceasing to operate a conveyance.

The current legislative equivalent to section 320.14(1(a) creates an offence of operating a motor vehicle while impaired, without referring to the degree of impairment that must be established. The generally accepted test is in *R. v. Stellato*[1] which says that if the evidence establishes any degree of impairment, the offence is made out. Including the qualifier 'to any degree' in proposed section 320.14 appears simply to codify this interpretation.

Proposed section 320.14(b) defines the prescribed limit of blood alcohol as 'equal to or over 80'. This contrasts with the current law that creates the offence only if the readings 'exceed 80'.

This proposal to reword 'over 80' to 'equal to or exceeding 80' seems intended to address the practice of 'rounding down' blood-alcohol concentration (BAC) results in some jurisdictions. Rounding down is sometimes done by the measurement instrument internally, without a technician even knowing the actual BAC. In addition, every instrument has some margin of error, which is also factored into the decision of whether to proceed with a prosecution.

There have been different practices in different parts of Canada about rounding down. The proposed change would address this situation. Certainly, greater consistency is desirable, but independent study documenting the extent of the problem may be advisable before moving forward. Without evidence of a significant problem, the legal challenges expected from this change may not be warranted.

Proposed section 320.14(1)(b) is read with proposed section 320.14(4), which provides a defense. The accused will not have committed an offence under section 320.14(1)(b) if:

a. they consumed alcohol after having ceased to operate the conveyance,
b. after having ceased to operate the conveyance, they had no reasonable expectation that they would be required provide a sample of breath or blood, *and*
c. their alcohol consumption is consistent with their blood-alcohol concentration as determined in accordance with *Criminal Code* section 320.32(1) or (3),[2] and with their having had, at the time when they were operating the conveyance, a blood-alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.

The operation of section 320.14(1)(b) and section 320.14(4) targets what is often referred to as a 'bolus drinking' defense. Essentially that term describes a situation where an accused

1 *R. v. Stellato*, [1994] 2 SCR 478.

2 Proposed sections 320.32(1) and (3), the new 'presumption back' rules, are addressed later in the submission.

drinks an abnormally large amount of alcohol after driving, producing readings on the approved instrument in excess of the limit but consistent with readings below the legal limit at the time driving. The combined operation of the two proposed new sections removes the ability of the defence to argue 'bolus drinking'.

While the CBA Section takes drinking and driving 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 the current defence still has to discharge an evidentiary burden to show bolus drinking and judges still have to assess the veracity of witnesses in determining whether the totality of the evidence raises a reasonable doubt. From our experience, judges generally reject the defence when 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* already provides an offence under section 139, obstruction of justice. Rather than risk criminalizing legal drinking, we suggest that offence should be charged where an accused willfully engaged in behavior to skew breath test results.

The case law has imposed significant requirements for using this defense. For example, the Ontario Court of Appeal[3] has held:

> The "No Bolus Drinking" Assumption
>
> 27 "Bolus drinking" is generally meant to describe the consumption of large quantities of alcohol immediately or shortly before driving: see Grosse, at p. 788; R. v. Hall (2007), 83 O.R. (3d) 641 (Ont. C.A.), at para. 14. See also Phillips at pp. 158-162, for a description of the "relatively rare" phenomenon, although not by the "no bolus drinking" name.
>
> 28 In establishing that an accused has not engaged in bolus drinking, the Crown is in the unenviable position of having to prove a negative. But how does it meet that onus in circumstances where — as is likely in many cases — it has no statement or evidence from the accused as to his or her drinking pattern at the relevant time and no other witnesses or evidence to shed any light on that issue? That is the dilemma posed, principally, by the Lima appeal.
>
> 29 At one level, the answer is straightforward: the Crown need do very little. The toxicologist's report is premised — amongst other things — on there being no bolus drinking. In the absence of something on the record to suggest the contrary, on what basis could a trier of fact conclude there was bolus drinking? This Court has answered the question posed by concluding that triers of fact may resort to a common sense inference in such circumstances, namely, that people do not normally ingest large amounts of alcohol just prior to, or while, driving: see Grosse, Hall, and R. v. Bulman, 2007 ONCA 169 (Ont. C.A.). As noted above, bolus drinking has been said

[3] *R* v. *Paszczenko*, 2010 ONCA 615 (CanLII).

> to be a "relatively rare" phenomenon: Phillips, at pp. 158-162. "No bolus drinking" is therefore largely a matter of common knowledge and common sense about how people behave.
>
> 32 I would frame the rationale for this approach as the imposition of a practical evidentiary burden on the accused, not to persuade or convince the trier of fact that there was bolus drinking involved, *but to point to something in the evidence (either in the Crown's case, or in evidence led by the defence) that at least puts the possibility that the accused had engaged in bolus drinking in play. The imposition of a practical evidentiary burden to come forward with evidence is simply another way of explaining the invitation to draw a common sense inference which puts the accused in essentially the same spot if he or she cannot point to some evidence to overcome either hurdle.*
>
> 37 For the reasons explained above, applying the common sense inference where there is no evidence of bolus drinking in circumstances where the Crown is required to prove the negative (i.e., no bolus drinking) is simply an example of the Schwartz notion of an evidential burden, in my view. It does not involve attaching an onus of proof to the accused or the creation of a presumption or deeming provision in the sense forbidden in Grosse. *On that basis, it would be more straightforward, it seems to me, to refer to this evidentiary exercise as a shift in the practical evidentiary burden on the basis of which — absent something to put bolus drinking in play — an inference may (but not must) be drawn.* [emphasis added]

Given the current case law, any benefit offered by the proposed changes is unclear. Section 320.14(b) may penalize individuals who were not driving while impaired, simply because they cannot meet the requirements of the section. Further, the new concept of having a “reasonable expectation of being required to provide a sample” would invite considerable litigation and introduce uncertainly into the law, which is not a productive use of public resources.

V. REFUSAL CAUSING BODILY HARM

Proposed sections 320.15(2) and 320.15(3) would create two new offences if a person unlawfully refuses to provide a breath or blood sample where the driver ‘knows or ought to have known’ that the operation of the motor or other vehicle caused an accident that resulted in bodily harm or death.

This appears intended to remove any incentive for unlawfully refusing to provide a sample in cases of death or bodily harm. The approach in proposed section 320.24(11) must be considered in light of the existing adverse inference in such circumstances under section 258(3) of the *Criminal Code*. There may be more proportionate responses to the problem, such as to strengthen the inference against an accused refusing to provide a sample or to increase available penalties. However, making the maximum penalties for refusal equal to those where

impairment actually plays a causal role in death or bodily harm is excessive, and may elicit constitutional scrutiny.

Finally, we question the proposed mental element in the language, 'knows or ought to have known'. An objective mental element has been the subject of extensive *Charter* challenge elsewhere in the *Criminal Code*. For example, this phrase was subject to challenge 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. In *R. v. Logan*, the Supreme Court of Canada declared that this phrase was inoperative for offences with a constitutionally mandated subjective mental element.[4] Again, the terminology proposed in Bill C-226 would likely result in *Charter* challenge, especially 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 given the proposed maximum penalty of life imprisonment for refusal causing death.

In general, the proposed 'refusal' standards are a significant change from current law, increasing the liability of any accused.

VI. MANDATORY MINIMUM PENALTIES

Bill C-226 would increase the penalties for impaired driving offences, including mandatory minimum penalties for several offences. Notably, if the Crown proceeds by indictment the Bill provides for a mandatory minimum of 30 days for a first offender.

The CBA Section has frequently disputed the efficacy or fairness of mandatory minimum penalties. In our experience, trial judges are best placed to fashion appropriate sentences considering all circumstances at hand.[5] Requiring judges to impose mandatory minimum sentences without allowing them to use judicial discretion to balance all sentencing objectives in each case does not, in our view, promote justice, fairness or ultimately, public respect for the administration of justice.

VII. EXCEPTION TO MANDATORY MINIMUM PENALTIES

Currently, *Criminal Code* section 255(5) allows a person convicted of impaired operation or over '.08' to seek a curative discharge if the court considers that the person needs curative

4 [1990] 2 SCR 731.

5 See, for example, *Justice in Sentencing*, Resolution 11-05-A.

treatment for alcohol or drugs, and that treatment would not be contrary to the public interest. Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Saskatchewan, Yukon and the Northwest Territories have enacted these provisions.

In appropriate circumstances, the 'curative discharge' rules provide an incentive for habitual offenders to seek treatment to avoid incarceration. If shown to be an alcoholic in need of treatment, and treatment is reasonably likely to succeed, the accused can avoid the mandatory minimum sentence that typically mean incarceration for repeat offenders. The current practice is that the accused makes the application and the judge decides if it is appropriate in the circumstances. There is no requirement that the regional Attorney General consent.

Proposed section 320.23 provides a somewhat similar mechanism. With the consent of the Attorney General, the court may delay sentencing to allow the offender to attend a treatment program approved by the province or territory where the offender resides. If the accused successfully completes the treatment program, the court is not required to impose the mandatory minimum sentence. However, the accused would not be entitled to a 'discharge' under section 730.

The CBA Section appreciates the rationale for these proposed changes but also identifies some problems. We disagree with requiring consent of the Attorney General to make an application. While Crown prosecutors have a quasi-judicial role in Canada's justice system, it is an adversarial system and the Crown would not have to consent. Further this proposal removes discretion from trial judges in crafting sentences, transferring discretion to the Crown.

The lack of and variation in available treatment facilities across the country would result in significant inconsistencies in the application of the law.

VIII. APPROVED SCREENING DEVICES

Proposed section 320.27 outlines procedures dealing with 'approved screening devices' (ASDs). Section 320.27(2) would provide a non-exhaustive list of conditions sufficient to establish 'reasonable suspicion':

a. the erratic movement of the conveyance
b. the person's admission of alcohol consumption
c. the odour of alcohol on the person's breath or emanating from the conveyance
d. the person's involvement in an accident that resulted in bodily harm or death

Some of these conditions may have nothing to do with consumption of alcohol and need to be considered with other surrounding facts. For example, erratic driving can suggest a poor, inexperienced, distracted or tired driver, and an odour emanating from a vehicle could be as a result of a sober designated driver with intoxicated passengers.

The 'random testing' under proposed section 320.27(3) would go further than the current law so a police officer with an ASD could make a demand without any grounds. Police now must have a 'reasonable suspicion' that the person has alcohol in their system before making a demand, and that is a low threshold.

In our experience, current legislative powers for police to deal with drinking and driving are adequate. What would actually make streets and highways safer are additional resources for police forces. Random breath testing (RBT) is likely to again lead to *Charter* litigation, absorbing significant system resources without substantial results. The Supreme Court of Canada has consistently upheld some degree of *Charter* infringement to combat impaired driving, using a section 1 analysis in the interest of promoting highway safety.[6] However, a law must be narrowly circumscribed to achieve its goals and also minimize the impact on the *Charter* right it is infringing, so Bill C-226 may be determined by the Court as going too far:

> [O]nce 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".[7] (emphasis added)

Currently, an officer need only suspect that a person has operated a motor vehicle in the preceding three hours with alcohol in his or her body to make an ASD demand. The Ontario

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6 *R. v. Orbanski*, *R. v. Elias* [2005] 2 SCR 3.

7 *R.* v. *Oakes*, [1986] 1 SCR 103 at para.70.

Court of Appeal has held that the smell of alcohol is sufficient and an officer need not believe that a driver has committed an offence to make the demand.

> 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 alcohol does not take away from the fact that there exists a reasonable suspicion within the meaning of the section.[8]

This low threshold of suspicion for detaining a driver, 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:

> 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.[10]

Keep in mind that most of those subjected to the RBT demand are likely to be law-abiding drivers. Stopping the occasional driver to make a demand only if the requisite suspicion exists is far different than setting up a roadside check point where motorists might be lined up to blow into the ASD. Moving to a random test and removing the minimal requirement that an officer form a suspicion may not be seen as minimal impairment, nor meet the proportionality

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8 *R. v. Lindsay* (1999), 150 CCC 3d 159 (ON CA) at para 2.

9 *Supra*, note 6.

10 *R. v. Ladouceur*, [1990]1 SCR 1257.

components of the *Oakes* test.[11] For serious collisions involving bodily harm and death and the increased jeopardy to the accused as a result, this interpretation may be even more likely.

We suggest that random breath testing as a general screening tool would be unwise and impractical, given the constitutional litigation that would certainly result.

Bill C-226 also proposes that ASD demands can be made up to three hours after a driver has relinquished care and control of a motor vehicle. This gives police three hours from the time of an accident to determine who was driving. In those circumstances, authorizing multiple random breath tests would unlikely 'minimally impair' the rights of those involved.

The CBA Section has often previously stressed[12] a cautious approach to legislative change for the impaired driving sections of the Code, given the amount of litigation those sections have and are likely to continue to attract. Any changes will involve years of litigation as decisions make their way through the courts. Until Courts of Appeal rule on the provisions, there is likely to be significant variation in the lower courts' decisions. Even after appellate rulings, there will be variations between jurisdictions on the legality of the provisions. The costs of litigating appeals related to the proposed RBT will be significant, as will the impact on the administration of justice.

We have additional concerns about proposed section 320.27(3). As under current law, it would allow the police to randomly stop people without probable cause, but would then also allow police to randomly subject drivers to breath demands and coordination tests, without particular justification. Again, this additional intrusion is likely to result in significant and unnecessary litigation, and *Charter* scrutiny.

IX. BREATH DEMANDS

Proposed section 320.29 is the basic breath demand section, analogous to current section 254(3) of the *Criminal Code*. The proposed changes include:

a. removing the requirement that the police officer believed the accused had committed the offence within the proceeding three hours. (The police officer now has only to believe the person operated a conveyance while their ability to do so was impaired, without reference to the time of driving in relation to the demand).

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11 *Supra*, note 7.

12 *Impaired Driving — Modernizing Transportation Provisions of the Criminal Code* (Ottawa: CBA, 2010).

b. the demand would have to be made "within a reasonable time," rather than "as soon as practicable", as currently required in the *Criminal Code*.

Removing the three hour time requirement is problematic. An officer could legitimately make a demand with reasonable and probable grounds to believe the accused committed an offence some days prior. This, again, is likely to attract *Charter* challenge.

The rationale for changing 'as soon as practicable' to 'a reasonable time' is difficult to comprehend. 'As soon as practicable' is well litigated. Prosecutors, judges, defense lawyers and police officers know what the phrase means from established jurisprudence. The plain meaning of 'a reasonable time' is not obviously different than the current wording, but creates a new variable ripe for more litigation. While the courts may eventually interpret the phrase to mean exactly the same thing as 'as soon as practicable', it will take a great deal of personal and public resources to work its way to the Supreme Court of Canada to establish this similarity.

X. BLOOD DEMANDS

Amendments to the *Criminal Code* in 2008 introduced the concept of an 'evaluating officer', defined as someone qualified under regulations to conduct evaluations to determine if a person's ability to operate a vehicle is impaired by a drug. To qualify, evaluating officers must complete a training program to assess impairment by drugs.

A person may be given a demand to comply with an examination by an evaluating officer if a police officer has reasonable grounds to believe that the person's ability to operate is impaired by a drug or combination of drugs and alcohol. If, after completing the tests, the evaluating officer has reasonable grounds to believe the person's ability to operate is impaired, the evaluating officer may then demand a sample of either oral fluid, urine or blood. Importantly, the evaluating officer's ability to make a demand under the current legislation crystalizes on completion of the evaluation and must be based on the evaluation.

The proposed regime includes a similar provision in section 320.29(4). If, on completion of the evaluation, the evaluating officer has reasonable grounds to believe that a person's ability to operate is impaired by drugs or a combination of drugs and alcohol, the evaluating officer may demand a bodily substance. In contrast to the current law in section 329.29(4), it does not specify that the grounds must be based on the evaluation. However, similar to existing legislation, it does require the grounds to be formed on "completion of the evaluation".

Accordingly, the evaluation officer must go through this examination process before formulating further grounds.

The rationale for a formal evaluation by a specially trained officer before a demand can be made for a bodily substance appears to clearly recognize that taking the samples is more intrusive than a simple breath sample. Accordingly, more judicial scrutiny of the grounds for these demands can be anticipated.

Section 320.29(2)(a) in Bill C-226 would permit a police officer to either demand a person submit to an evaluation by an evaluating officer or, under 320.29(2)(b), to directly demand the person to provide a blood sample to enable a determination of their blood drug concentration. The procedure in both current and proposed legislation is consistent in requiring the evaluating officer to conduct a formal evaluation before requesting a bodily substance. However, proposed section 320.29(b) in Bill C-226 would permit a police officer to bypass the evaluating officer and go directly to a blood demand. Less qualified officers would have authority to make a blood demand on 'reasonable grounds', while more formally qualified evaluating officers would have to complete a formal evaluation before formulating grounds to make the same demand. This is illogical and should be remedied.

XI. DEFINITION OF DRUGS

Proposed section 320.29(5) would define which drugs could be subject to a bodily seizure through a drug recognition expert. The section is vaguely written. For example 'an inhalant' could be interpreted as medicine for somebody who suffers from asthma, whereas 'a stimulant' could include coffee or tea.

There is no reason to use imprecise language, as the current *Controlled Drugs and Substances Act* (CDSA), Schedule I – VIII, outlines the exact chemical composition of all prohibited substances. For example, if Parliament wanted to include cannabis in the impaired driving regime, it could simply adopt Schedule II of the CDSA, or whichever part deemed appropriate.

XII. PRESUMPTIONS REGARDING BREATH SAMPLES

Proposed section 320.32 deals with evidentiary presumptions affecting impaired driving litigation, and is analogous to existing section 258(1)(c). The new provision contains no definition of 'evidence to the contrary', and from our experience, this has resulted in significant litigation since the amendments to the Code in 2008.

Section 320.32(5) proposes that if the samples were taken over two hours from the time of the offence, the person's blood alcohol concentration is presumed to be what was stated by the approved instrument, plus an additional five mg of alcohol in 100 milliliters of blood for every 30 minutes in excess of those two hours.

This presumption would eliminate the need for the Crown to call an expert toxicologist when the sample is taken after the two hour period. Currently, *Criminal Code* section 657.3 allows the Crown to adduce scientific evidence without calling a toxicologist, and leave to cross-examine the expert must be sought from the trial judge. As gatekeepers of the evidence, trial judges are in a position to determine when it is necessary to call a toxicologist. The proposed legislation should not eliminate the need to call an expert.

The 2008 impaired driving amendments were largely a reaction to the 'evidence to the contrary' rules, or the so-called 'last drink defence.' The intent then was to limit this defence, and to provide legislative guidance to courts on what constitutes valid 'evidence to the contrary'. Proposed sections 320.32(3) and (7) apply similar language for both blood and drug analyses, but there is no corresponding section for breath samples. Removing these sections would essentially turn back the clock on the *Carter* defence and revert to common law rules.

XIII. STATEMENTS MADE BY THE ACCUSED

Proposed section 320.32(10) states that a statement made by the accused to a police officer, including a statement compelled under provincial statute, indicating that they operated the conveyance, is admissible in evidence only for the purpose of justifying a breath demand.

This proposal appears to go against section 7 of the *Charter*. In *R v White,*[13] the majority of the Supreme Court of Canada held:

> (1) The Need for an Honest and Reasonably Held Belief
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> 74 A declarant under s. 61 of the *Motor Vehicle Act* will be protected by use immunity under s. 7 of the *Charter* only to the extent that the relevant statements may properly be considered compelled. Accordingly, the driver has an interest in knowing with some certainty precisely when he or she is required to speak, and when he or she is permitted to exercise the right to remain silent in the face of police questioning. Conversely, the ability of the state to prosecute crime will be impaired to the extent of the reporting requirement under s. 61 of the *Motor Vehicle Act*. Thus the public, too, has a strong interest in identifying with some certainty the dividing line between the taking of an accident report under s. 61, on the one hand, and

[13] (1999) 2 SCR 417.

> ordinary police investigation into possible crimes, on the other. When will a driver's answers to police questioning cease to be protected by the use immunity provided by s. 7 of the *Charter*?
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> 75 The Court of Appeal below did not discuss this issue in detail. I would like to elaborate briefly on the legal definition of a compelled statement under s. 61. In my view, the test for compulsion under s. 61(1) of the *Motor Vehicle Act* is whether, at the time that the accident was reported by the driver, the driver gave the report on the basis of an honest and reasonably held belief that he or she was required by law to report the accident to the person to whom the report was given.
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> 76 The requirement that the accident report be given on the basis of a subjective belief exists because compulsion, by definition, implies an absence of consent. If a declarant gives an accident report freely, without believing or being influenced by the fact that he or she is required by law to do so, then it cannot be said that the statute is the cause of the declarant's statements. The declarant would then be speaking to police on the basis of motivating factors other than s. 61 of the *Motor Vehicle Act*.
>
> 77 The requirement that the declarant's honest belief be reasonably held also relates to the meaning of compulsion. The principle against self-incrimination is concerned with preventing the abuse of state power. It is not concerned with preventing unreasonable perceptions that state power exists. There is no risk of true oppression of the individual where the state acts fairly and in accordance with the law, but the individual unreasonably perceives otherwise. It is true that the individual who unreasonably believes that he or she is compelled to speak may produce an unreliable confession, but this result will have flowed from concerns that are outside the scope of the principle against self-incrimination: see *Hodgson*, *supra*, at para. 34, per Cory J. *The requirement that an honest belief be reasonably held is an essential component of the balancing that occurs under s. 7. The application of the principle against self-incrimination begins, and the societal interest in the effective investigation and prosecution of crime is subordinated, at the moment when a driver speaks on the basis of a reasonable and honest belief that he or she is required by law to do so.* (emphasis added)

Someone arguing in support of the constitutionality of proposed section 320.32(10) might say that any breach is minor in nature and can be justified under section 1 of the *Charter*. The importance of detecting and deterring impaired drivers was accepted as section 1 justification by the Supreme Court of Canada in *R. v. Orbanski*[14] where the court upheld the authority of police to question and administer sobriety tests to a driver suspected of impaired driving. However, *Orbanski* and the related case law authorities all deal with evidence obtained at a roadside screening where complying with section 10(b) counsel rights was problematic. Statutorily compelled statements are often made at a later date when reports are filled out, rather than at the time of the initial detention. Further, statutory compulsion could vary from region to region in accordance with motor vehicle legislation.

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14 Supra, note 6.

Another issue with proposed section 320.32(10) is that it refers to *any* statement given to an officer and provides that the *sole* use that can be made of the statement is to establish grounds. If an accused gives a formal statement to an officer admitting to the operation of a conveyance, after appropriate cautions and exercise of counsel rights, that statement could not then be used to establish that the accused did operate the conveyance. We expect that is not Parliament's intent.

XIV. SERVICE

Proposed section 320.33 deals with issues relating to service of the certificate of analysis. Section 320.33(3) is similar to current section 258(6) of the *Criminal Code*, in that the accused has the right to compel cross-examination of the person who swore the certificate. However, proposed sections 320.33(4) and (5) create several procedural hurdles for the accused. Notably, the hearing cannot take place during the trial, and 30 days' notice of the hearing must be given.

Practically, this proposed change will cause delays with no particular benefit. In metropolitan areas, justice system resources may be greater than in more isolated parts of Canada. While courts commonly sit every day in big cities, this is uncommon in smaller centres. In some parts of Saskatchewan for example, courts sit only once a month. This overly detailed section will be cumbersome to apply consistently throughout Canada. It would be best to leave these matters to provincial or territorial rules of court, as those courts are better positioned to identify what is reasonable notice and how best to use scarce court resources.

XV. LIMITS ON DISCLOSURE

Proposed section 320.35 deals with disclosure to the accused in a '.08' prosecution. Section 320.35(1) says the Crown shall disclose the information sent by the alcohol test committee on the Canadian Society of Forensic Science's webpage, and that is sufficient to assess whether an improved instrument was in proper working order.

According to sections 320.35(2), (3) and (4), if the accused is not satisfied, another disclosure application must be filed and take place 30 days before the trial, and the application must be received by the Crown 30 days before the hearing. Under section 320.35(5), at the hearing itself the court *shall* consider webpage resources of the Canadian Society of Forensic Sciences.

Section 320.35(8) says that this is not designed to limit the disclosure to which an accused may otherwise be entitled.

Section 320.32(2) also allows the Crown to establish that the approved instrument was "in proper working order" if it complied with the procedures on the Canadian Society of Forensic Science's webpage, as amended from time to time.

Again, the CBA Section expects this provision will attract significant *Charter* scrutiny. The accused's right to disclosure would be circumscribed by the Canadian Society of Forensic Science, its resources, and whatever documents it posts on its webpage.

Whether or not a specific piece of information is properly the result of first party disclosure is a matter for the courts to decide, after having heard evidence from all parties. The accused's disclosure rights under *Charter* section 7 cannot be delegated to an unelected body.

XVI. CONCLUSION

The CBA Section urges a particularly cautious approach to legislative change to the impaired driving provisions of the *Criminal Code*. Delays in criminal courts are already of sufficiently serious concern that they are the subject of review by the Senate Committee on Legal and Constitutional Affairs.

Parliament has a duty to create and amend laws in the best interests of Canadians. We suggest a balanced approach considering the impact of costly, extensive litigation on litigants and the system overall, and any potential benefits to public safety. As well, established constitutional Supreme Court of Canada jurisprudence on impaired driving should be considered.

Applying that exercise in balancing important considerations, we suggest that Bill C-226 should not become law.