



THE CANADIAN  
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BARREAU CANADIEN

August 4, 2017

Via email: monique.macaranas@justice.gc.ca

Monique Macaranas  
Criminal Law Policy Section  
Justice Canada  
284 Wellington Street  
Ottawa, ON K1A 0H8

Dear Ms. Macaranas:

**Re: Proposal to lower the criminal Blood Alcohol Concentration**

The Criminal Justice Section of the Canadian Bar Association (CBA Section) appreciates your invitation to comment on the proposal to lower the criminal Blood Alcohol Concentration (BAC) from the current 80 milligrams to 50 milligrams per 100 millilitres of blood.

The CBA is a national association of over 36,000 lawyers, notaries, law students and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of prosecutors and defence lawyers from across Canada.

Road safety is a matter of national concern, and impaired driving, whether by drugs or alcohol, is a significant problem that too often results in injury or death. As lawyers in criminal courts on a daily basis, we know that impaired driving is one of the most extensively litigated areas of criminal law, and that volume alone has enormous implications for the system in terms of cost, delay and uncertainty while cases are pending.

Lowering the BAC to 50 mg of alcohol per 100 ml of blood might seem a common sense approach to further reduce impaired driving. However, we caution that there are important considerations at play. A BAC at 50 mg does not necessarily measure impairment. Even if any alcohol in a person's system has some impact, not every level of alcohol actually constitutes legal impairment.

The broad acceptance among experts in this field is that people are impaired at 100 mg. There is less consensus at the current 80 mg level, but enough that the Crown can produce expert evidence at trial to support this argument. However, we understand that there is little to no consensus in the scientific community that 50 mg is impairing. While it is certainly permissible for the federal government to decide on the lower level to better respond to the danger posed by drinking drivers, it cannot, in our view, justify that change as something that will effectively detect impaired drivers.

It may well be a step that improves road safety, but we believe it is critical to recognize its limitations for detecting impairment.

The Discussion Paper on *Lowering the Criminal Blood Alcohol Concentration* (Discussion Paper) attached to the Minister's July 7 letter to CBA President Rene Basque recognizes the impact of lowering the threshold on the administration of justice as a potential concern. We see this as a serious concern – one that our members, as front line Crown and defence lawyers from all regions of the country, have often stressed. We have frequently noted that impaired driving offences consume a disproportionate amount of court time and cautioned that the potential benefit of any legislative change must be balanced with this reality.

Criminal courts are overburdened and court delays are a problem receiving significant attention. If, as suggested in the Discussion Paper, an additional 75,000 to 100,000 cases would be added to the dockets as a result of the proposed change, the criminal justice system will have difficulties coping with that additional demand. This is particularly problematic with the time restrictions placed on the courts following the Supreme Court of Canada decision in *R. v. Jordan*.<sup>1</sup> Most drinking and driving offences proceed by way of summary conviction in provincial and territorial courts, and those cases must be completed within 18 months to comply with that decision.

The Discussion Paper refers to the administrative regime in British Columbia where first time offences are not charged criminally but subject to non-criminal provincial sanctions. Reference is also made to the recent experience in Ireland where the BAC level was lowered to 50 mg. At the same time as making that change, Ireland moved to a regime where offenders with a valid licence whose levels were below a certain level could proceed by way of administrative penalty. If the BAC is lowered in Canada, the CBA Section believes that the federal government should encourage an administrative approach across the country to ensure the system can cope with the anticipated increased case load. With respect, our view is that Bill C-46 would not result in further trial efficiencies, as the Discussion Paper mentions, and we have raised concerns about the contrary result in our 2016 submission on a similar bill (Bill C-226).<sup>2</sup>

We welcome further questions or discussion with you about the points we have raised. Thank you again for seeking the CBA's views on this important topic, and we hope they will be helpful to your deliberations.

Yours truly,

*(original letter signed by Gaylene Schellenberg for Loreley Berra)*

Loreley Berra  
Chair, CBA Criminal Justice Section

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<sup>1</sup> [2016] 1 SCR 631.

<sup>2</sup> <http://ow.ly/1x4L30eb0xi>