



MADD Canada has long voiced its support for introducing a federal *Criminal Code* .05% Blood-Alcohol Concentration (BAC) offence. An overwhelming body of research has established that this measure is an effective means of reducing impaired driving. Despite this empirical evidence, the federal government has not adopted this proven means of significantly reducing impaired driving.

In June 2009, Canada's *Standing Committee on Justice and Human Rights* released a series of recommendations aimed at ending impaired driving. Unfortunately, the Committee did not recommend introducing a *Criminal Code* .05% BAC offence. The Committee stated that a lower *Criminal Code* BAC would be difficult to implement because it would significantly increase criminal prosecutions and overburden the legal system. This argument is contrary to the experience of the EU countries, Australia and the other jurisdictions which have enacted a .05% BAC offence. Nevertheless, the Committee cited a survey of Canadian lawyers by the Traffic Injury Research Foundation (TIRF) to support concerns about overburdening the justice system.

MADD Canada recognizes the value of survey data, but has several reservations about the TIRF study. For example, the survey was conducted before the proclamation of Bill C-2 and the resulting changes in impaired driving prosecution and defence. Consequently, some of the concerns expressed by prosecutors have since been addressed by the changes brought about by Bill C-2.

For these and other reasons, MADD Canada believes that the TIRF survey needs to be carefully re-examined in terms of the .05% issue. The following article addresses these issues.

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### ***A Review of the TIRF National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving***

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#### **Overview**

In June 2009, the Traffic Injury Research Foundation (TIRF) published the *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving*.<sup>1</sup> According to TIRF,

the survey was designed “to examine the legal process as it applies to alcohol-impaired driving from the point of view of Crown prosecutors and defence counsel, and to identify evidentiary or procedural factors which may have an impact on the legal process.”<sup>2</sup> While the survey provides helpful information about the perceptions, experiences and working conditions of criminal lawyers who deal with impaired driving cases, its results should be treated with some care. Most notably, the survey was conducted prior to the proclamation of Bill C-2,<sup>3</sup> which was enacted to facilitate criminal prosecutions and narrow certain defences to impaired driving. Several of the concerns expressed by Crown prosecutors in the *National Survey* were addressed by Parliament in Bill C-2, and should accordingly carry little weight in considering future reforms. In particular, the results of the survey should not be used as a justification to reject proposals for a *Criminal Code* offence of driving with a blood-alcohol concentration (BAC) above 0.05%. Finally, while the administrative concerns of some Crown prosecutors may indicate a need to improve certain procedures, these administrative matters should not be the primary consideration in defining the substantive content of the criminal law.

### **Methodological Concerns**

While there is no reason to doubt the methodology used in the *National Survey*, it is important to bear in mind the inherent limitations in the survey results. First, participation in the survey was voluntary, so the responses do not necessarily reflect the overall experiences of criminal lawyers. Respondents may have self-selected on the basis of their own strong opinions on impaired driving issues or the criminal justice system, thereby introducing potential bias. As acknowledged by the authors of the survey, “it was not possible to identify or access the entire population of lawyers who handle [impaired driving] cases, or even a truly representative sample.”<sup>4</sup> Indeed, the responses represent only 33% of all Canadian Crown prosecutors and 15% of defence lawyers.<sup>5</sup> The majority of the Crown prosecutors’ responses came from Ontario, Québec and British Columbia, while almost all defence counsel responses were from Ontario, Québec and Alberta.<sup>6</sup> Thus, the survey does not necessarily reflect the experiences of counsel across the country.

Second, parts of the survey questionnaire asked respondents to provide estimates regarding charges, case outcomes, and BAC levels of accused impaired drivers. For example, both Crown prosecutors and defence counsel were asked to estimate the percentage of cases they had conducted in the past 24 months resulting in: (a) stay/withdrawal, (b) plea agreement, (c) guilty plea, or (d) trial; and also to estimate what percentage of trials resulted in convictions.<sup>7</sup> These estimates, relying on respondents’ memories of their own impaired driving cases over the past 24 months, will be approximate, at best. This is demonstrated by the discrepancies between

Crown and defence counsel responses. For instance, while Crown prosecutors responded that 40% of accused impaired drivers plead guilty as charged, defence counsel estimated that only 29% do so.<sup>8</sup> Hence, the responses to these questions are not especially helpful, and cannot be treated as an accurate reflection of conviction rates and trends. At any rate, more precise data on case outcomes are available from the Canadian Centre for Justice Statistics.

A final methodological concern is the timing of the survey, which was conducted in 2006 and 2007 – well before the enactment of Bill C-2. As discussed below, some of the obstacles to prosecution that were examined in the *National Survey* were addressed by Parliament in that legislation. This means that several of the concerns expressed by Crown prosecutors, while accurate at the time of the survey, are now outdated.<sup>9</sup>

### **Substantive Concerns**

In examining what the authors of the *National Survey* perceived to be declining conviction rates for impaired driving,<sup>10</sup> they suggested some reasons why increasing numbers of accused drivers may be acquitted.<sup>11</sup> This information is undoubtedly helpful. However, in light of Bill C-2, it is unlikely to reflect Crown experience in the near future. In particular, Bill C-2 significantly limited the ability of accused impaired drivers to challenge the results of their evidentiary breath and blood tests by way of the “evidence to the contrary” defences. These defences challenged the *Criminal Code*’s presumptions that the evidentiary BAC test results accurately reflected the accused’s BAC at the time of testing (the presumption of accuracy) and at the time of driving (the presumption of temporality or “identity”).<sup>12</sup> Prior to Bill C-2, these presumptions could be rebutted by “evidence to the contrary” through the so-called “*Carter*” and “Last Drink” defences.

The *Carter* (or “two drink”) defence was typically based on the accused’s testimony that he or she consumed only a small amount of alcohol prior to driving.<sup>13</sup> A defence toxicologist was then called to testify that, if the accused had, in fact, consumed such a small quantity of alcohol, his or her BAC would not have exceeded 0.08%. Since the toxicologist’s evidence was based solely on the accused’s self-reported consumption, it added nothing to the credibility of the accused’s testimony. Yet, if the court accepted the accused’s evidence, it was usually considered sufficient “evidence to the contrary” to rebut the presumption of accuracy. As a result, the breath or blood test results would be disregarded, and the accused would almost always be acquitted.

In the *National Survey*, Crown prosecutors estimated that the *Carter* defence was successful in 70% of the cases in which it was raised.<sup>14</sup> This is discouraging, but not surprising, given the state of the law at the time of the survey. Fortunately, the *Carter* defence was significantly curtailed in Bill C-2.<sup>15</sup> The amendments make evidentiary breath test results

“conclusive proof” of the accused’s BAC, unless he or she introduces evidence “tending to show” that the approved breath-testing instrument was malfunctioning or misused, that the malfunction or misuse resulted in the BAC reading above 0.08%, and that his or her BAC did not in fact exceed 0.08% at the time of driving. In addition, the amendments specifically state that evidence of the accused’s alcohol consumption, absorption and elimination rates, or related calculations, do not constitute evidence that the approved instrument was malfunctioning or misused.<sup>16</sup> As a result, the *Carter* defence should now be much more difficult to establish, and should not be the obstacle to conviction that it was at the time of the survey.

Similarly, Bill C-2 reduced the scope of the “Last Drink” defence, which Crown prosecutors believed to be successful in about 27% of the cases in which it was raised. This defence is typically based on the accused’s testimony that he or she quickly consumed a large quantity of alcohol immediately before driving. The defence, supported by toxicological evidence which was again based on the accused’s self-reported consumption pattern, contended that very little of the alcohol would have been absorbed into the accused’s bloodstream when stopped by the police. Thus, the accused argued that his or her BAC was below the legal limit when driving, and only rose above that limit in the interval between being stopped and being tested. Bill C-2 narrowed this defence by requiring the accused to introduce evidence “tending to show” that his or her alcohol consumption pattern was consistent with both a lawful BAC when driving and the evidentiary breath or blood test results. The new limitations on the *Carter* and Last Drink defences should not only improve conviction rates, but should also, over time, reduce the number of accused impaired drivers who plead not guilty and insist on a trial.

The *National Survey* claims that more accused impaired drivers are proceeding to trial to avoid the penalties associated with conviction,<sup>17</sup> particularly the one-year driving prohibition mandated by the *Criminal Code*.<sup>18</sup> The underlying implication of this observation is that the penalties for impaired driving are too harsh, and are partly to blame for the increasing percentage of cases proceeding to trial. The authors of the survey further suggest that, in addition to reducing guilty pleas, the onerous penalties for impaired driving are largely ineffective. For instance, they note that approximately 70% of offenders continue to drive during their prohibition periods,<sup>19</sup> thereby suggesting that it is not an effective deterrent.

There are several problems with these implications. First, while there have been increases to the maximum penalties for the impaired driving offences in recent years,<sup>20</sup> these are rarely imposed.<sup>21</sup> The minimum (and typical) penalty for a first impaired driving conviction is still a relatively modest \$1,000 fine.<sup>22</sup> Second, while it is true that many offenders continue to drive during their prohibition periods,<sup>23</sup> research indicates that they drive both less frequently and more carefully than they did prior to the prohibition.<sup>24</sup> On the whole, driving prohibitions

continue to be cited as one of the most effective countermeasures for impaired driving.<sup>25</sup> The fact that some offenders continue to drive simply means that more effective measures, such as licence checks and vehicle sanctions, are necessary to reduce the occurrence of driving while prohibited.

Finally, as noted by the authors of the *National Survey*,<sup>26</sup> the *Criminal Code* driving prohibition can be reduced to as little as three months if a driver participates in an ignition interlock program.<sup>27</sup> The survey thereby supports the enhancement and promotion of interlock programs within the provinces, something that MADD Canada has advocated for many years.<sup>28</sup> Ignition interlocks have been shown to reduce recidivism by 40-95% compared to licence suspensions alone,<sup>29</sup> and interlock programs are in place in almost every province and territory. Unfortunately, only 34% of Crown prosecutors who responded to the *National Survey* supported their use.<sup>30</sup> As the authors of the survey note, Crown prosecutors would benefit from more education on these measures.<sup>31</sup> Thus, rather than showing that the existing sanctions are too harsh or ineffective, the survey results actually indicate the need for a more comprehensive and creative approach to the impaired driving problem. Crown prosecutors can play an important role in this approach by seeking interlock orders as part of the criminal sentencing process.

The *National Survey* also asked for respondents' opinions on potential impaired driving reforms, ranging from enforcement issues to vehicle sanctions and public education. Granted, it is helpful to learn Crown and defence counsels' opinions about such reforms (since they will be involved in their implementation). However, it must be remembered, as the survey's authors point out elsewhere,<sup>32</sup> that the personal opinions of Crown prosecutors and defence counsel do not necessarily reflect the proven traffic safety impact of the various proposals or sanctions. For instance, it is no surprise that defence counsel showed little support for random breath testing (5%) and administrative licence suspensions (15%),<sup>33</sup> even though the traffic safety benefits of these measures are well-documented in the research literature.<sup>34</sup>

MADD Canada is particularly concerned that Crown counsels' lack of support for a BAC limit of 0.05% will be exploited by those who oppose such a limit, in spite of its proven traffic safety benefits in other countries throughout the world.<sup>35</sup> The *National Survey* warns, for instance, that a 0.05% BAC limit would increase the already heavy caseload on Crown prosecutors.<sup>36</sup> This is a common criticism by opponents of lower BAC limits, but it has never been substantiated. It ignores the fact that a lower BAC limit has been proven to have general deterrent effects, and should reduce overall rates of impaired driving in Canada.<sup>37</sup> In fact, while numerous jurisdictions worldwide have lowered their BAC limits in recent decades, there is no evidence that either their law enforcement or judicial systems were overwhelmed.<sup>38</sup> Further, recent proposals for a 0.05% BAC limit have included streamlined procedures, which should

maximize the efficiency of prosecutions.<sup>39</sup> Lastly, while the administrative burdens on Crown prosecutors cannot be ignored, they cannot be allowed to shape the substantive criminal law. Harmful conduct should not escape criminal sanction simply because some Crown prosecutors consider it challenging to enforce.

## **Conclusion**

The *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* provides helpful information on the perceptions, attitudes and practices of lawyers involved in the criminal prosecution of impaired drivers. However, its results should be given appropriate weight. Some of its findings and conclusions are outdated, given the enactment of Bill C-2. Other findings indicate a need to introduce or promote the use of complementary countermeasures, such as vehicle sanctions or alcohol interlocks, to maximize the efficacy of the *Criminal Code* provisions. Finally, while it is useful to gauge Crown prosecutors' opinions on a range of traffic safety measures, this cannot be substituted for the extensive body of traffic safety research on the effectiveness of various countermeasures, such as BAC limits and ignition interlocks.

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## ENDNOTES

- <sup>1</sup> R. Robertson, W. Vanlaar & H. Simpson, *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* (Ottawa: TIRF, 2009) [National Survey].
- <sup>2</sup> *Ibid.* at vii.
- <sup>3</sup> *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, S.C. 2008, c. 6, ss. 18-26 [Bill C-2].
- <sup>4</sup> *National Survey*, *supra* note 1 at viii.
- <sup>5</sup> *Ibid.* at 8.
- <sup>6</sup> *Ibid.* at viii.
- <sup>7</sup> *Ibid.* at 119 and 145.
- <sup>8</sup> *Ibid.* at 60.
- <sup>9</sup> The authors of the survey themselves point out that Bill C-2 should improve Crown prosecutors' experience with the various "evidence to the contrary" defences. *Ibid.* at 111.
- <sup>10</sup> In several provinces, survey respondents indicated that the rate of conviction for cases proceeding to trial was around only 50%. The authors of the *National Survey* compared this with studies conducted by other researchers in the 1980s and 1990s, which showed conviction rates of 75% or more. The *National Survey* thus infers that conviction rates have declined in recent years. *Ibid.* at 66-67.
- <sup>11</sup> They list, among other things, increasingly complex case law and evidentiary issues. *Ibid.* at 67.
- <sup>12</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 258(1)(c), (d), (g) and (h). See *R. v. Gibson*, 2008 SCC 16.
- <sup>13</sup> The defence is named after *R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.). See also *R. v. Dubois* (1990), 62 C.C.C. (3d) 90 (Que. C.A.); and *R. v. Fox* (2003), 238 Sask. R. 271 (C.A.).
- <sup>14</sup> *National Survey*, *supra* note 1 at 71.
- <sup>15</sup> For more detailed analysis, see R. Solomon, E. Chamberlain & C. Lynch, "Canada's New Impaired Driving Legislation: Modest Gains and Missed Opportunities" (2009) *Crim. L.Q.* (forthcoming).
- <sup>16</sup> Parallel provisions were introduced in regard to evidentiary blood tests.
- <sup>17</sup> *National Survey*, *supra* note 1 at 67.
- <sup>18</sup> *Criminal Code*, *supra* note 12, s. 259(1)(a).
- <sup>19</sup> *National Survey*, *supra* note 1 at 110.
- <sup>20</sup> *An Act to amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32; *An Act to amend the Criminal Code (impaired driving causing death and other matters)*, S.C. 2000, c. 25; and *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, S.C. 2007, c. 12.
- <sup>21</sup> As the *National Survey* itself points out, 77% of impaired driving cases in 2001-2002 resulted in only a fine. This apparently includes cases involving repeat offenders, who should theoretically receive more severe penalties. See *National Survey*, *supra* note 1 at 75, citing: Statistics Canada, "Impaired Driving and Other Traffic Offences 2002" (7 November 2003) *The Daily*.
- <sup>22</sup> *Criminal Code*, *supra* note 12, s. 255(1)(a)(i).
- <sup>23</sup> See R. Scopatz *et al.*, *Unlicensed to Kill: The Sequel* (Washington: AAA Foundation for Traffic Safety, 2003).
- <sup>24</sup> J. Malenfant, R. Van Houten & B. Jonah, "A study to measure the incidence of driving under suspension in the Greater Moncton area" (2002) 34 *Accid. Anal. and Prev.* 439 at 443-44; and H. Ross & P. Gonzales, "Effects of license revocation on drunk-driving offenders" (1988) 20 *Accid. Anal. and Prev.* 379.
- <sup>25</sup> See generally T. Babor *et al.*, *Alcohol: No Ordinary Commodity* (Oxford University Press, 2003) at 163; and *Countermeasures that Work*, 3d ed. (Washington: National Highway Traffic Safety Administration, 2008) at 1-22.
- <sup>26</sup> *National Survey*, *supra* note 1 at 110.
- <sup>27</sup> *Criminal Code*, *supra* note 12, s. 259(1.2)(a).

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- <sup>28</sup> See for example, R. Solomon *et al.*, *Taking Back our Roads: Federal Legislative Reform Agenda 2001* (Mississauga: MADD Canada, 2001); E. Chamberlain, R. Solomon & S. Pitel, *Rating the Provinces and Territories: A Comprehensive Review of the Highway Traffic Law Across Canada* (Mississauga: MADD Canada, 2003); and J. Suggett & R. Solomon, *Rating the Provinces and Territories on Ignition Interlock Programs: The 2008 Report Card* (Oakville: MADD Canada, 2008).
- <sup>29</sup> ICADTS Working Group on Alcohol Interlocks, *Alcohol Ignition Interlock Devices. I: Position Paper* (Calverton, MD: International Council on Alcohol, Drugs and Traffic Safety, 2001) at 10. See also R. Voas *et al.*, “The Alberta interlock program: The evaluation of a province-wide program on DUI recidivism” (1999) 94 *Addiction* 1849; and D. Beirness & R. Robertson, “Best Practices for Alcohol Interlock Programs: Findings from Two Workshops” in D. Mayhew & C. Dussault, eds., *Proceedings of the 16 International Conference on Alcohol, Drugs and Traffic Safety* (Montreal: Société de l’assurance automobile du Québec, 2002).
- <sup>30</sup> *National Survey*, *supra* note 1 at 86.
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Ibid.* at 76.
- <sup>33</sup> *Ibid.* at 85.
- <sup>34</sup> See for example, J. Henstridge, R. Homel & P. Mackay, *The Long-Term Effects of Random Breath Testing in Four Australian States: A Time Series Analysis* (Canberra: Federal Office of Road Safety, 1997); R. Shults *et al.*, “Reviews of Evidence Regarding Interventions to Reduce Alcohol-Impaired Driving” (2001) 21 (4S) *Am. J. Prev. Med.* 66 at 75-76; J. Grube, “Preventing Alcohol-Related Problems: Public Policy Strategies” in *Implementing Impaired Driving Countermeasures: Putting Research into Action* (Washington: Transportation Research Board, 2005) 93 at 104; A. Wagenaar & M. Maldonado-Molina, “Effects of Drivers’ License Suspension Policies on Alcohol-Related Crash Involvement: Long-Term Follow-Up in Forty-Six States” (2007) 31:8 *Alcohol Clin. Exp. Res.* 1.; and M. Asbridge *et al.*, “The effects of Ontario’s administrative driver’s licence suspension law on total driver fatalities: A multiple time series analysis” (2009) 16 *Drugs: Education, Prevention and Policy* 140.
- <sup>35</sup> For more comprehensive reviews of the evidence, see E. Chamberlain & R. Solomon, “The Case for a 0.05% Criminal Law Blood Alcohol Concentration Limit for Driving” (2002) 8 (Suppl. III) *Injury Prevention* iii1; R. Mann *et al.*, “The Effects of Introducing or Lowering Legal Per Se Blood Alcohol Limits for Driving: An International Review” (2001) 33 *Accid. Anal. and Prev.* 569; and J. Fell & R. Voas, “The effectiveness of reducing illegal blood alcohol concentration (BAC) limits for driving: Evidence for lowering the limit to .05 BAC” (2006) 37 *J. Safety Research* 233.
- <sup>36</sup> *National Survey*, *supra* note 1 at 84.
- <sup>37</sup> See Chamberlain & Solomon, *supra* note 35 at iii13. For instance, when the Australian Capital Territory reduced its BAC limit 0.05%, the number of breath-tested drivers with BACs between 0.05% and 0.08% was lowered from 363 per 10,000 tests to 34 per 10,000 tests in one year. C. Brooks & D. Zaal, “Effects of a Reduced Alcohol Limit for Driving” in H. Utzelmann, G. Berghaus & D. Kroj, eds., *Proceedings of the 12th International Conference on Alcohol, Drugs and Traffic Safety, T’92* (Cologne: Verlag TÜV Rheinland, 1992).
- <sup>38</sup> In an Illinois study on the effects of a lower criminal BAC limit on the justice system, researchers made site visits to Chicago, Springfield and Peoria to interview police, prosecutors, judges and licensing officials. Neither police nor prosecutors and judges were overwhelmed with new cases. Rather, they found that it was easier to prosecute “borderline” cases, and reported that there were fewer defence counsel challenges. National Highway Traffic Safety Administration, “An evaluation of the .08 per se law in Illinois finds 13.7 percent fewer fatal crashes with Positive BACs” (2000) 232 *Traffic Tech* 1. See also K. Hutt, *Setting Limits, Saving Lives* (Washington: National Highway Traffic Safety Administration, 2000).
- <sup>39</sup> See R. Solomon, E. Chamberlain and S. Usprich, “BAC to the Future: Modernizing the Criminal Drinking-Driving Threshold” (2006) 52 *Crim. L.Q.* 35.