
TAKING BACK OUR ROADS

A strategy to eliminate impaired driving in Canada

**A comprehensive review of federal
impaired driving legislation**



MADD Canada

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INTRODUCTION



Taking Back Our Roads: A strategy to eliminate impaired driving in Canada is intended to provide the necessary context for a meaningful dialogue with the Federal Government on the legislative steps it must take to effectively address impaired driving in Canada.

Although Parliament reviewed the impaired driving legislation in 1999 and passed related *Criminal Code* amendments in 1999 and 2000, there are important issues that have not been addressed by our federal elected representatives and government officials. MADD Canada has published this comprehensive review of federal impaired driving legislation to prompt an immediate discussion on what must be done to combat the number one criminal cause of death in our country. The Federal Government has an essential role to play in this fight, and it must act now if Canadians are to see safer roads and an elimination of impaired driving crashes, injuries and deaths.

Taking Back Our Roads is a summary of a larger and on-going endeavour of more than 400 pages of research and background information. A team of MADD Canada researchers has been working on federal legislative matters off-and-on since 1998, and has been working intensively on this particular project for the past twelve months.

The initiatives in *Taking Back Our Roads* are supported by public opinion research confirming Canadians' desire for new, effective approaches to fighting impaired driving. There is an overwhelming sense of injustice regarding the needless tragedy of alcohol-related crashes. In addition, research illustrates that Canadian laws have fallen behind the more progressive laws of comparable democratic countries. The public opinion and international research in *Taking Back Our Roads* help place our Canadian impaired driving policies and the proposed initiatives into context.

MADD Canada trusts this comprehensive study will prove to be a useful index of realistic measures to reduce impaired driving crashes and their resulting deaths and injuries. This document provides a snapshot of where Canada stands today compared to other countries – and how the Federal Government can improve its legislation to eliminate impaired driving. MADD Canada is presenting *Taking Back Our Roads* as a tool for the public, media, and particularly for legislators, who want to reduce impaired driving.

MESSAGE FROM THE NATIONAL PRESIDENT

The Federal Government must do much more to eliminate impaired driving in our country. MADD Canada's *Taking Back Our Roads* offers a checklist of initiatives that would save lives and make our roads safer.

MADD Canada is a grassroots, volunteer organization that is dedicated to saving lives by stopping impaired driving, as well as assisting the victims of this violent crime. One of the ways MADD Canada strives to fulfil its mission is by advocating more effective impaired driving laws in our country. This document is our contribution to improving federal legislation.



MADD Canada supports a comprehensive approach to reducing impaired driving. We realize that no one measure, in and of itself, will eliminate this crime. For that reason, the initiatives in *Taking Back Our Roads* should not be cherry-picked, but need to be dealt with as a whole. A lower blood-alcohol concentration (BAC) limit will have little effect if police are not given the tools they need to detect, apprehend and gather evidence against impaired drivers. However, it is MADD Canada's strong belief that these five components, taken together, will result in far fewer deaths and injuries on Canadian roads.

MADD Canada is proud to release *Taking Back Our Roads*. From the outset, we want to be clear that we have not gone to this extent in researching impaired driving legislation to simply be critical of the Federal Government for its failing to respond to the calls for reform that were heard during the Justice Committee's 1999 hearings. On the contrary, our organization wants to pick up from that Parliamentary review and provide support for a continued, effective federal action plan on impaired driving. MADD Canada supporters want to work with the Federal Government to introduce the necessary improvements to federal impaired driving legislation.

Impaired Driving Policy Priorities

The Federal Government has the necessary legislative and regulatory tools to significantly improve impaired driving laws, make our roads safer and better serve victims. The strategy we have forwarded contains realistic and workable changes in the law — changes that are compatible with the legislative and constitutional framework currently governing impaired driving issues in Canada.

Unfortunately, Canada lags far behind most countries in reducing alcohol-related traffic deaths and injuries, even though many of those countries have far higher per capita rates of alcohol consumption. They have succeeded to a far greater extent in inducing their populations to refrain from drinking and driving. Their laws are deterring impaired driving and protecting the public, whereas our laws are deterring police and prosecutors, and protecting impaired drivers from criminal sanction.

The current 0.08% *Criminal Code* BAC limit allows individuals to drink considerable amounts of alcohol and then drive without criminal sanction. Given the case law, most police will not even lay an impaired driving charge unless the driver's BAC is above 0.10%. Thus, a 200-pound man can drink almost six beers in two hours and get behind the wheel of his car, reasonably confident that he will not be criminally charged. Or, to use another example, a 125-pound female can consume three glasses of wine in two hours before she may be criminally charged. *MADD Canada believes that the current Criminal Code BAC limit poses unacceptable risks to Canada's safe, sober and responsible drivers.*

However, MADD Canada's proposal to lower the criminal BAC limit will undoubtedly incite a great deal of criticism from the alcohol and hospitality industries. In what will be a lively debate, we must keep the arguments in perspective. It is not an issue of consumption — 'of drinking a glass of wine with a meal.' Rather, the question is, 'Just how much should a person be allowed to drink before being considered an unacceptable risk to public safety on the roads?' Ask yourself, "How much is too much for a drinking driver behind the wheel of a car, barreling towards you and your family?"

MADD Canada strongly believes that, by lowering the Criminal Code BAC limit, we will make our roads safer. Research shows that this initiative will have a significant deterrent effect, and will encourage Canadians to totally separate their drinking and driving occasions – thereby decreasing the number of drinking drivers and impaired driving crashes.

As you will read in *Taking Back Our Roads*, under the current law, millions of Canadians continue to drink and drive. In the *1999 National Opinion Poll on Drinking and Driving*, 19.3 % of licensed drivers acknowledged that they had recently driven within two hours of drinking. In the authors' words, "when applied to the entire population of licensed drivers, it shows that over four million Canadians admit to driving after drinking." Moreover, an estimated 2.3 million drove in the past year when they thought they were over the legal limit – many of them on a routine basis. Given this information, there are tens of thousands of impaired drivers on Canadian roads each night, and very few ever come to police attention. In fact, it has been estimated that only 1 in every 445 impaired driving trips in Canada results in a criminal charge, and some American studies indicate that the figure may be as low as 1 in 2,000. Little progress can be made when so many Canadians continue to drink and drive, and so few are ever apprehended.

In order for Canada's impaired driving laws to be effective, the police must be given the necessary tools to detect and apprehend impaired drivers. MADD Canada has a strong working partnership with the police community, and understands police frustration with the current law. Instead of assisting police with the difficult task of apprehending impaired drivers, the *Criminal Code*, as currently interpreted by the courts, serves to deter effective enforcement and prosecution. MADD Canada's enforcement recommendations are designed to assist police in stopping, detecting, and gathering evidence against impaired driving suspects. These initiatives will help to ensure that impaired drivers are apprehended, charged and, ultimately, convicted.

Fighting the Crime of Impaired Driving

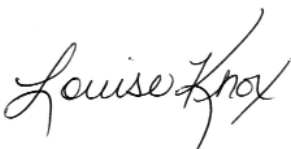
Impaired driving is a crime that costs Canadians dearly. MADD Canada supporters are most interested in what their federal representatives can and will do to improve the legislation in our country. We will not stand by while Canada lags further behind the international community in fighting impaired driving. With an average of 4.5 Canadians killed another 125 Canadians injured daily, there is no reason why our country should not be at the forefront of all nations in its attempt to eliminate this crime. Placed in the proper context, this study provides a reflection of how the Federal Government stacks up against its own potential to curtail the serious problem of impaired driving. Again, our intent is to establish those priorities for effective change – *on what can be done to eliminate impaired driving*.

For those legislators who are looking for answers on how they can reduce impaired driving, it should be comforting to know that virtually all of the initiatives within *Taking Back Our Roads* have already been implemented in jurisdictions around the world.

In presenting this material, MADD Canada is looking to forge partnerships with legislators and to work with government officials to accelerate the development of more effective legislation across the country. There are many initiatives (some recognized in the Justice Committee's 1999 report) that can make an immediate difference in the fight against impaired driving. From our perspective, the Federal Government has no excuse for delay – there are effective ways to address impaired driving in our country.

We urge the Federal Government to act. We urge the Government to take up MADD Canada's initiatives in Taking Back Our Roads. Our organization and its thousands of supporters across Canada look forward to working with the Federal Government to make our communities' roads safer – and to ensure that no more Canadians are needlessly killed or injured as a result of impaired driving.

We are respectfully submitting *Taking Back Our Roads* to our federal legislators as a catalyst for action.



Louise Knox
National President
Madd Canada

EXECUTIVE SUMMARY

- MADD Canada has released the comprehensive review, *Taking Back Our Roads*. This document summarizes the latest research and presents a checklist of impaired driving initiatives for introduction and/or implementation by the Federal Government by 2004. *Taking Back Our Roads* is intended to provide the necessary context for a meaningful dialogue with the Federal Government on the legislative steps it must take to effectively address the crime of impaired driving in Canada.
- Under the direction of Robert Solomon, Professor of Law at the University of Western Ontario and MADD Canada's Director of Legal Policy, MADD Canada has prepared a strategy to eliminate impaired driving. With *Taking Back Our Roads*, MADD Canada offers extensive supporting documentation and a checklist of initiatives for the Federal Government's use in the next two years. The checklist includes 19 initiatives, under five headings: Lowering the *Criminal Code* BAC Limit, Enhancing Enforcement Powers, Clarifying and Redefining the Offences, Rationalizing Sentencing, and Addressing Administrative Issues.
- MADD Canada's checklist of initiatives to eliminate impaired driving is as follows.

LOWERING THE CRIMINAL CODE BAC LIMIT

- The *Criminal Code* BAC limit should be reduced from 0.08% to 0.05%.

ENHANCED ENFORCEMENT POWERS

- Police should be authorized to stop any vehicle at random to determine if the driver has a valid licence, is fit to drive, and is complying with the *Criminal Code*'s impaired driving provisions.
- Police should be authorized to use passive alcohol sensors.
- If a police officer reasonably suspects that a driver has alcohol or drugs in his or her body, the officer should be authorized to demand a standardized field sobriety test, and should be authorized to videotape the test. It should be an offence to refuse to comply with the officer's demand.
- If a police officer reasonably suspects that a driver is impaired by a drug, drugs, or a combination of alcohol and drugs, the officer should be authorized to demand that the driver participate in a test under the Drug Evaluation and Classification Program. The officer should be authorized to videotape the test, and it should be an offence to refuse to comply with the officer's demand.
- If a police officer has reasonable and probable grounds to believe that a driver is impaired by a drug, drugs, or a combination of alcohol and drugs, the officer should be authorized to demand a saliva, blood or urine sample from the driver. It should be an offence to refuse to provide such a sample.

- The Alcohol Test Committee should expedite the process of approving more practical, mobile evidentiary breath test units for use as approved instruments.
- Police should be authorized to demand a breath sample on an approved screening device or a standardized field sobriety test from any driver involved in a crash causing personal injury or death. If a breath sample or sobriety test cannot be completed for any reason, police should be authorized to demand a blood sample.
- The blood sampling provisions of the *Criminal Code* should be amended to make it easier for the police to demand blood samples when an impaired driver is injured or taken to hospital, or it is otherwise impracticable to obtain evidentiary breath samples.

CLARIFYING AND REDEFINING THE OFFENCES

- The *Criminal Code* should be amended to include a definition of “impairment” that is clear for both police and judges.
- The *Criminal Code* should be amended to include a definition of “cause” for cases of impaired or dangerous driving causing bodily harm or death.
- The presumptions regarding the use of breath or blood test evidence should be strengthened to eliminate the “Carter” and “Last Drink” defences.

RATIONALIZING SENTENCING

- The *Criminal Code* should provide for tiered sentencing of impaired drivers based on a number of aggravating factors, including the offender’s BAC, prior offences, and the existence of a crash, injuries or deaths.
- Parliament should eliminate the availability of conditional sentences for those convicted of impaired driving causing bodily harm or death.
- The ignition interlock provisions of the *Criminal Code* should be expanded to encourage all impaired driving offenders to participate in an interlock program, whether they are first or repeat offenders.

ADDRESSING ADMINISTRATIVE ISSUES

- The offences of impaired driving, driving with an illegal BAC, and failing or refusing to provide breath or blood samples should be added to the list of offences within the exclusive jurisdiction of the provincial courts.
- The mandate and approach of the Alcohol Test Committee should be altered to include a fee-based system that is faster and includes more practical criteria for the approval of breath and blood-testing instruments. A certified breath technician should be added to the Committee to ensure that the practical concerns of front-line officers are taken into account.
- The role of the Victims’ Policy Office should be expanded to ensure that it becomes a practical source for victims and victim service practitioners.
- The federal government should develop a concrete action plan with realistic, measurable goals. Parliament should also commit itself to reviewing both the impaired driving legislation and Canada’s progress relative to that of the international community every five years.

MADD CANADA'S FEDERAL LEGISLATIVE REFORM AGENDA

THE CURRENT IMPAIRED DRIVING SITUATION

The impaired driving law has become exceedingly technical, time-consuming and unrewarding to enforce and prosecute. The federal legislation and the courts' interpretation of it have created insurmountable barriers to efficient enforcement and prosecution.¹ Even if charged, those with sufficient resources can escape conviction altogether, have the criminal charges dropped in exchange for pleading guilty to a provincial traffic offence, or have the penalty significantly discounted. While many defence counsel may privately view the law as a game, some publicly boast about their near perfect records of getting impaired drivers acquitted.²

Leaving aside the injustice and inappropriateness of the current situation, the law is not achieving its primary goal of protecting the public. Impaired driving remains the leading criminal cause of death in Canada, claiming over three times as many lives per year as all forms of homicide combined.³ While the incidence of impaired driving has fallen from the record high levels of the mid-1980s,⁴ progress slowed in the 1990s.⁵

Indeed, Canada lags far behind most comparable democratic countries in reducing alcohol-related traffic deaths and injuries, even though many have far higher per capita rates of alcohol consumption.⁶ They have succeeded to a far greater extent in inducing their populations to refrain from drinking and driving. Their laws are deterring impaired driving and protecting the public, whereas ours are deterring police and prosecutors, and protecting impaired drivers from criminal sanction.

Millions of Canadians continue to drink and drive. In the 1999 *National Opinion Poll on Drinking and Driving*, 19.3% of licensed drivers acknowledged that they had recently driven within two hours of drinking.⁷ In the authors' words, "when applied to the entire population of licensed drivers, it shows that *over four million Canadians admit to driving after drinking*."⁸ Moreover, an estimated 2.3 million drove in the past year when they thought they were over the legal limit – many of them on a routine basis.⁹ Thus, there are tens of thousands of impaired drivers on Canadian roads each night,¹⁰ and very few ever come to police attention. It has been estimated that only 1 in every 445 impaired driving trips in Canada results in a criminal charge,¹¹ and some American studies indicate that the figure may be as low as 1 in 2,000.¹² Little progress can be made when so many Canadians continue to drink and drive, and so few are ever apprehended.

Even if the police conclude that a driver is legally impaired, criminal charges may not be laid. In a recent national survey, 42% of Canadian police officers admitted that they sometimes or frequently release impaired driving suspects with a short-term provincial suspension, rather than proceed with criminal charges.¹³ One-third of the officers indicated that they sometimes or frequently release the driver without any sanction, and merely arrange for safe transportation home. This police reaction is not surprising. It takes an average of 2.6 hours to process a simple impaired driving case to the point of laying the charge.¹⁴ The task of gathering evidence against accused impaired drivers is technical, convoluted and often frustrating. Among the reasons cited for not laying criminal charges was that the process was too time-consuming, and three-quarters of the officers stated that they were discouraged because impaired drivers sometimes or frequently escape conviction on legal technicalities.¹⁵ The current law makes it inordinately difficult for police to apprehend impaired drivers and gather sufficient evidence to secure a conviction.

The prosecution of impaired driving cases has become equally challenging. While holding the police and prosecutors to exacting standards of proof, the courts have interpreted the law to unduly narrow the offences, and have recognized defences that appear to lack an air of reality. Figures from the Canadian Centre for Justice

Statistics indicate that, depending on the offence, only 23% to 61% of impaired driving charges between 1994 and 1998 resulted in a guilty disposition in the provincial courts.¹⁶ To make matters worse, those charged with the most serious offences were the least likely to be convicted. While the conviction rate for driving with a blood-alcohol concentration (BAC) above 0.08% was 61%, the rate dropped to only 33% for impaired driving causing bodily harm and 23% for impaired driving causing death.¹⁷

The federal government did introduce amendments in 1999 and 2000, but these focused almost exclusively on increasing the penalties.¹⁸ The government ignored proposals to lower the *Criminal Code* BAC limit to 0.05%, enhance police enforcement powers, clarify and redefine some of the offences, and rationalize sentencing. In short, Parliament failed to consider the most pressing issues, namely, the diminishing deterrent impact of the federal law and the obstacles to the efficient apprehension, processing and prosecution of impaired drivers.

FEDERAL LEGISLATIVE REFORM AGENDA

Without substantive reform of the *Criminal Code*, the annual toll of alcohol-related traffic deaths and injuries will continue unabated. Responsible Canadians will continue to be exposed to needless risks that are unacceptable in most of the international community. Consequently, MADD Canada believes that the 1999 and 2000 amendments must be viewed as only the beginning of the process of reforming the federal impaired driving law.

In the remainder of this report, MADD Canada summarizes its *Federal Legislative Reform Agenda*.^{*19} The *Agenda* focuses on pragmatic, achievable changes, rather than radical shifts in legislative direction. The proposals are based on traffic safety research undertaken in Canada and abroad. The impaired driving laws in other modern democracies were examined, with particular emphasis on Australia, New Zealand, Western Europe, and the United States. Despite the predictable protests from criminal defence lawyers and the alcohol industry, all of the substantive reform proposals are commonplace in the international community. While *Charter* litigation is an inevitable fact of legislative reform, MADD Canada's proposals have been drafted to comply with *Charter* values.

It is impossible in this brief document to outline MADD Canada's complete *Federal Legislative Reform Agenda*, let alone the empirical research and legal analyses upon which it is based. Rather, this document sets out the five major components of the *Agenda*: a 0.05% *Criminal Code* BAC limit; enhanced enforcement powers; clarifying and redefining the offences; rationalizing sentencing; and administrative issues. While all of these components would improve the current situation, the first two are vital. A 0.05% *Criminal Code* BAC limit, coupled with enhanced enforcement powers, holds the greatest promise for deterring impaired driving, dramatically improving apprehension, charge and conviction rates, and reducing alcohol-related crashes.

COMPONENT I: THE NEED FOR A 0.05% CRIMINAL CODE BAC LIMIT²⁰

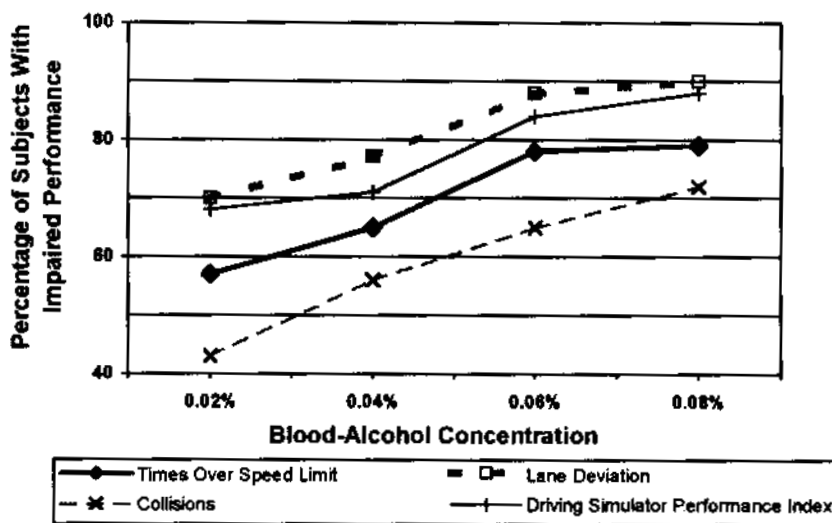
The current federal BAC limit allows individuals to drink considerable amounts of alcohol and then drive without criminal sanction. Given the case law, most police will not even lay an impaired driving charge unless the driver's breathalyzer readings are above 0.10%.²¹ Thus, a 200-pound man can drink over six beers or more than a bottle of wine in a three-hour period, and get behind the wheel of his car reasonably confident that he is immune from criminal liability. Indeed, it is unlikely that the man would even be charged.

At best, the 0.08% BAC limit gives drivers an ambiguous message. They are not admonished to refrain from drinking and driving. Rather, the message in Canada appears to be "Don't drive when you're very drunk, but any lesser level of impairment is fine." The current law does not require clear boundaries to be drawn between drinking occasions and driving. It is hardly surprising that the 0.08% BAC limit is having such limited deterrent effects.

As early as 1960, the British Medical Association stated that "a concentration of 50 mg% of alcohol in 100 ml of blood while driving a motor vehicle is the highest that can be accepted as entirely consistent with the safety of other road users."²² Since Canada's 0.08% limit was introduced in 1969, studies conducted in laboratories, on driving simulators and on closed access courses have established that impairment of critical driving skills, including vision, psychomotor tasks, reaction time, drowsiness, information processing, and divided attention tasks, begins at levels well below 0.08%.²³ For example, drivers with BACs of 0.03% and higher have significantly impaired performance in tracking tasks, "choice" reaction time,²⁴ steering accuracy, and braking ability.²⁵

Most recently, a 2000 study undertaken for the American National Highway Traffic Safety Administration (NHTSA) found that almost 60% of drivers demonstrated impairment of divided attention skills at a BAC of only 0.02%, and over 80% were impaired in these essential skills below 0.06%.²⁶ Moreover, the majority of subjects had impaired performance on a driving simulator at BACs of 0.04%.²⁷ At a BAC of 0.06%, 84% of subjects were impaired. Selected results of that study are illustrated in the following graph.

Impairment of Selected Skills at Various BACs in Driving Simulator Tests



Source: H. Moskowitz *et al.*, *Driver Characteristics and Impairment at Various BACs* (Washington: National Highway Traffic Safety Administration, 2000).

This impairment of driving-related skills is reflected in a corresponding body of research on the relative risk of crash. Studies conducted over the last forty years have consistently established that drivers with BACs in the 0.05% to 0.08% range are at a substantially greater relative risk of crash, injury and death than their sober counterparts.²⁸ As the following chart illustrates, these risks rise even more sharply in the 0.08% to 0.10% BAC range, a level at which most police will not even consider laying a criminal charge under the existing law.²⁹ The current *Criminal Code* BAC limit clearly fails to sanction drivers who present substantial and serious risks to themselves and, more importantly, all other users of the road.

The Relative Risk of a Fatal Single-Vehicle Crash for Males at Various BACs

	0.02%-0.049%	0.05%-0.079%	0.08%-0.099%
Age 16-20	4.64	17.32	51.87
Age 21-34	2.75	6.53	13.43
Age 35+	2.57	5.79	11.38

Source: P.L. Zador, S.A. Krawchuk & R.B. Voas, "Alcohol-Related Relative Risk of Driver Fatalities and Driver Involvement in Fatal Crashes in Relation to Driver Age and Gender: An Update Using 1996 Data" (2000) 61 *J. Stud. Alcohol* 387 at 392.

Nevertheless, support for a lower BAC limit is not limited to the laboratory or abstract calculations of risk. There is substantial evidence of the positive real-world impact of various low BAC limits both in Canada and abroad. This includes research on the impact of: lowering the criminal BAC limit from 0.10% to 0.08% in about half of the American states; establishing zero or low BAC limits for young drivers; introducing 12 to 24-hour provincial licence suspensions for drivers with BACs over 0.05%; and enacting BAC limits of 0.05% or lower in various jurisdictions around the world.

International studies reporting the benefits of 0.05% or lower BAC limits have emerged from, among others, Sweden, Germany, Belgium, France, Austria, Australia, and the Netherlands.³⁰ Indeed, a recent Canadian literature review concluded that, in “every jurisdiction in which a 50 mg% limit has been introduced, there is at least some evidence of beneficial effects, in terms of reduced collisions, injuries and fatalities.”³¹ Studies have found that such 0.05% BAC limits produce a variety of traffic safety benefits, helping to reduce fatal crashes, single-vehicle crashes, alcohol-related crashes, and serious collisions. They also help to reduce overall rates of drinking and driving, the percentage of BAC-positive drivers, and the mean BAC of drinking drivers. In short, the international experience with BAC limits of 0.05% and lower very strongly supports a similar change in Canada’s *Criminal Code*.

Unfortunately, the Canadian alcohol industry has successfully lobbied against a lower *Criminal Code* BAC limit. Although it has never seriously challenged the research on the impairment of driving skills or the relative risk of crash, it frequently claims that a 0.05% BAC limit would have no positive real-world impact. Among other things, it has been argued that a 0.05% BAC limit: would not deter “hard core” drinking drivers; would reduce public support for impaired driving laws; and would be difficult and costly to enforce. As briefly outlined below, the industry’s criticisms are directly refuted by the research or are simply unfounded.

First, the argument that a lower BAC limit would not deter so-called “hard core” drinking drivers is flatly contradicted by international research. This research suggests that lower BAC limits reduce impaired driving among all drivers, including those with high BACs. In Australia and Sweden, the low BAC limit had its greatest effects on drivers with the highest BACs – the so-called “hard core” drinking drivers – who allegedly pose the greatest risks.³² For example, in the Australian Capital Territory, the 0.05% BAC limit resulted in a 34% decrease in the percentage of tested drivers with BACs above 0.15%, and a 58% decrease in those with BACs of 0.20% and higher.³³ These were among the largest decreases of all the BACs categories.

The alcohol industry has also claimed that a 0.05% BAC limit would decrease public support for the law by encroaching on “responsible” drinking among so-called “social drinkers.” However, a 2001 opinion poll conducted for MADD Canada found that two-thirds of Canadians would support or strongly support reducing the *Criminal Code* BAC limit to 0.05%.³⁴ Moreover, contrary to the impression created by the industry, it takes more than a drink or two for the average male to reach a BAC of 0.05%. Given the margin of error currently accepted by our courts, and the delay between the driver being stopped and being tested, the following chart significantly underestimates the actual consumption necessary to generate any real-world risk of a 0.05% *Criminal Code* conviction.

BAC for Males in Relation to Time, Weight and Consumption*

	2 hours		3 hours	
	180 lbs	200 lbs	180 lbs	200 lbs
2 standard drinks	0.0237%	0.0189%	0.0117%	0.0694%
3 standard drinks	0.0476%	0.0404%	0.0356%	0.0284%
4 standard drinks	0.0714%	0.0619%	0.0594%	0.0499%
5 standard drinks	0.0953%	0.0834%	0.0833%	0.0714%
6 standard drinks	0.1191%	0.1048%	0.1071%	0.0928%
7 standard drinks	0.1430%	0.1263%	0.1310%	0.1143%

* This chart is based on a formula provided by the American National Highway Traffic Safety Administration (NHTSA). See *Computing a BAC Estimate* (Washington: National Highway Traffic Safety Administration, 1994), online: NHTSA Homepage <www.nhtsa.dot.gov/people/injury/alcohol/bacreport.html>.

The current *de facto* BAC limit of 0.10% permits consumption at levels that very few Canadians would consider tolerable, let alone “responsible,” for individuals who intend to drive.

It has been argued that a 0.05% BAC limit would pose special enforcement difficulties for the police. Yet, in most provinces, police are already enforcing zero BAC limits for young or beginning drivers, low BACs for commercial drivers, and the 0.04% to 0.06% provincial roadside suspensions for the rest of the driving population. If the police can routinely enforce these existing low BAC limits, why would they have difficulty enforcing a 0.05% *Criminal Code* BAC limit?

While it is true that a 0.05% BAC limit would theoretically make more drivers liable to prosecution, it does not follow that the police and the courts will be overburdened with cases. A lower *Criminal Code* BAC limit would have a major general deterrent effect, reducing the number of people who drive after drinking, and thus, the number of potential offenders. The American states that have lowered their criminal BAC limits from 0.10% to 0.08% have not reported being overburdened.³⁶ In addition, while some Australian states have had 0.05% BAC limits for at least twenty years, there is no evidence in the literature of any crisis in impaired driving enforcement or prosecution.

Similarly, the industry has argued that a 0.05% limit would greatly increase enforcement and court costs.³⁷ Again, this argument appears to assume that a 0.05% BAC limit would not have any impact on the prevalence of impaired driving. Moreover, it fails to consider the potential cost savings to Canadian society of any reduction in impaired driving crashes, deaths and injuries. A Stanford University study of the economics of a proposed reduction in New York State’s BAC limit to 0.08% estimated that it would, indeed, increase enforcement costs by \$80 million (U.S.) over its first ten years. The author also found that the limit would save between \$9 and \$11.4 billion dollars (U.S.) in the same period, based on even a conservative estimate of the number of crashes avoided and lives saved.³⁸ Thus, the additional enforcement costs were less than 1% of the most conservative estimate of the law’s benefits.

Finally, some critics feel that there is no need for a 0.05% *Criminal Code* limit because the existing 0.04% to 0.06% provincial roadside suspensions are sufficient. However, it is difficult to believe that any objective observer would consider the current system to be acceptable, given the number of Canadians who continue to drink and drive, and Canada’s high rate of impaired driving compared to similar democratic countries. With the exception of Quebec, all of the provinces and territories do have some form of short-term roadside licence suspension, but in most jurisdictions, they carry no long-term licensing consequences. It is inappropriate to assume that the deterrent impact of a mere 12 to 24-hour administrative licence suspension is comparable to that of a *Criminal Code* offence, which currently carries the possibility of imprisonment and results in a permanent criminal record, a substantial fine and a minimum one-year federal driving prohibition. We can expect the deterrent effects of a *Criminal Code* 0.05% BAC limit to be far greater, resulting in an overall decrease in impaired driving, as well as the crashes, injuries and deaths it generates.

COMPONENT II: ENHANCED ENFORCEMENT POWERS

Although it has been estimated that 12.5 million impaired driving trips are made in Canada each year,³⁹ only 70,587 people were charged with impaired driving offences in 1998.⁴⁰ While the vast majority of impaired drivers are never stopped by police, more than half who are stopped at sobriety checkpoints may go undetected and are released.⁴¹ As indicated, the *Criminal Code* makes it so difficult and unrewarding to gather evidence against impaired driving suspects that many police are reluctant to lay criminal charges.⁴² A recent British Columbia survey found that nearly half of the officers will simply not lay *Criminal Code* charges, even if they believe that a driver is impaired.⁴³ MADD Canada’s enforcement recommendations are designed to assist police in stopping, detecting, and gathering evidence against impaired driving suspects.

Police should be authorized to stop any motor vehicle at random to determine if the driver has a valid licence, is fit to drive, and is complying with the *Criminal Code*’s impaired driving provisions. It should be a federal criminal offence to fail to stop when directed to do so by an officer. As highway traffic legislation varies from province to province, these *Criminal Code* provisions are necessary to clearly authorize police across Canada to stop any driver, and require all drivers to comply. The *Criminal Code* should also be amended to specifically authorize police to use passive alcohol sensors (PAS). These small air-sampling devices enable the police to detect the presence of alcohol in the ambient air around a driver. A positive result on the PAS provides the police with the necessary suspicion to demand a breath sample on an approved screening device (ASD).⁴⁴ Studies from the United States

indicate that the use of passive alcohol sensors improves the detection of impaired drivers by up to one-third, and decreases the number of law-abiding drivers who are unnecessarily detained.⁴⁵

In addition, if the police reasonably suspect that a driver has any alcohol or drug in his or her body, they should be authorized to demand that the driver submit to a standardized field sobriety test (SFST). This amendment would assist the police in several ways. First, SFSTs can provide the necessary grounds for demanding evidentiary breath tests if an ASD were unavailable.⁴⁶ Second, the amendment would clarify the current legal uncertainties about SFSTs,⁴⁷ by clearly authorizing the police to demand participation and by making it a *Criminal Code* offence to fail to comply unless one had a lawful excuse. Third, SFSTs can provide the police with objective evidence to support a conviction for driving while impaired, which may be the only basis for conviction if evidentiary breath tests are not undertaken, cannot be conducted within the statutory time limits, or are otherwise successfully challenged.

Similarly, if an officer suspects drug impairment, he or she should have authority to demand that the driver submit to a test by a Drug Recognition Expert. These specially-trained officers conduct a standardized test to determine if a suspect is impaired, if that impairment is drug-related, and what type of drug may be involved. This will help to address a gap in the Canadian law, as there are currently no means of testing for drug impairment in the absence of a crash. Moreover, police should have authority to videotape both SFSTs and Drug Recognition tests. These tests provide objective evidence of impairment, and should give greater weight to police testimony in impaired driving cases,⁴⁸ particularly when supported by a videotape record.

Given police frustration with the time-consuming nature of the current impaired driving provisions, MADD Canada also advocates enforcement reforms that would streamline the processing of suspected impaired drivers. In particular, the Alcohol Test Committee should expedite the approval of more practical, mobile evidentiary breath test instruments so that impaired drivers could be processed at roadside, rather than the police station. To assist in this process, police should also be equipped with secure digital telephones, which would allow suspects to contact counsel more quickly, at any location. It is unrealistic to expect significant improvements in the *Criminal Code* charge rates if it continues to take officers an average of 2.6 hours to process even a simple impaired driving case to the point of laying the charge.⁴⁹

MADD Canada's other major enforcement recommendations involve police authority to demand blood and breath samples. Currently, police can only demand blood samples from a suspected impaired driver if he or she is incapable of providing breath samples or it is "impracticable" to obtain breath samples because of the driver's physical condition.⁵⁰ Unfortunately, the courts have so narrowly defined the term "impracticable" that many impaired driving suspects who have or feign injuries and are taken to hospital can escape criminal liability altogether.⁵¹ Consequently, it is recommended that Canada, like Australia, New Zealand, and the United Kingdom,⁵² allow the police to demand blood samples whenever a suspect is taken to hospital.

Finally, MADD Canada recommends that police be authorized to demand a breath sample from *any* driver involved in a fatal or personal injury crash, whether or not there are reasonable grounds to suspect that the driver is impaired. The occurrence of the crash would provide the basis for the demand. While our law generally requires individualized suspicion for searches, it must be emphasized that driving is a highly regulated activity that occurs on public roads. Given that nearly 40% of traffic fatalities and 20% of personal injury crashes involve a drinking driver,⁵³ it can hardly be said that the demand is random or arbitrary. This proposal is consistent with the laws in many comparable countries, including Australia, New Zealand and the United Kingdom.⁵⁴ Moreover, in the absence of this provision, the overwhelming majority of those who drink, drive and kill or injure in Canada will continue to escape criminal liability for their conduct.

COMPONENT III: CLARIFYING AND REDEFINING THE OFFENCES

The current *Criminal Code* provisions and some courts' interpretation of them allow many impaired drivers to escape conviction. For example, the *Criminal Code* makes it an offence to drive while one's *ability* to do so is impaired by alcohol. As indicated, impairment of key driving-related skills begins at levels well below 0.08%. Nevertheless, many judges refuse to convict an accused unless he or she was actually *driving* in an impaired manner. In addition, a number of lower courts require the police to prove that the driver exhibited multiple, visible signs of severe intoxication, even though the appeal courts have ruled that slight impairment of driving ability is all that is required for a conviction.⁵⁵ This reflects an outdated attitude that equates impairment with an alcohol-induced stupor.

Similarly, some judges require the prosecution to prove that the driver's impairment was the sole or primary

cause of the crash in cases of impaired driving causing death or bodily harm. Yet, the appeal courts have repeatedly held that the causation element will be satisfied if the impaired driving is simply a cause of the crash beyond a trivial or insignificant level.⁵⁶ Therefore, MADD Canada recommends that the concepts of “impairment” and “causation” be expressly defined in the *Criminal Code*, consistent with the higher courts’ rulings and Parliament’s intent.

Another concern is that the courts have interpreted the *Criminal Code* in a manner that results in the evidentiary breath or blood test results being thrown out based solely on the accused’s unsubstantiated and self-serving testimony. In the absence of the test results, the charges are invariably dropped or the accused is acquitted. The two major defences that arise are outlined below in non-technical terms.⁵⁷

First, the “Carter” defence, as it is called, is based on the accused’s testimony that he or she consumed only a small amount of alcohol on the date of the alleged offence.⁵⁸ A defence toxicologist is then called to confirm that the accused’s BAC would have been below 0.08% if he or she had, in fact, consumed such a small amount. If the court accepts the accused’s evidence, the breath or blood evidence is completely disregarded, even if the tests were administered properly, are consistent with the reading on the roadside screening device, and are supported by the officer’s evidence that the accused showed signs of intoxication. It is simply assumed that the results must somehow be wrong, and they are rejected.

Second, the “last drink” defence is typically based on the accused’s testimony that he or she consumed a large quantity of alcohol immediately before driving.⁵⁹ It is contended that this alcohol had not yet been absorbed into the driver’s bloodstream when stopped by the police. Thus, the accused argues 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. Again, the breath test results are rejected and the accused is acquitted.

These questionable defences do not appear to be available in other jurisdictions. For example, the impaired driving legislation in the United Kingdom states that the breath or blood tests must be taken into account in all cases, and assumes that the accused’s BAC at the time of driving was not less than that indicated by the test results.⁶⁰ The only exception arises when the accused *proves* that: he or she consumed alcohol after driving but before providing a breath or blood sample; and that, as a result of this consumption, his or her BAC would not have exceeded the prescribed limit at the time of driving. As can be seen, this places a much heavier onus on an accused who wishes to challenge the BAC results.

MADD Canada recommends that the *Criminal Code* be redrafted to ensure that Parliament’s intent in designating approved instruments does not continue to be thwarted. This will require strengthening the presumptions regarding the evidentiary weight to be given to evidentiary breath or blood test results. In particular, if the accused wishes to challenge breath test results, he or she should be required to show on a balance of probabilities that the tests were conducted improperly or that the approved instrument was malfunctioning at the time of the test.

COMPONENT IV: RATIONALIZING SENTENCING

While the federal government has recently increased the maximum penalties for most impaired driving offences, many judges continue to greatly discount the severity of impaired driving, even in the face of aggravating factors. Moreover, due to various factors, it is common for repeat offenders to be sentenced as first offenders and escape the minimum sanctions Parliament had prescribed for second and subsequent offences. Finally, the penalties imposed in very similar cases vary greatly; they appear to have more to do with the judges’ attitudes toward impaired driving than the offenders’ conduct.

In order to address these concerns, the *Criminal Code* should provide tiered penalties for impaired drivers based on specific aggravating factors, including: the offender’s BAC, the existence of a crash, injuries or fatalities, and any prior offences. The provisions should indicate how each factor affects the sentence, and should be binding on the sentencing judge. These types of provisions, or “sentencing grids,” exist in several European countries, including Sweden, the Netherlands, France, and Denmark.⁶¹ They appear to be easy to use and would reduce the broad, unfettered discretion that currently exists in Canada.

Second, the driving prohibitions in the *Criminal Code* should be amended to encourage all impaired driving offenders to participate in an alcohol interlock program, whether they are first-time or repeat offenders. The minimum length of time an offender spends in the program should be linked to his performance in the program. For example, a pattern of attempts to drive with a BAC above the pre-set limit indicates that a driver is not ready to have the interlock removed from his or her vehicle.

COMPONENT V: ADMINISTRATIVE ISSUES

These recommendations deal primarily with court procedures and the accountability of the federal government. MADD Canada recommends that the offences of impaired driving, driving with an illegal BAC, and failing to provide breath or blood samples be subject to the exclusive jurisdiction of the provincial courts. This will allow the offences to be tried by indictment in the provincial courts, thereby eliminating the legal formalities that would have applied if tried by indictment in the superior courts. Next, the mandate and approach of the Alcohol Test Committee should be altered to include a fee-based system that is faster and includes more practical criteria for the approval of breath and blood-testing instruments. A certified breath technician should be added to the Committee to ensure that the practical concerns of front-line officers are taken into account. In addition, the role of the Victims' Policy Office should be expanded to ensure that it becomes a practical source for victims and victim service practitioners. Finally, the federal government should develop a concrete action plan with realistic, measurable goals. Parliament should also commit itself to reviewing both the impaired driving legislation and Canada's progress relative to that of the international community every five years.

THE NEED FOR COMPREHENSIVE LEGISLATIVE REFORM

Earlier this year, the federal government published *Road Safety Vision 2001*, in which it stated that its goal was to "make Canada's roads the safest in the world."⁶² Similarly, MADD Canada has set for itself the less grandiose goal of reducing alcohol-related traffic deaths to two per day by December 2003. Significant progress toward achieving these ends is impossible without comprehensive reform of the federal law. As long as drivers with BACs of up to 0.10% are largely immune from criminal liability and the police are denied the powers they need to efficiently enforce the law, Canada will lag far behind the world leaders in traffic safety.

While the *status quo* shields impaired drivers from criminal liability and financially benefits defence lawyers and the alcohol industry, it does so by endangering the safe, sober and responsible users of the roads. The real issue in terms of the *Criminal Code* BAC limit is whether it should be based on traffic safety research and serve the public interest, or based on lobbying and serve the financial interests of the alcohol industry. Canadians should consider the appropriateness of the current BAC limit when they or their loved ones have to drive late Thursday, Friday or Saturday night. They should remember that a significant percentage of the approaching vehicles are driven by individuals who have had a couple of drinks or a lot more. Although the presence of these drinking drivers greatly increases the likelihood of a fatal crash, most are not committing a criminal offence under the existing federal law.

MADD Canada believes that the current law also results in injustice. For example, assume in the preceding scenario that an approaching driver passes out in an alcohol-induced haze, crosses the centre line, and injures you or someone in your family. In Canada, it is very, very unlikely that the driver, despite being highly intoxicated, would even be charged with impaired driving causing bodily harm.⁶³ Even if charged, the odds are about three to one that the impaired driver would not be convicted of that offence.⁶⁴

MADD Canada's federal legislative reform agenda is designed to address these imbalances in the existing law. In order to enhance both public safety and justice, there must be substantive reform of the federal impaired driving legislation. Without such reform, impaired driving will remain the country's leading criminal cause of death and one of its leading criminal causes of injury.⁶⁵

ENDNOTES

- 1 A recent report from the Police Services Division of the British Columbia Ministry of the Attorney General indicated that almost half of the police simply refuse to lay *Criminal Code* impaired driving charges, even if they believe that the driver is impaired. Of those who do not lay charges, 40% indicated that their reasons included their concern that the driver was unlikely to be convicted. Police Services Division, *Safe Roads, Safe Communities* (Victoria: Ministry of the Attorney General, Public Safety and Regulatory Branch, 2000) at B-4.
- 2 For example, one Saskatoon defence lawyer stated that, in the last several years, he has never lost more than one impaired driving trial per year, even though he handles at least one such case per week. Another Saskatoon lawyer boasted a string of 28 consecutive acquittals at trial. See D. Zakreski, "How Big Bucks Can Beat .08" *The [Saskatoon] Star Phoenix* (18 March 2000) E1.
- 3 In 1997, a Health Canada report estimated that 1,680 Canadians die each year in alcohol-related crashes. D.J. Beirness, D.R. Mayhew & H.M. Simpson, *DWI Repeat Offenders: A Review and Synthesis of the Literature* (Ottawa: Health Canada, 1997) at 11 [hereinafter *DWI Repeat Offenders*]. In comparison, Statistics Canada reported that there were 536 homicides in Canada in 1999, including all murder, manslaughter and infanticide cases. *Homicide Offences, Number and Rate*, online: Statistics Canada Homepage, <www.statcan.ca/english/Pdgb/State/Justice/legal12a.htm> (last modified: 14 September 2001).
- 4 For example, while 62% of all fatally injured drivers tested positive for alcohol in the early 1980s, this figure dropped to 43% by 1990. Similarly, the number of fatally injured drivers with BACs above 0.08% dropped from 52% in 1981 to 35% in 1990. D.R. Mayhew, D.J. Beirness & H.M. Simpson, "Trends in Drinking-Driving Fatalities in Canada – Progress Continues" (Paper presented to *International Conference on Alcohol, Drugs and Traffic Safety – T'2000*, Stockholm, 22-26 May 2000), online: ICADTS 2000 Homepage <www.vv.se/traf_sak/t2000/index2.htm> (date accessed: 14 September 2001) at 2.
- 5 The percentage of fatally injured drivers who tested positive for alcohol increased to 48% in 1991 and 1992, dropped back to 45% in 1993, and has decreased at a slower rate since. *STRID 2001 Monitoring Report: Progress in 1997 and 1998* (Ottawa: Canadian Council of Motor Transport Administrators and Transport Canada, 1999) at 23 [hereinafter *STRID Monitoring Report*].
Among young drivers, the crash death rate has been hovering around 20 per 100,000 since 1994. Road crashes still account for one-third of all deaths and one-fifth of all serious injuries among Canadians aged 15 to 19. D.R. Mayhew & H.M. Simpson, *Youth and Road Crashes: Reducing the Risks from Inexperience, Immaturity and Alcohol* (Ottawa: Traffic Injury Research Foundation, 1999) at 8-9 [hereinafter *Youth and Road Crashes*]. Finally, the percentage of fatally injured youth who had BACs above 0.08% actually increased in the early 1990s, and has remained relatively constant since. *Ibid.* at 16.
- 6 A 2001 Transport Canada report indicated that, in terms of the percentage of fatally injured drivers who were legally impaired, Canada lags behind numerous countries, including: Japan, the Netherlands, Germany, Sweden, Great Britain, Finland, and the United States. This is particularly noteworthy because five of those seven countries have BAC limits that are lower than Canada's, and thus, define "legal impairment" at levels below 0.08%. Transport Canada, *Road Safety Forum: Beyond 2001* (Ottawa: Minister of Public Works and Government Services, 2001), CD-ROM.
Canada's high rate of impairment among fatally injured drivers is particularly troubling given our relatively low rate of per capita alcohol consumption. With the exception of Sweden, all of the countries that rank ahead of Canada in terms of legal impairment among fatally injured drivers have higher per capita rates of alcohol consumption. While Canada ranked 30th in per capita consumption between 1995 and 1998, Germany ranked 5th, the Netherlands ranked 16th, and the United Kingdom ranked 21st. Thus, for example, the average German drinks 10.6 litres of pure alcohol annually, while the average Canadian drinks only 6.2 litres. *World Drink Trends, 1999 Edition*, online: ALCOWEB Homepage, <http://www.alcoweb.com/english/gen_Info/alcohol_health_society/eco_aspects/consumption/world/world.html> (last modified: 20 April 2001).
- 7 H.M. Simpson, D.J. Beirness & D.R. Mayhew, *National Opinion Poll on Drinking and Driving* (Ottawa: Traffic Injury Research Foundation, 1999) at 10 [hereinafter *National Opinion Poll*].
- 8 *Ibid.* Emphasis in original. Fifty-four per cent of those who admitted to driving after drinking said that they do so at least three times a month.
- 9 *Ibid.* Based on the number of times respondents admitted to driving when they thought they were over the legal limit, the authors estimated that 12.5 million impaired driving trips are made each year in Canada.

- 10 Based on the estimated 12.5 million annual impaired driving trips, an average of roughly 34,246 such trips are made each day. *Ibid.* Even accounting for impaired drivers who make more than one trip, it seems reasonable to assume that, on average, tens of thousands of impaired drivers are on the roads each night. Granted, there may well be far fewer impaired drivers on the roads earlier in the week, and far more on Thursday, Friday and Saturday.
- 11 *DWI Repeat Offenders, supra note at 4.*
- 12 R.F. Borkenstein, "A Panoramic View of Alcohol, Drugs and Traffic Safety" (1972) 16 *Police* 6.
- 13 B. Jonah *et al.*, "Front-line Police Officers' Practices, Perceptions and Attitudes about the Enforcement of Impaired Driving Laws in Canada" (1999) 31 *Accid. Anal. and Prev.* 421 at 426 [hereinafter *Police Perceptions*].
- 14 *Ibid.*
- 15 *Ibid.* at 435.
- 16 Figures from the Canadian Centre for Justice Statistics indicate that only 23% of those charged with impaired driving causing death pleaded or were found guilty in the provincial courts between 1994 and 1998. The conviction rate rose to 33% for impaired driving causing bodily harm, 56% for failing to provide breath or blood samples, and 61% for driving with a BAC above 0.08%. *Adult Criminal Court Survey* (Ottawa: Canadian Centre for Justice Statistics, 1999) [hereinafter *ACCS*].
- While statistics indicate that only 31% of those charged with impaired driving pleaded or were found guilty in the provincial courts, this low rate of guilty dispositions is misleading. Typically, the police will, if possible, charge impaired drivers with both impaired driving and having an illegal BAC. The Canadian courts have held that, once a driver is convicted of one of these offences, he cannot be convicted of the other if they arose out of the same incident. See *R. v. Kienapple* (1975), 15 C.C.C. (2d) 524 (S.C.C.), as applied in *R. v. Houchen* (1976), 31 C.C.C. (2d) 274 (B.C. C.A.); and *R. v. Boivin* (1976), 34 C.C.C. (2d) 203 (Que. C.A.). Consequently, once a driver pleads or is found guilty on the first charge (driving with an illegal BAC), the other charge (impaired driving) is invariably stayed or withdrawn. Indeed, 61% of the charges for impaired driving were stayed or withdrawn in the provincial courts between 1994 and 1998.
- 17 *Ibid.*
- 18 The 1999 and 2000 amendments doubled the fines for first impaired driving offenders; increased the minimum driving prohibitions for first, second and subsequent offenders to one, two and three years, respectively; increased the maximum penalty for driving while prohibited to five years' imprisonment, when tried by indictment; increased the maximum penalty for leaving the scene of a crash, with the intent to escape criminal or civil liability, to ten years' imprisonment, if the crash causes injury, and life imprisonment, if the crash causes death; and increased the maximum penalty for impaired driving causing death to life imprisonment. Of the other amendments, three related to sentencing, and two related to enforcement. See *An Act to amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32; and *An Act to amend the Criminal Code (impaired driving causing death and other matters)*, S.C. 2000, c. 25.
- 19 MADD Canada has prepared a longer document that explains its entire *Reform Agenda* in detail. In addition, background memoranda have been prepared on most of the proposals, and are being included on MADD Canada's website: <www.madd.ca>. Several memoranda have been or will shortly be published in academic journals.
- 20 For a complete review of this critical issue, see E. Chamberlain & R. Solomon, "The Case for a 0.05% *Criminal Code* BAC Limit," in MADD Canada's *Federal Legislative Reform Agenda*.
- 21 In a recent survey, three-quarters of Canadian police indicated that they only charge suspects with impaired driving if their BACs are above 0.10%. The survey's authors suggested that this likely reflects a desire to ensure that the BAC readings will not be challenged in court, due to the margin of error that Canadian courts attribute to the current breath-testing instruments. See *Police Perceptions, supra note at 429*. See also *supra note* .
- 22 Quoted in *Combating Drink Driving: Next Steps. A Consultation Paper Response by the Institute of Alcohol Studies* (St. Ives: Institute of Alcohol Studies, 1998) at 4, online: Institute of Alcohol Studies Homepage <www.ias.org.uk/ddconsult.htm> (date accessed: 14 September 2001).
- 23 See, for example, H. Moskowitz & D. Fiorentino, *A Review of the Literature on the Effects of Low Doses of Alcohol on Driving-Related Skills* (Washington: National Highway Traffic Safety Administration, 2000); National Institute on Alcohol Abuse and Alcoholism, "Alcohol-Related Impairment" (1994) 25 *Alcohol Alert* 1 at 1; P. Howat, D. Sleat & I. Smith, "Alcohol and driving: is the 0.05% blood alcohol concentration limit justified?" (1991) 10 *Drug and Alcohol Review* 151; and H. Laurell, "Effects of small doses of alcohol on driver performance in emergency traffic situations" (1977) 9 *Accid. Anal. and Prev.* 191.
- 24 Choice reaction time should not be confused with simple reaction time. The latter is measured by repetitive testing with a single known stimulus and a single known response. The former uses multiple stimuli and response possibilities, thereby requiring subjects to perform a greater degree of information processing. See Moskowitz, *ibid.*
- 25 See *ibid.*, Table 2; M. Linnolla *et al.*, "Effects of Age and Alcohol on Psychomotor Performance of Men" (1980) 41 *J. Stud. Alcohol* 488; and E.F. Cormier, *Position Paper on BAC and Driving* (Winnipeg: Addictions Foundation of Manitoba and Citizens Against Impaired Driving, 1995) at 5.

- 26 H. Moskowitz *et al.*, *Driver Characteristics and Impairment at Various BACs* (Washington: National Highway Traffic Safety Administration, 2000), Table 2, online: National Highway Traffic Safety Administration Homepage <www.nhtsa.dot.gov/people/injury/r.h/pub/impaired_driving/BAC/index.html> (date accessed: 26 September 2001).
- 27 *Ibid.*
- 28 R.F. Borkenstein *et al.*, *The Role of the Drinking Driver in Traffic Accidents* (Bloomington: Indiana University Department of Police Administration, 1964; M.W. Perrine, J.A. Waller & L.S. Harris, *Alcohol and highway safety: behavioural and medical aspects* (Washington: Department of Transportation, 1971); A.J. McLean, O.T. Holubowycz & B.L. Sandow, *Alcohol and Crashes: Identification of Relevant Factors in this Association* (Adelaide: Federal Office of Road Safety, 1980); P.L. Zador, S.A. Krawchuk & R.B. Voas, “Alcohol-Related Relative Risk of Driver Fatalities and Driver Involvement in Fatal Crashes in Relation to Driver Age and Gender: An Update Using 1996 Data” (2000) 61 J. Stud. Alcohol 387; M.B. Snyder, *Driving Under the Influence: A Report to Congress on Alcohol Limits* (Washington: National Highway Traffic Safety Administration, 1992); and D.R. Mayhew *et al.*, “Youth, Alcohol and Relative Risk of Crash Involvement” (1986) 18 *Accid. Anal. and Prev.* 273.
- 29 See *supra* note .
- 30 See, for example, P.C. Noordzij, “Decline in Drinking and Driving in the Netherlands” in *The Nature and the Reasons for the Worldwide Decline in Drinking and Driving* (Washington: National Academy Press, 1994); T. Norström & H. Laurell, “Effects of lowering the legal BAC-limit in Sweden” in C. Mercier-Guyon, ed., *Alcohol, Drugs and Traffic Safety – T’97* (Annecy, France: Centre d’études et de recherche en médecine du trafic, 1997) at 90 [hereinafter Sweden]; G. Bartl & R. Esberger, “Effects of lowering the legal BAC-limit in Austria” (Paper presented to *International Conference on Alcohol, Drugs and Traffic Safety – T’2000*, Stockholm, 22-26 May 2000), online: ICADTS 2000 Homepage <www.vv.se/traf_sak/t2000/index2.htm> (date accessed: 14 September 2001); and 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).
- 31 R.E. Mann *et al.*, *Assessing the Potential Impact of Lowering the Legal Blood Alcohol limit to 50 mg% in Canada* (Toronto: Addiction Research Foundation, 1998) at 58 [hereinafter Mann].
- 32 See Sweden, *supra* note ; and C. Brooks & D. Zaal, “Effects of a Reduced Alcohol Limit for Driving” in H.D. Utzelmann, G. Berghaus & D. Kroj, eds., *Alcohol, Drugs and Traffic Safety, T’92* (Cologne: Verlag TÜV Rheinland, 1992) at 1284.
- 33 *Ibid.*
- 34 SES Canada Research Incorporated, *National Survey on Drinking and Driving Issues* (Toronto: MADD Canada, 2001) at 13-14.
- 35 This chart is based on a formula provided by the American National Highway Traffic Safety Administration (NHTSA). However, the figures were adjusted to reflect that a standard American drink contains only 0.54 ounces of pure alcohol, while a standard Canadian drink contains 0.6 ounces of pure alcohol.
- 36 See “An Evaluation of the .08 Per Se Law in Illinois Finds 13.7 Percent Fewer Fatal Crashes with Positive BACs” (September 2000) NHTSA *Traffic Tech* No. 232; and K. Hutt, *Setting Limits, Saving Lives* (Washington: National Highway Traffic Safety Administration, 2000) at 19.
- 37 For example, one commentator estimated that a lower BAC limit could create an extra \$40 million in court costs. See Mann, *supra* note at 51.
- 38 This included savings in property damage, insurance administrative costs, legal costs, emergency medical services, workplace costs, and travel delay. D. Eisenberg, *Evaluating the Effectiveness of a 0.08% BAC Limit and Other Policies Related to Drunk Driving* (Stanford: Institute for Economic Policy Research, 2001).
- 39 See *supra* note .
- 40 J. Sauv , “Impaired Driving in Canada – 1998” (1999) 19:11 *Juristat* 1 at 1.
- 41 See S.A. Ferguson, J.K. Wells & A.K. Lund, “The Role of Passive Alcohol Sensors in Detecting Alcohol-Impaired Drivers at Sobriety Checkpoints” (1995) 11 *Alcohol, Drugs and Driving* 23 [hereinafter Role]; I.S. Jones & A.K. Lund, “Detection of Alcohol-Impaired Drivers Using a Passive Alcohol Sensor” (1986) 14 *J. Police Sci. Administration* 153 [hereinafter Detection]; and E. Vingilis, A.M. Adlaf & L. Chung, “Comparison of Age and Sex Characteristics of Police-Suspected Impaired Drivers and Roadside Surveyed Impaired Drivers” (1982) 14 *Accid. Anal. and Prev.* 425.
- 42 See *supra* notes and and .
- 43 *Supra* note .
- 44 In order to demand a test on an approved screening device, a police officer needs only a reasonable suspicion that the driver has alcohol in his or her body. *Criminal Code*, R.S.C. 1985, c. C-46, s. 254(2). Thus, a positive reading on a passive alcohol sensor would provide the necessary suspicion.
- 45 See Detection, *supra* note ; Role, *supra* note ; and R. Compton, *Pilot Test of Selected DWI Procedures for Use at Sobriety Checkpoints* (Washington: National Highway Traffic Safety Administration, 1985).

- 46 Currently, immediate access to an ASD is often critical to the establishment of reasonable and probable grounds for demanding an evidentiary breath test. In *R. v. Grant* (1991), 67 C.C.C. (3d) 268, the Supreme Court of Canada held that a thirty-minute delay in the arrival of an ASD provided the driver with a reasonable excuse for refusing the test. Consequently, the suspect had to be acquitted of failing to provide a breath sample. However, if the police had been authorized to demand an SFST, the results may have provided them with grounds for demanding an evidentiary breath test.
- 47 While Quebec's legislation specifically authorizes sobriety tests, most provincial highway traffic statutes are silent on the issue. Thus, although the police have common law authority to request an SFST, a driver can refuse to take the test without incurring any penalty. General provisions in some of the provincial traffic acts have been interpreted as authorizing the police to request that a suspect take an SFST, without first informing him or her of the right to counsel. See *R. v. Smith* (1996), 28 O.R. (3d) 75 (C.A.); and *R. v. Bonin* (1989), 47 C.C.C. (3d) 230 (B.C. C.A.). However, in other provinces, the courts have held that the police must inform the driver of the right to counsel before he or she performs the SFST. See *R. v. Gallant* (1989), 48 C.C.C. (3d) 329 (Alta. C.A.); and *R. v. Baroni* (1989), 49 C.C.C. (3d) 553 (N.S. C.A.).
- 48 Police typically complain that judges refuse to accept their evidence that the accused's ability to drive was impaired. In a recent survey, 29% of officers felt that judges give greater credibility to defence witnesses than to police at impaired driving trials. Police Perceptions, *supra* note at 432.
- 49 See *supra* note .
- 50 *Criminal Code*, *supra* note , s. 254(3)(b).
- 51 See *R. v. MacMillan* (1989), 19 M.V.R. (2d) 137 (P.E.I. S.C.); and *R. v. Lipka* (1989), 20 M.V.R. (2d) 298 (Ont. Dist. Ct.).
- 52 See, for example, *Traffic Act 1949 (Qnd)* s 16A; *Road Safety (Alcohol and Drugs) Act 1970 (Tas)* s 10(6); *Traffic Act 1987 (NT)* s 25(2); *Transport Act 1962 (N.Z.)*, s. 58; and *Road Traffic Act 1988 (U.K.)*, s. 7.
- 53 *STRID Monitoring Report*, *supra* note at 29-31.
- 54 See, for example, *Transport Act 1962 (N.Z.)*, s. 58A; *Road Traffic Act 1988 (U.K.)*, s. 6(2); *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* s 9; *Road Safety Act 1986 (Vic)* ss 55 and 56; *Road Traffic Act 1974 (WA)* s 66; and *Road Traffic Act 1961 (SA)* s 47E(1)(d).
- 55 See, for example, *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.), *aff'd* [1994] 2 S.C.R. 478; and *R. v. Andrews* (1996), 104 C.C.C. (3d) 392 (Alta. C.A.).
- 56 See *R. v. Larocque* (1988), 5 M.V.R. (2d) 221 (Ont. C.A.); *R. v. Colby* (1989), 52 C.C.C. (3d) 321 (Alta. C.A.); *R. v. Ewart* (1989), 53 C.C.C. (3d) 153; and *R. v. Halkett* (1988), 11 M.V.R. 73 (Sask. C.A.).
- 57 The *Criminal Code* contains two presumptions concerning the evidentiary breath tests. The "presumption of accuracy" provides that, in the absence of evidence to the contrary, the test results accurately measure the accused's BAC *at the time the tests were conducted*. The "presumption of identity" or "temporality" provides that, in the absence of evidence to the contrary, the breath results, taken up to two hours after the accused was stopped, reflect the accused's BAC *at the time of driving*. See *Criminal Code*, *supra* note , s. 258(1)(c) and (g). The "Carter" defence rebuts the presumption of accuracy, whereas the "Last Drink" defence rebuts the presumption of identity.
- 58 See *R. v. Davis* (1973), 14 C.C.C. (2d) 513 (B.C. C.A.); *R. v. Carter* (1985), 19 C.C.C. (3d) 174 (Ont. C.A.); and *R. v. Dubois* (1990), 25 M.V.R. (2d) 21 (Que. C.A.).
- 59 See *R. v. Nelson* (1987), 1 M.V.R. (2d) 15 (Sask. Q.B.); *R. v. Lacey* (1992), 111 N.S.R. (2d) 348 (Co. Ct.); and *R. v. Knox* (19 January 2001), Halifax 965266-268 (N.S. Prov. Ct.).
- 60 *Road Traffic Offenders Act 1988 (U.K.)*, 1988, c. 53, s. 15(2) and (3). See also *Transport Act 1962 (N.Z.)*, s. 58.
- 61 In these countries, the offender's BAC is usually the most important factor in sentencing. Further increases in the sentence result from prior offences, committing the offence while disqualified from driving, causing personal injury or damage to property, or other circumstances of the offence. See K. Stewart, *On DWI Laws in Other Countries* (Washington, National Highway Traffic Safety Administration, 2000), Table 2.
- 62 Transport Canada, *Road Safety Vision 2001* (Ottawa: Minister of Public Works and Government Services, 2001) at 16.
- 63 While it has been estimated that 74,000 Canadians are injured each year in alcohol-related crashes, the average number of charges per year for impaired driving causing bodily harm was only 1,365 between 1994 and 1998. *ACCS*, *supra* note .
- 64 As indicated, only 33% of those charged with impaired driving causing bodily harm pleaded or were found guilty for that offence in the provincial courts between 1994 and 1998. *Ibid*.
- 65 Impaired driving is responsible for approximately 74,000 "injuries" each year in Canada. *DWI Repeat Offenders*, *supra* note at 11. This compares with a total of approximately 80,000 court cases in 1997-98 for violent *Criminal Code* offences (other than homicide) — assault, aggravated assault, sexual assault, abduction, and sexual abuse. The largest of these categories was assault, which accounted for 48,919 cases. Even allowing for unreported assault cases, impaired driving, with 74,000 estimated injuries, still appears to rank among the leading criminal causes of injury in Canada. C. Brookbank & B. Kingsley, *Adult Criminal Court Statistics, 1997-98* (Ottawa: Canadian Centre for Justice Statistics, 1998) at 3.

LOOKING TOWARD 2004



One of the recommendations forwarded in the House of Commons Justice Committee's 1999 report, *Toward Eliminating Impaired Driving*, was that Parliament consider systematic and timely reviews of impaired driving legislation every five years. In supporting the Justice Committee's rationale, MADD Canada is looking toward the 2004 Parliamentary review with a goal of introducing the initiatives found in this document.

In the next two years, much can and should be accomplished by the Federal Government with respect to new federal impaired driving initiatives. MADD Canada supporters recognize that there are specific initiatives the Federal Government can act on immediately to improve impaired driving legislation. The organization will work with government to implement new, necessary measures that will make a difference in saving lives and creating safer roads.

Taking Back Our Roads provides the Government and the public with a checklist of 19 initiatives that should be introduced and/or implemented by the time of the next Parliamentary review. The checklist involves:

- Lowering the *Criminal Code* BAC Limit
- Enhancing Enforcement Powers
- Clarifying and Redefining the Offences
- Rationalizing Sentencing
- Addressing Administrative Issues.

In 2004, MADD Canada intends to produce another federal legislative review, which will build on the information presented within this document, as well as report on the progress realized by the Federal Government.

On behalf of the thousands of Canadians who support MADD Canada, as well as the thousands of Canadians who are directly affected by impaired driving each year, it is MADD Canada's hope to report on 'a list of accomplishments' by the Federal Government's 2004 timeline.

M A D D C A N A D A

Mothers Against Drunk Driving's objective is saving lives. Our membership is committed to halting the daily deaths and human carnage on our roads due to drinking and driving. MADD Canada supporters are resolved to combat Our National Tragedy - and ensure that no more innocent Canadians are killed and injured by impaired drivers.

Impaired driving is the country's number one criminal cause of death and injury. Every day, an average of 4.5 Canadians are killed and another 125 are injured as a result of alcohol-related crashes. Every day, volunteers of MADD Canada must deal with the senseless loss of life and the human suffering that result from impaired driving. What is most troubling is that the tragic results of alcohol-related crashes are 100% preventable.

As a non-profit, volunteer driven and directed grassroots organization, MADD Canada is striving to ensure that our streets and highways are safer. MADD Canada's mission is to stop impaired driving and to support the victims of this violent crime. One of the ways MADD Canada works to fulfil its mission is to advocate a comprehensive approach in fighting impaired driving. This approach consists of:

- important federal and provincial legislative changes to ensure more effective laws and more efficient practices
- the vigilant enforcement of laws and increased support for police and judiciary
- uniform application of laws and the available sanctions by the Canadian judiciary
- programs and policies that effectively educate the social drinker, and provide treatment and just punishment for convicted offenders
- increased education and public awareness of the seriousness of impaired driving
- counselling and educational programs for youth on the subject of responsible drinking habits and sober driving

Recognizing that there is no single initiative that is a panacea for eliminating impaired driving, MADD Canada is committed to taking action on all fronts.

Through the years, MADD Canada has grown from coast to coast. Its local Chapters are run by volunteers, and include not only mothers, but also fathers, friends, business professionals, experts in the impaired driving field, and concerned citizens who want to make a difference in the fight against impaired driving. The organization is unique from other anti-impaired driving groups because of its commitment to victim support and services. MADD Canada and its programs and services are supported by the generous donations of over 500,000 Canadians each year.

MADD Canada continues to call for change to make our roads safer and to provide a voice for victims of impaired driving. For further information on MADD Canada and its goals, programs and services, visit the website –

www.madd.ca – or phone the National Office at **1-800-665-6233 (MADD)**.



