

**DRUG-IMPAIRED DRIVING IN CANADA:
REVIEW AND RECOMMENDATIONS**

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SECTION I: INTRODUCTION

For many years, the efforts of traffic safety advocates have been quite rightly focused on alcohol-impaired driving. The issue of drug-impaired driving has risen to prominence much more recently. Statistics indicate that driving after drug use is not uncommon, and is more prevalent among some young people than driving after drinking. Crash statistics also indicate that a substantial number of fatally-injured drivers in Canada had been using drugs. Drug-impaired driving is an issue that now requires serious attention.¹

The *Criminal Code* first prohibited drug-impaired driving in 1925.² However, it poses enforcement issues that are quite distinct from alcohol-impaired driving. There is a wide variety of drugs, both licit and illicit, that can impair a person's ability to operate a motor vehicle. Further, until 2008, the drug-impaired driving provisions were primarily enforced and prosecuted by observational evidence of a driver's impairment, which generally meant that a driver had to be obviously high in order to be detected and charged. In 2008, the *Criminal Code* was amended to give police authority to demand "physical coordination tests" (ie standardized field sobriety tests or SFSTs) and Drug Recognition Evaluations (DREs),³ which provided more detailed, objective evidence of a driver's impairment.⁴ Nevertheless, as discussed below, the DRE process is cumbersome, expensive, and readily susceptible to legal challenge, and thus appears to be of limited utility in criminal prosecutions. It is therefore likely that drug-impaired driving is, and will continue to be, dramatically under-enforced in Canada.

¹ See generally DJ Beirness et al, *International Symposium on Drugs and Driving: Summary Report* (Ottawa: Canadian Centre on Substance Abuse, 2012); D Beirness et al, *Drugs and Driving: Detection and Deterrence* (Paris: OECD Transport Research Centre, 2010) [OECD Report]; and AJ Porath-Waller, DJ Beirness & EE Beasley, "Toward a More Parsimonious Approach to Drug Recognition Expert Evaluations" (2009) 10 *Traffic Inj Prev* 513.

² *An Act to Amend the Criminal Code*, SC 1925, c 38, s 5. The 1925 provision prohibited driving under the influence of "narcotics." In 1951, this provision was broadened to include driving while under the influence of any drug. *An Act to Amend the Criminal Code*, SC 1951, c 47, s 14(1) and (2). The current provisions can be found in the *Criminal Code*, RSC 1985, c C-46, s 253(a) [*Criminal Code*].

³ Also known as the Drug Evaluation and Classification Program (DEC).

⁴ See *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, SC 2008, c 6, ss 18-26. For a more detailed discussion of these amendments, see R Solomon, E Chamberlain & C Lynch, "Canada's New Impaired Driving Legislation: Modest Gains and Missed Opportunities" (2010) 56 *Crim LQ* 51 [Modest Gains].

The enforcement process would be more accurate and efficient if, as with alcohol, it were conducted by means of toxicological tests. Unfortunately, unlike alcohol, drugs cannot be easily detected in a driver's breath, but must be identified through saliva, blood or urine. Testing such bodily fluids is more intrusive and costly than testing breath. Moreover, the non-active metabolites of some drugs may remain in a driver's system long after their impairing effects have worn off, which means that a positive drug test is not necessarily indicative of impairment. Finally, unlike the .08% or .05% blood-alcohol concentration (BAC) limits in the *Criminal Code* and provincial highway traffic legislation, there is less scientific consensus on appropriate *per se* limits for the vast range of drugs that can impair one's ability to drive.

These challenges are not, however, insurmountable. Roadside saliva tests have become more accurate and cost-effective in recent years, particularly for the most commonly-used drugs. The Australian states and several European countries have introduced roadside saliva testing, which has increased detection and conviction rates of drug-impaired drivers. With appropriate modifications to suit Canada's unique constitutional structure, the enforcement regimes in these countries can serve as useful models of more efficient and effective detection of drivers impaired by drugs.

This report begins with an overview of the drug-impaired driving problem in Canada and the federal enforcement provisions currently in place. It then provides a brief survey of other enforcement options, and ultimately recommends the establishment of *per se* limits for a small number of drugs that are commonly used by drivers and readily detected in roadside saliva tests. These federal *per se* limits would complement the existing DRE provisions, and would roughly parallel the system of roadside screening and evidentiary breath tests that currently applies to alcohol-impaired driving.

Given their control over traffic enforcement and driver licensing, the provinces and territories also have an important role to play in reducing drug-impaired driving. The report outlines the drug-impaired driving measures that the provinces have adopted to date, and then proposes additional steps that should be undertaken. Combined with the proposed changes to federal law, these recommendations should help to identify and remove drug-impaired drivers from the roads, and subject them to the sanctions that are already set out in the *Criminal Code*. The increased apprehension and conviction rates will, in turn, enhance the general deterrent effect of the law.

SECTION II: DRUG-IMPAIRED DRIVING IN CANADA

(a) Survey Data

Survey data indicate that driving after drug use has become more common in Canada during the last decade. For example, in a national survey of drivers, the percentage of respondents who admitted to driving within two hours of using marijuana or hashish increased from 1.5% in 2002 to 2.4% in 2006.⁵ This represents over half a million Canadians driving after using those drugs in the past twelve months. Similarly, in a survey of adult drivers in Ontario, 2.9% of respondents admitted to driving within one hour of using marijuana or hashish in the past twelve months.⁶

Perhaps of greater concern, several regional and national surveys indicate that more young Canadians drive after using cannabis than after consuming alcohol. In a survey of grade 10 and 12 students in Atlantic Canada, 15.1% of all respondents reported driving within an hour of using cannabis during the past 12 months, while 11.7% reported driving within an hour of consuming two or more alcoholic drinks.⁷ Similarly, in the national *Canadian Addiction Survey*, 39.8% of those aged 15-24 reported driving within two hours of using cannabis during the past 12 months, compared to 20.9% who reported driving under the influence of alcohol.⁸ In addition, the mean number of times that respondents admitted to driving “under the influence of cannabis”

⁵ H Simpson et al, *The Road Safety Monitor: Drugs and Driving* (Ottawa: Traffic Injury Research Foundation, 2006) at 9. A total of 1,218 drivers completed the survey, which was weighted to make it representative of the national population. See also GW Walsh & RE Mann, “On the high road: driving under the influence of cannabis in Ontario” (1999) 90 CJP 260; and EM Adlaf, RE Mann & A Paglia, “Drinking, cannabis use and driving among Ontario students” (2003) 168 CMAJ 565.

⁶ RE Mann et al, “Self-Reported Collision Risk Associated With Cannabis Use and Driving After Cannabis Use Among Ontario Adults” (2010) 11 Traffic Inj Prev 115 at 117. The study merged all responses between 2002 and 2007. Those who drove after cannabis use were 1.84 times more likely to report a collision in the past year than those who did not.

⁷ M Asbridge, C Poulin & A Donato, “Motor vehicle collision risk and driving under the influence of cannabis: Evidence from adolescents in Atlantic Canada” (2005) 37 Accid Anal and Prev 1025 at 1029. Another 33.6% of respondents reported using marijuana in the past 12 months but not driving afterward. See also DJ Beirness & CG Davis, *Driving Under the Influence of Cannabis: Analysis drawn from the 2004 Canadian Addiction Survey* (Ottawa: Canadian Centre on Substance Abuse, 2006); and A Paglia-Boak et al, *Drug Use Among Ontario Students 1977-2009: Detailed OSDUHS Findings* (Toronto: Centre for Addiction and Mental Health, 2009) at 173-79.

⁸ Nearly 40% of respondents also reported having been a passenger with someone who was driving under the influence of cannabis. *Canadian Addiction Survey (CAS): Substance Use by Canadian Youth* (Ottawa: Health Canada, 2007) at 95.

in the past year was 10, compared to 1.6 for alcohol. The authors of the Atlantic Canada study suggested that the prevalence of driving after drug use was due to a lack of awareness about its risks (particularly in contrast to driving after alcohol),⁹ and to a lack of fear of being charged and convicted for such behaviour.¹⁰

The frequency of driving after drug use was confirmed by a recent roadside survey in British Columbia, which examined the prevalence of alcohol and drug use among drivers on Wednesday to Saturday evenings in June 2010.¹¹ Using oral fluid samples, the researchers tested for six commonly-used drugs.¹² They found that 7.2% of the drivers who provided a sample tested positive for a drug other than alcohol, the most common being cannabis (4.5%) and cocaine (2.3%).¹³ Moreover, of the drivers who tested positive for cannabis, 90% had a THC level that was likely to cause impairment.¹⁴ In comparison, 10.7% of all drivers who provided a breath sample were alcohol-positive (though only 1.8% of breath-tested drivers had a BAC above .05%).¹⁵ While alcohol-positive drivers tended to be more prevalent on weekends and later at night, there was no significant variation in positive drug tests for day-of-week or time-of-day.

⁹ Notably, most educational and policy initiatives aimed at young people, including graduated driver licensing programs, stress the risks associated with alcohol-impaired driving. Young people are less knowledgeable about the risks of driving after drug use, and are less likely to see it as problematic behaviour. See also IP Albery et al, "Illicit drugs and driving: prevalence, beliefs and accident involvement among a cohort of current out-of-treatment drug users" (2000) 58 *Drug Alcohol Depend* 197; and D Patton et al, *Substance Use Among Manitoba High School Students* (Winnipeg: Addiction Research Foundation of Manitoba, 2001).

¹⁰ Asbridge, Poulin & Donato, *supra* note 7 at 1031. See the similar comments of American researchers: PM O'Malley & LD Johnson, "Unsafe Driving by High School Seniors: National Trends from 1976 to 2001 in Tickets and Accidents after Use of Alcohol, Marijuana and Other Illegal Drugs" (2003) 64 *J Stud Alcohol* 305 at 311.

¹¹ DJ Beirness & EE Beasley, *Alcohol & Drugs Use Among Drivers: British Columbia Roadside Survey 2010* (Ottawa: Canadian Centre on Substance Abuse, 2011).

¹² These were: amphetamines, benzodiazepines, cannabis, cocaine, methamphetamine, and opiates. *Ibid* at 5.

¹³ *Ibid* at 13. Approximately 11% of the drug-positive drivers also tested positive for alcohol.

¹⁴ *Ibid* at 12.

¹⁵ *Ibid* at 9.

(b) Drug-Impairment in Crashes

The previously-described patterns of driving after drug use are reflected in Canada's crash statistics.¹⁶ A recent study comparing alcohol and drug use among fatally-injured drivers in Canada indicated that one-third of such drivers had been using drugs.¹⁷ The categories of drugs most commonly found in fatally-injured drivers were central nervous system depressants, followed by cannabis and stimulants.¹⁸ Of the drivers who were tested for both alcohol and drugs, 14.2% were positive for both.¹⁹ This is particularly troubling because the combined effects of drugs and alcohol on driving performance may be multiplicative.²⁰

Consistent with the survey data, the patterns of use were different between alcohol-positive and drug-positive drivers. Whereas alcohol-positive drivers tended to be more prevalent late at night and on weekends, drug-positive drivers were more prevalent during daytime hours (6 am to 6 pm), and were spread relatively evenly across the days of the week.²¹ These data suggest that the problem of drug-impaired driving may require a different approach than alcohol-impaired driving. In particular, it may not be as effective to concentrate enforcement efforts, such as roadside checkpoints, on weekend nights. Rather, police should be trained and equipped to identify potentially drug-impaired drivers during their routine traffic patrol activities.

¹⁶ For comparable data in other jurisdictions, see OH Drummer et al, "The involvement of drugs in drivers of motor vehicles killed in Australian road traffic crashes" (2004) 36 *Accid Anal and Prev* 239; and EW Schwilke, MI Sampaio dos Santos & BK Logan, "Changing Patterns of Drug and Alcohol Use in Fatally Injured Drivers in Washington State" (2006) 51 *J Forensic Sci* 1191.

¹⁷ EE Beasley, DJ Beirness & AJ Porath-Waller, *A Comparison of Drug- and Alcohol-involved Motor Vehicle Driver Fatalities* (Ottawa: Canadian Centre on Substance Abuse, 2011) at 1. The data were drawn from a merger of two databases: the National Fatality Database, which contains coroners' information on the toxicological tests performed on fatally-injured drivers, and the National Collision Database, which records detailed information about the circumstances of motor vehicle crashes occurring on public roads. Unfortunately, only 46.4% of fatally-injured drivers were tested for drugs, so the estimate was based on a less-than-complete data set. Further, the rates of drug-testing ranged from 30% to 80% across the provinces and territories. This makes it difficult to determine the true extent of drug impairment in fatal crashes. Improving the testing rates for drugs among fatally-injured drivers should be a national priority.

¹⁸ *Ibid* at 10. Hallucinogens and inhalants were rarely detected.

¹⁹ *Ibid* at 11.

²⁰ OECD Report, *supra* note 1 at 22.

²¹ Beasley, Beriness & Porath-Waller, *supra* note 17 at 16-17, 31. See also E Beasley & D Beirness, *Drug Use by Fatally Injured Drivers in Canada (2000-2008)* (Ottawa: Canadian Centre on Substance Abuse, 2011).

As indicated earlier, the fact that a fatally-injured driver tests positive for drugs does not necessarily mean that he or she was impaired. More research is necessary to determine both the levels at which various drugs impair driving-related abilities, and the relative risk of crash for drivers with drugs in their systems.

SECTION III: ENFORCEMENT OF DRUG-IMPAIRED DRIVING

(a) The *Criminal Code* Provisions Prior to the 2008 Amendments

It has long been a criminal offence in Canada to drive, or have care or control of a motor vehicle, while one's ability is impaired by a drug. However, until recently, the police were not given any specific means of enforcing this drug-impaired driving prohibition. The prosecution of drug-impaired driving was typically based on an officer's testimony about the accused's driving and other behaviour.²² Moreover, even when a driver had consumed drugs and was obviously impaired, the Crown usually needed to bring expert evidence to show that the drug was actually the cause of the impairment. As expressed by Devine J in *R v Rosskoph*,²³ "the preferred practise is for the Crown to call expert medical or scientific evidence regarding the effects of drugs.... [T]he court cannot take judicial notice of the effects of various drugs." This made drug-impaired driving an onerous and uncertain offence to prosecute. Indeed, a 2003 Department of Justice report indicated that prosecuting a drug-impaired driving offence based on the observations of non-expert police officer (such as one who would make an arrest on routine patrol) was "nearly impossible."²⁴

Although the criminal justice statistics relating to drug-impaired driving are incomplete, there is every reason to believe that the offence was infrequently pursued.²⁵ This was acknowledged by the Standing Committee on Justice and Human Rights back in 1999, when it

²² See *R v Rosskoph* (1995), 11 MVR (3d) 62 (Man Prov Ct), where the accused was convicted based on evidence of speeding, erratic driving, flushed face, lack of balance and coordination, slurred speech, belligerence, and his own admission that he had "been chewing Tylenol with codeine all day" (at para 4).

²³ *Ibid* at para 16. See also *R v Caldwell*, [2004] OJ No 4769 (OCJ) (QL), aff'd [2006] OJ No 3280 (SCJ) (QL). As discussed below, the introduction of Drug Recognition Evaluations has not adequately addressed this problem.

²⁴ *Drug-Impaired Driving: Consultation Document* (Ottawa: Department of Justice Canada, 2003) at 4.

²⁵ Indeed, even after the 2008 amendments, the charge rates for drug-impaired driving have been extremely low. See Table 1, *infra*.

lamented the lack of enforcement mechanisms in regard to suspected drug-impaired drivers.²⁶ Given prosecutors' heavy workloads and limited resources, the need to hire and call an expert witness in each drug-impaired driving case undoubtedly constituted a major disincentive to prosecution.

(b) The *Criminal Code* Provisions After the 2008 Amendments

In light of the growing prevalence of driving after drug use, the federal government amended the *Criminal Code* in 2008 to include two new measures aimed at enforcing the prohibition against drug-impaired driving. First, section 254(2)(a) authorizes the police to demand that a driver participate in physical coordination testing (commonly known as Standardized Field Sobriety Testing or SFST)²⁷ if they have reason to suspect that he or she has any alcohol or drugs in his or her body. This is a relatively low threshold test, which is based on the same grounds as the demand for breath tests on approved screening devices (ASDs). As with ASD tests, the results of SFST can be used to screen drivers and provide grounds for demanding evidentiary breath tests or DRE.²⁸ It is an offence to refuse to comply with an officer's demand to participate in SFST without a reasonable excuse.²⁹

The second aspect of the 2008 amendments was the establishment of formal procedures for gathering evidence of drug use from suspected impaired drivers. The amendments authorize

²⁶ Standing Committee on Justice and Human Rights, *Toward Eliminating Impaired Driving* (J Maloney, Chair) (Ottawa: Publications Service, 1999) at 24-26. At the time, the Committee did not feel it had sufficient information to recommend specific drug-impaired driving reforms.

²⁷ See *Evaluation of Impaired Operation (Drugs and Alcohol) Regulation*, SOR/2008-196, s 2. This test is comprised of three components: horizontal gaze nystagmus, walk-and-turn, and one-leg stand. See generally J Stuster, *Development of a Standardized Field Sobriety Test (SFST) Training Management System* (Washington: National Highway Traffic Safety Administration, 2001); and C Stough et al, *An evaluation of the Standardised Field Sobriety Tests for the detection of impairment associated with cannabis with and without alcohol* (Payneham, SA: National Drug Law Enforcement Research Fund, 2006).

²⁸ The Supreme Court of Canada has held that SFST entails a "detention," and thereby triggers the right to counsel under section 10(b) of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*]. Accordingly, if a driver is not given the right to counsel, the results of the SFST will not be admissible at trial as proof of a driver's impairment. However, this violation of a driver's right to counsel is justified under section 1 of the *Charter* if the SFST is used solely for screening purposes to determine if further, evidentiary testing is warranted. See *R v Orbanski; R v Elias*, [2005] 2 SCR 3.

²⁹ *Criminal Code*, *supra* note 2, s 254(5). The penalties are the same as those for refusing to provide a breath or blood sample. The minimum penalty is a \$1,000 fine and a one-year driving prohibition.

police to demand a DRE from a driver who they have reasonable ground to believe has, within the preceding three hours, driven while impaired by a drug or a combination of drugs and alcohol.³⁰ The results of the DRE are admissible in evidence at a criminal trial for impaired driving, if it was conducted in accordance with the stringent requirements of the relevant regulations and the driver was afforded the right to counsel.

Developed and used in the United States since the 1980s, DRE is designed to determine if an individual's ability to drive is impaired by one of seven classes of frequently-abused drugs.³¹ DRE is conducted by trained and certified "evaluating officers" and includes two major components. The first component includes 11 separate steps.³² The first nine are: (i) a breath test to rule out alcohol as a major cause of impairment; (ii) an interview with the arresting officer; (iii) a preliminary examination; (iv) various eye examinations; (v) a series of divided attention tests; (vi) an examination of vital signs; (vii) a darkroom examination of pupil sizes; (viii) a check of muscle tone; and (ix) an examination of typical injection sites. If the evaluating officer concludes, after these first nine steps, that the suspect is impaired, the officer must provide an opinion regarding the class of drugs involved. This "opinion" is step (x) of the DRE. The officer then completes step (xi), which is an interview with the subject.

It is only at this point that the officer can undertake the second component, or step (xii), of the DRE, which entails demanding a sample of the suspect's blood, urine or saliva for analysis.³³ These toxicological test results do not provide evidence of impairment, but rather, simply confirm if the class of drugs the officer identified was present in the suspect's body. A drug-impaired driving charge will only proceed to trial if the analysis of the suspect's bodily sample confirms the evaluating officer's conclusion about the class of drugs involved.³⁴ Studies

³⁰ *Ibid*, s 254(3.1).

³¹ The seven classes of drugs are: depressants (eg barbiturates); inhalants (eg gasoline); phencyclidine (PCP); cannabis; stimulants (eg amphetamines and cocaine); hallucinogens (eg LSD and MDA); and narcotics (eg heroin and morphine). Department of Justice, *Drug Recognition Expert Testing* (Ottawa: Department of Justice, 2005).

³² Department of Justice, Fact Sheet, "Drug Recognition Expert Testing" (2004) online: Department of Justice <www.justice.ca/eng/news-nouv/fs-fi/2004/doc_31166.html>.

³³ *Criminal Code*, *supra* note 2, s 254(3.4).

³⁴ Indeed, in the absence of a confirmatory toxicological test, the evidence of the evaluating officer may be inadmissible unless the Crown independently establishes the officer as an expert: *R v Wakewich*, 2010 ONCJ 86; and *R v Steeves*, [2010] NBJ No 155 (Prov Ct) (QL), rev'd on other grounds (2001), 379 NBR (2d) 222 (CA).

indicate that DRE is highly accurate in identifying the class of drugs that is present in a suspect's body, but research is lacking in terms of whether it correlates well with impairment of driving skills as measured by laboratory, driving simulator or closed access roadway tests.³⁵

Thus, while DRE is accurate in identifying drug use, it appears to be of limited value in drug-impaired driving prosecutions. The Canadian courts remain sceptical about the link between the presence of drugs in a driver's system and the actual impairment of driving ability. This is illustrated in the recent Saskatchewan case of *R v Perillat*.³⁶ The accused was stopped at a roadside checkpoint, and the officer smelled "an overwhelming odour" of marijuana coming from her vehicle.³⁷ The accused admitted to smoking marijuana 2½ hours earlier, and showed the officer the "roach" on her centre console. The investigating officer, who was also a certified DRE officer, had her perform an SFST. In his view, her performance on the SFST was indicative of marijuana use.³⁸ As a result of these observations, the officer made a demand for a DRE. The results of the physical and behavioural components of the DRE led the officer to conclude that she was impaired by cannabis, and the presence of the drug was confirmed by a urine test. He then charged her with impaired driving.

At trial, Labach J reviewed the 2008 *Criminal Code* amendments and surmised that their main purpose was "to determine if a suspect has drugs in their system, and if so, what particular

³⁵ The DRE is reportedly accurate in predicting the presence of the class of drugs in over 90% of the cases. Its accuracy is particularly good in field studies, where the subject has presumably already been subject to SFST and the arresting officer has observed signs of impairment prior to making the DRE demand. See for example, J Smith et al, "Drug recognition expert evaluations made using limited data" (2002) 130 *Forensic Sci International* 167; E Schectman & D Shinar, "Modeling drug detection and diagnosis with the 'drug evaluation and classification program'" (2005) 37 *Accid Anal and Prev* 852; and D Beirness et al, "The Accuracy of Evaluations by Drug Recognition Experts in Canada" in B Logan, ed, *Proceedings of the 18th International Conference on Alcohol, Drugs and Traffic Safety – T-2007* (Seattle: International Council on Alcohol, Drugs and Traffic Safety, 2007) (CD-ROM).

However, there is evidence that DRE still misses a significant number of drug-positive cases: DJ Beirness, J LeCavalier & D Singhal, "Evaluation of the Drug Evaluation and Classification Program: A Critical Review of the Evidence" (2007) 8 *Traffic Inj Prev* 368. Further, there is currently no evidence on the number of drug-impaired drivers who go undetected at roadside and are never subject to a demand for DRE in Canada.

³⁶ 2012 SKPC 135.

³⁷ *Ibid* at para 3.

³⁸ *Ibid* at para 6. The accused also had reddened conjunctivae (whites of the eyes), which is consistent with marijuana use.

drug or what particular category of drug it may be.”³⁹ While the judge accepted that the DRE confirmed recent marijuana use, he was not convinced that the accused’s ability to drive was impaired by marijuana. He noted that, unlike the *Criminal Code* provisions relating to alcohol impairment, the drug-impaired driving provisions did not have the benefit of any statutory presumptions that relate chemical analysis to the impairment of driving-related skills.⁴⁰

Accordingly, Labach J explained:

But at its best, Constable Schaefer’s evidence convinces me that the accused had used marijuana at some point prior to her being stopped at the police check stop that evening and that she still had some of it in her system at the time he did his Drug Recognition Evaluation on her at the police station. What his evidence does not convince me of is that at the time she was driving, her ability to operate a motor vehicle was impaired by marijuana?

...

Constable Schafer’s evidence does not explain the accused’s test results and how they relate to the accused’s ability to drive a motor vehicle or how they relate back to the time of driving. Without testimony on these points, I am left with many questions. For example, what signs of impairment would one expect to see in someone who has been using marijuana? How long after using marijuana would you expect to see these signs and how long would they last? Can the results of Drug Recognition Evaluation tests taken over one and one-half hours after the time of driving be reliably related back to the time the accused pulled into the check stop? Was the accused’s performance in some of the tests just as consistent with someone who has poor balance or poor co-ordination as it was with someone who had used marijuana?⁴¹

The judge also stressed the absence of any evidence that the accused had been driving in an erratic or impaired manner.

This case and others that adopt a similar approach do not augur well for drug-impaired driving prosecutions.⁴² Charges will become far more contentious and vulnerable to successful challenge if the prosecutor has to adduce expert evidence in each case to explain the relationship

³⁹ *Ibid* at para 23.

⁴⁰ Section 258(1) of the *Criminal Code* contains several important evidentiary presumptions regarding evidentiary breath or blood samples. In particular, as long as the appropriate procedures are followed, the results of a breath test conducted on an approved instrument are presumed to accurately reflect the accused’s BAC at the time of testing (the presumption of accuracy) and at the time of the alleged offence (the presumption of identity), in the absence of evidence to the contrary. For commentary on these provisions, see Modest Gains, *supra* note 4 at 68-72.

⁴¹ *Perillat*, *supra* note 36 at paras 24, 26. See also *R v Jansen*, [2010] OJ No 959 (OCJ), where Fuerth J made similar criticisms of DRE evidence. The accused in that case had consumed high doses of prescription drugs, and had been in a single-vehicle accident.

⁴² See also *Jansen*, *ibid*; *R v Sanclimenti*, [2010] OJ No 5917 (OCJ) (QL); and *Steeves*, *supra* note 34.

between the accused's performance on the various elements of the DRE and the accused's alleged drug impairment at the time of driving.⁴³ Thus, it does not appear that DRE will significantly streamline the prosecution of drug-impaired driving in Canada.

Physical coordination testing and DRE are first steps in the move to greater enforcement of the *Criminal Code*'s prohibition of drug-impaired driving. However, DRE is complex, technical and time-consuming. It has been reported that a typical DRE in Canada lasts 30-45 minutes, and entails the collection of over 100 separate pieces of information.⁴⁴ This does not include the time necessary to conduct a preliminary roadside SFST, transport the suspect to the police station, or allow him or her to consult with counsel. When these aspects are included, the process takes close to two hours from roadside testing to completion.

Further, the process of training and certifying "evaluating officers" is rigorous and expensive. Training of evaluating officers occurs in three stages: pre-school (16 hours), expert school (56 hours) and field certification (approximately 40-60 hours).⁴⁵ It is estimated that the cost of training an evaluating officer in Canada is \$17,000, and that a total of 800 officers have been trained.⁴⁶ However, with transfers and retirements, fewer than 500 officers are currently conducting DREs. Finally, the availability of DRE evidence does not appear to relieve the Crown of the burden of proving how the drug in question affected the accused's ability to drive.⁴⁷ These problems with the DRE may help to explain why many comparable countries have enacted or are in the process of enacting *per se* limits for the most commonly-used illicit drugs.

⁴³ This was the case in *R v MacDonald* (2012), 315 NSR (2d) 146 (Prov Ct), where a forensic toxicologist from the RCMP's National Forensic Services office in Halifax gave testimony regarding the impairing effects of marijuana. The accused was convicted.

⁴⁴ Porath-Waller, Beirness & Beasley, *supra* note 1 at 517.

⁴⁵ In order to become evaluating officers, candidates must meet the rigorous training and testing standards established by the International Association of Chiefs of Police. The International Drug Evaluation & Classification Program, online: <www.decp.org/training> (accessed: 16 January 2012). See also *Drug Evaluation and Classification Training, Administrator's Guide* (Washington: US Department of Transportation, 2007).

⁴⁶ Personal communication from Doug Beirness to Andrew Murie (24 September 2012). There are currently 491 certified evaluating officers in Canada.

⁴⁷ In addition, prior to the 2008 amendments, some courts refused to admit expert DRE evidence on the grounds that it did not meet minimum levels of reliability: *R v Wood* (2007), 426 AR 335 (QB).

(c) Criminal Justice Statistics

Even with approximately 500 officers conducting DREs in Canada, the number of federal drug-impaired driving charges has been disappointing. As Table 1 illustrates, the number of drug-impaired driving charges in 2010 (915) constituted only 1.4% of the total impaired driving charges laid (65,183). Despite the 2008 amendments and the millions of dollars spent on training officers, drug-impaired driving remains grossly under-enforced.

Table 1: The Number of Persons Charged With a Federal Drug-Impaired Driving Offence by Jurisdiction: 2008-2010

Prov/Terr	Number of Persons Charged		
	2008	2009	2010
NL	19	36	51
PE	1	5	5
NS	18	39	69
NB	13	67	37
QC	3	51	98
ON	66	317	322
MB	7	21	27
SK	8	45	57
AB	29	86	132
BC	23	128	112
YK	0	0	0
NT	0	1	4
NU	1	0	1
Canada (total impaired)	188 (65,822)	796 (68,399)	915 (65,183)

Source: Statistics Canada, *CANSIM Table 252-0051, Incident-based crime statistics, by detailed violations* (Ottawa: Statistics Canada, 2012).⁴⁸

While the total number of persons charged with a drug-impaired driving offence increased by almost 15% from 2009 to 2010, it is not clear if this trend will continue. Even if drug-impaired driving charges tripled, they would still constitute less than 5% of the total impaired driving charges in Canada.

⁴⁸ Note that *CANSIM Table 252-0051* is subject to numerous qualifications and limitations.

As surprising as it may seem, there is no information on the outcome of these drug-impaired driving cases. Statistics Canada does not currently provide specific data on drug-impaired driving cases by type of decision or by type of sentence. Conviction data are simply not available.⁴⁹ Nevertheless, the available information suggests that a tiny percentage of drug-impaired drivers are ever charged, let alone convicted. As indicated, 2006 survey data indicated that approximately half a million Canadians admitted to driving within two hours of using marijuana or hashish.⁵⁰ Assuming that these individuals did so only once in the year (rather than an average of 10 times, as reported in a 2007 national study of Canadian youth), the average user would have had to make 550 trips after using marijuana before he or she would have even been charged once. While the half-million figure likely includes people who were not *impaired* by marijuana or hashish at the time of driving, it also excludes those who were impaired by other drugs. In any event, given the prevalence of drug-impaired driving in Canada, the number of criminal charges seems inordinately small. The criminal law will have a minimal deterrent effect if drivers can reliably expect that they will not be detected and prosecuted for driving after drug use.⁵¹ It seems clear that enhanced enforcement measures are essential if we are to make progress against drug-impaired driving in Canada.

SECTION IV: ALTERNATIVES TO DRUG RECOGNITION EVALUATION

(a) Testing of Bodily Fluids

In addition to the behavioural-based enforcement used in Canada, drug use can be detected through the testing of blood, saliva or urine. Ideally, the program for the testing of bodily fluids for drugs would parallel the existing BAC limit and breath-testing provisions for alcohol. That is, preliminary screening could be conducted at roadside, with further evidentiary testing conducted at the police station after the accused has been afforded the right to counsel. However, drug impairment is more complex than alcohol impairment in several important

⁴⁹ To better understand the drug-impaired driving problem, it would be extremely helpful if Statistics Canada were to separately report conviction and sentencing outcomes in alcohol and drug-impaired driving cases.

⁵⁰ *Road Safety Monitor*, *supra* note 5.

⁵¹ This appears to be borne out in the statistics on driving after drug use among youth. See *supra* notes 7-10.

ways.⁵² First, not all drugs necessarily or consistently cause impairment.⁵³ Second, the non-active metabolites of some drugs stay in a driver's system long after their impairing effects have worn off.⁵⁴ Third, until recently, there has not been a quick, inexpensive and non-invasive means of screening drivers for drug use. Finally, some individuals will drive better when taking their prescription medication, whereas those taking such drugs for non-medicinal reasons may have their abilities impaired.⁵⁵ It is for these reasons that it is difficult to simply translate the scheme for enforcing alcohol-impaired driving to the problem of drug-impaired driving.

Other jurisdictions have approached this problem in two main ways. In some jurisdictions, it is an offence to drive with any amount of a drug in one's system. This is known as a zero tolerance approach. It has the advantage of being easy to enforce, and sends a consistent message that individuals should not drive after consuming drugs. However, it has the drawback that an individual may be convicted of a criminal offence even though his or her ability to drive was not actually impaired at the time.

An alternative approach is to establish a *per se* limit for given drugs, similar to the .08% BAC limit for alcohol. The limit can be set at a level where a typical driver's abilities will be impaired. This provides an objective and efficient means of drug-impaired driving enforcement. Moreover, it allows the government to focus on the drugs that are most commonly used, most likely to cause impairment, and can be screened for using a relatively quick and inexpensive test. As discussed below, several Australian states have adopted this approach, and it probably provides the most appropriate model for Canada.

(b) Zero Tolerance

As their name suggests, zero tolerance laws make it illegal to operate a motor vehicle with any amount of a prohibited drug in one's body. At least a dozen American states use this

⁵² See RL Dupont et al, "The Need for Drugged Driving *Per Se* Laws: A Commentary" (2012) 13 Traffic Inj Prev 31.

⁵³ See generally, OECD Report, *supra* note 1, ch 2; and EJD Ogden & H Moskowitz, "Effects of Alcohol and Other Drugs on Driving Performance" (2004) 5 Traffic Inj Prev 185.

⁵⁴ Ogden & Moskowitz, *ibid* at 191.

⁵⁵ For instance, central nervous system depressants have legitimate therapeutic uses for conditions such as epilepsy.

approach, and apply it to a range of prohibited drugs or substances.⁵⁶ For example, in Arizona, it is an offence to operate a motor vehicle with any controlled substance or its metabolite in one's body. This includes illicit and prescription drugs, as well as inhalants like glue and varnish.⁵⁷ The criminal sanctions include up to 6 months' imprisonment and a \$2,500 fine for a first offence, and a driving suspension of 90 days to one year.⁵⁸

Evidence suggests that the introduction of a zero tolerance law with chemical testing can increase enforcement rates for drug-impaired driving. In Wisconsin, for example, arrests for drug-impaired driving increased from 3.4% to 5.2% of total impaired-driving arrests after the 2003 implementation of a zero tolerance law.⁵⁹ This was also reflected in the number of drug tests requested, which rose from 1,452 in 2003 to 2,350 in 2005.⁶⁰ In addition, both police and prosecutors reported that the zero tolerance laws had made it easier to prosecute drug-impaired driving cases, and that most suspects plead guilty.⁶¹

Zero tolerance laws have the advantage that they are clear and unambiguous, and can be enforced objectively by police without extensive specialized training. However, an outright prohibition on driving with any drugs in one's system may not garner public or political support in Canada, given that drugs do not necessarily cause impairment and may appear in a driver's system long after they have ceased having any impairing effects. Moreover, such a prohibition may be perceived as a back-door attack on drug use, rather than on drug-impaired driving.⁶² This would be particularly controversial if the *Criminal Code* were amended to allow for random drug screening, as described below.

⁵⁶ J Lacey, K Brainard & S Snitow, *Drug Per Se Laws: A Review of Their Use in States* (Washington: National Highway Traffic Safety Administration, 2010). In addition to zero tolerance laws of general application, some states (North Carolina and South Dakota) prohibit driving after drug use among drivers under 21, while others prohibit drug addicts or habitual users from driving at all.

⁵⁷ *Ibid*, Appendix B.

⁵⁸ *Ibid* at 13 (Table 4).

⁵⁹ *Ibid* at 58 (Table 15).

⁶⁰ *Ibid*.

⁶¹ *Ibid* at 2.

⁶² On the other hand, establishing a legal limit above zero may give the impression that there is a "safe" or "acceptable" limit for using a given drug, which contradicts more general laws against illicit drug possession.

(c) *Per Se* Limits

Given the negative policy implications of a zero tolerance law in Canada, it is preferable to establish *per se* limits. This would allow the government to target specific, commonly-used drugs, and would establish a more rational link between drug use and impairment of driving-related skills. Like the .08% BAC *per se* limit for driving, this would require defining a level at which a typical driver's skills would be impaired by a given drug. Current research has determined appropriate ranges for some drugs; however, more research is required to establish *per se* limits for the various other categories of drugs that may cause driver impairment.

There is now a considerable body of research indicating an appropriate *per se* limit for cannabis. This is helpful, because cannabis is one of the drugs most commonly used before driving, and has been shown to impair critical driving-related skills.⁶³ Cannabis is also a drug that can remain in a person's system long after its impairing effects have worn off. For instance, frequent cannabis users may have detectable metabolites in their system for days or even weeks after their last use, while the drug's impairing effects typically dissipate after three to four hours.⁶⁴ It is for this reason that a zero tolerance law for cannabis would potentially be politically and legally questionable.

An interdisciplinary working group of international scientists recently reviewed the research literature and meta-analyses on the impairing effects of cannabis, the relative risk of crash for drivers using cannabis, and comparisons with alcohol-impairment in order to determine a viable tetrahydrocannabinol (ie THC or cannabis) *per se* limit.⁶⁵ The researchers suggested a limit in the range of 7-10 ng/ml (blood serum), which had roughly the same impairing effects as a .05% BAC. This limit allowed for a reasonable margin of error and for variations in individual

⁶³ The effects of cannabis include increased variability in headway (ie following distance) and lateral lane position, slower reaction time, and lower mean speed. The impairing effects of cannabis appear to be more pronounced in inexperienced drivers. MG Lenné et al, "The effects of cannabis and alcohol on simulated arterial driving: Influences of driving experience and task demand" (2010) 42 *Accid Anal and Prev* 859 at 864-65.

⁶⁴ F Grotenhermen et al, "Developing limits for driving under cannabis" (2007) 102 *Addiction* 1910 at 1911.

⁶⁵ *Ibid.*

absorptions of THC. It also avoided the risk that individuals would be charged because of having metabolites in their system when the impairing effects of cannabis had worn off.⁶⁶

It should thus be relatively straightforward to establish a *per se* limit for cannabis. However, further research is required to establish a *per se* limit for other commonly-used drugs that impair the ability to drive. The federal government should make it a priority to determine appropriate *per se* limits for such drugs, building on or contributing to the international research that is currently underway.

(d) Enforcing Zero Tolerance or *Per Se* Limits

It is not enough to create an offence for operating a motor vehicle with a proscribed drug in one's body. As with alcohol-impaired driving, police need to be given the authority and means to conduct toxicological drug tests on drivers. Given the other demands on criminal justice resources, enforcement powers that are time-consuming, costly, complex, and likely to lead to protracted and frequent legal challenge will not be used except in cases involving crash deaths and serious injuries. It is therefore necessary to authorize enforcement procedures that are relatively straightforward and cost-effective, while still constitutionally valid.

Currently, a variety of enforcement systems are available worldwide. In some jurisdictions, toxicological drug tests are conducted in a relatively small number of cases. For instance, although Arizona has a zero tolerance law for all controlled substances, the likelihood of a given driver being chemically tested for drugs is minimal.⁶⁷ Police must have probable cause in order to stop a driver (erratic driving, traffic or equipment violation), and can only pursue further investigation if there is a reasonable suspicion of alcohol or drug impairment. More specifically, a drug-impaired driving investigation is only initiated if the driver shows visible signs of impairment but has a low BAC (thereby ruling out alcohol as the source of impairment); or if there are other obvious signs of drug use (eg drug paraphernalia). At that stage, the investigating officer can contact a Drug Recognition Expert and/or request a blood sample from

⁶⁶ *Ibid* at 1915-16. Interestingly, the researchers suggested that, given the combined impairing effects of alcohol and cannabis, it may be advisable to set a lower *per se* limit for drivers who tested positive for both alcohol and cannabis.

⁶⁷ Lacey, Brainard & Snitow, *supra* note 56 at 14 (Figure 2). Michigan has a similar process, but without DRE.

the driver for chemical testing. Blood tests are typically conducted at a hospital⁶⁸ or by an officer trained in phlebotomy. All together, this is a relatively long and cumbersome process, and still depends heavily on the personal observations of the investigating officer. It is unlikely that such a system will result in dramatic increases in drug-impaired driving charges, although it may help to secure convictions when charges have been laid.⁶⁹

By contrast, several European countries and Australian states have introduced random roadside screening for certain drugs.⁷⁰ In these jurisdictions, police typically have authority to demand that any driver take a saliva screening test at roadside. If the driver tests positive, he or she will be required to undergo additional, evidentiary testing. Like random breath testing (RBT), which also exists in these jurisdictions, random drug screening allows for police to test a substantial number of drivers in a relatively short period of time.⁷¹ For drivers who test negative, there is only a modest delay and slight inconvenience.

The drug-impaired driving legislation in the Australian state of Victoria provides a useful model for Canada. The *Road Safety (Drugs Driving) Act, 2003* and *Road Safety (Drugs) Act, 2006* prohibit drivers from operating a motor vehicle with any level of methamphetamine (speed), THC or MDMA (ecstasy) in their systems. The legislation authorizes police to randomly

⁶⁸ Some police officers in Michigan reported that hospital personnel were reluctant to draw blood because they had legal concerns about sharing patient information with police. *Ibid* at 28. For a discussion of similar concerns in Canada, see generally E Chamberlain & R Solomon, “Enforcing Impaired Driving Laws Against Hospitalized Drivers: The Intersection of Healthcare, Patient Confidentiality, and Law Enforcement” (2010) 29 WRLSI 45.

⁶⁹ Police in Arizona reported that the accused would most often plead guilty once the drug test results were available. A veteran prosecutor also reported that the law had made drug-impaired driving prosecutions “much easier.” Lacey, Brainard & Snitow, *supra* note 56 at 16, 18.

⁷⁰ See OECD Report, *supra* note 1, Table 5.1. A number of European jurisdictions have also tested roadside saliva screening devices under the auspices of the European Integrated Project DRUID (Driving Under the Influence of Drugs, Alcohol, and Medicines). See T Blencowe, A Pehrsson & P Lillsunde (eds), *Analytical evaluation of oral fluid screening devices and preceding selection procedures* (DRUID, 2010).

⁷¹ During an RBT checkpoint, police engage in minimal preliminary discussion with drivers before demanding a breath test. The test itself takes about 30 seconds to administer. Thus, a Finnish study reported that drivers undergoing RBT were detained on average for under a minute, and a team of ten officers could test 500 drivers in half an hour. JA Dunbar, A Penttila & J Pikkarainen, “Drinking and Driving: Success of Random Breath Testing in Finland” (1987) 295 BMJ (Clinical Research Edition) 101 at 101. See also T Miller, M Blewden & J-f Zhang, “Cost savings from a sustained compulsory breath testing and media campaign in New Zealand” (2004) 36 *Accid Anal & Prev* 783 at 788. Granted, random drug screening takes slightly longer (about five minutes), because the driver must swipe the testing stick around his or her mouth, and the stick takes some time to react to saliva.

demand an oral fluid (saliva) screening test from any driver at roadside. This initial screening test takes approximately five minutes.⁷² If the driver tests positive for any of the target drugs, he or she is required to accompany police to a testing vehicle where a second saliva sample is taken. The second sample is tested by a specially trained and qualified police officer. If it also shows the presence of a targeted drug, it is sent on to a laboratory for confirmatory analysis, and the driver is immediately prohibited from driving for a specified time. The driver will only be charged if the laboratory analysis confirms the presence of a targeted drug. If the second test is negative, the driver will be released, with a total elapsed detention time of approximately 15 minutes.

Preliminary analysis of Victoria's drug testing framework has shown positive results. All of the 489 drivers who were prosecuted between December 2004 and December 2006 pursuant to the legislation were convicted.⁷³ Another 17 were convicted of refusing to provide a sample. Drivers were processed relatively quickly (30 minutes total for drivers who were charged), which is considerably quicker than the roughly two hours needed to complete an SFST and DRE in Canada.⁷⁴ Further, the saliva tests provided an accurate indication that a targeted drug was in the driver's system. The Victorian legislation thus provides a model of efficient, accurate and relatively user-friendly drug testing.

Of course, the Victorian model would need to be modified to address Canada's legal and social framework. First, as described above, a zero tolerance approach is likely to be seen as back-door enforcement of the federal drug offences, and would capture drivers who are not actually impaired by the drug while driving. Consequently, a *per se* limit would need to be established. The roadside screening test should register a fail at a level roughly comparable to a .05% BAC, with the subsequent evidentiary testing providing more precise results. Depending on the drug involved, it may be preferable to perform the evidentiary testing on blood or urine, rather than saliva, as is currently the process with DRE. Second, Canadian police are not generally equipped with roadside testing vehicles, so suspected drug-impaired drivers would need to be taken to a police station for further evidentiary testing. Further, as discussed below,

⁷² M Boorman & K Owens, "The Victorian Legislative Framework for the Random Testing of Drivers at the Roadside for the Presence of Illicit Drugs: An Evaluation of the Characteristics of Drivers Detected from 2004 to 2006" (2008) 10 *Traffic Inj Prev* 16 at 17.

⁷³ *Ibid* at 21.

⁷⁴ See *supra* note 44.

drivers would need to be informed of and allowed to exercise the right to counsel before evidentiary testing took place.

More importantly, Canada does not currently have legislation authorizing the random screening of drivers. In order to demand a breath test on an ASD or a physical coordination test, police must reasonably suspect that a driver has alcohol or drugs in his or her body.⁷⁵ This generally means that a driver must admit to alcohol or drug use, or exhibit some obvious outward signs of consumption (eg flushed face, odour of alcohol or drugs, reddened eyes, confusion or lack of coordination), in order to be subject to testing. Although the grounds for demanding an ASD test in Canada are not particularly onerous, police often have difficulty making the necessary assessment during the brief interaction that they have with drivers at sobriety checkpoints or their other patrol duties.⁷⁶ Consequently, a substantial number of impaired drivers are able to evade detection, and the deterrent effect of the law is undermined.⁷⁷ To address this problem, most comparable jurisdictions worldwide have introduced RBT, which allows police to demand a breath test from any driver at any time. These jurisdictions have experienced sustained and significant reductions in impaired driving and in alcohol-related crashes, injuries and deaths.⁷⁸

MADD Canada and the authors have advocated on numerous occasions for the adoption of RBT in Canada,⁷⁹ so those arguments are not repeated here. The case for random drug screening has equal force as the case for RBT. Moreover, we suspect that the opposition to

⁷⁵ *Criminal Code*, *supra* note 2, s 254(2).

⁷⁶ E Vingilis & V Vingilis, “The Importance of Roadside Screening for Impaired Drivers in Canada” (1987) 29 Can J Crim 17 at 22-25. Police are most likely to miss experienced drinkers because they exhibit fewer signs of drinking, as well as drivers who do not fit the impaired driving stereotype. E Vingilis, EM 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 at 429.

⁷⁷ See generally R Solomon et al, “The Case for Comprehensive Random Breath Testing Programs in Canada: Reviewing the Evidence and Challenges” (2011) 49 *Alta LR* 37 at 46-48.

⁷⁸ See generally 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); A Erke, C Goldenbeld & T Vaa, “The Effects of Drink-Driving Checkpoints on Crashes – A Meta-Analysis” (2009) 41 *Accid Anal & Prev* 914; Solomon et al, *ibid*.

⁷⁹ Solomon et al, *ibid*; R Solomon et al, “Random Breath Testing: A Canadian Perspective” (2011) 12 *Traffic Inj Prev* 111; R Purssell, R Solomon & E Chamberlain, “Random breath testing: A Needed and effective measure to prevent impaired driving fatalities” (2009) 51 *BCMJ* 446; R Solomon et al, “Predicting the Impact of Random Breath Testing on the Social Costs of Crashes, Police Resources, and Driver Inconvenience in Canada” (2011) 57 *Crim LQ* 438.

random drug screening might actually be less than that to RBT, given that it would target drugs that are already illegal, and that illicit drug users are not backed by powerful lobby groups like the alcohol industry. Put briefly, if RBT is successfully introduced in Canada, it should be relatively easy to make the case for random drug screening as well.

SECTION V: *CHARTER* ISSUES

Like most changes to enforcement practices, the random stopping of drivers and random testing of their bodily fluids for drugs will undoubtedly give rise to challenges under the *Charter of Rights and Freedoms*. The most likely challenges would be based on section 9 (arbitrary detention), section 10(b) (the right to counsel), and section 8 (unreasonable search or seizure).

There is no doubt that drivers subject to roadside drug tests would be “detained” within the meaning of the *Charter*. Although the stop would be relatively brief, the police officer would effectively control the driver’s movement, and there would be a penalty for drivers who refused to comply.⁸⁰ In the case of *random* saliva testing, the detention would also be “arbitrary,” because there would be no objective criteria for the selection of drivers to be tested.⁸¹ Accordingly, roadside drug testing would violate section 9. However, like the detention involved in random spot checks that assess drivers’ sobriety, this violation should be upheld under section 1 of the *Charter*.⁸²

The right to legal counsel under section 10(b) of the *Charter* is triggered whenever a person is “detained.” The Canadian courts have unanimously held that the right to counsel is triggered when a driver is directed to provide a breath sample on an ASD,⁸³ to answer police questions,⁸⁴ or to submit to physical coordination testing for the purposes of determining

⁸⁰ See *R v Hufsky*, [1988] 1 SCR 621 at 632. *Hufsky* found that a random spot check during a RIDE program constituted a detention within the meaning of section 9.

⁸¹ *Ibid* at 633.

⁸² *Ibid*. See also *R v Ladouceur*, [1990] 1 SCR 1257, which upheld random spot checks during routine patrol activities.

⁸³ *R v Thomsen*, [1988] 1 SCR 640.

⁸⁴ *Orbanski*, *supra* note 28.

impairment.⁸⁵ Requiring drivers to submit to questioning and these tests without the opportunity to consult counsel infringes section 10(b). Similarly, there is no question that requiring drivers to provide a saliva sample at roadside would also violate section 10(b). But again, like the other roadside tests, this violation should be upheld under section 1 of the *Charter*.

The greatest uncertainty arises in regard to whether random saliva testing would violate the right to be free from unreasonable search and seizure under section 8. In *Hunter v Southam*,⁸⁶ the Supreme Court of Canada found that warrantless searches and seizures are presumptively unreasonable, and must be justified through the three-part test laid out in *R v Collins*.⁸⁷ First, was the search authorized by law? Second, is the law itself reasonable? Third, was the search carried out in a reasonable manner? Since roadside saliva testing will presumably be enacted through the *Criminal Code*, it will satisfy the requirement of being “prescribed by law.” The third element of the *Collins* test typically addresses how the police conducted the search in a particular case, and thus, cannot be analyzed in the abstract. Therefore, the main debate will centre on the reasonableness of the law itself. This, in turn, will depend on whether drivers have a reasonable expectation of privacy with respect to saliva testing, and the reasonableness of the grounds or bases for demanding such tests.

First, the Canadian courts have already held that drivers have a reasonable expectation of privacy with respect to breath and blood testing, where those samples are used for the purposes of an impaired driving prosecution.⁸⁸ Saliva testing will unquestionably also be found to attract a reasonable expectation of privacy in this regard. Nevertheless, because driving is a licensed activity, a driver’s expectation of privacy is qualified. As stated by the Supreme Court of Canada in *R v Wise*⁸⁹:

For the safety of all, it is essential that drivers be tested before receiving their licence; that RIDE programs be instituted to discourage the drinking driver; that the speed of

⁸⁵ *Ibid*; and *R v Saunders* (1988) 41 CCC (3d) 532 (Ont CA).

⁸⁶ [1984] 2 SCR 145 at 161.

⁸⁷ [1987] 1 SCR 265 at 278.

⁸⁸ See for example, *R v Wills* (1992), 70 CCC (3d) 529 (Ont CA); *R v Haas* (2005), 76 OR (3d) 737 (CA) (breath); and *R v Dymont*, [1988] 2 SCR 417; *R v Pohoretsky*, [1987] 1 SCR 945; *R v Colarusso*, [1994] 1 SCR 20 (blood).

⁸⁹ [1992] 1 SCR 527 at 533-34. See also L’Heureux-Dubé J’s decision in *R v Bernshaw*, [1995] 1 SCR 254, which addressed the interaction of section 8 and the *Criminal Code*’s breath-testing provisions for alcohol.

vehicles be supervised and that the mechanical fitness of vehicles be inspected. These inspections and tests and this supervision do not constitute unreasonable breaches of basic civil liberties. Rather, they are common sense rules that exist for the protection of society as a whole.... Without them, motor vehicles inevitably become instruments of crippling injury, death and destruction.

Society then requires and expects protection from drunken drivers, speeding drivers and dangerous drivers.... All this is set out to emphasize that, although there remains an expectation of privacy in automobile travel, it is markedly decreased relative to the expectation of privacy in one's home or office.

Similarly, the expectation of privacy an individual has in his or her own saliva will be limited when the individual engages in a licensed activity that involves considerable risk and requires that one's abilities not be impaired by drugs. The *Criminal Code's* existing breath and blood-testing provisions have never been struck down on the basis of a section 8 violation, so there is every reason to believe that saliva testing for drug impairment would similarly be upheld.

Second, it must be decided if demanding roadside saliva tests at random (ie in the absence of a reasonable suspicion that the driver had used drugs) is unreasonable within the meaning of section 8 of the *Charter*. We have elsewhere provided a detailed analysis of this issue in terms of RBT,⁹⁰ so we only summarize it here. In our view, a strong argument can be made that random saliva testing for drugs is not unreasonable. Although the courts have typically accorded a high degree of privacy to bodily integrity and bodily samples,⁹¹ providing a saliva sample at roadside is minimally intrusive.⁹² The driver physically takes control of the swab and swirls it around his or her own mouth. The driver stays in the vehicle throughout. The test does not involve pain, discomfort or indignity. The test reveals no personal information about the driver except for the presence of certain drugs in his or her system.⁹³ The test is used solely for screening purposes and is not admissible in criminal proceedings.

⁹⁰ See Solomon et al, *supra* note 77.

⁹¹ See generally *R v Stillman*, [1997] 1 SCR 607.

⁹² Particularly when placed on the spectrum of other searches than have been upheld by the Canadian courts, including: the use of so-called "drug loo" facilities (where the subject is compelled to have a bowel movement) (*R v Monney*, [1999] 1 SCR 652); DNA testing through the production of hair or blood samples and buccal swabs (*R v SAB*, [2003] 2 SCR 678); and strip searches at the border (*R v Simmons*, [1988] 2 SCR 495).

⁹³ This was important in *SAB*, *ibid*, where the court noted that the *Criminal Code's* DNA testing provisions only provide for the use of "non-coding" DNA, which is DNA that can be compared to an existing sample, but that does not reveal any medical, physical or mental characteristics about an

Moreover, the proposed random saliva tests have to be put in the context of the screening procedures routinely used at every Canadian airport, and many courts and other government buildings, at which every passenger or entrant is required to pass through a metal detector and have his or her baggage and/or person searched. In 2010, 106 million passengers enplaned and deplaned at Canada's airports,⁹⁴ where it is not uncommon for them to have to take off their shoes and belts, be swabbed for explosives' residue, scanned for weapons under their clothes, and subjected to a thorough pat-down search (which involves touching the neck, legs, arms, chest, hips and buttocks through their clothes). We would venture to say that, for many people, it is a greater intrusion on privacy to have one's purse, briefcase and luggage publicly searched, and more humiliating to be patted down in public or strip-searched in private at a busy airport, than to swirl a swab around their mouths for a few minutes while sitting in their cars.

The almost 100 million returning Canadians and international visitors crossing into Canada each year may be subject to these same screening and search procedures.⁹⁵ The Canadian courts have never found such random intrusions, or those routinely imposed on anyone entering their courtrooms, to violate section 8 of the *Charter*.⁹⁶ Given the diminished expectation of privacy associated with driving and the state interest in traffic safety, random drug screening, like airport, customs and court screening procedures, is consistent with *Charter* values.

However, even if random saliva testing were found to violate sections 8, 9 and 10(b) of the *Charter*, these violations should be upheld under section 1 as reasonable limits "prescribed by law [that] can be demonstrably justified in a free and democratic society."⁹⁷ We have fully

individual. See also *R v Tessling*, [2004] 3 SCR 432, where the court found that the use of thermal heat imaging to detect heat patterns emanating from the accused's home did not involve a reasonable expectation of privacy because it revealed no personal information or intimate details of the occupants' lifestyle.

⁹⁴ Transport Canada, *Transportation in Canada: An Overview* (Ottawa: Minister of Public Works and Government Services Canada, 2010) at 20.

⁹⁵ Canadian Border Security Agency, *CBSA National Statistics*, online: www.cbsa-asfc.gc.ca/agency/stats/trade-echange-eng.html (accessed 11 May 2009).

⁹⁶ See *Simmons*, *supra* note 92; *R v Lindsay (DK)* (2004), 187 Man R (3d) 236 (CA); and *R v Campanella* (2005), 75 OR (3d) 342 (CA).

⁹⁷ The test for justifying *Charter* violations is set out in *R v Oakes*, [1986] 1 SCR 103. It involves five elements. (i) Is the infringement prescribed by law? (ii) Does it respond to a pressing and substantial legislative objective? (iii) Is the measure rationally connected to the objective? (iv) Does it infringe *Charter* rights as little as possible? (v) Do its positive effects outweigh its deleterious effects? The

analyzed this issue elsewhere with respect to RBT,⁹⁸ and will not repeat that discussion here. Suffice it to say that roadside saliva testing is the least drastic means of addressing the growing problem of drug-impaired driving in Canada. As discussed above, the current system of SFST and DRE is time-consuming, cumbersome, expensive, and readily susceptible to various legal and *Charter* challenges, and has left drug-impaired driving grossly under-enforced. This leads drivers, particularly young drivers, to accurately conclude that there is little chance of being apprehended or charged if they drive after consuming drugs. Roadside toxicological screening, particularly if done on a random basis, is the best way to increase the perceived and actual rates of apprehension, and thereby deter drug-impaired driving in Canada.

SECTION VI: RECOMMENDED PROVINCIAL AND TERRITORIAL MEASURES

The provinces and territories should enact measures to complement the proposed *Criminal Code* amendments. First, the provinces and territories need to enact comprehensive administrative licence suspension legislation specifically for drivers who fail an SFST or roadside drug screening test. Currently, while all the provinces except Québec impose administrative licence suspensions and other sanctions on drivers who have a BAC of .05% or more (.04% in Saskatchewan) or who are reasonably believed to be impaired by alcohol,⁹⁹ only six jurisdictions have enacted specific short-term administrative sanctions for drug-impaired driving in the absence of a *Criminal Code* charge.¹⁰⁰ Two other jurisdictions have enacted general administrative sanctions for drivers who fail an SFST or refuse to take the test.¹⁰¹

majority of the section 1 cases turn on the fourth sub-issue, which is often referred to as the minimum impairment test.

⁹⁸ See Solomon et al, *supra* note 77 at 71-77.

⁹⁹ This has been the subject of a model policy by the Canadian Council of Motor Transport Administrators (CCMTA). See CCMTA, *STRID Model for Short-Terms Suspensions* (Ottawa: CCMTA, 2005).

¹⁰⁰ R Solomon et al, *The 2012 Provincial and Territorial Review* (Oakville: MADD Canada, 2012) at 90.

¹⁰¹ *Ibid.* These general provincial administrative sanctions were made possible by the introduction of the 2008 *Criminal Code* SFST amendments. Section 254(2)(a) of the *Criminal Code* authorizes officers to demand a SFST from a driver who they reasonably suspect has any alcohol or drugs in his or her body.

Moreover, the drug-impaired administrative sanctions are generally less onerous than the alcohol-related sanctions.¹⁰²

As Table 2 illustrates, only three of the eight jurisdictions with specific or general drug-related administrative licence suspensions report them separately from their alcohol-related suspensions. The 2011 data, albeit extremely limited, indicate that British Columbia accounted for almost 98% of the known short-term, drug-related administrative sanctions.

Table 2: Drug-Related Administrative Licence Suspensions by Jurisdiction: 2011

Prov/Terr	Drug-Related Administrative Licence Suspensions	Duration (1st occurrence)	Number
	Grounds		
NL	Reasonable grounds to believe driver's ability is impaired by a drug or combination of drugs and alcohol	7 days	Not known
PE	No drug-related administrative program		
NS	No drug-related administrative program		
NB	No drug-related administrative program		
QC	No alcohol or drug-related administrative program		
ON	No drug-related administrative program		
MB	Based on SFST, believe driver is unable to drive safely; refuses SFST; or is so impaired by alcohol or drugs as to be unable to provide a sample or take SFST	24 hours	48
SK	Refusal to undergo, or a failure of, a SFST	24 hours	61
AB	Reasonably suspect driver's physical or mental ability is affected by a drug	24 hours	Not known
BC	Reasonable grounds to believe driver's ability is affected by a drug	24 hours	4,457
YK	Reasonable grounds to believe driver's ability is impaired by drugs or another substance	24 hours	Not known
NT	Reasonable grounds to believe driver's ability is impaired by drugs or fatigue	24 hours	Not known
NU	Reasonable grounds to believe driver's ability is impaired by drugs or fatigue	4 to 24 hours	Not known

Sources: R. Solomon et al, *The 2012 Provincial and Territorial Review* (Oakville: MADD Canada, 2012) at 90; and personal correspondence with A. Murie, CEO MADD Canada (September 2012)

¹⁰² *Ibid* at 92.

In all likelihood, provincial licence suspensions based on roadside saliva screening tests will need to be relatively short. Parts of British Columbia's *Motor Vehicle Act* were recently found to be unconstitutional because they applied significant sanctions (a 90-day licence suspension, a possible \$500 fine, vehicle impoundment and enrolment in a remedial and alcohol interlock program) based solely on failing a roadside ASD test (ie registering a BAC of .08% or more), in the absence of a formal criminal charge.¹⁰³ The sanctions, combined with the lower grounds for testing (reasonable suspicion of alcohol consumption), the lack of an opportunity to consult with counsel, and the lack of a meaningful process to challenge the roadside ASD test result, led the court to conclude that this provision violated section 8 of the *Charter* and could not be justified under section 1.

Similar principles would likely apply to any sanctions that are based solely on roadside drug screening. If anything, given that saliva tests are not yet as accurate as ASDs,¹⁰⁴ the courts are likely to be even more wary of imposing significant administrative sanctions based on only a failed roadside drug screening test. Accordingly, the provinces should realistically only impose short-term (eg 24-hour to 3-day) licence suspensions on drivers who fail a roadside saliva test. More significant administrative sanctions should only apply when a driver has failed an evidentiary drug test, having been afforded the right to counsel. Consistent with the procedures for drivers who test above .08% BAC on an approved instrument, drivers who fail evidentiary drug tests should be subject to longer administrative licence suspensions (eg 90 days) and vehicle impoundments, and be required to undergo a drug assessment and any recommended treatment.

Finally, the provinces could enact a zero tolerance law for drugs as part of their graduated licensing programs. This would parallel the .00% BAC restriction that typically applies to young and novice drivers.¹⁰⁵ Although a zero tolerance law would likely be politically unworkable for

¹⁰³ *Sivia v British Columbia (Superintendent of Motor Vehicles)* (2011), 27 BCLR (5th) 229 (SC) at paras 313-321. The court noted that the financial costs of these various sanctions could amount to \$4,000.

¹⁰⁴ See for example T Blencowe et al, "An analytical evaluation of eight on-site oral fluid drug screening devices using laboratory confirmation results from oral fluid" (2011) 208 *Forensic Sci International* 173; and S Strano-Rossi et al, "Evaluation of four oral fluid devices... for on-site monitoring drugged driving in comparison with UHPLC-MS/MS analysis" (2012) 221 *Forensic Sci International* 70.

¹⁰⁵ See generally E Chamberlain & R Solomon, "Zero blood alcohol concentration limits for drivers under 21: lessons from Canada" (2008) 14 *Inj Prev* 123; and E Chamberlain & R Solomon, "Minimizing Impairment-related Youth Traffic Deaths: The Need for Comprehensive Provincial Action" (2008) 99 *CJPH* 267.

the entire population of drivers, it is justifiable for drivers in the graduated licensing program. These drivers are already at greatly increased risk due to their immaturity and/or inexperience,¹⁰⁶ and should not have their abilities impaired by drugs in any way. A zero tolerance approach should help to promote more responsible driving habits among new drivers. This is particularly important given that the recent survey data indicate that youth are more likely to drive after using drugs than after using alcohol.¹⁰⁷

SECTION VII: CONCLUSION AND RECOMMENDATIONS

Drug-impaired driving is a growing problem in Canada, but remains dramatically under-enforced. Current enforcement procedures are time-consuming and unwieldy, and fail to identify the vast majority of drug-impaired drivers. Based on the model used in Australia and several European countries, the Canadian government should work toward introducing roadside saliva screening for the most commonly-used drugs. Drivers who test positive for drugs on the roadside screening test should be taken for evidentiary testing and afforded the right to counsel. This system would parallel the two-step procedure that already exists for alcohol (ie testing on an ASD and then an approved instrument). Ideally, the government should introduce random roadside testing for both alcohol and drugs, thereby increasing the chances of detection and promoting general deterrence.

Drug-impaired driving is a field where technology is constantly advancing. It is likely that the accuracy and affordability of drug screening tests will improve rapidly, and the Canadian government should take advantage of these technological improvements. Canada needs to keep abreast of international research on the impairing effects of various drugs, the relative risk of crash at various drug levels, drug involvement in fatal and serious injury crashes, and appropriate *per se* drug limits for driving. At the same time, the rapid growth in international drug-impaired driving research should not be used as an excuse to delay measures that have already proven effective in countries like Australia.

¹⁰⁶ See *ibid*; AT McCartt, VI Shabanova & WA Leaf, “Driving experience, crashes and traffic citations of teenage beginning drivers” (2003) 35 *Accid Anal & Prev* 311; HA Deery, “Hazard and risk perception among young novice drivers” (1999) 30 *J Safety Res* 225; and R Solomon et al, *Alcohol, Trauma and Impaired Driving*, 4th ed (Oakville: MADD Canada, 2009) at 64-68.

¹⁰⁷ See *supra* notes 7-8.

While this report has stressed the importance of improving enforcement of the *Criminal Code*'s prohibition on drug-impaired driving, this does not detract from the need to strengthen enforcement of the drinking and driving law. Alcohol-impaired driving is responsible for hundreds of deaths and tens of thousands of injuries annually, and there are proven measures, such as enacting a federal .05% BAC offence and comprehensive RBT programs, that can significantly reduce this figure. The measures outlined here are meant to complement the alcohol-related measures, and to promote a coordinated effort at reducing both alcohol and drug-impaired driving in Canada.

- Canada should move away from its reliance on SFST and DRE for investigating, apprehending and prosecuting drug-impaired driving suspects. The current approach is cumbersome, time-consuming, expensive, and vulnerable to challenge.
- Canada should contribute to and take advantage of international research on the impairing effects of various illicit drugs, in order to establish *per se* limits that are akin to the .05% and .08% BAC limits for driving.
- Canada should work toward implementing a system of roadside saliva testing, preferably on a random basis, to screen drivers for the most commonly-used illicit drugs. Drivers who test positive would be taken for further, evidentiary testing, and would be given the right to counsel.
- Statistics Canada should introduce separate codes to permit the reporting of drug-impaired driving cases that come to court, the outcome in these cases and the sentences that are imposed in those cases in which there is a guilty disposition.
- The provinces should increase the rates of testing for drugs in fatally-injured drivers to help determine the involvement of drugs in fatal crashes.
- The provinces and territories, through the Canadian Council for Motor Transport Administrators (CCMTA), should adopt a model administrative licence suspension program for drug-impaired driving that is parallel to the model that it developed for alcohol-impaired driving.
- Prince Edward Island, Nova Scotia, New Brunswick, Québec, and Ontario should enact a short-term administrative licence suspension program for drivers who: are reasonably suspected to be impaired by drugs; test positive for drugs or refuse to take a roadside saliva test; or fail or refuse to take a SFST.

With the exception of British Columbia, the provinces and territories should expand and strengthen the enforcement of their drug-impaired administrative licence suspension programs.

- The provinces should prohibit drivers in the Graduated Licensing Program from driving after drug use.