

1. Sentencing on Impaired Driving Causing Death or Bodily Harm

Introduction

The principles governing Canadian sentencing law are convoluted. It is often difficult to understand the sentence imposed in a particular case or the discrepancies in the sentence received by offenders who committed the same offence.

These concerns arise frequently in cases of impaired driving causing death and impaired driving causing bodily harm. Since these offences carry no minimum sentence, and a maximum of life and ten years imprisonment respectively, they provide judges with potentially sweeping flexibility in both the type of sentence imposed and the length of any prison term. Although trial judges are subject to the general sentencing guidelines established by their provincial appeal court, they retain broad discretion.

The short sentences imposed in some cases of impaired driving causing death or bodily harm, the generous credit given for pre-conviction imprisonment and the fact that many of these offenders are paroled after serving only one-third of their sentence has generated controversy and angered victims of impaired driving.

Sentencing Principles

A sentence must be consistent with the “fundamental principle” and “fundamental purpose” of sentencing, and other “sentencing principles.” However, the *Criminal Code* defines these terms in vague, open-ended language which leaves judges with broad discretion.

(a) The Fundamental Principle and Purpose of Sentencing

According to the *Criminal Code*, the “fundamental principle” of sentencing is that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Of greater concern is the very flexible definition of the “fundamental purpose” of sentencing. The *Criminal Code* states that the fundamental purpose of sentencing is to “contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: denunciation; deterrence of the offender and others; rehabilitation; separation of the offender from society where necessary; reparation; and promotion of a sense of responsibility in the offender and acknowledgement of the harm done to the victim.

Punishment or retribution is not viewed as a legitimate purpose of sentencing and reference to it may result in an appeal.

In our view, the fundamental principle and purpose of sentencing may be noble sounding, but they provide little direction. A judge who wishes to impose an onerous sentence need only emphasize the objectives of

denunciation and deterrence. Conversely, a judge who wishes to impose a lenient sentence will emphasize rehabilitation.

(b) Aggravating and Mitigating Factors

Judges must also consider any aggravating and mitigating factors relating to the offence or the offender, and should increase or decrease the sentence accordingly. The aggravating factors that are relevant to the impaired driving offences include: driving with a blood-alcohol concentration above .16% (*i.e.* twice the *Criminal Code* limit); a lack of remorse or failure to accept responsibility; a failure to seek or accept assistance to address an underlying addiction or other problem; and a prior criminal record or history of violence.

The accepted mitigating factors include: previous good character; genuine remorse; aboriginal status, youth, or physical or mental disability; acceptance of responsibility; commitment to address an addiction or another underlying problem; and ongoing financial or other responsibilities for dependant family members.

Considerable weight is routinely given to an offender's guilty plea, based on the theory that it indicates remorse and an acceptance of responsibility. In reality, many accused individuals plead guilty for strategic reasons unrelated to these factors.

(c) Other Sentencing Principles

Other relevant sentencing principles include: the maximum sentence should only be imposed on very serious offenders in the most troubling circumstances; all available sentences that are reasonable, other than imprisonment, should be considered for all offenders, particularly those who are aboriginal; and the sentence imposed should be similar to sentences imposed on similar offenders for similar offences in similar circumstances.

Although not a formal sentencing principle, judges commonly gave offenders two days credit toward their sentence for every day they were imprisoned prior to their conviction. In 2009, the federal government enacted legislation limiting such credit to one and a half days, unless a judge could establish unique circumstances justifying greater credit.

Concurrent and Consecutive Sentences

Concurrent sentences are sentences for two or more criminal offences which are served at the same time. Judges will order sentences to be served concurrently if the offences arise from a single act. Thus, an impaired driver who causes a crash killing three people may be convicted of three counts of impaired driving causing death, but the sentences will be served concurrently. Nevertheless, the fact that the offender has killed three people goes to the gravity of the offence and should be reflected in the length of the sentence imposed.

Judges will almost always order sentences to be served concurrently if separate offences arise from a single event. For example, an impaired driver who is speeding can be convicted of both impaired and dangerous driving, but the judge will most likely order the sentences to be served concurrently.

Consecutive sentences are sentences for two or more criminal offences which are served one after another. Judges may order sentences to be served consecutively if the offences arose from different events (*e.g.* an impaired driver causes a crash and then flees the scene). The *Criminal Code* provides that if consecutive sentences are

imposed “the combined sentence should not be unduly long or harsh.” In practice, consecutive sentences are rarely imposed.

Victim Surcharges

The *Criminal Code* imposes a victim surcharge of 15% on any fine that is imposed. If no fine is provided for an offence, the surcharge is \$50 for a summary conviction offence and \$100 for an indictable offence. Judges may increase the surcharge if they believe that doing so is appropriate and the offender can pay it or they may waive the surcharge in cases of undue hardship. Proceeds from the surcharge are to be used to fund provincial and territorial victim assistance programs. MADD Canada supports federal proposals to double the victim surcharge and make it mandatory.

Minimum Sentences

The *Criminal Code* contains minimum sentences for the least serious impaired driving offences (ie. driving while impaired, driving with a BAC above .08%, and failing to take a required physical co-ordination, drug recognition, breath, or blood test). As indicated, there are no minimum sentences for impaired driving causing death or bodily harm. There are pros and cons to calling for minimum sentences for these offences. Minimum sentences would: remove discretion at the lowest end of the sentencing range, eliminating the most unduly lenient sentences; and reduce sentencing discrepancies, ensuring greater consistency and fairness. The minimum sentence, however, often becomes the average sentence, whether or not the offender warrants it. Further, minimum sentence legislation would: generate *Charter* challenges; may discourage the police from laying these charges; and increase pressure on prosecutors to plea bargain to a lesser charge.

While MADD Canada has succeeded in encouraging the courts to impose longer sentences for impaired driving causing death or bodily harm, there remain cases where the sentences are unduly lenient. Rather than calling for minimum sentences, MADD Canada has established guidelines, set out later in this document, on the range of appropriate sentences for impaired driving causing death.

Maximum Sentences

As indicated, charges of impaired driving causing death or bodily harm carry very high maximum sentences. However, sentences at or near the maximum are almost never imposed. In fact, MADD Canada is aware of only one case in which an offender received the maximum sentence for impaired driving causing death – a case in which a Québec impaired driver with 18 previous impaired driving convictions struck and killed a woman.

The Supreme Court of Canada recently held that the maximum sentence for an offence is not limited to the worst offender in the worst of all possible circumstances. Rather, the maximum sentence can be imposed “when it is proportionate to the gravity of the offence.” This change in policy should encourage the courts to impose the maximum and sentences in the upper range more frequently.

MADD Canada believes that first offenders should be given meaningful opportunities to change their behaviour and address any underlying alcohol or drug problem. Nevertheless, MADD Canada believes that sentences in the upper range including the maximum should be imposed more often in cases where there are aggravating factors. These sentences are appropriate for offenders with multiple impaired driving convictions who repeatedly disregard the law, endanger the public, take no responsibility for their conduct, and ignore opportunities to address their underlying substance abuse problems.

Repeat Offenders

Preventing people from becoming repeat offenders is clearly preferable to incarcerating them after they have amassed multiple convictions or, worse, killed someone.

MADD Canada recommends a two-track approach. First, minimize the likelihood of individuals becoming repeat offenders through early identification and intervention, including alcohol assessment, treatment and rehabilitation to address their drinking behaviour. These measures should be coupled with licence suspensions, alcohol ignition interlocks, vehicle impoundment and forfeiture programs. Second, should these measures fail, individuals who continue to re-offend need to be subject to lengthy incarceration. MADD Canada believes that in these cases, priority must be given to public safety.

(a) Identifying Repeat Offenders

The *Criminal Code* sets out heavier sanctions for repeat impaired driving offenders. Leaving aside the issue of the adequacy of the sanction, knowing the offender has a prior conviction is important in identifying those with alcohol problems that require mandatory treatment, on-going monitoring and lengthy interlock orders. Thus, MADD Canada strongly believes that repeat offenders need to be identified and sentenced as repeat offenders.

Unfortunately, many offenders with one or more prior convictions are sentenced and treated as first offenders, undermining both the fundamental principle of sentencing and public safety. While we have outlined below why this occurs, administrative and legislature measures must be taken to remedy this problem. First, since most impaired driving offenders are not finger-printed, it can be very difficult and time-consuming for a prosecutor to prove conclusively that an offender has a prior impaired driving conviction. Second, if a prosecutor wants to seek the heavier sanction that the *Criminal Code* provides when there is a prior conviction, that prosecutor must notify the offender before he or she enters a plea. Third, prosecutors generally choose not to introduce a suspect's prior impaired driving conviction if it occurred five or more years ago. Fourth, as part of a plea or sentence negotiation, a prosecutor may agree not to introduce the offender's record. Finally, if the accused pleads guilty at his or her first court appearance, the prosecutor may not be aware of the offender's record.

MADD Canada believes that repeat offenders should be identified and sentenced as repeat offenders.

(b) Sentencing Repeat Offenders

MADD Canada has previously set out its position on sentencing repeat offenders who have been convicted of: impaired driving; driving with a BAC above .08%; or failing to undertake a required SFST or DRE test, or provide a breath or blood sample. (*Addressing the Problem of Repeat and Chronic Impaired Drivers*, February

2010) Drivers with three prior impaired driving convictions who are convicted within a ten year period of impaired driving causing death or bodily harm should be subject to the maximum sentence.

Dangerous and Long-Term Offender Status

In certain limited circumstances, the Crown can apply to the court to have an offender sentenced as a dangerous or long-term offender. These designations provide the Crown with discretion to seek longer terms of incarceration and supervision in the community.

An individual can be sentenced as a “dangerous offender” if he or she has committed a “serious personal injury offence” and will continue to be a threat to the life, safety or physical well-being of others. The term “serious personal injury offence” is limited to offences which carry a maximum penalty of 10 years’ incarceration or more. Consequently, the only impaired driving offences that meet the criteria are impaired driving causing death and impaired driving causing bodily harm. Dangerous offenders must be sentenced to indeterminate incarceration unless the court is satisfied that there is “a reasonable expectation that a lesser measure...will adequately protect the public against...murder or a serious personal injury offence.”

An individual can be classified as a “long-term offender” if the Crown establishes that a prison sentence of two years or more is appropriate, there is a substantial risk that the offender will re-offend and there is a reasonable possibility of eventual control of the risk in the community. In addition to the sentence for the offence in issue, long-term offenders may be subject to supervision upon release for a period of up to 10 years.

Although these classifications are warranted in a number of impaired driving cases, there is considerable reluctance to use the legislation. Only a handful of impaired-driving offenders have been held to be long-term offenders and no impaired driver has ever been classified as a dangerous offender. MADD Canada believes the Crown should pursue dangerous offender or long-term offender status for any impaired driving offender who meets the restrictive criteria.

Parole

Like other offenders, impaired drivers can apply for parole after serving a portion of their sentence. The public and impaired driving victims are often shocked to learn that impaired driving offenders may apply for day parole after serving only one-sixth of their sentence and for full parole after serving one-third of their sentence. Victims who apply to the National Parole Board have a right to be informed about all of the offender’s parole hearings, and the right to present a statement in person, in an audio or video recording, or in a letter. Victims may also apply for more specific information about the offender, including, where the offender is imprisoned, the offender’s parole conditions, and destination upon release. This information will be provided if the Parole Board believes that the victim’s interest in the information outweighs the offender’s privacy interests.

The Parole Board is required to take the victim’s impact statement into consideration. The Board also considers other factors, including whether the offender has expressed remorse and taken responsibility for the crime, and the likelihood that he or she will re-offend.

2. Progress on Sentencing Issues

(a) Victim Impact Statements

In 1999, victims and their families won the right to present a statement at trial and any subsequent parole hearings, describing the physical, emotional and financial toll the crime has had on them. The statement gives victims a voice in the criminal justice system, allowing them to explain to the court and the offender, in their own words, how they have been affected by the crime.

(b) Conditional Sentences of Imprisonment

A conditional sentence is a prison sentence of less than two years which the judge may allow the offender to serve in the community. Conditional sentences of imprisonment cannot be awarded for any offence that carries a minimum term of imprisonment. Moreover, a judge may only impose a conditional sentence if he or she is satisfied that it “would not endanger the safety of the community and would be consistent with the fundamental purpose and principle of sentencing.” Prior to 2007, individuals convicted of impaired driving causing death often received conditional sentences, which resulted in them serving no time in jail for the crime.

After years of effort by MADD Canada, victims of impaired driving and others, the federal government enacted Bill C-9, which eliminated conditional sentences for violent crimes, including impaired driving causing death and impaired driving causing bodily harm. MADD Canada’s efforts to limit conditional sentences included: submitting a petition with 33,000 signatures to the government; and commissioning a public opinion survey that found that most Canadians opposed conditional sentences for violent crime.

(c) Increasing the Length of Sentences

Although unduly lenient sentences continue to be awarded in some cases, sentencing in impaired driving causing death or bodily injury has improved in the past 15 years. For example, sentences for impaired driving causing death are now often in the 4-year plus range. In the past, conditional sentences and sentences of 18 to 24 months were the norm.

3. Range of Sentences for Impaired Driving Causing Death

Rather than advocating for minimum sentences, MADD Canada has set out below what it believes to be a range of appropriate sentences for impaired driving causing death. In establishing the following sentencing ranges, MADD Canada has sought to reflect the gravity of the offence of impaired driving causing death, taking into account the major aggravating and mitigating factors. The proposed sentencing guidelines call for considerably longer sentences of incarceration than are currently imposed upon such offenders.

MADD Canada has adopted this approach because it strongly believes that the existing sentences have not reflected the gravity of the offender's behaviour or the irreparable harm that results from this crime.

The following guidelines seek to strike an appropriate balance that both respects the feelings of the victims and yet encourages the courts to adopt more appropriate sanctions.

Range of Sentences for Impaired Driving Causing Death

Conviction		Appropriate Sentence Range	
		Not Guilty Plea	Guilty Plea
No prior federal <i>Criminal Code</i> impaired driving or federal <i>Criminal Code</i> traffic conviction within the past 10 years	BAC at or under .160%	<ul style="list-style-type: none"> • 4-5 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 4 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment 	<ul style="list-style-type: none"> • 3-4 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 3 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment
	BAC over .160%	<ul style="list-style-type: none"> • 5-7 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 5 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment 	<ul style="list-style-type: none"> • 4-6 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 4 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment
1 prior federal <i>Criminal Code</i> impaired driving or federal <i>Criminal Code</i> traffic conviction within the past 10 years	BAC at or under .160%	<ul style="list-style-type: none"> • 8-10 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 8 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment 	<ul style="list-style-type: none"> • 6-8 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 6 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment
	BAC over .160%	<ul style="list-style-type: none"> • 10 – 12 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 10 years after release from 	<ul style="list-style-type: none"> • 8-10 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 8 years after release from prison

		prison <ul style="list-style-type: none"> • Mandatory alcohol assessment and, where appropriate, mandatory treatment 	<ul style="list-style-type: none"> • Mandatory alcohol assessment and, where appropriate, alcohol treatment
Convictions		Appropriate Sentence Range	
2 prior federal <i>Criminal Code</i> impaired driving or federal <i>Criminal Code</i> traffic convictions within the past 10 years		<ul style="list-style-type: none"> • 13-15 year jail term • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock 15 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment 	
3 prior federal <i>Criminal Code</i> impaired driving or federal <i>Criminal Code</i> traffic convictions within the past 10 years		<ul style="list-style-type: none"> • 16-18 year jail term • Automatic classification as a long-term offender • Lifetime driving ban • Driving privileges can be reinstated with permanent alcohol ignition interlock, 16 years after release from prison • Mandatory alcohol assessment and, where appropriate, alcohol treatment 	
4 prior federal <i>Criminal Code</i> impaired driving or federal <i>Criminal Code</i> traffic convictions within the past 10 years		<ul style="list-style-type: none"> • 20 year - life jail term • Automatic classification as a dangerous offender • Lifetime driving ban • No interlock provision 	

- MADD Canada believes that the above sentences appropriately reflect the gravity of the offences and the damage caused to victims and their families.
- In the case of impaired driving causing death where there are multiple deaths and injuries, the above sentences should be increased to reflect the gravity and magnitude of the offences and the damage caused to all victims and their families.
- MADD Canada agrees lifetime driving bans are appropriate for repeat offenders, based on their driving records and the damage they have caused to others. However, we also recognize the reality that people with lifetime driving bans will likely resume driving at some point, even though they are prohibited by law from doing so. Furthermore, the research indicates that prohibited and banned drivers are over-represented in impaired driving crashes. Alcohol interlocks reduce the rate of crashes among banned and prohibited drivers. This is not an easy issue for MADD Canada and the victims we represent and support. However, we do believe that lifting the lifetime driving bans – when appropriate assessment, treatment and interventions have been applied – and providing the offender with an opportunity to drive with an alcohol interlock, will prevent those individuals from driving impaired.