Gouvernement du Canada | Government of Canada

Legislative Background: reforms to the Transportation Provisions of the *Criminal Code* (Bill C-46)

MAY 2017

Canada

ISBN 978-0-660-08516-6
Cat. No. J2-449/2017E-PDF

TABLE OF CONTENTS

BACKGROUND

Impaired drivers kill and injure thousands of Canadians every year and impose enormous social and economic costs on society. Since the early days of the automobile age, Parliament has repeatedly taken action to try to protect Canadians from this carnage. In 1921, Parliament made it an offence to drive while intoxicated. In 1925, it criminalized driving while intoxicated by narcotics. Dangerous driving has also been an offence since 1938. In 1951, Parliament responded to the concern that some courts were only convicting if the driver was "falling down drunk" by adding the offence of driving while impaired by alcohol.

Major changes were made to the impaired driving laws in 1969. Parliament repealed the offence of driving while intoxicated, while keeping the offence of driving while impaired. At the same time, it made it an offence to drive with a Blood Alcohol Concentration (BAC) over 80 mg of alcohol per 100 ml of blood (over 80) and created an offence of refusing to provide a breath sample. Parliament provided for the BAC to be determined by an "approved instrument" (AI). In 1979, Parliament also authorized the use of an "approved screening device" (ASD) at the roadside to facilitate the detection of impaired drivers. It is a criminal offence to refuse to provide an ASD or AI sample.

Parliament has also amended the *Criminal Code* over the years to respond to certain court decisions. It has also passed legislation to deter the dangers caused by street racing, fleeing the police and leaving the scene of an accident. It is also a criminal offence to drive while prohibited from doing so as a result of a *Criminal Code* conviction.

In 2008, Parliament made more major changes to address drug-impaired driving, creating the legal framework for the Drug Recognition and Evaluation (DRE) Program. It also eliminated the "two beer defence", i.e., the use of low alcohol consumption evidence alone, to rebut the presumption that the BAC produced by the AI at the time of testing equals the BAC at the time of driving. The key requirement that there must be evidence of operator error or instrument malfunction before the BAC produced by the AI could be challenged was upheld by the Supreme Court in *R. v. St-Onge Lamoureux,* (*St-Onge*)[1].

It should be noted that in developing the impaired driving legislation, the Government and Parliament have always been assisted by the scientific advice of committees of the Canadian Society of Forensic Science, namely the Alcohol Test Committee (ATC) and the Drugs and Driving Committee (DDC).

Although there has been progress in reducing the toll caused by impaired driving, it remains the leading criminal cause of death and injury in Canada. In 2015, police recorded 72,039 impaired

[1] [2012] S.C.C. 57

driving incidents (drugs and alcohol); a decrease of 4% from 2014 and 65% lower than 1986.[2] Nearly 3,000 of these incidents related to drugs (4%). The number of drug-impaired driving incidents has increased steadily since 2009 (when data was first collected).

In 2013, 31% of all fatally injured drivers in Canada (excluding BC) had been drinking and 76.6% of these fatally injured drinking drivers had BACs exceeding the criminal legal limit of 80.[3] In 2012, there were 2,546 crash deaths. Of those, 1,497 deaths, or 58.8%, involved drivers who had some alcohol and/or drug present in their systems.[4]

Canada lags behind other countries in combatting this crime. On July 8, 2016, the American Centers for Disease Control and Prevention released a report indicating that Canada has the highest percentage of alcohol-related crash deaths (33.6%) among 20 high-income countries (median 19.1%).[5]

Impaired driving cases clog the courts. The median length of time for an alcohol-impaired driving trial was 92 days in 2000/01. It rose sharply, primarily due to the two beer defence, and was 146 days in 2010/11. With the enactment of restrictions on the two beer defence in 2008, and particularly the Supreme Court decision that the two beer defence was insufficient by itself to raise a reasonable doubt about BAC, the median time required has declined to 127 days in 2014/15 – similar to the median for other criminal trials (121 days). However, drug-impaired driving trials take almost twice as long - the median length of time for a drug-impaired driving trial was 227 days.[6]

OVERVIEW OF EXISTING LAW AND CHALLENGES

The Government has committed to creating new and stronger laws to combat this crime. On April 13, 2017, the Government therefore introduced Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts.*

To understand Bill C-46, it is important to understand how the current *Criminal Code* provisions dealing with impaired driving work. This is difficult as impaired driving is amongst the more complex and heavily litigated areas of the criminal law. Over the years, these provisions have been amended on a piecemeal basis, resulting in a complex set of provisions which are challenging to understand, even to senior legal practitioners and judges.

---

[2] Perreault, S. (2016). Juristat Impaired Driving in Canada, 2015. Canadian Centre for Justice Statistics.
[3] Brown, S, Vanlaar, W.G.M. and Robertson, R.D (2017). Alcohol and Drug-Crash Problem in Canada report 2013. Canadian Council of Motor Transport Administrators.
[4] Total Crash Deaths Involving Alcohol and/or Drugs in Canada, by Jurisdiction: 2012 http://madd.ca/pages/wp-content/uploads/2015/03/MADD-Canada-Submisson-to-Comm-on-Public-Safety_Bill-C226.pdf
[5] E. Sauber-Schatz et al., "Vital Signs: Motor Vehicle Injury Prevention — United States and 19 Comparison Countries" (2016) 65(27) Morbidity and Mortality Weekly Report 672 at 675
[6] Perreault, S. (2016). Juristat Impaired Driving in Canada, 2015. Canadian Centre for Justice Statistics.

The *Criminal Code* prohibits driving while impaired by alcohol and/or drugs and driving with a BAC "over 80". While the impaired driving offence requires proof of impairment, the over 80 offence does not. There is currently no equivalent legal limit offence for drugs.

To facilitate the investigation and prosecution of impaired driving, the *Criminal Code* provides law enforcement officers (officers) with powers to obtain breath or blood samples and administer physical sobriety tests. The police also have powers under common law and provincial highway traffic legislation to randomly stop a driver to check the driver's licence and vehicle registration, and to determine vehicle fitness and the driver's sobriety.

However, officers cannot currently require a driver to comply with any roadside test unless they have reasonable grounds to suspect the driver has alcohol or drugs in their body. With reasonable suspicion, they can demand that the driver either provide a breath sample on an approved screening device (ASD) (for alcohol) or perform standard field sobriety tests (for drugs or alcohol).

If an officer has reason to suspect drugs in the body, they can only demand that a driver perform standardized field sobriety tests (SFST) at the roadside. These tests (e.g., walk and turn) provide evidence that the driver may be impaired. SFST does not indicate whether they have drugs in their body and, if so, at what level. The *Criminal Code* does not currently authorize the use of any roadside test of a bodily substance to indicate whether a driver has drugs in their body.

Depending on the results of the roadside tests, the officer may have reasonable grounds to believe that the driver has committed an alcohol-impaired or drug-impaired driving offence. At that point, they may demand that the driver accompany them to the police station to either provide an evidentiary breath sample on an AI (i.e., breathalyser for alcohol) or submit to a drug recognition evaluation (DRE) by a specially trained evaluating officer (for drugs). If the evaluating officer identifies a drug as causing impairment, they may demand a bodily substance (i.e., blood, urine, or saliva) to determine the presence of a drug. Currently, without a warrant, there is no legal mechanism for taking a blood sample to determine the presence or concentration of drugs in the blood, without first undergoing a DRE.

The SFST and DRE provisions were added to the *Criminal Code* in 2008 and have increased the detection of drug-impaired drivers. However, there is an insufficient number of DRE trained officers who can conduct these tests. Additionally, some lower courts have been reluctant to accept the opinion evidence from DRE officers or to draw the inferential link between the presence of drugs found in a driver's body and impairment at the time of driving.[7]

Proving someone has committed an "over 80" offence can be challenging. Accordingly, the *Criminal Code* currently contains two presumptions to assist the Crown in these cases. The

[7] See: *R. v. Klatt* [2014] O.J. No. 2302; R. v. Bingley [2013] O.J. No. 6203; *R. v. Perillat* [2012] S.J. No. 508

"presumption of accuracy" assists the Crown in proving that the BAC reading on the AI is accurate if certain procedures have been followed (e.g., the first sample was taken within two hours of driving). The "presumption of identity" helps the Crown prove that the accused's BAC at the time of driving was the same as his or her BAC at the time of testing.

The ability of the Crown to rely on these presumptions has been limited in certain circumstances. For example, the defence frequently requests disclosure of scientifically irrelevant materials, (e.g., maintenance records in order to argue that the failure to conduct an annual inspection rebuts the presumption of accuracy even though the tests of the AI just prior to testing the accused showed that the AI was working properly). This strategy has resulted in significant trial delays and has led to several cases not being tried for delay or lack of evidence. The ATC has published a paper setting out what is scientifically relevant to proving BAC and indicating that maintenance records are not relevant.[8] Nevertheless, there continue to be applications for more disclosure than what the ATC considers relevant.

The presumption of identity has been undermined by the defences of *bolus* drinking and intervening drink. The *bolus* drinking defence arises when the driver claims to have consumed a large amount of alcohol just before driving. Although they admit that their BAC was "over 80" at the time of testing, they claim that the alcohol was still being absorbed and, at the time of driving, they were under 80. The intervening drink defence arises when a driver drinks after being stopped by the police or involved in an accident, but before they provide a breath sample. This defence undermines the integrity of the justice system as it rewards conduct specifically aimed at frustrating the breath testing process. It also leads to unnecessary litigation, contributing to an overburdened criminal justice system.

The *Criminal Code* also contains other offences relating to transportation (e.g., dangerous driving, failure to stop at the scene of an accident, flight from police, street racing, and operating a vehicle while prohibited). The underlying conduct of these offences is duplicative of other offences (e.g., the street racing offences and dangerous driving); the only difference is in the penalties and the prohibitions are discretionary.

BILL C-46

The Government has committed to creating new and stronger laws to combat this crime. On April 13, 2017, the Government therefore introduced Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts.* Bill C-46 would strengthen existing drug-impaired driving laws and create an impaired driving regime that would be amongst the strongest in the world.

[8] Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results: Canadian Society of Forensic Science Journal, Vol. 45, No.2, 2012

The Preamble to the Bill sets out nine considerations that motivate the proposed legislation including that dangerous and impaired driving are unacceptable at all times and in all circumstances; that it is important to give law enforcement better tools to detect impaired drivers; that it is important to simplify the law relating to proving blood alcohol concentration; that it is important to protect the public from those who consume large amounts of alcohol before driving and that it is important that federal and provincial laws work together to promote safety. The Preamble is intended to be read as part of the Bill and assist in explaining its purpose and objectives.[9]

Bill C-46 has two Parts. The first Part of the proposed legislation would come into force on Royal Assent to ensure that a robust drug-impaired driving regime is in place before Bill C-45, the *Cannabis Act*, which would create a strict legal framework for controlling the production, distribution, sale and possession of cannabis in Canada, comes into force.

The second Part of the proposed legislation would reform the entire *Criminal Code* transportation regime to create a new, modern, simplified, and more coherent system to better deter drug and alcohol-impaired driving. It would include all the drug-impaired driving provisions under Part 1 of the Bill. It would repeal all the current provisions dealing with transportation offences (sections 249 to 261) and replace them with a new Part VIII.1, Offences Relating to Conveyances. The new Part VIII.1 would come into force 180 days after Royal Assent to allow the provinces time to prepare for its implementation.

Part 1 of Bill C-46 – Drug-impaired driving

Bill C-46 proposes to supplement the existing drug-impaired driving offence by creating three new offences for having specified levels of a drug in the blood within two hours of driving. The penalties would depend on the drug type and the levels of drug or the combination of alcohol and drugs. The levels would be set by regulation.

For THC (the main psychoactive compound in cannabis), the proposed levels would be:

- 2 nanograms (ng) but less than 5 ng of THC: Having at least 2 ng but less than 5 ng of THC per millilitre (ml) of blood within two hours of driving would be a summary conviction criminal offence, punishable by a fine of up to $1,000;
- 5 ng or more of THC: Having 5 ng or more of THC per ml of blood within two hours of driving would be a hybrid offence. Hybrid offences are offences that can be prosecuted either by indictment, in more serious cases, or by summary conviction, in less serious cases; and,
- Combined THC and Alcohol: Having a blood alcohol concentration (BAC) of 50 milligrams (mg) of alcohol per 100 ml of blood, combined with a THC level greater than 2.5 ng per ml of blood within two hours of driving would also be a hybrid offence.

[9] *Interpretation Act* R.S., c. I-23

Both hybrid offences would be punishable by mandatory penalties of $1,000 for a first offence and escalating penalties for repeat offenders (e.g., 30 days imprisonment on a second offence and 120 days on a third or subsequent offence). The maximum penalties would mirror the existing maximum penalties for impaired driving. These would be increased when Part VIII.1 comes into force to two years less a day on summary conviction (up from 18 months), and to 10 years on indictment (up from 5 years). The latter penalty would make a dangerous offender application possible in appropriate circumstances.

The legislation would also authorize the Attorney General of Canada to approve the use of oral fluid drug screeners by police. These are hand held devices that determine whether a drug is present in oral fluid (saliva). Following a legal roadside stop, law enforcement would be authorized to demand that a driver provide an oral fluid sample if they reasonably suspect that a driver has drugs in their body. A positive reading would assist in developing reasonable grounds to believe that an offence has been committed. Once the officer has reasonable grounds to believe an offence has been committed, they could demand a drug evaluation by an "evaluating officer", or the taking of a blood sample at the station.

The proposed amendments in Part 1 of the Bill would also facilitate the proof of drug impaired driving. Where an evaluating officer has identified a drug type as impairing a driver at the time of testing and that drug type is found by analysis to be in the driver's body, it would be presumed that the drug was causing impairment at the time of driving. The proposed legislation would also provide police with the option to pursue a drug recognition evaluation or the taking of a blood sample in situations where they have reasonable grounds to believe an offence has occurred. This could save valuable time when testing for drugs, such as THC, that leave the blood very quickly.

Part 2 of Bill C-46 – Transportation Offence Reform (drug and alcohol impaired)

The proposed legislation would reform the entire *Criminal Code* regime dealing with transportation offences by repealing all of the current transportation offence provisions and replacing them with a modern, simplified, and coherent new Part VIII.1, Offences Relating to Conveyances, including all the drug-impaired driving provisions in Part 1. It would:

- Authorize mandatory alcohol screening at the roadside where police have already made a lawful stop under provincial law or at common law;
- Increase certain minimum fines and certain maximum penalties; and,
- Permit an earlier enrolment in a provincial ignition interlock program.

The proposed mandatory alcohol screening provisions would authorize law enforcement officers who have an "approved screening device" at hand to demand breath samples of any drivers they lawfully stop, without first requiring that they have a suspicion that the driver has alcohol in their body. As research shows that many impaired drivers are able to escape detection at check stops, this authority would help police detect more drivers who are "over 80" and reduce litigation regarding whether or not the officer had a reasonable suspicion. The result of a test on an

approved screening device would not, by itself, lead to a charge. It would lead only to further investigation, including a test on an “approved instrument” at the police station.

The proposed legislation would enact some new and higher mandatory minimum fines, and some higher maximum penalties. Currently, the mandatory minimum penalties for impaired driving are:

- First Offence: $1,000 fine;
- Second Offence: 30 days imprisonment; and,
- Third Offence: 120 days imprisonment.

The proposed legislation would increase the mandatory fines for first offenders with high BAC readings or who refuse to provide a sample:

- A first offender with a BAC of 80 to 119 would be subject to the current mandatory minimum fine of $1,000;
- A first offender with a BAC of 120 to 159 would be subject to a mandatory minimum fine of $1,500;
- A first offender with a BAC of 160 or more would be subject to a mandatory minimum fine of $2,000; and,
- A first offender who refuses testing would be subject to a mandatory minimum fine of $2,000.

Mandatory prison sentences for repeat offenders would stay the same as they are under the current law – 30 days for a second offence and 120 days for a subsequent offence.

The maximum penalties for impaired driving would be increased in cases where there is no injury or death, to two years less a day on summary conviction (up from 18 months), and to 10 years on indictment (up from 5 years). The latter penalty would make a dangerous offender application possible in appropriate circumstances.

Offences causing bodily harm would become hybrid offences allowing the Crown to decide whether to proceed summarily where the injuries are less severe (for example, a broken arm). This will also help to address the issue of reducing court delays because summary conviction proceedings are simpler and take less time.

The maximum penalty for dangerous driving causing death would be increased to life imprisonment (up from 14 years). This is consistent with the maximum penalty for other transportation offences involving death.

Under the current law, a driver is permitted to drive during the period of prohibition if they are admitted into a provincial ignition interlock program. An ignition interlock device prevents the car from starting if the driver has been drinking. Currently, the driver must wait for a specified period of time before the province may consider an application. The proposed legislation would

reduce the time an offender must wait before they can be enrolled in an ignition interlock program and drive. There would be no wait period for a first offence, three months for a second offence and six months for a subsequent offence. Evidence shows that ignition interlock devices reduce recidivism.

These are the provisions that will most directly affect the public. Part 2 of the legislation also proposes to:

- Facilitate the proof of BAC;
- Eliminate and restrict defences that encourage risk-taking behaviour and make it harder to enforce laws against drinking and driving; and,
- Clarify Crown disclosure requirements.

Detailed information about these provisions is set out in the Overview of the proposed Part VIII.1, Offences Relating to Conveyances.

OVERVIEW OF PART VIII.1 AS PROPOSED BY BILL C-46

PURPOSE

As noted, the *Criminal Code* first prohibited driving while intoxicated by alcohol in 1921 and by a drug in 1925. Since that time, there have been numerous amendments to the transportation offences, most frequently in the area of impaired driving.

While these reforms have strengthened measures to combat impaired driving, they have also added to the complexity of the *Criminal Code's* transportation offence provisions and they have created some overlap between offences and inconsistencies amongst penalties. In its 1991 Report *Recodifying Criminal Procedure*, the Law Reform Commission wrote that some of the impaired driving provisions had "become virtually unreadable".[10] Moreover, the impaired driving provisions have been subject to such extensive litigation that it is difficult in some cases to understand how they operate from simply reading the text. This, in turn, has affected effective and efficient investigation and prosecution.

Bill C-46 therefore proposes a revision of the provisions in a new Part of the *Criminal Code* to make the law more comprehensible, by simplifying and modernizing the drafting, eliminating some provisions that are unnecessary, and introducing some new provisions. The overall intention is to make the investigation and prosecution of impaired driving offences simpler while respecting the *Charter* rights of Canadians. It is anticipated that these reforms will have a positive effect on bringing cases to a resolution and reduce delays.

[10] Canada, Law Reform Commission, *Recodifying the Criminal Law,* Vol. 1 (Ottawa: 1991) at 84.

I. PRINCIPLES

Bill C-46 contains a statement of principles (section 320.12). The principles are declaratory statements, which form part of the *Criminal Code*, and, if enacted, are intended to act as an interpretative tool for the reforms. For example, the principles regarding breath testing for alcohol and the Drug Recognition and Evaluation (DRE) process reflect the government's confidence in the science underlying the procedures.

Although everyone who meets provincial standards concerning age, health, knowledge of the rules of the road, and competence by passing a driving test is entitled to a driver's licence, the privilege of driving is subject to the person respecting provincial highway traffic laws and federal and provincial laws regarding sobriety, blood alcohol concentration (BAC) and blood drug concentration (BDC).

II. DEFINITIONS AND CLEAR LANGUAGE

Bill C-46 seeks to reduce the complexity of the law and to use simpler and more modern drafting language. More modern language does not of itself indicate a substantive change. For example, "forthwith" in the English would be replaced with "immediately" in the context of a driver providing a breath sample on the approved screening device (ASD). This change is consistent with the interpretation of forthwith in the jurisprudence[11] and is not intended to impact the flexible approach adopted by the courts in administering the ASD in situations, for example, where there is mouth alcohol present. It is also consistent with the current French version which uses the term "immédiatement" which is also used in the new Part VIII.1.

Similarly, in the proposed French version, "alcootest approuvé" as the equivalent of "approved instrument" (AI) would be replaced by "éthylomètre approuvé" which is the more commonly used term in Francophone countries. Other examples include "thereby" being replaced by "as a result" and "where it is proved" being replaced by "if it is proved".

The term "conveyance" is used to refer to any motor vehicle, vessel, aircraft or railway equipment. Defining "conveyance" reduces the need for unnecessary repetition throughout Part VIII.1. Where the words "motor vehicle, vessel, aircraft or railway equipment" (other than in the definition of "conveyance") nonetheless appear separately in a provision of the Bill, the provision only applies to the type of conveyance mentioned in that provision, (e.g., mandatory alcohol screening only applies to motor vehicles).

The definition of "operate" has also been amended to incorporate the concept of "care or control" which currently is only in the impaired driving offences. This amalgamation is not

[11] See for example, *R v Woods* [2005] S.C.J. no. 42.

intended to change the meaning of either “operate” or “care or control”. The use of “operate” and “conveyance” results in shorter, clearer provisions.

Certain expressions that add to the complexity of the law would not be in the proposed new Part. For example, the requirements in paragraph 258(1)(c) that samples of breath be taken “pursuant to a demand under subsection 254(3)” and that the sample be “received directly” into an AI do not appear in proposed section 320.31.

III. OFFENCES

Part VIII.1 contains 10 basic transportation offences:[12]

- Dangerous operation of a conveyance (section 320.13);
- Operating a conveyance while impaired (paragraph 320.14(1)(a));
- Having a BAC of 80 or more within two hours of operating a conveyance (paragraph 320.14(1)(b));
- Having a blood drug concentration (BDC) over the prescribed legal limit within two hours of operating a conveyance (paragraph 320.14(1)(c));
- Having a combined BAC and BDC over the prescribed legal limit within two hours of operating a conveyance (paragraph 320.14 (1)(d));
- Having a BDC over a prescribed limit that is lower than the BDC set under paragraph 320.14(1)(c) within two hours of operating a conveyance (subsection 320.14(4));
- Refusing to comply with a demand (section 320.15);
- Failure to stop after an accident (section 320.16);
- Flight from peace officer (section 320.17); and,
- Driving a conveyance while prohibited (section 320.18).

The three offences referring to a BDC over the legal limit reflect the new offences proposed in Part 1 of the Bill. There are also significant changes to the offences of operating while impaired, operating “over 80” and refusal. Elements of all other offences remain essentially unchanged from their previous versions although the drafting has, in some cases, been modernized. Where language has been modernized, previous jurisprudence on the interpretation of these offences should continue to be applicable.

Impaired Operation

Part VIII.1 proposes to clarify the degree of impairment that would be necessary to commit the offence (section 320.14). The language of the offence indicates it would be an offence to operate a conveyance if a person’s ability is impaired by alcohol or a drug or a combination of alcohol and a drug “to any degree”. This is to reinforce that evidence of impairment established to any

[12] Seven of the offences have higher punishments when they involve bodily harm or death.

degree, ranging from slight to great, is sufficient to ground the offence of impaired driving. This represents the current law.[13]

Operating with a BAC equal to or exceeding 80 within two hours of driving

The proposed formulation "equal to or exceeding" responds to concerns regarding the practice of truncating (i.e., rounding down to the nearest multiple of 10) BAC results.[14] Under the current provision, the police must take two samples of breath that are 15 minutes apart and the lower of the two BAC results is used. Consequently, when, for example, a person blows 101 and 89, as indicated by the digital readout on an AI, they would not be charged as the lower reading would be rounded down to 80 even though there is no doubt the person was over 80.

The new formulation of the offence "operating at or over 80 within two hours of driving" would eliminate the bolus drinking defence, by changing the timeframe within which the offence can be committed. Also, it significantly limits the intervening drink defence. The bolus drinking defence arises when the driver claims to have consumed a large amount of alcohol just before or while driving. Although they admit that their BAC was "over 80" at the time of testing, they claim that the alcohol was still being absorbed and, at the time of driving, they were not "over 80". Making this behaviour subject to criminal sanctions is consistent with the comments of the Supreme Court of Canada in *R v St-Onge – Lamoureux (St-Onge*).[15] The Court stated that such a defence showed "significant irresponsibility with regard to public safety."

This formulation of the offence is used in at least 16 American states[16] and has been upheld by the courts. As one Washington court noted in upholding such a law in 1997, "[t]he [legal limit for] BAC is not some magical bright line between safely drunk and unsafely drunk, and the fact that driving with less than a [legal limit for] BAC may prove to be criminal under the two-hour rule does not mean that the rule is arbitrary or not substantially related to public safety".[17]

The formulation also limits the intervening drink defence which arises when a driver drinks after driving but before they provide a breath sample. This defence often arises where there has been a serious collision and the driver claims to have been settling their nerves. This undermines the integrity of the justice system as it rewards conduct specifically aimed at frustrating the breath testing process. The only situation in which a driver could rely on intervening consumption to avoid a conviction is captured in subsection 320.14(5).The offence is not made out if all of the following conditions are met:

---

[13] See *R. v. Stellato*, (1993), 12 O.R. (3d) 90

[14] A practice which is recommended by the ATC and is reflected in 320.32(1)(c).

[15] [2012] 3 S.C.R. 187 at paragraph 90.

[16] Per letter from Jennifer Mnookin, Professor of Law, UCLA School of Law, July 2008.

[17] *United States v. Skinner*, 973 F. Supp. 975 (W.D. Wash. 1997). See also: *Commonwealth v. Duda*, 923 A. 2d 1138 (Pa. 2007); *City of Fargo v. Stensland*, 492 N.W.2d 591, 594-95 (N.D. 1992); *Sereika v. State*, 114 Nev. 142, 955 P.2d 175 (Nev. 1998); *Bohannon v. State*, 497 S. 552 (Ga. 1998); *State v. Chirpich*, 392 N.W.2d 34, 37 (Minn. App. 1986).

- The person consumed alcohol after ceasing to operate the conveyance;
- The person had no reasonable expectation that they would be required to provide a sample of breath or blood; and,
- Their alcohol consumption is consistent with their BAC at the time the samples were taken and with their having had a BAC of less than 80 at the time of operation.

Situations in which a person would have "a reasonable expectation" that they would be required to provide a sample would be decided on a case-by-case basis by the courts. However, a person involved in a serious collision causing death, bodily harm, or major damage should reasonably expect to be required to provide a sample. This limitation is consistent with the Supreme Court comment in *St-Onge* where the Court indicated that, "there is good reason to suspect that post‑driving drinking (or just the claim thereof) is an act of mischief intended to thwart police investigators. All such cases, at the very least, involve a significant degree of irresponsibility and a cavalier disregard for the safety of others and the integrity of the judicial system."[18]

Operating a Conveyance with a BDC over the Legal Limit

The three new offences of having a BDC above the prescribed limit for that drug within two hours of driving that would be enacted by Part 1 of the Bill are reproduced in Part VIII.1 using simplified and modernized drafting. These offences are similar in principle to the offence of operating with a BAC equal to or over the legal limit. Several jurisdictions have established legal drug limits while driving, including the United Kingdom that has limits for 16 drugs and Norway that has limits for 20 drugs.[19] The legal limits under the proposed framework will be set by regulation, on the basis of advice from the DDC.

The proposed offences are

1. A straight summary conviction offence for drivers with low levels of impairing drugs;
2. A hybrid offence for drivers with impairing levels of drugs alone; and,
3. A hybrid offence for drivers with impairing levels of drugs in combination with alcohol.

The proposed THC offences are:

1. Summary conviction: 2 ng but less than 5 ng THC per ml of blood;
2. Hybrid – drug alone: 5 ng or more THC per ml of blood; and,
3. Hybrid – drug and alcohol: 2.5 ng THC per ml of blood combined with a BAC of 50.

The hybrid drug-alone offence would also apply to other impairing drugs (e.g., LSD, Ketamine, PCP, magic mushrooms).

[18] *St-Onge* at paragraph 90 quoting *R v St. Pierre*, [1995] 1 SCR 791 at paragraph 106.
[19] See Annex 4 for proscribed drug limits.

Authorizing the Governor-in-Council (Cabinet) to set the blood-drug limits by regulation is a flexible process to respond to the evolving science with respect to drug impairment rather than having to amend the *Criminal Code* whenever a new limit is proposed. The DDC has provided a report on THC and eight other drugs.[20]

Refusal

The proposed section 320.15 clarifies the intent required for a person to commit the offence. The person must know that a demand has been made and fail or refuse to comply without a reasonable excuse.

Where there has been an accident causing bodily harm or death, the mental element is knowledge or recklessness that they were involved in the accident that resulted in bodily harm or death. Under the current law, the mental element is that the person knew or ought to have known that they had caused the accident.

Offences not to be re-enacted

Part VIII.1 would not re-enact certain offences, such as "dangerous driving during flight from police causing bodily harm or death" and "dangerous driving during street racing" offences. These offences were originally enacted to provide a higher maximum penalty for dangerous driving in certain narrow circumstances. The proposed increases in the maximum penalties for dangerous driving makes these offences unnecessary. Additionally, the current offences of failure to keep watch on a person towed and taking an unseaworthy vessel on a voyage would not be re-enacted. These offences are administrative in nature and, where the conduct rises to the level of criminal activity, the offences of criminal negligence and dangerous operation are available.

IV. PENALTIES AND PROHIBITIONS

The proposed penalties and prohibitions are, with a few exceptions, the same as those that currently exist. The changes are:

The mandatory minimum fine for a first conviction for impaired driving or having a BAC of 80 to 119 would be: $1,000. There would be higher mandatory fines for first offenders with high BACs: $1,500 for a BAC of 120 to 159, and $2,000 for a BAC of 160 or more. To ensure that there is no incentive to refuse to comply with a demand, the MMP for a first refusal conviction would be $2,000.

The current mandatory minimum penalties (MMP) for repeat offenders would be unchanged: 30 days imprisonment for a second offence and 120 days imprisonment for a third or subsequent offence.

[20] See Annex 2 for the Executive Summary of the DDC report.

The maximum penalty for all the transportation offences would be increased from 18 months to two years less a day on summary conviction, and from 5 years to 10 years on indictment. The 10 year maximum would make it possible to make application for the offender to be designated as a Dangerous Offender or a Long Term Offender.

It is proposed that offences causing bodily harm be hybridized. This would allow the Crown to elect whether to proceed by indictment or by summary conviction. Where the Crown proceeds by summary conviction, the maximum penalty would be 2 years less a day. Where the Crown proceeds by indictment, the maximum penalty would be 14 years imprisonment.

Nine transportation offences would be added to the definition of "designated offence" in section 752 (dangerous offender and long term offenders).

Aggravating Factors for the Purpose of Sentencing

In addition to the general sentencing principles in Part XXIII (Sentencing) of the *Criminal Code*, section 320.22 contains a list of aggravating factors which a court must consider when imposing a sentence for any of the conveyance offences. It should be noted that the aggravating factor of having a BAC over 120 would not be considered for a first offence of impaired driving simpliciter since a higher mandatory fine is already provided for in this circumstance. However, it would be an aggravating factor in subsequent impaired driving offences or if bodily harm or death is involved.

Postponement of Sentencing

Under the proposed provision, a court that convicts a person of impaired operation or refusing to provide a sample could postpone sentencing, where the offence did not cause bodily harm or death to permit the offender to attend a treatment program (section 320.23(1)). The Crown must consent and the treatment program must be approved by the province. However, if the court postpones sentencing, it must make a prohibition order.

If the offender successfully completes the treatment program, subsection 320.23(2) would permit the court to decline to impose the MMP. However, the court would not be permitted to direct a discharge. This limitation ensures that the offence for which the accused was convicted will remain on their criminal record and act as a prior offence for any subsequent impaired or refusal offence.

These provisions would replace the current subsection 255(5), which allows a court to discharge an offender on condition that they take a curative treatment for their consumption of alcohol or drugs. This provision is not in force in Newfoundland and Labrador, Quebec, Ontario and British Columbia.

Prohibitions and Provincial Ignition Interlock Programs

The new Part would maintain the current approach to prohibition orders for transportation offences. However, an offender may be permitted to drive earlier than is currently allowed during the prohibition period if they are enrolled in a provincial ignition interlock program and comply with the conditions of the program. The intent of the Bill is to encourage the use of ignition interlocks by reducing the period during which an offender has to wait before they are permitted, under the criminal law, to drive with an ignition interlock program.

The new Part would no longer require the court to bring to the attention of the accused the specific *Criminal Code* provision which makes it an offence to drive while prohibited. This requirement is unnecessary, overly technical, and contrary to the principle that a person is presumed to know the law. Consequently, 320.24(5) only requires the court to ensure that the offender has read the order or received a copy.

V. INVESTIGATIVE MATTERS

Mandatory alcohol screening

Under current law, the police must have suspicion of alcohol in the body to be able to demand a roadside alcohol screening. Research has shown that police are often unable to develop the necessary suspicion in their brief interaction with drivers stopped at roadside for a sobriety check. Some studies have indicated that police using the current system may fail to detect as many as half the drivers above the limit.[21]

A significant proposed change is the introduction of mandatory alcohol screening (320.27(2)) which would likely occur mainly, but not exclusively, at organized sobriety checkpoints. Quite simply, a police officer who has stopped a driver, for example to investigate a speeding violation, would be able to demand that the driver provide an ASD sample without needing to have reasonable suspicion that the driver has alcohol in the body.

In countries that have adopted mandatory alcohol screening, the reductions in deaths and injuries on the roads have been dramatic. The Standing Committee on Justice and Human Rights in its 2009 Report "Ending Alcohol-Impaired Driving, A Common Approach" noted a decrease in deaths of 36% in four years in New South Wales and 23% in Ireland in the first year after they adopted mandatory alcohol screening.[22]

The Standing Committee therefore unanimously recommended mandatory alcohol screening in its 2009 report.[23] It responds to research that indicates that many drivers who have an illegal

[21] Drinking Drivers Missed at Sobriety Checkpoints" (1997) 58(5) Journal of Studies on Alcohol 513 at 516 (Wells, 1997).
[22] Annex 5 provides more information on the international experience with mandatory alcohol screening.
[23] The Standing Committee referred to "Random Breath Testing" (RBT), the term used for mandatory alcohol screening in Australia.

BAC are able to pass through sobriety checkpoints undetected by understating the amount they drank or claiming they did not drink at all. Mandatory alcohol screening will detect these drivers. Moreover, the knowledge that drivers who are stopped cannot avoid providing a breath sample is a powerful deterrent to drinking and driving.

Mandatory alcohol screening has sometimes been referred to as Random Breath Testing (RBT), the terminology used in Australia, and some commentators and members of the public mistakenly consider this to be a new power to stop vehicles at random.

In fact, random stopping has been considered on three occasions by the Supreme Court of Canada. The first case was *R v Dedman*[24] where the Court found that random stops were justified at common law because of the importance of deterring impaired driving, the necessity of random stops to effective detection, and the fact that driving is already subject to regulation and control in the interests of safety.

The second case was *R v Hufsky*.[25] It dealt with a random stop at a checkpoint pursuant to the Ontario Highway Traffic Act. The Supreme Court found that, in view of the importance of highway safety and the role to be played in relation to it by a random stop, the limit on the right not to be arbitrarily detained is a reasonable one that is demonstrably justified in a free and democratic society.

The third case was *R v Ladouceur*.[26] In that case, the stop was by a roving patrol car and not at an organized checkstop. The Supreme Court held that reducing the carnage on the highways caused by impaired drivers was a pressing and substantial concern which the government was properly addressing through random stops. As the Court noted, “stopping vehicles is the only way of checking a driver's licence and insurance, the mechanical fitness of a vehicle, and the sobriety of the driver.”

With respect to screening on suspicion of alcohol in the body, the law would be unchanged and the peace officer may demand Standardized Field Sobriety Tests (SFST) and/or ASD tests.

Testing for the presence of a drug

Currently, an officer who has a reasonable suspicion of a drug in a driver’s body can only demand that the person perform the SFST. Bill C-46 would authorize the Attorney General of Canada to approve, by Ministerial Order, roadside drug screeners (drug screeners). At this time, oral fluid screening devices are the only appropriate technology for use by law enforcement. These are devices that detect the presence (essentially a “yes” or “no” answer) of a few drugs, including THC, cocaine and methamphetamines, three of the most commonly occurring drugs

[24] [1985] 2 S.C.R. 2
[25] [1988] 1 S.C.R. 621
[26] [1990] 1 S.C.R. 1257

found in Canadian drivers. Before a drug screener could be authorized for use, it would have to be evaluated by the Drugs and Driving Committee against a set of rigorous evaluation criteria.

An officer would be authorized to demand that a driver provide an oral fluid sample if they reasonably suspect that a driver has drugs in their body. The results on a drug screener would not directly lead to a charge, but would instead lead to further investigation. They would be useful in detecting drivers who have drugs in their body and would provide more specific information about the presence of drugs than the SFST tests. For THC, it is probable that, if it is found in oral fluid, it will also be found in the blood. However, the screeners cannot provide any information about the level of a drug in the blood, nor any information about whether or not a driver is impaired.

A peace officer may demand all three tests if they have a suspicion of the presence of both alcohol and drugs. The peace officer does not need to articulate which drug is suspected of being present.

Drug Recognition Evaluation (DRE)

The law relating to the taking of a bodily sample for the purpose of an evaluation would be essentially unchanged. However, "based on the evaluation" has been deleted to ensure that the evaluating officer can testify as to all their observations, not just those specifically related to the DRE steps (320.28(4)). For example, if the person is constantly twitching, that may indicate they are under the influence of a stimulant. Evaluating officers are trained to note such observations in developing their conclusions.

There would also be a new power for an evaluating officer to demand a breath sample by means of an AI if this demand has not already been made. This change addresses a challenge encountered under the current legislation which provides that an AI demand cannot be made if there had already been an ASD demand. Where the evaluating officer suspects that alcohol is involved, it is essential that there be an AI analysis to prove the person's BAC. Even a low BAC combined with another drug, particularly cannabis, can produce impairment. Proof of BAC must be based on the results of the AI test and not on the ASD test.

Demands for Blood by Investigating Officer

Under the current provisions, a patrol officer can only demand a blood sample where the driver was, for some reason, incapable of providing a breath sample; for example, if the person's mouth was injured in a collision or the person had a congenital mouth defect. This limit on a blood sample demand exists because the breath test on an AI is far less intrusive and produces immediate results. Where such a blood sample is taken, it may be further tested for a drug as it is an offence to be impaired by a combination of alcohol and a drug.

However, the proposed new drug-impaired offences require that there be proof of blood drug concentration. Currently, there is no equipment to rapidly determine blood drug concentration at

the roadside. Consequently, when a drug has been detected in a driver's saliva at roadside and the officer believes the driver is impaired by a drug, the police would be authorized to demand a blood sample for analysis.

Authorization to Take Blood Samples

Subsection 320.28(6) proposes that a qualified blood technician can take blood in ordinary cases rather than requiring the supervision of a doctor. Taking a person to a hospital is unnecessary in the vast majority of cases. Qualified blood technicians are authorized by the proposed provision to take blood samples only if they believe that there is no danger to the person's health.[27]

Warrants to Obtain Blood Samples

The timeframe in which the police can seek to obtain a warrant to take a blood sample from a person who cannot consent would be extended from four hours to eight hours (section 320.29). Typically, the person has been injured in an accident that caused bodily harm or death and was taken to hospital. This extension of time recognizes that, in these situations, police often have to deal with the aftermath of the collision before seeking the blood sample warrant. Situations where individuals have been injured or died are the most serious and the Government believes it is important to ascertain whether or not alcohol or drugs were involved in these situations.

The grounds for granting the warrant would be changed. Under the current warrant provision, the peace officer must have reasonable grounds to believe that the person had committed the offence of driving while impaired or driving while over the legal limit and reasonable grounds to believe they were involved in a collision causing bodily harm or death. A doctor would have to confirm that the person was incapable of consenting, usually because the person is unconscious, and that taking the sample would not endanger the person's health. A doctor would either have to take the blood or supervise the taking of the blood by a qualified technician.

The new warrant provision only requires that the peace officer have reasonable grounds to suspect that the person has alcohol or a drug in the body. This change mirrors the provision in the current law which permits a peace officer to demand an ASD test if there are reasonable grounds to suspect alcohol in the body.

[27] About 20 ml of blood are required for analysis while preserving a second sample for independent testing. Thousands of Canadians provide this much blood for medical testing every day. The Canadian Blood Services takes approximately 450 ml of blood from a donor.

VI. EVIDENTIARY MATTERS

Proof of BAC

There are several proposed changes dealing with proof of BAC but the underlying principles are the same. The law would now clearly spell out the procedures that must be followed to ensure an accurate BAC reading.

As noted in the Principles, if enacted, Parliament has confidence in the accuracy and reliability of AIs that are approved by the Attorney General of Canada after being evaluated and recommended by the ATC. Modern AIs perform internal checks and are programmed so that they will not activate if there is a problem that could affect the result. For example, the standard alcohol solution test used to determine whether or not the AI is properly calibrated must be within set parameters or the AI will not operate. Furthermore, modern AIs are digital and provide a printout showing the results of the air blank tests, the standard alcohol solution tests and the subject tests, such that there is no possibility of an AI malfunctioning or being used improperly in a way that would not be evident on the printed test record.[28]

Subsection 320.31(1) reflects this confidence. It would make the results of a breath analysis by an AI conclusive proof of the BAC at the time of testing if the prosecution can establish that these conditions are met: before each sample was taken there was an air blank test and a calibration check within specified parameters, there were 15 minutes between tests and the two tests, when truncated, were within 20 mg/100 mL of one another. These procedures, if followed, ensure that the breath test of a person has produced accurate results.[29]

With respect to breath samples, an accused would no longer be able cast doubt on the reliability of the AI breath analysis. If the results of the conditions above are met, BAC at the time of testing is a proven fact.

Conclusive proof – blood samples

The law with respect to blood samples to determine BAC would not be changed – the person must point to evidence of a mistake by the analyst and cannot rely solely on evidence of consumption and a calculation of BAC based on that consumption to show an improper analysis

[28] In 2009 and 2010, 10 older AIs were de-listed because they did not meet these requirements.

[29] Alcohol Test Committee (ATC) Recommended Operational Procedures
This document should not be confused with two other related documents produced by the ATC:

- Evaluation standards for equipment: Manufacturers of screeners and instruments must meet these standards if the ATC is to recommend to the Attorney General that their equipment be approved for use.
- Best practices for a breath program: Police forces should carry out training and maintain their equipment as recommended to correct possible problems before they manifest themselves in the field.

Proof of BAC - more than two hours after operating

Due to the proposed reformulation of the offence, the presumption that, where the first sample is taken within two hours, the results of the AI analysis are equal to the BAC at the time of driving (the presumption of identity) is no longer necessary. Where the sample is taken beyond two hours, BAC would be BAC at the time of testing plus an additional 5 mg for every 30 minutes in excess of those two hours. This approach eliminates the requirement for a toxicologist to calculate what the drivers BAC would have been at the time of driving.

While the elimination rate of alcohol varies from individual to individual, it is scientifically accepted that after two hours, people are eliminating alcohol from their bodies at a rate of 10 to 20 mg per hour; thus BAC is falling.[30] The mathematical formula is therefore favourable to the accused. This change also reflects the fact that the time of the test is irrelevant to the accuracy of the BAC analysis. The AI does not transform from a reliable instrument when the tests are within two hours into an unreliable instrument when the test is performed after two hours. It is impossible for the very same AI to be reliable at 10:00 and 10:16 for the tests on a driver who was stopped at 8:01 but unreliable if the driver was stopped at 7:59.

Presumption of drug-impairment

There are two significant changes proposed relating to evidence in the area of DRE. The law would be clarified to ensure that the evidence of an evaluating officer conducting the DRE is admissible at trial without a hearing to qualify the evaluating officer as an expert. This clarification reflects the confidence that Parliament has in the specially-trained evaluating officers and their opinion on impairment by drugs. It also reflects the majority opinion in the Supreme Court of Canada decision *R. v. Bingley*.[31]

The second proposed change is the introduction of a presumption in the DRE context. This presumption in subsection 320.32(7) is triggered if an evaluating officer identifies a type of drug as being in the system of a person based on his or her evaluation and that type of drug is confirmed by testing a bodily sample in a lab. Once the identified type of drug is confirmed as the same as the evaluating officer identified, it is presumed, in the absence of evidence to the contrary, that the identified drug was also present in the person's body at the time when they were operating the conveyance and caused the impairment observed by the peace officer who made the arrest.

This presumption can be rebutted by the accused if they can raise a reasonable doubt that the signs of impairment were caused by something else such as a medical condition.

[30] Some individuals with severe liver diseases may eliminate at a lower rate but they would be too sick to drive. Some alcoholics eliminate at a faster rate as their body tries to cope with large quantities of alcohol.
[31] 2017 SCC 12

Certificates

There is a proposed change in procedure related to certificates when the accused seeks to have the person who signed the certificate cross-examined. Under the proposal, the accused has to apply in writing and provide particulars of the likely relevance to an issue in the trial of the evidence that the person who signed the certificate can give that is beyond the facts set out in the certificate. A copy of the application will have to be served on the prosecution at least 30 days before the date set for hearing, which date must also be at least 30 days before trial. The provision is intended to ensure that the person who signed the certificate is not required to attend unnecessarily. In particular, a certificate of the qualified technician showing that the conditions for establishing conclusively BAC were fulfilled, should eliminate the need for the qualified breath technician to testify in the vast majority of cases.

Disclosure

A new procedure is proposed with respect to disclosure relating to subject breath tests (320.35). It specifies what the prosecution is required to disclose based on what the ATC advises is scientifically necessary to determine whether a subject breath test provided accurate results.[32] The accused can apply for further disclosure but must satisfy a judge that additional material is likely to be relevant.

In the wake of the 2008 amendments restricting evidence to the contrary, and most recently following the Supreme Court of Canada decision in *St-Onge*, there has been an increase in the number of requests for disclosure of information which is irrelevant to determining that the AI was in proper working order. This increase has led to lengthy hearings and contradictory judgments on what has to be disclosed. It has caused significant delays in bringing many impaired driving cases to trial.

These changes reflect the Government's confidence in the reliability of AIs and its acceptance of the ATC's position that such items as maintenance records of AIs are scientifically irrelevant to determining a valid subject breath test.

It is important to note that nothing in section 320.34 limits the disclosure to which an accused may otherwise be entitled. In any issue unrelated to the accuracy of the BAC, the *Criminal Code* is silent with respect to the disclosure obligations and reference should be made to the common law.

[32] Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results

VII. TRANSITIONAL PROVISIONS

The elements related to the proof of BAC and disclosure in response to the Supreme Court of Canada's decision in *St-Onge* will apply to any case before the courts when the new Part comes into force. This legislative direction clearly indicates that all cases before the courts are to be decided on scientifically valid grounds.

BILL C-46

TABLE OF CONCORDANCE

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
1	253(3)-(4) Operation while impaired – blood drug concentration; exception	N/A	NEW
2	253.1 Regulations – Governor in Council - prescribing blood drug and blood alcohol concentration	N/A	NEW
3(1)	254(1) Definitions – approved container, approved instrument, approved screening device	254(1) Definitions – approved container, approved instrument, approved screening device	AMENDED
3(2)	254(1) Definitions – approved drug screening equipment	N/A	NEW
3(3)	254(2) Testing for presence of alcohol or drug	254(2) Testing for presence of alcohol or a drug	AMENDED
3(4)	254(2)(c) Testing for presence of alcohol or drug – drug screening equipment	N/A	NEW
3(5)	254(3.1) Evaluation and samples	254(3.1) Evaluation	AMENDED
3(6)	254(3.3) Testing for presence of alcohol	254(3.3) Testing for presence of alcohol	AMENDED
3(7)	254(3.4) Samples of bodily substances	254(3.4) Samples of bodily substances	AMENDED
3(8)	254(3.5), (3.6) Admissibility of evaluating officer's	254(4) Condition	AMENDED

C-46 Clause	C-46 *Criminal Code* Section	Current *Criminal Code* Section	Remarks
	opinion; presumption – drug; condition		
4	254.01 Approval – Attorney General of Canada	254(1) Definitions – approved screening device, approved instrument, approved container	AMENDED
5(1)	255(1) Punishment	255(1) Punishment	AMENDED
5(2)	255(1.1) Summary conviction	N/A	NEW
5(3)	255(2.1) Blood concentration equal to or over legal limit – bodily harm	255(2.1) Blood alcohol level over legal limit — bodily harm	AMENDED
5(4)	255(3.1) Blood concentration equal to or over legal limit – death	255(3.1) Blood concentration equal to or over legal limit – death	AMENDED
5(5)	255(4) Previous convictions	255(4) Previous convictions	AMENDED
6	257(2) No criminal or civil liability	257(2) No criminal or civil liability	AMENDED
7(1)	258(1)(d) Blood samples	258(1)(d) Blood samples	AMENDED
7(2)	258(1)(d)(iii) Blood samples	258(1)(d)(iii Blood samples	AMENDED
7(3)	258(1)(d) after subparagraph (v) Blood samples	258(1)(d) after subparagraph (v) Blood samples	REPEALED
7(4)	258(1)(h)(ii), (iii) Certificates	258(1)(h)(ii), (iii) Certificates	AMENDED
7(5)	258(2) Evidence of failure to give sample	258(2) Evidence of failure to give sample	AMENDED

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
7(6)	258(5) Testing of blood – alcohol and drugs	258(5) Testing of blood for concentration of a drug	AMENDED
8(1)	258.1(1) Unauthorized use of bodily substance	258.1(1) Unauthorized use of bodily substance	AMENDED
8(2)	258.1(2) Unauthorized use or disclosure of results	258.1(2) Unauthorized use or disclosure of results	AMENDED
9(1)	259(1) Mandatory order of prohibition	259(1) Mandatory order of prohibition	AMENDED
9(2)	259(1.01) Discretionary order of prohibition	259(2) Discretionary order of prohibition	AMENDED
9(3)	259(3) Saving provision	259(3) Saving provision	AMENDED
9(4)	259(5) Definition of disqualification	259(5) Definition of disqualification	AMENDED
10	254(1); 254.01 Definitions	254(1) Definitions	AMENDED
11	N/A	N/A	Consequential Amendment – *Customs Act*
12	2 Definitions – street racing	2 Definitions – street racing	REPEALED
13	214 Definitions – aircraft, operate, vessel	214 Definitions – aircraft, operate, vessel	REPEALED
14	249 – 261 Motor Vehicles, Vessels and Aircraft	249 – 261 Motor Vehicles, Vessels and Aircraft	REPEALED
15	320.11 Definitions	2, 214, 254(1) Definitions	AMENDED
15	320.12 Recognition and declaration	N/A	NEW
15	320.13(1) Dangerous operation	249(1) Dangerous operation	AMENDED

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
15	320.13(2) Operation causing bodily harm	249(3) Dangerous operation causing bodily harm	AMENDED
15	320.13(3) Operation causing death	249(4) Dangerous operation causing death	AMENDED
15	320.14(1) Operation while impaired	253(1) Operation while impaired	AMENDED
15	320.14(2) Operation causing bodily harm	255(2), (2.1) Impaired driving causing bodily harm	AMENDED
15	320.14(3) Operation causing death	255(3), (3.1) Impaired driving causing death	AMENDED
15	320.14(4) Operation – low blood drug concentration	N/A	NEW
15	320.14(5) Exception – alcohol	N/A	NEW
15	320.14(6) Exception – drugs	N/A	NEW
15	320.14(7) Exception – combination of alcohol and drugs	N/A	NEW
15	320.15(1) Failure or refusal to comply with demand	254(5) Failure or refusal to comply with demand	AMENDED
15	320.15(2) Accident resulting in bodily harm	255(2.2) Failure or refusal to provide sample — bodily harm	AMENDED
15	320.15(3) Accident resulting in death	255(3.2) Failure or refusal to provide sample — death	AMENDED
15	320.15(4) Only one conviction	254(6) Only one conviction	AMENDED

C-46 Clause	C-46 *Criminal Code* Section	Current *Criminal Code* Section	Remarks
15	320.16(1) Failure to stop after accident	252(1) Failure to stop at scene of accident	AMENDED
15	320.16(2) Accident resulting in bodily harm	252(1.2), (1.3) Offence involving bodily harm	AMENDED
15	320.16(3) Accident resulting in death	252(1.3) Offence involving bodily harm or death	AMENDED
15	320.17 Flight from peace officer	249.1 Flight from peace officer	AMENDED
15	320.18(1), (2) Operation while prohibited; exception – alcohol ignition interlock device program	259(4) Operation while disqualified	AMENDED
15	320.19(1) Punishment - simpliciter	255(1) Punishment - simpliciter	AMENDED
15	320.19(2) – Punishment – simpliciter – low blood drug concentration	N/A	NEW
15	320.19(3) Minimum fines for high BAC	N/A	NEW
15	320.19(4) Minimum fine – failure or refusal to comply with demand	N/A	NEW
15	320.19(5) Punishment – dangerous operation and other offences	249(2); 249.1(2); 252(1.1) Punishment – dangerous operation, flight, failure to stop	AMENDED
15	320.2 Punishment – bodily harm	255(2) Punishment – bodily harm	AMENDED
15	320.21 Punishment - death	255(3) Punishment - death	AMENDED

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
15	320.22 Aggravating circumstances	255.1 Aggravating circumstances	AMENDED
15	320.23(1), (2) Delay of sentencing; exception to minimum punishment	N/A	NEW
15	320.24(1), (2) Mandatory prohibition order; prohibition period	259(1) Mandatory order of prohibition	AMENDED
15	320.24(3) Discretionary order of prohibition – low blood drug concentration	N/A	NEW
15	320.24(4), (5) Discretionary order of prohibition – other offences; prohibition period	259(2) Discretionary order of prohibition	AMENDED
15	320.24(6) Obligation of court	260(1)(a) Proceedings on making of prohibition order	AMENDED
15	320.24(7) Validity of prohibition order not affected	260(3) Validity of order not affected	AMENDED
15	320.24(8) Application – public place	259(1), (2) Mandatory order of prohibition; discretionary order of prohibition	AMENDED
15	320.24(9) Consecutive prohibition periods	259(2.1) Consecutive prohibition periods	AMENDED
15	320.24(10) Minimum absolute prohibition period	259(1.2) Minimum absolute prohibition period	AMENDED
15	320.25(1)-(3) Stay of order pending appeal; appeals to SCC; effect of conditions	261(1)-(2) Stay of order pending appeal; appeals to SCC; effect of conditions	AMENDED

C-46 Clause	C-46 *Criminal Code* Section	Current *Criminal Code* Section	Remarks
15	320.26 Earlier and subsequent offences	255(4) Previous convictions	AMENDED
15	320.27 (1) Testing on suspicion – presence of alcohol or drug	254(2) Testing on suspicion	AMENDED
15	320.27(2) Mandatory alcohol screening	N/A	NEW
15	320.28(1) Samples of breath or blood - alcohol	254(3) Samples of breath or blood	AMENDED
15	320.28(2) Evaluation and samples of blood – drugs	254(3.1) Blood samples or evaluation – drugs	AMENDED
15	320.28(3) Samples of breath evaluation – alcohol	254(3.3) Testing for presence of alcohol	AMENDED
15	320.28(4) Samples of bodily substances	254(3.4) Samples of bodily substances	AMENDED
15	320.28(5) Types of drugs	N/A	NEW
15	320.28(6) – (8) Condition, approved containers, retained sample	254(4) Condition; 258(1)(h) Container; 258(1)(d)(i) Retained sample	AMENDED
15	320.28(9) Validity not affected	N/A	NEW
15	320.28(10) Release of retained sample	258(4) Release of sample for analysis	AMENDED
15	320.29(1)-(5) Warrants to obtain blood samples, Form, Procedure – telephone or other means of telecommunications; Duration of warrant; Copy or facsimile to person	256(1)-(5) Warrants to obtain blood samples; Form, Procedure – telephone or other means of telecommunications; Duration of warrant; Copy or facsimile to person	AMENDED

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
15	320.29(6) Taking of samples	N/A	NEW
15	320.3 – Testing blood – drug or alcohol	258(5) Testing blood for concentration of a drug	AMENDED
15	320.31(1)(a) Breath samples – system blank test and calibration	N/A	NEW
15	320.31(1)(b) Breath samples – 15 minute interval between samples	258(1)(c)(ii) Breath samples – 15 minute interval between samples	AMENDED
15	320.31(1)(c) Breath samples – results of analyses	N/A	NEW
15	320.31(2) Blood samples – concentration when sample taken (alcohol and drugs)	258(1)(c), (d) Blood samples – concentration when sample taken (alcohol)	AMENDED
15	320.31(3) Evidence not included	258(1)(d.01) Evidence not included	AMENDED
15	320.31(4) Presumption BAC	N/A	NEW
15	320.31(5) Presumption of evaluating officer's opinion	N/A	NEW
15	320.31(6) Presumption – drug	N/A	NEW
15	320.31 (7) Admissibility of result of analysis	258(1)(b) Admissibility of result of analysis	AMENDED
15	320.31(8) Evidence of failure to provide sample	258(2) Evidence of failure to give sample	AMENDED
15	320.31(9) Admissibility of statement	N/A	NEW

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
15	320.31(10) Evidence of failure to comply with demand admissible	258(3) Evidence of failure to comply with demand	AMENDED
15	320.32(1) Certificates	258(1)(e), (f), (f.1), (g), (h), (i); Certificates	AMENDED
15	320.32(2) Certificates - notice of intention to produce certificate	258(7) Notice of intention to produce certificate	AMENDED
15	320.32(3) Certificates - attendance and cross-examination	258(6) Attendance and right to cross-examine	AMENDED
15	320.32 (4)-(5) Certificates – form and content of application; time of hearing	N/A	NEW
15	320.32(6) Certificate admissible in evidence	260(5) Certificate admissible in evidence	AMENDED
15	320.32 (7) Onus	260(4) Onus	AMENDED
15	320.33 Printout from approved instrument	258(1)(f.1) Printout from approved instrument	AMENDED
15	320.34 Disclosure of information	N/A	NEW
15	320.35 Presumption of operation	258(1)(a) Presumption of operation	AMENDED
15	320.36(1) Unauthorized use of bodily samples	258.1(1) Unauthorized use of bodily substance	AMENDED
15	320.36(2) Unauthorized use or disclosure of results	258.1(2) Unauthorized use or disclosure of results	AMENDED
15	320.36(3) Unauthorized disclosure - exception	258.1(4) Unauthorized disclosure - exception	AMENDED

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
15	320.36(4) Unauthorized use or disclosure - offence	258.1(5) Unauthorized use or disclosure - offence	AMENDED
15	320.37(1), (2) Refusal to take sample; no liability	257(1), (2) No offence committed – refusal to take sample	AMENDED
15	320.38(a) Regulations – peace officer qualifications and evaluating officer training	254.1(1)(a) Regulations - qualifications and training of evaluating officers	AMENDED
15	320.38(b) Regulations – prescribing blood drug concentration	N/A	NEW
15	320.38(c) Regulations – prescribing blood alcohol and blood drug concentration	N/A	NEW
15	320.38(d) Regulations – prescribing blood drug concentration	N/A	NEW
15	320.38(e) Regulations – prescribing physical coordination tests	254.1(1)(b) Regulations - prescribing physical coordination tests	AMENDED
15	320.38(f) Regulations – prescribing tests and procedures	254.1(1)(c) Regulations – prescribing tests and procedures	AMENDED
15	320.39 Approval – Attorney General of Canada	254(1) – Definitions – AGC approval	AMENDED
15	320.4 Designation – Attorney General	254(1) – Definitions – analyst and qualified technician	AMENDED
16	335(2) Definition of vessel	335(2) Definition of vessel	AMENDED

C-46 Clause	C-46 *Criminal Code* Section	Current *Criminal Code* Section	Remarks
17	461(3), (4) Notice of intention to produce certificate; attendance and cross-examination	N/A	NEW
18(1)	487.04(c)(iv) Definition – secondary designated offence	487.04(c)(iv) Definition – secondary designated offence	REPEALED
18(2)	487.04(c)(viii.2) Definition – secondary designated offence	N/A	NEW
18(3)	487.04(d.1), (d.2) Definition – secondary designated offence	N/A	NEW
18(4)	487.04(e)(ii) Definition – secondary designated offence	487.04(e)(ii) Definition – secondary designated offence	AMENDED
19(1)	487.1(2) Telewarrants	487.1(2) Telewarrants	AMENDED
19(2)	487.1(5) Issuing telewarrant	487.1(5) Issuing telewarrant	AMENDED
19(3)	487.1(7), (8) Providing facsimile; affixing facsimile	487.1(7), (8) Providing facsimile; affixing facsimile	AMENDED
20	662(5) Conviction for dangerous operation when another offence charged	662(5) Conviction for dangerous driving where manslaughter charged	AMENDED
21	673(b) Definition – sentence	673(b) Definition – sentence	AMENDED
22	680(1) Review by court of appeal	680(1) Review by court of appeal	AMENDED
23	729.1(2) Definition – analyst	729.1(2) Definition – analyst	AMENDED
24	732.1(3) g.2) Conditions facultatives (French version)	732.1(3) g.2) Conditions facultatives (French version)	AMENDED

C-46 Clause	**C-46 *Criminal Code* Section**	**Current *Criminal Code* Section**	**Remarks**
25	752(xxiii.4)-(xxiii.8) Definition – designated offence	N/A	NEW
26	785(b) Definition – sentence	785(b) Definition – sentence	AMENDED
27	811.1(2) Definition – analyst	811.1(2) Definition – analyst	AMENDED
28	XXVIII FORMS	XXVIII FORMS	AMENDED
29(1)	Form 5.04(b)(iii) Order Authorizing the Taking of Bodily Substances for Forensic DNA Analysis	Form 5.04(b)(iii) Order Authorizing the Taking of Bodily Substances for Forensic DNA Analysis	AMENDED
29(2)	Form 5.04(b)(iv.1) Order Authorizing the Taking of Bodily Substances for Forensic DNA Analysis	N/A	NEW
30	Form 5.1 Warrant to search	Form 5.1 Warrant to search	AMENDED
31	Form 5.2 Report to a justice	Form 5.2 Report to a justice	AMENDED

CHARTER STATEMENT

BILL C-46, *AN ACT TO AMEND THE CRIMINAL CODE (OFFENCES RELATING TO CONVEYANCES) AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS*

Explanatory Note

The Minister of Justice prepares a "Charter Statement" to help inform public and Parliamentary debate on a government bill. One of the Minister of Justice's most important responsibilities is to examine legislation for consistency with the *Canadian Charter of Rights and Freedoms* ["the Charter"]. By tabling a Charter Statement, the Minister is sharing some of the key considerations that informed the review of a bill for consistency with the Charter. A Statement identifies Charter rights and freedoms that may potentially be engaged by a bill and provides a brief explanation of the nature of any engagement, in light of the measures being proposed.

A Charter Statement also identifies potential justifications for any limits a bill may impose on Charter rights and freedoms. Section 1 of the Charter provides that rights and freedoms may be subject to reasonable limits if those limits are prescribed by law and demonstrably justified in a free and democratic society. This means that Parliament may enact laws that limit Charter rights and freedoms. The Charter will be violated only where a limit is not demonstrably justifiable in a free and democratic society.

A Charter Statement is intended to provide legal information to the public and Parliament. It is not intended to be a comprehensive overview of all conceivable Charter considerations. Additional considerations relevant to the constitutionality of a bill may also arise in the course of Parliamentary study and amendment of a bill. A Statement is not a legal opinion on the constitutionality of a bill.

Charter Considerations

The Minister of Justice has examined Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, for consistency with the Charter pursuant to her obligation under section 4.1 of the *Department of Justice Act*. This review included consideration of the objectives and features of the Bill.

What follows is a non-exhaustive discussion of the ways in which Bill C-46 potentially engages the rights and freedoms guaranteed by the Charter. It is presented to assist in informing the public and Parliamentary debate on the Bill.

Life, liberty and security of the person (section 7)

Section 7 of the Charter guarantees to everyone the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

A criminal offence that carries the possibility of imprisonment implicates the right to liberty, and so must not be contrary to the principles of fundamental justice. These include the principles that laws must not be arbitrary, overbroad or grossly disproportionate. A law will be arbitrary where it impacts section 7 rights in a way that is not rationally connected to the law's purpose. A law will be overbroad where it impacts section 7 rights in a way that, while generally rational, goes too far by capturing some conduct that bears no relation to the law's purpose. A grossly disproportionate law is one where effects on section 7 rights are so severe as to be "completely out of sync" with the law's purpose.

The right against self-incrimination has also been recognized as a principle of fundamental justice for the purposes of section 7. Although individuals are protected from testifying in court against themselves under section 11(c) of the Charter, section 7 can also protect individuals from self-incrimination outside the courtroom context in some circumstances.

The reworded offence for driving with a Blood Alcohol Concentration (BAC) "over 80", as well as new offences for driving with prescribed limits on Blood Drug Concentration (BDC) and combinations of BDC and BAC, may engage section 7 and must therefore not be arbitrary or overbroad. A new provision clarifying the admissibility of compelled roadside statements may engage the protection under section 7 against self-incrimination.

Change to "over 80" offence

Clause 15 (new paragraph 320.14(1)(b)) rewords the current "over 80" offence to prohibit having a BAC at or over 80 mg/100ml within two hours of driving. This would be subject to an exception for "innocent intervening consumption," meaning consumption that occurred after driving, where the individual had no reason to expect a breath or blood demand, and where the quantity consumed was consistent with a BAC that was below 80 at the time of driving. This would criminalize consumption of alcohol prior to driving in quantities sufficient to result in a BAC at or over 80 ("bolus drinking"), even where the BAC at time of driving may have not yet risen above the limit. It also criminalizes consumption after driving, in situations where an individual had a reasonable expectation that he or she may be required to provide a sample (for example, after an accident), and that may serve to obstruct investigation of the offence.

The following considerations support the consistency of this section with the Charter.

By criminalizing bolus drinking and drinking that may obstruct an investigation, the offence captures two categories of reckless, morally culpable conduct, the prohibition of which serves the Government's objective of combating impaired driving. The definition of the offence in terms of BAC within two hours of driving and the "innocent intervening consumption" exception combine to ensure that dangerous conduct is covered while innocent consumption after driving is not captured.

Per Se Blood Drug Concentration offences

Clauses 1 and 2 create offences (new paragraphs 253(3)(a) and (c) respectively) for having a BDC above a prescribed limit, or a prescribed combination of BDC and BAC, within two hours of driving. These are subject to the same sentences as existing impaired driving offences. These clauses also create a "low Blood Drug Concentration" offence (new paragraph 253(3)(b)) that is punishable only by a fine of no more than $1000 and which would not count as a previous conviction for the purposes of minimum sentencing in impaired driving proceedings. These offences are, like the "over 80" offence, subject to an exception for "innocent intervening consumption."

The following considerations support the consistency of these provisions with the Charter. As with the new "over 80" offence, the definition of the offence in terms of BDC/BAC levels within two hours of driving criminalizes "bolus consumption" and post-driving consumption that may obstruct the investigation of an offence. These are both categories of reckless, morally culpable conduct, the prohibition of which serves the Government's objective of combatting impaired driving. As with the "over 80" offence, these offences have a carve-out for innocent intervening consumption, and so are tailored to exclude conduct that is unrelated to the objective.

Admissibility of roadside statements

Clause 15 (new section 320.31(9)) provides that a statement made by a person to a police officer that is compelled under a provincial Act is admissible for the purpose of justifying a roadside screening demand authorized by the *Criminal Code*. This has the potential to engage the protection under section 7 of the Charter against self-incrimination.

The following considerations support the consistency of this section with the Charter. While compelled statements under provincial highway legislation may not be used to prove an element of an impaired driving offence at trial, the same concerns do not apply where the compelled statement is to be used for the purpose of justifying an Approved Screening Device (ASD) demand. Officers should be entitled to use facts at their disposal, including compelled statements, for the purpose of establishing the reasonable suspicion required to make an ASD demand.

Searches or Seizures (section 8)

A number of provisions in the Bill have the potential to engage section 8 of the Charter, which protects against "unreasonable" searches and seizures. A search or seizure will be reasonable if it is authorized by a law, the law itself is reasonable in striking an appropriate balance between privacy interests and the state interest being pursued, and the search is carried out in a reasonable manner.

Rules surrounding roadside screening for alcohol and drugs, and rules surrounding breath and blood testing, govern searches and seizures and therefore implicate section 8 of the Charter.

Mandatory Alcohol Screening

Clause 15 (new section 320.27(2)) allows an officer to require a driver to provide a breath sample on an ASD if the officer has an ASD close at hand. Unlike the current framework, this provision does not require that the officer form a reasonable suspicion that the driver has alcohol in his or her body. Reasonable suspicion will still be required where the ASD is not at hand.

The following considerations support the consistency of this section with the Charter. The provision applies only if a person is otherwise lawfully stopped and provides lawful authority to interfere with privacy in a breath sample to further the important objective of enhanced road safety. The privacy interest in a breath sample in this context is low. The Supreme Court of Canada has recognized as reasonable the authority, under provincial law and common law, of police officers to stop vehicles at random to ensure that drivers are licensed and insured, that the vehicle is mechanically fit, and to check for sobriety. The information revealed from a breath sample is, like the production of a drivers licence, simply information about whether a driver is complying with one of the conditions imposed in the highly regulated context of driving. It does not reveal any personal or sensitive information and taking the sample is quick, and not physically invasive. A "fail" does not constitute an offence, but is simply a step that could lead to further testing on an Approved Instrument (AI, or "breathalyzer"), typically at a police station.

Eliminating the requirement that an officer form reasonable suspicion furthers the Government's compelling objective. The evidence shows that, currently, police officers often face many challenges in detecting when drivers have consumed alcohol and so may fail to demand a breath sample. As new section 320.27(2) would authorize a police officer to make a demand without having to make inquiries into whether an individual had consumed alcohol, it would reduce the impact of this kind of human error. It also would increase the deterrent effect of roadside stops by eliminating the perception that motorists could avoid having to give a sample by hiding their impairment.

This approach has been introduced in a number of countries, including Australia, New Zealand, Ireland, France, Belgium and the Netherlands. Research in a number of countries demonstrates that it has contributed to a measurable reduction in accidents and deaths on roads and highways. For example, in Ireland, it has been credited by the Road Safety Authority with a 23% reduction in road deaths in the 11 months after introduction. In New Zealand, visible mandatory-screening checkpoints were credited with a 32% reduction in crashes. In the State of Tasmania, serious accidents declined by 24% in the first year after the introduction of Mandatory Alcohol Screening, while in Western Australia, fatal accidents declined by 28% in the first year.

Approved Screening Devices (ASDs)

Clauses 3(1)-(5) and 4 (new section 254.01) expand the use of ASDs to include devices that test bodily samples (for example, oral fluid) for the presence of drugs ("drug screeners"). An officer could demand that an individual submit to a test on a drug screener where the officer has reasonable grounds to suspect that the individual has a drug in his or her body. Any such screening devices would have to be approved by the Attorney General of Canada.

The following considerations support the consistency of this section with the Charter. Like the roadside alcohol screeners that are used under the existing framework, a drug screener is an investigative tool used at the roadside solely to help an officer determine if reasonable grounds exist to believe that an offence has been committed. It would not be used to prove the offence at trial. Like a roadside alcohol screener, a drug screener is a quick, non-intrusive search method that reveals information in which individuals have a limited expectation of privacy given the highly regulated highway context. The provision would require that an officer, before demanding a sample, have a reasonable suspicion that the individual has a drug in his or her body. This reduces the potential for unnecessary administration of the tests. The use of non-intrusive drug screeners subject to the existing framework for the use of ASDs represents a reasonable interference with privacy interests in service of the important purpose of detecting drivers who have consumed drugs.

Blood Sampling

Clause 3(5) (new paragraph 254(3.1)(b)) enables an officer to demand that an individual provide a blood sample if the officer has reasonable grounds to believe that the individual has committed an offence of driving while impaired by a drug, or of driving with a prescribed BDC, whether or not the officer makes a demand for a Drug Recognition Evaluation (DRE). This is a change from the current approach, in which a blood demand may only be made after a DRE. The DRE is a series of tests intended to determine whether an individual is impaired and, if so, by what substance. This is normally done at a police station.

The following considerations support the consistency of this provision with the Charter. The purpose of the change is to effectively enforce the new offences, which are defined in terms of BDC. The only way to prove a prescribed BDC offence using current technology is through a blood sample taken as close to the time of driving as reasonably possible. Obtaining a blood sample in a timely manner is therefore critical to proving these offences, since levels of a drug in the bloodstream can decline rapidly after consumption, particularly for smoked cannabis. This makes it essential to obtain a blood sample promptly, as soon as an officer has developed reasonable grounds to believe that an offence has been committed. The delays associated with the DRE would make it impossible in many cases to prove a prescribed BDC offence. Further, these delays cannot be compensated for by calculating the rate at which the BDC declines, since rates at which drugs are eliminated from the body vary widely based on a number of variables. The proposal is as tailored as possible given this constraint, in that it maintains the same threshold as the existing framework before a sample can be demanded, namely reasonable grounds to believe that an offence has been committed.

Warrant for blood sample where individual incapable of consent

Clause 15 (new section 320.29) provides that a justice may issue a warrant to obtain a blood sample from a person where the justice is satisfied that:

- There are reasonable grounds to believe that the person was involved in an accident causing bodily harm or death within the previous 8 hours;
- There are reasonable grounds to suspect that there is alcohol or a drug in the person's body; and
- A medical practitioner is of the opinion that the person is incapable of consent and that the taking of the sample would not endanger the person's health.

This replaces the current provision which uses reasonable grounds to believe that the person had committed an impaired driving offence. The time frame is also changed from 4 hours to 8 hours.

The following considerations support the consistency of this section with the Charter. Currently, a warrant is available in similar circumstances only where the justice has reasonable grounds to believe that the person has committed an impaired driving offence. The new approach will reduce the threshold to a reasonable suspicion standard in order to better serve the intended purpose of enabling investigation of impaired offences where a driver is unconscious and unable to consent to the blood sampling. In ordinary circumstances (i.e. where a driver is conscious), a police officer may administer an ASD or administer sobriety tests based on reasonable grounds to suspect that the individual has alcohol or a drug in his or her body. The ASD and sobriety test, along with observations, may be used to establish the grounds that are necessary to make a demand on an Approved Instrument, or a blood demand. In the case of an individual who is not able to consent, it is not possible to administer an ASD or a sobriety test. Accordingly, it is difficult to gather enough information to establish the grounds that are necessary to obtain a

warrant. By providing that there need only be reasonable suspicion of alcohol or a drug in a person's body, this provision ensures that investigations can proceed in such circumstances. The provision is reasonably tailored in that it still requires that an officer have reasonable grounds to believe that the individual was involved in an accident and that a medical practitioner opine that taking the sample would not endanger the individual's health.

Trial Fairness and Presumption of Innocence (section 11(d))

Section 11(d) of the Charter guarantees the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Measures that govern how a trial is conducted and that set out rules of evidence may in some circumstances engage the "fair hearing" and "presumption of innocence" rights protected under section 11(d).

Evidentiary presumption

Clause 3(8) (new subsection 254(3.6)) creates a rebuttable presumption regarding the link between the drug found in a person's body and the signs of impairment observed by the arresting officer. Where a type of drug has been identified by an officer who conducted a DRE as causing impairment and where that drug type is found in a bodily sample, it will be presumed that the drug was present at the time of the alleged offence and was the cause of the observed impairment that constituted the alleged offence.

The following considerations support the consistency of this section with the Charter. The presumption reflects a logical consequence of observed facts, namely that the observed impairment was caused by the drug identified by the officer and found in the sample. It does not release the Crown from the burden of proving impairment or proving the presence of a drug. It is also rebuttable, meaning that the accused still has the opportunity to raise a reasonable doubt. The presence of other causes of observed impairment is also information that is uniquely within the knowledge of the accused and can be used to rebut the presumption.

Proof of BAC using Approved Instrument

Clause 15 (new section 320.31(1)) provides that, where two Approved Instrument tests have been performed, the lower of the two results will be conclusive proof of BAC at time of testing. Both tests must be performed at least 15 minutes from each other by qualified technicians in accordance with prescribed procedures and following an "air blank" check to exclude alcohol in ambient air. In addition, there must have been a calibration check with standard alcohol solution, and the tests must be within 20 mg of each other.

The following considerations support the consistency of this section with the Charter. This provision reflects the procedure that has been determined by the Alcohol Test Committee of the Canadian Society of Forensic Science to constitute proof, to a scientific standard, of BAC.

Unlike the provisions that were struck down by the Supreme Court of Canada in *R. v. St-Onge Lamoureux* (2012), the onus remains on the Crown to prove the offence beyond a reasonable doubt, by proving that the accuracy of the devices was verified and that the tests were conducted in accordance with prescribed procedures. The requirement of a 15-minute delay eliminates the possibility that mouth alcohol could interfere with the result of the test. When these facts have been established, there can be no scientifically valid reasonable doubt as to whether the individual had a BAC above the limit.

Back-extrapolation

As described above, the "over 80" offence is defined in terms of BAC within two hours of driving. New subsection 320.31(4) provides that, where testing on an AI is performed more than two hours after driving, BAC at the time of the offence (i.e. within the two-hour window) is conclusively deemed to be equal to the BAC at the time of testing plus 5 mg/100 ml for every complete 30 minutes between the expiry of the two hour period and the time of testing.

The following considerations support the consistency of this section with the Charter. The level of 5 mg/100 ml for every 30 minutes reflects a very conservative estimate of the rate at which alcohol leaves the bloodstream. In other words, there is scientific consensus that alcohol leaves the bloodstream at a rate significantly greater than 5 mg/100 ml per 30 minutes even in individuals who process alcohol slowly (other than in cases of near-complete liver failure that would ordinarily render them incapable of driving). Accordingly, a BAC calculated according to this provision will be lower than the absolute minimum scientifically possible BAC that an individual will have had within the two-hour window. It also maintains the onus on the Crown to prove the offence beyond a reasonable doubt, by combining the scientifically valid AI test with well-established scientific knowledge on the metabolism of alcohol.

Disclosure to the accused

Clause 15 (new section 320.34) provides that the Crown is only obligated to disclose listed materials that are relevant to determine whether the AI was in proper working order, and to determine the results of the AI tests. The accused may apply to the court for further disclosure if the accused believes that other materials are relevant to these facts. In addition to section 11(d), this may implicate section 7 of the Charter.

The following considerations support the consistency of this section with the Charter. The clarification of materials that are relevant is based on the fact that, as discussed above, the result of the AI test is valid and conclusive if conducted in accordance with prescribed procedures. Accordingly, only materials that relate to whether prescribed procedures were followed are relevant. This provision therefore tracks the Crown's obligation to disclose all records that are relevant. The court also retains the authority to determine whether other records may be relevant, upon application by the accused for further disclosure.

ANNEX 1

ALCOHOL AND DRUG-IMPAIRED DRIVING STATISTICS

Alcohol-impaired driving

Alcohol-impaired driving rates have been declining steadily since 1986 (when data was first collected).

- In 2015, police recorded 72,039 impaired driving incidents (drugs and alcohol); a decrease of 4% from 2014 and 65% lower than 1986;
- In 2013, 31% of all fatally injured drivers in Canada (excluding BC) had been drinking and 76.6% of these fatally injured drinking drivers had BACs exceeding the criminal legal limit of 80;
- In 2015, young adults between the ages of 20 to 24 had the highest impaired driving rates; but the largest decline since 2009 has also been observed for this age group;
- Amongst young people in Ontario in 2015, approximately 5% of Grades 10—12 students reported driving within an hour of using alcohol in the past year;
- Police-reported incident data shows that alcohol-impaired driving tends to peak on weekends between 11 pm and 4 am.

Prosecuting alcohol-impaired driving

- Police *Criminal Code* impaired driving charges have decreased in recent years which could be explained by an increase in provincial administrative measures, such as licence suspension and vehicle seizure;
- In 1998, 89% of impaired driving incidents were cleared by a charge. In 2015, only 71% of incidents were cleared by a criminal charge;
- The majority of people charged with impaired driving (drug or alcohol) are male, but the proportion of females has increased from 8% in 1986 to 20% in 2015;
- In 2015, 81% of cases where alcohol-impaired driving was the primary offence resulted in a guilty finding;
- The median length of time for an alcohol-impaired driving trial was 92 days in 2000/01. It rose sharply, primarily due to the “two beer defence”, and was 146 days in 2010/11. With the enactment of restrictions on the two beer defence in 2008, and particularly the Supreme Court decision that the two beer defence was insufficient by itself to raise a reasonable doubt about BAC, the median time required has declined to 127 days in 2014/15 – similar to the median for other criminal trials (121 days).

Drug-impaired driving

- Nearly 3,000 of the total impaired driving incidents recorded by police in 2015 (72,039) were related to drugs (4%); this number has increased steadily since 2009 (when data was first collected);

- In one roadside study, THC was the most common impairing drug (about half of drug-impaired driving incidents) found in drivers (63% of drug-positive cases), followed by cocaine;
- In 2013, 82.9% of fatally-injured drivers in Canada (excluding BC) were tested for drugs; of these, 44% tested positive for some drug (caution is urged as there may be jurisdictional differences in the tests and the results are not indicative of impairment in each of these deceased drivers);
- Amongst young people in Ontario, in 2015 approximately 10% of Grades 10—12 students reported driving within an hour of using cannabis during the past year;
- Prevalence studies indicate that drug-impaired driving is not significantly more prevalent on weekend nights but rather it tends to spread across all weekdays and across all periods in a 24 hour day.

Prosecuting drug-impaired driving

- Drug-driving trials take longer than alcohol-impaired driving trials; 28% of drug-impaired driving incidents required more than 30 days in 2015. In comparison, only 16% of alcohol-impaired driving incidents took more than 30 days;
- 61% of drug-impaired driving cases resulted in a guilty verdict. Drug-impaired driving charges were more likely to be withdrawn, dismissed or discharged by the Crown (25%) than alcohol-impaired driving charges (12%);
- The median length of time for a drug-impaired driving trial between 2010-2011 to 2014-2015 was 227 days – almost twice as long as for an alcohol-impaired trial.

References:

Beirness and Beasley. (2011). *Alcohol and Drug Use Among Drivers: British Columbia Roadside Surveys 2010.* Canadian Centre for Substance Abuse.

Boak, A, Hamilton, H, Adlaf, E and Mann, R. (2015). *Drug Use Among Ontario Students: 1977-2015. Research Document Series No. 41*. Centre for Addiction and Mental Health.

Brown, S, Vanlaar, W.G.M. and Robertson, R.D (2017). *Alcohol and Drug-Crash Problem in Canada report 2013*. Canadian Council of Motor Transport Administrators.

Brown, S, Hing, M, Vanlaar, W.G.M. and Robertson, R.D. (2016). *Road Safety Monitor 2016: Drinking and Driving in Canada*. Traffic Injury Research Foundation.

Perreault, S. (2016). *Juristat Impaired Driving in Canada, 2015*. Canadian Centre for Justice Statistics.

ANNEX 2

DRUGS AND DRIVING COMMITTEE REPORT ON DRUG PER SE LIMITS

Executive Summary

- Establishing a drug *per se* limit does not imply all drivers below this limit are not impaired and all drivers above this limit are impaired.
- Impairment can be defined as a decreased ability to perform a certain task; this differs from intoxication which can be described as the observable signs of drug use.
- The primary psychoactive compound in cannabis products is tetrahydrocannabinol (THC).
- THC impairs the ability to operate a motor vehicle.
- THC is the most frequently encountered drug in Canadian drivers, after alcohol.
- THC and alcohol are frequently detected in combination in drivers.
- Although the scientific literature varies, several well-controlled studies with sufficient discriminating power have demonstrated an increased crash risk in THC-positive drivers. Risks were increased for fatal collisions and with elevated THC concentrations.
- Available evidence suggests significantly increased risks for drivers positive for alcohol and THC in combination.
- Unlike alcohol, the effects of THC do not correlate well with THC blood concentrations.
- Impairment due to THC is related to the amount, the route of administration, the time elapsed since use, and inter-individual variability.
- Existing *per se* limits for THC vary widely between jurisdictions.
- The THC *per se* limits considered by this committee are 5 ng/mL and 2 ng/mL in blood.
- The 5 ng/mL THC *per se* limit is based upon impairment considerations, while the 2 ng/mL THC *per se* limit is based upon public safety considerations.
- This committee recommends the use of distinct but corresponding *per se* limits for plasma.
- This committee recommends a combined offence of 50 mg of alcohol in 100 mL of blood when detected in combination with THC at a concentration less than the limit for the THC alone offence.
- Minimizing time delays in sample collection is critical to implementation of an effective THC *per se* limit.
- Consideration of THC *per se* limits is complicated by the potential for prolonged THC blood concentrations in chronic users although there is evidence of residual impairment in this population.
- The potential for passive exposure to THC resulting in concentrations at or above a *per se* limit is not a practical concern in the context of the conditions that would be required, the levels discussed and the inevitable time delay to sample collection.

- Cocaine is a central nervous system stimulant which impairs the ability to operate a motor vehicle. Cocaine is susceptible to degradation in the body and in a collection tube; therefore, timely collection, preservative and proper storage conditions, and timely analysis are important. This committee recommends a cocaine *per se* limit of 30 ng/mL in the blood. No limit is recommended for benzoylecgonine, the inactive breakdown product of cocaine.
- Gammahydroxybutyrate (GHB) is a drug which demonstrates central nervous system depressant activity in a dose dependent manner. GHB impairs the ability to operate a motor vehicle. GHB is also a compound that occurs naturally in the body at low levels, and as such, the *per se* limit must reflect a concentration above endogenous levels. This committee recommends a GHB *per se* level of 10 mg/L in the blood.
- Heroin is an opioid analgesic which has central nervous system depressant properties. Heroin impairs the ability to operate a motor vehicle. Given the extremely short time frame for heroin detection in the body due to the rapid metabolism of heroin to its active metabolite, 6-monoacetylmorphine (6-MAM), this committee recommends zero tolerance for 6-MAM detection in the blood.
- Ketamine is a dissociative anaesthetic which impairs the ability to operate a motor vehicle. This committee recommends zero tolerance for ketamine detection in the blood.
- Lysergic Acid Diethylamide (LSD) is a potent hallucinogen which impairs the ability to operate a motor vehicle. This committee recommends zero tolerance for LSD detection in the blood. LSD is susceptible to degradation in a collection tube as it is light and heat labile; therefore, proper storage conditions and timely analysis are important.
- Methamphetamine is a central nervous system stimulant which impairs the ability to operate a motor vehicle. This committee recommends a methamphetamine *per se* limit of 50 ng/mL in the blood.
- Phencyclidine (PCP) is a dissociative anaesthetic which impairs the ability to operate a motor vehicle. This committee recommends zero tolerance for PCP detection in the blood.
- Psilocybin is the compound present in ‘magic’ mushrooms which are used for hallucinogenic purposes; psilocin is the primary psychoactive metabolite of psilocybin. Psilocybin/psilocin impairs the ability to operate a motor vehicle. This committee recommends zero tolerance for psilocybin and/or psilocin in the blood.
- Any drug recommended for zero tolerance in a blood sample is also recommended for zero tolerance in a serum or plasma sample.
- Since zero tolerance will be related to the limits of the methodology employed, this committee recommends that the provincial and federal government forensic laboratory systems develop a common limit of detection for the aforementioned drugs so as to ensure the *Criminal Code* offence will not vary between jurisdictions.

ANNEX 3

INTERNATIONAL APPROACHES TO THC AND DRIVING

United States

Colorado- If a driver has a THC level of 5 ng/ml or more then the trier of fact may infer that they were impaired, but is not required to do so. Colorado is currently engaged in a pilot project involving oral fluid screening devices, but they are not currently authorized for use in a law enforcement context.

Washington– Washington prohibits driving with a 5 ng/ml of THC in the blood. Washington does not authorize the use of oral fluid screening devices.

Montana- A driver who has a THC level of 5 ng/ml or more is presumed to be impaired.

Nevada– The threshold limits are 2 ng/ml in blood and 10 ng/ml of marijuana metabolite in urine but prosecution must prove the driver was under the influence of the drug.

Ohio- The limits are 2 ng/ml in blood and 10 ng/ml of marijuana metabolite in urine.

Pennsylvania– The limit is 1 ng/ml of blood.

California- The limit is 5 ng/ml of blood but there must be corroborating evidence of impairment.

United Kingdom

The UK set a *per se* limit of 2 ng/ml of blood. The UK has a very limited medical defence for users of prescription drugs which contain cannabis-based elements. The UK authorizes the use of oral fluid drug screening devices for THC and cocaine; a positive result on an oral fluid screener results in a demand for a blood sample.

Ireland

Ireland recently enacted new offences for drugs and driving including driving with 1 ng/ml THC. A person who has a "medical exemption certificate" is not subject to the offence. Ireland authorizes roadside drug screening for cannabis, cocaine, opiates (e.g. heroin, morphine) and benzodiazepines (e.g. valium).

Australia

Australia authorizes random roadside oral fluid screening. A positive result on an oral fluid screener (with a second saliva sample confirming drug presence by the lab) is sufficient to prove the offence of driving with the presence of a prohibited drug in the body.

New Zealand

New Zealand prohibits the presence of THC in a blood sample in situations where a driver has also failed roadside sobriety tests. New Zealand does not authorize the use of roadside drug screeners.

ANNEX 4

TABLE OF DRUGS AND LIMITS[33]
UNITED KINGDOM

benzoylecgonine	50 µg/L
cocaine	10 µg/L
delta-9-tetrahydrocannibinol (cannabis)	2 µg/L
ketamine	20 µg/L
lysergic acid diethylamide	1 µg/L
methylamphetamine	10 µg/L
Methylenedioxymethamphetamine (MDMA)	10 µg/L
6-monoacetylmorphine (heroin)	5 µg/L
clonazepam	50 µg/L
diazepam	550 µg/L
flunitrazepam	300 µg/L
lorazepam	100 µg/L
methadone	500 µg/L
morphine	80 µg/L
oxazepam	300 µg/L
temazepam	1,000 µg/L
amphetamine	250 µg/L

TABLE OF DRUGS AND LIMITS

[33] The UK prescribes limits in micrograms per litre (µg/L). This is the same as ng/ml.

REPUBLIC OF IRELAND

THC	1 ng/ml
Carboxy THC	5 ng/ml
Cocaine	10 ng/ml
Benzolecgonine (Cocaine)	50 ng/ml
6-Acetylmorphine (Heroin)	5 ng/ml

TABLE OF DRUGS AND LIMITS
NORWAY

Norway has set different limits that result in penalties equivalent to the penalties for BAC

Drugs	***Impairment limits comparable to 0,02 % (ng/ml in whole blood)***	***Limit for graded sanctions comparable to 0,05 % BAC (ng/ml in whole blood)***	***Limit for graded sanctions comparable to 0,12 % BAC (ng/ml in whole blood)***
Alprazolam	3	6	15
Clonazepam	1.3	3	8
Diazepam	57	143	342
Fenazepam	1.8	5	10
Flunitrazepam	1.6	3	8
Nitrazepam	17	42	98
Oxazepam	172	430	860
Zolpidem	31	77	184
Zopiclone	12	23	58
THC	1.3	3	9
Amphetamine	41	*	*
Cocaine	24	*	*
MDMA	48	*	*
Methamphetamine	45	*	*
GHB	10300	30900	123600
Ketamine	55	137	329
LSD	1	*	*
Buprenorphine	0.9	*	*
Methadone	25	*	*
Morphine	9	24	61

ANNEX 5

INTERNATIONAL EXPERIENCE WITH MANDATORY ALCOHOL SCREENING

Mandatory alcohol screening has been used in Finland since 1977 and in Australia since the 1980s where it is called Random Breath Testing ("RBT"). Most Australian states brought RBT into force at the same time as they lowered the BAC limit from 80 to 50 making it difficult to apportion the deterrent effect between the two measures. RBT is also in force in Japan and New Zealand.

On April 6, 2004, the European Commission made 19 recommendations to achieve the objective of reducing the annual number of road deaths in the EU by 50 % by 2010 including:

> 6. ensure the application of random breath testing with an alcohol screening device as a leading principle for surveillance of drink-driving and in such a way as to guarantee its effectiveness; with a view to this, in any event ensure that random breath testing is carried out regularly in places where and at times when non-compliance occurs regularly and where this brings about an increased risk of accidents, and ensure that officers carrying out random breath testing checks use evidential breath test devices whenever they suspect drink-driving.

RBT is now in use in 22 European countries.

REPUBLIC OF IRELAND – Mandatory alcohol testing (MAT) came into force in Ireland in July 2006 and was credited by the Road Safety Authority with reducing the number of people being killed on Irish roads by almost a quarter (23%) in the eleven month period since the introduction of MAT compared to the previous eleven month period. In 2005, the last full year in Ireland without MAT, road fatalities were 398. By 2009, fatalities on Ireland's roads had declined to 238, a reduction of 39.9% from 2005. In 2010, Ireland lowered the legal limit from a BAC of 80 to a BAC of 50. By 2016, road fatalities had declined to 139, a decrease of 64.9% over 11 years.

NEW ZEALAND - RBT was introduced in 1993 along with other measures to combat impaired driving and increase enforcement and a media campaign. The cumulative crash reduction was 54%: 32% was credited to aggressively visible RBT checkpoints and 22% to the other measures.

QUEENSLAND, AUSTRALIA - RBT was introduced in Queensland on December 1, 1988. During the first year of implementation, Queensland experienced a 19% reduction in all serious accidents (789) and a 35% reduction in all fatal accidents (194). The long-term effects of RBT in Queensland could not be estimated at the time since the data for the years prior to 1986 was inadequate. It should be noted that the study also found an 18% reduction in fatal accidents as a result of the introduction of a 50 BAC limit and a reduction of 15% as a result of enhanced police enforcement through a "Reduce Intoxicated Driving" campaign.

TASMANIA, AUSTRALIA - RBT was introduced on January 6, 1983. During the first year of implementation, Tasmania experienced a 24% reduction in all serious accidents.

VICTORIA, AUSTRALIA - RBT was introduced in Victoria in 1976 and was re-structured in 1989. In 1977, 49% of all drivers killed were found to be in excess of 50 BAC. In 1992 that figure was reduced to 21%.

WESTERN AUSTRALIA - RBT was introduced in Western Australia on October 1, 1988. During the first year of implementation, Western Australia experienced a 28 % reduction in all fatal collisions (72). The long-term effect of RBT in Western Australia has been:

- 13% reduction in all serious accidents;
- 28% reduction of all fatal accidents;
- 26% reduction in single-vehicle night-time accidents.

NEW SOUTH WALES, AUSTRALIA - RBT was introduced in New South Wales on December 17, 1982. Taking into account, and thereby controlling, factors such as weather information, road usage indicators, time factors and the BAC 50 legislation introduced in December 1980, it was found that RBT is extremely effective.

The initial effect of RBT on total fatal accidents was extremely marked, with a drop of 48% that was sustained for a period of 4.5 months. The initial impact on all serious accidents was a 19% decline that was sustained for a period of 15 months. The initial impact on single-vehicle night-time accidents was a 26% decline that lasted a period of 10 years.

The New South Wales program, including media publicity, cost approximately $3.5 million in 1990 Australian currency annually. The random breath testing program is estimated conservatively to save 200 lives each year, with savings to the community of at least $140 million in 1990 Australian currency each year.