



Department of Justice  
Canada

Ministère de la Justice  
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**Backgrounder for former Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, as enacted***

Department of Justice  
Canada  
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## **LIST OF COMMONLY USED ACRONYMS**

**AI** – Approved Instrument

**ASD** – Approved Screening Device

**ADSE** – Approved Drug Screening Equipment

**ATC** – Alcohol Test Committee

**BAC** – Blood Alcohol Concentration

**BDC** – Blood Drug Concentration

**DDC** – Drugs and Driving Committee

**DRE** – Drug Recognition Evaluation

**MAS** – Mandatory Alcohol Screening

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## **PURPOSE**

*An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*, (S.C., 2018, c. 21), former Bill C-46 (the Act), strengthens the criminal law approach to drug-impaired driving, restructures and simplifies the transportation-related provisions, increases some penalties, and facilitates the investigation and prosecution of alcohol-impaired and drug-impaired driving.

This Backgrounder describes the policy intent behind the Act and provides a general overview of changes and a detailed examination of certain elements of the Act, with references to:

- aspects of the new law that mirror the former law and an explanation of aspects that are different;
- key aspects of jurisprudence under the former law that are incorporated into or replaced by the new law; and
- relevant excerpts from Parliamentary consideration of the new law.

This Backgrounder does not contain a comprehensive analysis of the law of impaired driving and as such does not contain a complete or exhaustive description of relevant jurisprudence and legal issues. As such, it does not constitute legal advice.

## BACKGROUND

Driving while impaired by alcohol or a drug and dangerous driving kill and injure thousands of Canadians every year and impose enormous social and economic costs on society. It is the leading criminal cause of death and injury in Canada. The criminal law has long recognized the potential devastating impacts of impaired driving. Canada first prohibited driving while intoxicated in 1921. In 1925, a drug-intoxicated driving offence was enacted. Since that time, there have been numerous amendments to the transportation offences, most frequently in the area of impaired driving.

While these periodic reforms strengthened measures to combat impaired driving, they also added to the complexity of the *Criminal Code*'s transportation offence provisions and created some overlap between offences and inconsistencies amongst penalties. 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 impacted effective and efficient investigation, prosecution and sentencing.

The Government introduced Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts* (the Act) on April 13, 2017 to modernize, simplify and strengthen these provisions as well as to create new and stronger laws to combat drug-impaired driving, in advance of cannabis legalization. The Bill received Royal Assent on June 21, 2018.

The Act is divided into three parts:

Part 1 aims to strengthen the criminal law approach to drug-impaired driving. It does this in a number of ways, including the creation of blood drug concentration (BDC) offences (with the prohibited drug levels being set by regulation) and the authorization of roadside drug screening using approved drug screening equipment (ADSE). It amended the existing *Criminal Code* transportation regime, and as such, did not change the numbering or structure of the transportation regime. Part 1 came into force on Royal Assent (June 21, 2018), which was ahead of legalization of cannabis in October 2018. The regulation setting the prohibited levels of impairing drugs came into force on June 26, 2018.<sup>1</sup>

Part 1 of the Act was subsequently repealed and replaced 180 days later on December 18, 2018, when Part 2 of the Act came into force. As such, the changes made in Part 1 have now been superseded by the amendments in Part 2. Part 2 of the Act repeals all of the current transportation offences and enacts a new Part VIII.1 of the *Criminal Code* (Offences Relating to Conveyances). The changes made in Part 1 were incorporated into Part 2. It aims to facilitate the detection and investigation of alcohol and drug-impaired driving; facilitate the prosecution of impaired driving; reduce court delays; and simplify and modernize the *Criminal Code* transportation regime. While much of the new Part will be familiar to criminal justice practitioners, the drafting has been modernized and simplified. In addition, the provisions have been organized in a coherent manner: definitions and interpretation; penalties and

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<sup>1</sup> *Blood Drug Concentration Regulations*, SOR/2018-148.

prohibitions; investigative matters; evidentiary matters; and general provisions. Notwithstanding the significant overhaul, much of previous jurisprudence will remain relevant and can continue to be relied on. This Backgrounder attempts to specifically indicate where this is the case.

In addition to the modernization and simplification of the drafting in Part 2, there have been some key policy changes: the authorization of mandatory alcohol screening (MAS); elimination of the “bolus drinking” defence; limitation of the “intervening drink” defence; facilitation of the proof of blood alcohol concentration (BAC); clarification with respect to certain elements of disclosure; and raising some mandatory minimum fines and maximum penalties. Part 2 of the Act came into force on December 18, 2018, which was 180 days after Royal Assent. This extra time was requested by provinces and territories to have adequate time to prepare for its implementation given the scope of the proposed reforms. As Part 1 was already in force, this allowed increased time for the implementation of Part 2, while still ensuring that a robust drug-impaired driving regime was in place to address any increase of drug-impaired driving that would occur as a result of the legalization and regulation of cannabis.

Part 3 outlines the coming into force of the Act.

All of the changes are intended to have a positive impact on road safety by reducing deaths and injuries caused by drinking or drug-using drivers and to facilitate the resolution of impaired driving criminal trials. As indicated by the former Minister of Justice and Attorney General of Canada during Second Reading debate in the House of Commons on Bill C-46, “I introduce the bill with the ultimate goal of reducing the significant number of deaths and injuries caused by impaired driving, a crime that continues to claim innocent lives and wreak havoc and devastation on Canadian families.”<sup>2</sup>

For further information, Canadians may wish to consult the information on the Parliament of Canada website on former Bill C-46 which includes links to major speeches and to committee proceedings in the House of Commons and the Senate, available at:

<http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8886286>

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<sup>2</sup> “Bill C-46, An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts”, Second reading, House of Commons Debates, 42-1, No 148 (19 May 2017) at 1005 (Hon Jody Wilson-Raybould) [House of Commons, second reading].

## **PART 1 – STRENGTHENING DRUG-IMPAIRED DRIVING IN THE *CRIMINAL CODE***

### **1. PREAMBLE**

The Preamble sets out nine considerations that motivate the reforms, including that:

- dangerous and impaired driving injure or kill thousands of people in Canada every year;
- dangerous and impaired driving are unacceptable at all times and in all circumstances;
- it is important to deter persons from driving while impaired by alcohol or drugs;
- it is important to give law enforcement better tools to detect impaired drivers;
- it is important to simplify the law relating to proving BAC;
- it is important to deter persons from consuming alcohol or drugs after driving in circumstances where they have a reasonable expectation they will be required to provide a breath or blood sample;
- it is important to protect the public from those who consume large amounts of alcohol before driving;
- it is important that federal and provincial laws work together to promote safety; and
- the Parliament of Canada is committed to adopting a precautionary approach in relation to driving and the consumption of drugs.

The Preamble is intended to be read as part of the Bill and to assist in explaining its purpose and objectives, but it does not form part of the consolidated *Criminal Code*.<sup>3</sup>

### **2. OFFENCES**

Three new offences have been enacted. These offences prohibit having a blood drug concentration (BDC) at or above a prescribed limit for that drug within two hours of driving. Two of the new offences are hybrid offences, and one is a straight summary conviction offence.

The two-hour timeframe guards against the conduct of consuming impairing drugs immediately before or after driving in order to frustrate the testing process.

The Act authorizes the Governor in Council to set the BDC limits by regulation. This approach is consistent with the approach used in other jurisdictions, including the United Kingdom (UK). It allows for a more flexible and prompt response to the evolving science with respect to drug impairment than having to amend the *Criminal Code* whenever a change is proposed (e.g., to add a prohibited level for a new drug, or amend an existing prohibited level). The current BDC levels have been set based, in part, on the advice of the Drugs and Driving Committee (DDC) of the Canadian Society of Forensic Science (CSFS).<sup>4</sup>

The jurisprudence relating to the elements of the “over 80” offence is relevant in interpreting these new offences, with any necessary modification to reflect the context of drugs.

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<sup>3</sup> *Interpretation Act*, RSC 1985, c I-23, s 13 [Interpretation Act].

<sup>4</sup> Canadian Society of Forensic Science Drugs and Driving Committee, *Report on Drug Per Se Limits* (September 2017), online: <<https://www.csfs.ca>> [CSFS Report].

## 2.1 Having a Prohibited BDC within Two Hours of Driving (paragraph 253(3)(a))

The prohibited drugs levels have been set by regulation as follows:

<b>Drug</b>	<b>Prohibited Blood Drug Concentration</b>
Tetrahydrocannabinol (THC)	5 ng THC/mL of blood
Lysergic acid diethylamide (LSD)	Any detectable level
Psilocybin	Any detectable level
Psilocin	Any detectable level
Phencyclidine (PCP)	Any detectable level
6-Monoacetylmorphine	Any detectable level
Ketamine	Any detectable level
Cocaine	Any detectable level
Gamma hydroxybutyrate (GHB)	5 mg GHB/L of blood
Methamphetamine	Any detectable level

The DDC did not specifically make a recommendation with respect to tetrahydrocannabinol (THC). Rather it outlined the pros and cons of two different BDC levels that have been used recently in other jurisdictions. The regulation adopts the 5 nanograms (ng)/millilitre (mL) concentration as it is a level that is associated with recent consumption, and therefore some impairment can be expected to be found at or above that level in the blood.

The levels for Lysergic acid diethylamide (LSD), Psilocybin, Psilocin, Phencyclidine (PCP), 6-Monoacetylmorphine, and Ketamine were recommended by the DDC to be set at “any detectable level”. This reflects the evidence that any level of these drugs in the body is incompatible with safe driving.

The levels for Gamma hydroxybutyrate (GHB), cocaine, and methamphetamine are lower than those levels that were recommended by the DDC. These are illicit and impairing drugs and it is not in the interest of public safety for drivers to have these drugs in their body when they are driving. The level for GHB takes into consideration that the human body can naturally produce GHB at low levels.

Several jurisdictions have established BDC levels while driving, including the United Kingdom (UK) that has limits for 16 drugs, and Norway that has limits for 20 drugs. Both of these countries have set prohibited levels for THC. The new approach to drug-impaired driving is also consistent with that of other international jurisdictions that have enacted BDC levels for THC and other drugs. In Colorado, the legal limit of 5 ng THC/mL of blood leads to a permissible

inference of impairment, whereas in Washington, 5 ng THC/mL of blood is sufficient on its own for a conviction. As indicated, the UK prohibits driving with 2 ng THC or more/mL of blood and Australia prohibits driving with any THC in the body, (proven through oral fluid), although cannabis remains prohibited in both jurisdictions. Norway has graduated sanctions starting at 1.3 ng/mL blood. It should be noted that the UK government prohibited BDCs for many drugs at lower concentrations than those which were recommended by their expert scientific expert panel (The Wolff Report, 2013). For example, the UK expert panel recommended 5 ng THC/mL and the UK Government enacted a 2 ng THC/mL level.<sup>5</sup>

Aggravated offences of having a prohibited BDC causing bodily harm and death have also been created (subsections 255(2.1) and (3.1)).

## **2.2. Having a Prohibited BDC that is Lower than the BDC set under paragraph 253(3)(a) (paragraph 253(3)(b))**

Paragraph 253(3)(b) sets out a straight summary conviction offence for having between 2 and 5 ng THC/mL of blood. There are no aggravating offences of being over the prohibited level in situations involving bodily harm or death. At this time, only THC is the subject of a prohibited BDC level for this offence.

<b>Drug</b>	<b>Prohibited Blood Drug Concentration</b>
THC	2 ng THC/mL or more of blood, but less than 5 ng THC/mL of blood

The level of THC in this offence is based on a number of considerations, but primarily on a precautionary approach. It recognizes that THC is an impairing drug but that setting BDC limits for THC is more complex than for alcohol. It is also based on the understanding that it is not possible to simply overlay the criminal approach to alcohol-impaired driving on the drug-impaired driving regime.

Practitioners should be aware that there is strong evidence of an increasing trend of drug-impaired driving in Canada<sup>6</sup>, and the risk of a further increase following the legalization and regulation of cannabis. The legislative approach with respect to low levels of THC reflects the fact that the scientific literature is unable to provide definitive guidance with respect to what level of THC, if any, can be considered safe, and therefore Parliament has considered that the best approach at this time is to take a precautionary approach and to set a low limit.

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<sup>5</sup> K Wolff, *Driving Under the Influence of Drugs – Report from the Expert Panel on Drug Driving* (March 2013), online: Department of Transport [www.gov.uk/dft](http://www.gov.uk/dft) [the Wolff Report, 2013].

<sup>6</sup> See S. Pitel & R. Solomon, *Estimating the Number and Cost of Impairment-Related Traffic Crashes in Canada: 1999-2010* (2013), online: <<http://madd.ca>>, and Statistics Canada, *Police-reported crime statistics in Canada 2016* by Katheryn Keighley, (Ottawa: Statistics Canada, 24 July 2017), online: <<http://www.statcan.gc.ca>>.

### **2.3. Having a Prohibited BAC and BDC in Combination Within Two Hours of Driving (paragraph 253(3)(c))**

Paragraph 253(3)(c) sets out a hybrid offence of operating a conveyance with a combined BAC and BDC that is equal to or exceeds the limit prescribed by regulation for the combination of alcohol with that drug.

This offence recognizes that, although individuals may have a BAC or BDC that does not reach the prohibited hybrid offence level for each substance on their own, when the substances are combined – even at low levels – the impairing effects are magnified. At present, the regulation only sets levels for a combination of alcohol and THC. Alcohol and THC are often found in combination in drivers and the impairing effect of this combination is more impairing than either substance alone.

<b>Drug in Combination with Alcohol</b>	<b>Prohibited Concentrations</b>
THC	2.5 ng THC or more/mL of blood in combination with 50 mg of alcohol/100 mL of blood

### **2.4. Limiting the Intervening Drug Defence and the “Innocent” Intervening Exception (subsection 253(4))**

The legislation enacts an “innocent intervening drug” defence to avoid criminalizing individuals who consume the impairing drugs after driving, but before blood testing in “innocent” situations. It would be a defence to the charge if the following conditions are met:

- The person consumed a drug after ceasing to operate the conveyance; and
- The person had no reasonable expectation that they would be required to provide a sample of blood.

Unlike the criteria for the “innocent intervening drink” defence (which comes into force in Part 2 of the Act), the criteria for the drug legal limit exception does not require a third condition of requiring a BDC consistent with being under the limit at the time of driving. This is because, unlike alcohol, it is not possible to determine at what rate drugs are absorbed and eliminated from the body. As such, a driver who has consumed drugs would not be able to establish that the level of drugs in their blood was consistent with their consumption and with being under the prohibited BDC at the time of driving.

This limitation placed upon an “intervening drug” defence signifies the Government’s determination to deter drivers from consuming drugs in situations where they should reasonably expect to provide a blood sample. There is nothing in the legislation that shifts the burden of proving this defence to the accused. Where there is an air of reality to a claim that such innocent conduct has occurred, the Crown would then have the burden of disproving the “intervening drug” defence.

As noted in the *Charter* statement, “bolus drinking” and post-driving consumption that may obstruct the investigation of an over 80 BAC offence are both categories of reckless, morally culpable conduct. The same applies to bolus consumption of drugs or consuming drugs after driving where the person reasonably expects that there may be a demand for a blood sample to prove the BDC offence. Prohibiting this conduct serves the Government’s objective of combatting impaired driving and is a consideration to support the consistency of these provisions with the *Charter*.<sup>7</sup>

## 2.5 Scientific Foundation (Offences)

Detecting and proving impairment caused by drugs is different and more complex than detecting and proving impairment caused by alcohol. Alcohol is an exceedingly simple molecule with predictable impairing effects. Essentially, as alcohol is consumed, the BAC rises; the higher the BAC, the more profound the impairment and the greater the risk of a fatal accident. The same correlation does not exist for drugs, which have various impairing effects and impacts on driving behaviour. Alcohol is unique in its simplicity, and as such it is difficult to draw direct parallels between the criminal law approach to alcohol-impaired driving and drug-impaired driving. It is also unrealistic to expect that the tools used to investigate drug-impaired driving will operate in the same way as those available for alcohol where there is a known correlation between breath alcohol concentration and BAC.

It was recognized several times during Parliamentary consideration of this legislation that the science with respect to drugs is more complex than it is for alcohol. However, as the former Minister of Justice and Attorney General of Canada stated in her remarks before the Senate Standing Committee on Legal and Constitutional Affairs, “[it] would not be prudent to delay this initiative, in my view, in the hopes that science will provide different or new conclusions. We will continue to invest in and monitor scientific developments in this area and will be responsive to any changes.”<sup>8</sup>

There is no dispute that THC can impair the ability to drive. However, the relationship between the concentration of THC in the blood and degree of impairment is more complex than with alcohol. If cannabis is smoked, the THC level in the blood rapidly rises and then declines quickly as the THC redistributes to the fatty tissues (sometimes before smoking is finished). As the THC level drops, impairment can persist such that a person can be significantly impaired even though they have a low level of THC in their blood. If cannabis is ingested (e.g., as an edible food product), the level of THC increases and declines more slowly than if it is smoked. Further, in chronic or regular users (including medical users), detectable levels of THC can persist in the blood (often called a “body burden”) long after the impairing effects have worn off.

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<sup>7</sup> Department of Justice, *Charter Statement: Bill C-46, An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts* (11 May 2017), online: <<http://www.justice.gc.ca>> [Department of Justice].

<sup>8</sup> Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 42-1, No 34 (31 January 2018) (Hon Jody Wilson-Raybould) [Senate].

The Government receives scientific advice on alcohol and drug-impaired driving from two volunteer sub-committees of the CSFS: the Alcohol Test Committee (ATC) and the DDC. The DDC has produced a number of publicly available documents on drug-impaired driving. These include:

- The final report on Drug Per Se limits outlining considerations and recommendations for enacting criminal offences for driving over a prohibited BDC<sup>9</sup>;
- The Standards and Evaluation Procedures for oral fluid drug screening equipment which sets the requirements that drug screening equipment must meet before it can be recommended for use<sup>10</sup> ; and,
- Report on Drug Screening Equipment – Oral Fluid which provides general information about oral fluid drug screening equipment.<sup>11</sup>

### **2.5.1 Blood Drug Concentration Offences**

The BDC offence levels (commonly known as “per se” offences), including those for THC, are based, in part, on the report of the DDC. It should be noted that the DDC did not make a recommendation for THC levels; rather, they outlined the pros and cons of two possible approaches (2 ng THC/mL and 5 ng THC/mL), taking into consideration the scientific literature. The levels also take into account the approach taken in other jurisdictions, including in particular the jurisdictions where cannabis has been legalized. With respect to THC, the DDC report on Drug Per Se limits<sup>12</sup> indicates the following:

- THC impairs the ability to operate a motor vehicle; however, establishing a BDC level does not imply that all drivers below this limit are not impaired and that all drivers above this limit are impaired;
- Unlike alcohol, the effects of THC do not correlate well with THC blood concentrations;
- Impairment due to THC is related to the amount, route of administration, the time elapsed since use, and the inter-individual variability;
- THC is the most frequently encountered drug in Canadian drivers, after alcohol, and the two are often detected in combination in drivers; and,
- The 5 ng THC/mL BDC limit is based upon impairment considerations as this level of THC can be expected to be associated with recent use, while the 2 ng THC/mL BDC

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<sup>9</sup> CSFS Report, *supra* note 4.

<sup>10</sup> Canadian Society of Forensic Science Drugs and Driving Committee, *Drug Screening Equipment – Oral Fluid Standards and Evaluation Procedures* (November 2017), online: <<https://www.csfs.ca>> [CSFS Standards].

<sup>11</sup> Canadian Society of Forensic Science Drugs and Driving Committee, *Report on Drug Screening Equipment – Oral Fluid* (October 2018), online: <https://www.csfs.ca> [CSFS Oral Fluid].

<sup>12</sup> CSFS Report, *supra* note 4.

limit is based upon public safety considerations, although drivers may be impaired at this low level as well.

During her February 14, 2018 appearance before the Senate Standing Committee on Legal and Constitutional Affairs, the Chair of the DDC, Dr. Amy Peaire, testified that given the wide variety of drugs that can impair individuals in different ways, “we must be careful not to try to oversimplify drug-impaired driving by expecting it to be directly analogous to alcohol-impaired driving, or by considering all drugs as a single category”. Dr. Peaire also testified that while the link between THC blood concentrations and impairment is not straightforward, the largest link is “between the presence of THC in the body and impairment”. She further indicated that higher concentrations of THC are generally linked to more recent use and the more recently cannabis has been used, the more likely the individual is to be impaired.<sup>13</sup>

### **3. INVESTIGATIVE MATTERS**

#### **3.1 Approved Drug Screening Equipment / Oral Fluid Drug Screeners (subsection 254(2))**

Subsection 254(2) authorizes an officer who has a reasonable suspicion that the driver has drugs in their body, to demand a standardized field sobriety test (SFST) test and/or a test on an ADSE. At this time, ADSE is limited to oral fluid drug screeners, but the legislation has been worded more broadly so that, as other technology becomes available, new equipment could be approved by the Attorney General of Canada without requiring a legislative amendment.

Oral fluid drug screeners indicate the presence of drugs in the oral fluid of a subject. If the oral fluid screener provides a positive result for any of the drugs for which it is approved at the side of the road, it will, in combination with the observations of the officer that led to the ADSE demand, assist in developing reasonable grounds to believe that either a drug-impaired driving offence or a BDC offence has been committed which is the standard that must be met before an officer may demand either a drug recognition evaluation (DRE) or a blood sample or both.

Although drug screening technology may have a weaker link to BDC than alcohol screening has to BAC, the link is nevertheless strong enough to support the use of this technology in assisting police officers to determine whether there are grounds to make a demand for DRE and/or a blood sample.

The Oral Fluid Standards and Evaluation Procedures<sup>14</sup> developed by the DDC have set the drug screening cut-off levels at: 25 ng of THC/mL of oral fluid; 50 ng of cocaine/mL of oral fluid; and 50 ng of methamphetamine/mL of oral fluid. As an oral fluid drug screener only indicates presence at these levels, the person could have concentrations in oral fluid well above the m. These levels are intended to maximize the likelihood that the drugs found are the result of

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<sup>13</sup> Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 42-1, No 36 (14 February 2018) (Dr. Amy Peaire) [Paire].

<sup>14</sup> CSFS Standards, *supra* note 10.

recent consumption, and therefore that the drugs will be found in the blood above the prohibited levels.<sup>15</sup>

With respect to THC, the impairing effects of cannabis are closely linked to how recently the substance has been consumed. There is general scientific agreement that THC in the oral fluid is caused by contamination from recent smoking or consumption of a THC-infused edible. Therefore, if the ADSE indicates that a driver has THC in their oral fluid at the cut-off level of 25 ng, it is likely that they have recently consumed cannabis, that there will be THC in their blood, and that the driver may be above the proscribed BDC.

The prohibited BDC levels for methamphetamine and cocaine are set at any detectable level. Therefore, it is highly probable that a positive screen on the oral fluid drug screener will result in a finding of those drugs in the blood.

Therefore, it is expected that the information that gives the officer reasonable suspicion that a driver has drugs in their body, combined with a positive result on the oral fluid drug screener, will assist in developing reasonable grounds to believe that a drug-impaired or a BDC offence has been committed, which will permit them to move the investigation forward, either to a blood sample or a DRE or both.

Like the approved screening devices (ASD) and the approved instruments (AI), which test for alcohol, the ADSEs will only be approved for use by the Attorney General of Canada by Ministerial Order, following a recommendation by the DDC that a particular screener meets their standards and is suitable for use by law enforcement.

The provisions do not preclude the administration of more than one of the roadside screening tests, in appropriate circumstances. As indicated in the *Charter* Statement, there are a number of considerations that 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.<sup>16</sup>

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<sup>15</sup> CSFS Oral Fluid, *supra* note 11.

<sup>16</sup> Department of Justice, *supra* note 7.

### 3.1.1 International Experience

Oral fluid drug screeners are widely used in other jurisdictions, including in the UK and Australia.

In 2017, the UK released a study of the first year of its new drug driving framework, which contains similar measures (i.e., they prohibit driving with 2 ng of THC/mL of blood and authorize police officers to use drug screeners). In addition, the UK legislation provides that an officer can demand a blood sample if, based on the results of the oral fluid drug screener they have reasonable grounds to believe (called reasonable cause) that a driver has a drug in their body. Therefore, in practice, a positive result on the oral fluid drug screener leads directly to a blood sample. The study indicated that, in the first year following the implementation of this legislation, in 70% of the 4,292 cases where a blood sample was taken after a positive oral fluid screen, the blood sample was over the 2 ng THC/mL limit.<sup>17</sup> The detection threshold on the drug screeners in the UK is set at 10 ng THC/mL of oral fluid, which is lower than the 25 ng threshold required by the DDC.

### 3.1.2. Scientific Foundation (Drug Screeners)

The DDC has adopted and endorsed the conclusions of an assessment of oral fluid drug screeners published online in the Canadian Society of Forensic Science Journal in 2016. Based on this report, the DDC has advised that oral fluid drug screeners could be a valuable tool in the detection of driver drug use in Canada.<sup>18</sup>

They employ immunoassay-based technology to identify target drugs in oral fluid (immunoassay technology is widely used in home pregnancy tests). The drug screeners detect presence (essentially a “yes” or “no” answer) of select impairing drugs, including THC, in oral fluid. However, unlike the ASD for alcohol, oral fluid drug screeners are unable to provide direct evidence of the level of drugs in the blood, nor do they provide evidence that the driver is impaired.

Due to the nature of immunoassay-based technology, the new legislation does not provide that the result on an oral fluid drug screener can form the basis of a criminal charge. Instead, a positive result would only provide the police officer with information that is highly suggestive that the driver recently consumed cannabis. Most cannabis users would not be expected to test positive on an oral fluid drug screener four hours after cannabis use

### 3.2 Demands for a Drug Recognition Evaluation (DRE) (paragraph 254(3.1)(a))

The law relating to a DRE is essentially unchanged, although there have been some modifications to clarify and strengthen the process.

Subsection 254(3.4) provides the power for an evaluating officer to demand a bodily sample if they have reasonable grounds to believe the person’s ability to operate a motor vehicle is

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<sup>17</sup> Risk Solutions, *Evaluation of the new drug driving legislation, one year after its introduction* (April 2017), online: Department of Transport [www.gov.uk/dft](http://www.gov.uk/dft) [UK Department of Transport].

<sup>18</sup> Doug Beirness & D’Arcy Smith, “An assessment of oral fluid drug screening devices” (2016) 50 Canadian Society of Forensic Science Journal at 55 [Beirness].

impaired based on a DRE. Under the previous law, the reasonable grounds to believe that the person's ability to operate a motor vehicle was impaired had to be developed "based on the evaluation". The words "based on the evaluation" have been removed from subsection 254(3.4) to ensure that the evaluating officer can use all of their observations, not just those specifically related to the DRE steps, when determining whether or not they have grounds to demand a bodily sample. For example, if the person is constantly twitching, that may indicate they are under the influence of a stimulant, although it may not necessarily relate to any of the prescribed DRE steps.

There is also a new power (subsection 254(3.3)) for an evaluating officer to demand a breath sample by means of an AI if this demand has not already been made during the investigation. This change addresses a challenge encountered under the previous legislation where an AI demand could not be made if there had already been an ASD demand. For example, in some jurisdictions a "WARN" on an ASD indicates that the person has a BAC of 50 to 99 milligrams (mg)/100 mg of blood but the ASD result cannot be used in court to prove BAC. Where the evaluating officer believes that alcohol is a factor, it is essential that there be an AI analysis to prove the person's BAC. Even a low BAC combined with another drug, particularly THC, can produce impairment.

### **3.3 Demands for Blood by Investigating Officer (paragraph 254(3.1)(b))**

Under the previous law, only evaluating officers were authorized to demand a bodily sample (including a blood sample) following a DRE. Now, paragraph 254(3.1)(b) authorizes any police officer who has reasonable grounds to believe a drug-impaired driving offence or a BDC offence has occurred to demand a sample of blood instead of demanding a DRE.

This change will facilitate the timely collection of blood samples, which is the only way to prove a BDC offence. Since levels of a drug in the bloodstream can decline rapidly after consumption, particularly for smoked cannabis, obtaining a blood sample in a timely manner is critical to proving these offences. As soon as an officer has developed reasonable grounds to believe that an offence has been committed, the officer should demand and obtain a blood sample. The delays associated with the DRE process would make it impossible in many cases to obtain the blood sample within two hours of driving. Further, these delays cannot be compensated for by back calculating the rate at which the BDC declines, because, unlike alcohol, rates at which drugs are eliminated from the body vary widely and are based on a number of variables. These considerations were cited in the *Charter* statement as supporting the consistency with the *Charter*.<sup>19</sup>

### **3.4 Persons Qualified to take Blood Samples (paragraph 254(3.1)(b))**

Under the previous law, only medical practitioners (i.e., medical doctors) or those operating under the direct supervision were permitted to draw blood pursuant to a police demand. As drawing blood in a timely manner is critical to preserving the evidence, in particular for the BDC offences, paragraph 254(3.1)(b) has been amended to permit a qualified blood technician to take blood in ordinary cases without requiring the supervision of a doctor. Qualified blood

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<sup>19</sup> Department of Justice, *supra* note 7.

technicians are to be designated by the provincial attorneys general and are only authorized to take blood if they believe that there is no danger to the person's health. Requiring the oversight of a doctor is a time-consuming process, which often involves transporting a suspected drug-impaired driver to a hospital.

#### **4. EVIDENTIARY MATTERS**

##### **4.1 Admissibility of Evaluating Officer's Opinion (subsection 254(3.5))**

The legislation has been clarified to ensure that the evidence of an evaluating officer conducting the DRE is admissible at trial, without first qualifying the evaluating officer as an expert. This clarification reflects the confidence that Parliament has in the specially trained evaluating officers. It also reflects the Supreme Court of Canada's decision in *R v Bingley*,<sup>20</sup> which held that the opinion evidence of an evaluation officer is admissible without first qualifying them through an expert witness hearing.

##### **4.2 Presumption in DRE Cases (subsection 254(3.6))**

Currently, some courts are reluctant to make the link between the results on a toxicological sample in a DRE case and the observed impairment by the arresting officer. The law has been changed to enact a presumption in the DRE context to draw the inferential link between the presence of drugs identified by the DRE as causing impairment at the time of the evaluation and the impairment observed at the time of driving. Subsection 254(3.6) provides that, if an evaluating officer identifies a type of drug as being in the system of a person and causing impairment and a drug of that type is confirmed by testing the bodily sample in a laboratory, it is presumed that the drug was also present in the person's body at the time when they were operating the conveyance and the drug caused the signs of impairment observed by the peace officer at the roadside.

The presumption can be rebutted by the accused if they raise a reasonable doubt, for example, by presenting evidence that the signs of impairment could have been caused by something other than the drug.

As indicated in the *Charter* Statement, there are a number of considerations that support 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.<sup>21</sup>

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<sup>20</sup> [2017] 1 SCR 170, 2017 SCC 12 [*Bingley*].

<sup>21</sup> Department of Justice, *supra* note 7.

## **PART 2 – PART VIII.1 OF THE *CRIMINAL CODE***

The following changes to the law came into force on December 18, 2018. At that point, the transportation regime in the *Criminal Code* was repealed and replaced with the provisions in Part 2 of the Act. This section of the Backgrounder explains the changes that now form Part VIII.1 of the *Criminal Code*.

### **1. PREAMBLE AND PRINCIPLES**

The Preamble sets out nine considerations that motivate the reforms, including that:

- dangerous and impaired driving injure or kill thousands of people in Canada every year;
- dangerous and impaired driving are unacceptable at all times and in all circumstances;
- it is important to deter persons from driving while impaired by alcohol or drugs;
- it is important to give law enforcement better tools to detect impaired drivers;
- it is important to simplify the law relating to proving BAC;
- it is important to deter persons from consuming alcohol or drugs after driving in circumstances where they have a reasonable expectation they will be required to provide a breath or blood sample;
- it is important to protect the public from those who consume large amounts of alcohol before driving;
- it is important that federal and provincial laws work together to promote safety; and
- the Parliament of Canada is committed to adopting a precautionary approach in relation to driving and the consumption of drugs.

The Preamble is intended to be read as part of the Bill and to assist in explaining its purpose and objectives, but it does not form part of the consolidated *Criminal Code*.<sup>22</sup>

The Principles are found at section 320.12 (Recognition and Declaration). They are declaratory statements, which form part of the *Criminal Code*, and are intended to act as an interpretative tool for the reforms.

One of the key stated principles is that driving is a privilege. Although everyone who meets provincial standards regarding age, health, and knowledge of the rules of the road and passes a driving test is eligible for a driver's licence, the privilege of driving is subject to the driver respecting provincial highway traffic laws, as well as federal and provincial laws with respect to alcohol and drug use and sobriety.

This particular principle reflects one of the recommendations of the 2009 Standing Committee on Justice and Human Rights entitled, "Ending Alcohol-Impaired Driving: A Common Approach", which stated, "Parliament has the ability to provide principles to guide the courts when they are

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<sup>22</sup> Interpretation Act, *supra* note 3.

applying the *Criminal Code* provisions related to impaired driving. A statement of principles might start by emphasizing that driving is a privilege and not a right.”<sup>23</sup>

Other principles emphasize that dangerous and impaired driving threatens the health and safety of all Canadians, and that addressing these issues is in the interest of public safety. Finally, the principles relating to breath-testing and DREs reflect the confidence that Parliament has in the underlying science of these testing regimes.

## 2. DEFINITIONS

Many of the definitions in Part VIII.1 are similar to the definitions in the previous law. The definitions of “**analyst**”, “**approved instrument**”, “**approved screening device**”, “**evaluating officer**”, “**qualified medical practitioner**”, and “**qualified technician**” are re-enacted.

It should be noted that there is a change in the French definition of “approved instrument”. The terminology of “**alcootest approuvé**” has been replaced by “**éthylomètre approuvé**”, which is the more commonly-used term in Francophone countries.

There is a new definition of “**approved drug screening equipment**” that will include oral fluid drug screeners, but is broad enough to permit the Attorney General of Canada to approve other types of drug screening equipment as technology in this area evolves.

The term “**conveyance**” has been chosen to refer to any motor vehicle, vessel, aircraft or railway equipment. The placement of “conveyance” in the definition section 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”) appear, they signal to the courts that they must indicate which particular conveyance is implicated in that provision.<sup>24</sup>

The definition of “**operate**” includes the concept of “care or control”, which is taken from the impaired driving offences. Consequently, “operate a conveyance” in the offence provisions eliminates unnecessary repetition and simplifies the provisions.<sup>25</sup>

The definition of “**approved container**” no longer refers to a container suitable for the purposes of receiving a breath sample. It was enacted along with a provision to provide a person a sample of their breath for independent analysis in the anticipation that such a container could be developed, but none was ever found to be practical. The provision for a second sample in a breath container was never proclaimed and was repealed in 2010.

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<sup>23</sup> House of Commons, Standing Committee on Justice and Human Rights, *Ending Alcohol-Impaired Driving: A Common Approach* (June 2009) at 24 (Chair: Ed Fast) [House of Commons].

<sup>24</sup> Subsection 320.36(2) lists the modes of conveyance. This is the result of an amendment at the Standing Committee on Justice and Human Rights.

<sup>25</sup> For example, the former subsection 249(1) dangerous driving offence has 224 words, while the new offence, subsection 320.13(1), is reduced to 24 words.

### 3. OFFENCES

Part VIII.1 aims to simplify the offence provisions by eliminating unnecessary offences<sup>26</sup> and clarifying some elements of other offences. There are now ten simpler<sup>27</sup> offences, seven offences of causing bodily harm (CBH), and seven offences of causing death (CD) (see chart in Annex 1):

- Dangerous operation of a conveyance (CBH and CD) (section 320.13);
- Operating a conveyance while impaired by alcohol or a drug or a combination of alcohol and a drug (CBH and CD) (paragraph 320.14(1)(a), and subsections 320.14(2) and (3));
- Having a BAC of 80 mg or more within two hours of driving (CBH and CD) (paragraph 320.14(1)(b), and subsections 320.14(2) and (3));
- Having a prohibited blood drug concentration (BDC) within two hours of driving (CBH and CD) (paragraph 320.14(1)(c), and subsections 320.14 (2) and (3))
- Having a prohibited BAC and BDC in combination within two hours of driving (CBH and CD) (paragraph 320.14 (1)(d), and subsections 320.14 (2) and (3));
- Having a prohibited BDC that is lower than the BDC set under paragraph 320.14(1)(c) (subsection 320.14(4));
- Refusing to comply with a demand (CBH and CD) (section 320.15);
- Failure to stop after an accident (CBH and CD) (section 320.16);
- Flight from a peace officer (section 320.17); and,
- Operating a conveyance while prohibited (section 320.18).

#### 3.1 Dangerous Operation of a Conveyance (section 320.13)

The offence of dangerous operation is re-enacted and amended to use modernized and simplified drafting. For example, the term “conveyance” replaces the many modes of transportation which can be used to commit the offence of dangerous driving (i.e., vessel, aircraft, railway equipment and motor vehicle). In determining whether the driving is dangerous, all of the circumstances must be considered, including those that were enumerated in the prior dangerous driving offence provision (e.g., the nature, condition and use of the place at which the motor vehicle is being operated (former section 249)).

The aggravated offences of dangerous operation causing bodily harm and death are also re-enacted.

The penalty provisions for these offences are re-enacted in separate sections (320.19, 320.2, and 320.21), which consolidate all penalties for transportation offences. Mandatory minimum penalties will now apply to the aggravated offences of dangerous driving causing bodily harm and dangerous driving causing death (\$1,000 fine for a first offence; 30 days imprisonment for a second offence, and 120 days imprisonment for a third or subsequent offence). This will result in conditional or absolute discharges no longer being possible for these offences.

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<sup>26</sup> Many of the offences that are being removed are covered by other offences, for example, the offence of dangerous driving while street racing will be subsumed into the dangerous driving offence.

<sup>27</sup> Offences where no one is hurt or killed.

### **3.2 Operating a Conveyance while Impaired (paragraph 320.14(1)(a))**

The offence of operating a conveyance while impaired (paragraph 320.14(1)(a)) is re-enacted with a change in the wording of the offence. The new provision makes it clear that it is an offence to operate a conveyance if a person's ability is impaired "to any degree". It is the intent of Parliament that no person should drive while impaired even slightly. This represents the current law;<sup>28</sup> however, codifying this element eliminates any potential confusion regarding this issue in the future.

The aggravated offences of impaired operation causing bodily harm and death are also re-enacted (subsection 320.14(2) and (3)), however, the causation element has been changed. Previously, there must have been proof that the impairment was a contributing cause of the injury or death. The new aggravated offences will require proof that the driver was impaired, and that the driver caused the bodily harm or death of another person. There is no requirement that the impairment be a contributing cause of the injury or death.

### **3.3 Having a BAC of 80 mg of alcohol/100 mL of blood or more Within Two Hours of Driving (paragraph 320.14(1)(b))**

The offence of operating a conveyance with a prohibited BAC has been re-enacted, with two key changes. Despite these changes, the overall policy objective is the same and the jurisprudence with respect to the unchanged elements of the offence will continue to apply.

First, the threshold at which the offence can be committed has been changed from "over 80 mg" to "equal to or exceeding 80 mg" so that a person who has a BAC of exactly 80 mg could be charged. This new formulation responds to a problem in a small number of cases caused by the practice of truncation (i.e., rounding down) of BAC results.<sup>29</sup> For example, when a person has a BAC reading of 101 mg of alcohol/100 mL of blood and 89 mg of alcohol/100 mL of blood on an AI, they might not have been charged, as the lower reading would be rounded down to 80 mg/100 mL.

Truncation is a mechanism used to address any potential variability in the results of the AI, and is a practice that is recommended by the ATC of the CSFS – the Government's scientific advisor on issues of breath testing to prove BAC.

Second, the timeframe in which the offence can be committed has been changed. Instead of being over the proscribed BAC limit at the time of driving, the new formulation is being at or over the proscribed BAC limit "within two hours". This formulation serves to eliminate the "bolus drinking" defence and limit the "intervening drink" defence.

As indicated in the *Charter* Statement,<sup>30</sup> there are a number of considerations that support the consistency of this section with the *Charter*. The criminalization of "bolus drinking" and drinking that may obstruct an investigation captures two categories of reckless and morally culpable driving. The exception and definition of the offence ensures that dangerous conduct is captured,

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<sup>28</sup> *R v Stellato*, [1994] 2 SCR 478.

<sup>29</sup> A practice which is reflected in paragraph 320.31(1)(c).

<sup>30</sup> Department of Justice, *supra* note 7.

while innocent consumption after driving is not. This serves the Government's objective of combatting impaired driving.

### **3.3.1 Eliminating the Bolus Drinking Defence**

In the "bolus drinking" defence, the driver admits that their BAC was "over 80" at the time of testing. However, they claim to have consumed a significant amount of alcohol just before or while driving such that the alcohol was still being absorbed and, at the time of driving, they were not "over 80".

Eliminating the "bolus drinking" defence is consistent with the comments of the Supreme Court of Canada in *R v St-Onge Lamoureux*<sup>31</sup> where they indicated that such a defence showed "significant irresponsibility with regard to public safety or a pathological reaction by the accused."

This approach is taken in many American states and it has been consistently upheld by American 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".<sup>32</sup>

### **3.3.2 Limiting the Intervening Drink Defence and the "Innocent" Intervening Drink (subsection 320.14(5))**

As indicated, this formulation also significantly limits the "intervening drink" defence. This defence arises when the driver claims to have consumed alcohol after operating the vehicle but before testing. This often occurs after an accident, where the driver claims to have taken the drink or drinks to calm his or her nerves prior to the arrival of police. This undermines the integrity of the justice system as it rewards conduct specifically aimed at frustrating the breath testing process.

However, as there are situations where the "intervening drink" defence could involve innocent conduct, the legislation contains an exemption to the offence of "at or over 80" in subsection 320.14(5). It is a defence to the charge if the following conditions are met:

- 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,
- The person's alcohol consumption is consistent with their BAC both at the time the samples were taken and with their having had a BAC of less than 80 at the time of operation.

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<sup>31</sup> [2012] 3 SCR 187 at para 90, 2012 SCC 57 [*St-Onge*].

<sup>32</sup> *United States v Skinner*, 973 F Supp 975 (WD Wash 1997).

This limitation placed upon the “intervening drink” defence signifies Parliament’s intent to deter drivers from drinking in situations where they should reasonably expect to provide a sample for analysis.

Situations in which a person would have “a reasonable expectation” that they would be required to provide a sample will be decided by the courts on a case-by-case basis. For example, a person involved in a serious collision could be found to reasonably expect to be required to provide a sample. However, a person who came home from work safely, without incident, was sober, and had a few drinks after arriving, would likely not have a reasonable expectation that the police would be investigating an impaired driving offence. Where there is an air of reality to a claim that such innocent conduct has occurred, the Crown would then have the burden of disproving the “intervening drink” defence.

This limitation is consistent with the Supreme Court of Canada jurisprudence 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.”<sup>33</sup> For this defence to succeed, the expectation of not having to provide a sample must be reasonable.

### **3.4 New Blood Drug Concentration (BDC) Offences<sup>34</sup>**

Part VIII.1 contains three new offences of having a BDC at or above a prescribed limit for that drug within two hours of driving. Two of the offences are hybrid, and one is straight summary conviction.

These new offences are similar in structure to the new “at or over 80” alcohol offence in that the offences are committed within two hours of driving. Similar to the alcohol context, this two-hour timeframe guards against the conduct of consuming impairing drugs immediately before driving, as well as consuming drugs after driving in order to frustrate the testing process.

The Act authorizes the Governor in Council to set the BDC limits by regulation.<sup>35</sup> This approach is consistent with the approach used in other jurisdictions, including in the UK. It allows for a more flexible and prompt response to the evolving science with respect to drug impairment than having to amend the *Criminal Code* whenever a change is proposed. The current BDC levels have been set based in part on the advice of the DDC of the CSFS.<sup>36</sup>

The jurisprudence relating to the elements of the “over 80” offence is relevant in interpreting these new offences, with any necessary modification to reflect the context of drugs.

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<sup>33</sup> *St-Onge*, *supra* note 31 at para 90 quoting *R v St. Pierre*, [1995] 1 SCR 791 at para 106.

<sup>34</sup> Part 2 repeals and replaces the entire transportation regime, including the drug-impaired driving provisions from Part 1. As such, the paragraphs in Part 2 of this Backgrounder pertaining to drug-impaired driving are a repeat of the paragraphs in Part 1.

<sup>35</sup> *Blood Drug Concentration* Regulations, SOR/2018-149.

<sup>36</sup> CSFS Report, *supra* note 4.

### 3.4.1. Having a Prohibited BDC within Two Hours of Driving (paragraph 320.14(1)(c))

The prohibited drugs levels have been set by regulation as follows:

Drug	Prohibited Blood Drug Concentration
Tetrahydrocannabinol (THC)	5 ng THC/mL of blood
Lysergic acid diethylamide (LSD)	Any detectable level
Psilocybin	Any detectable level
Psilocin	Any detectable level
Phencyclidine (PCP)	Any detectable level
6-Monoacetylmorphine	Any detectable level
Ketamine	Any detectable level
Cocaine	Any detectable level
Gamma hydroxybutyrate (GHB)	5 mg GHB/L of blood
Methamphetamine	Any detectable level

The DDC did not specifically make a recommendation with respect to THC. Rather it outlined the pros and cons of two different BDC levels that have been used recently in other jurisdictions. The regulation adopts the 5 ng / mL concentration as it is a level that is associated with recent consumption and some impairment and can be expected to be at or above that level in the blood.

The levels for Lysergic acid diethylamide (LSD), Psilocybin, Psilocin, Phencyclidine (PCP), 6- Monoacetylmorphine, and Ketamine were recommended by the DDC to be set at “any detectable level”. This reflects the evidence that any level of these drugs in the body is incompatible with safe driving.

The levels for Gamma hydroxybutyrate (GHB), cocaine, and methamphetamine are lower than the levels that were recommended by the DDC. These are illicit and impairing drugs and it is not in the interest of public safety for drivers to have these drugs in their body when they are driving. The level for GHB takes into consideration that the human body can naturally produce GHB at low levels.

Several jurisdictions have established BDC limits while driving, including the UK that has limits for 16 drugs, and Norway that has limits for 20 drugs. Both of these countries have set prohibited levels for THC. The new approach to drug-impaired driving is consistent with that

of other international jurisdictions that have enacted BDC levels for THC and other drugs. In Colorado, the legal limit of 5 ng THC/mL of blood leads to a permissible inference of impairment, whereas in Washington, 5 ng THC/mL of blood is sufficient on its own for a conviction. As indicated, the UK prohibits driving with 2 ng THC or more/mL of blood and Australia prohibits driving with any THC in the body, (proven through oral fluid), although cannabis remains prohibited in both jurisdictions. Norway has graduated sanctions starting at 1.3 ng/mL of blood. It should be noted that the UK government prohibited BDC for many drugs at lower concentrations than those which were recommended by their expert scientific expert panel (The Wolff Report, 2013). For example, the UK expert panel recommended 5 ng THC/mL and the UK Government enacted a 2 ng THC/mL level.<sup>37</sup>

Aggravated offences of having a prohibited BDC causing bodily harm and death have been re-enacted (subsections 320.14(2) and (3)).

**3.4.2. Having a Prohibited BDC that is Lower than the BDC set under paragraph 320.14(1)(c) (subsection 320.14(4))**

This is a straight summary conviction offence for having between 2 and 5 ng THC/mL of blood. There are no aggravating offences of being over the prohibited level in situations involving bodily harm or death. At this time, only THC is the subject of a prohibited BDC level for this offence.

Drug	Prohibited Blood Drug Concentration
THC	2 ng THC/mL or more of blood, but less than 5 ng THC/mL of blood

The level of THC in this offence is based on a number of considerations, but primarily on a precautionary approach. It recognizes that THC is an impairing drug but that setting BDC limits for THC is more complex than for alcohol. It is also based on the understanding that it is not possible to simply overlay the criminal approach to alcohol-impaired driving on the drug-impaired driving regime.

Practitioners should be aware that there is strong evidence of an increasing trend of drug-impaired driving in Canada<sup>38</sup>, and the risk of a further increase following the legalization and regulation of cannabis. The legislative approach with respect to low levels of THC reflects the fact that the scientific literature is unable to provide definitive guidance with respect to what level of THC, if any, can be considered safe, and therefore Parliament has considered that the best approach at this time is to take a precautionary approach and to set a low limit.

<sup>37</sup> K Wolff, *supra* note 5.

<sup>38</sup> See Solomon and Keighley, *supra* note 6.

### 3.4.3. Having a Prohibited BAC and BDC in Combination Within Two Hours of Driving (paragraph 320.14(1)(d))

This is a hybrid offence of operating a conveyance with a combined BAC and BDC that is equal to or exceeds the limit prescribed by regulation for the combination of alcohol with that drug.

This offence recognizes that, although individuals may have a BAC or BDC that does not reach the prohibited hybrid offence level for each substance on their own, when the substances are combined – even at low levels – the impairing effects are magnified. At present, the regulation only sets levels for a combination of alcohol and THC. It is known that alcohol and THC are often found in combination in drivers and the impairing effect of this combination, even in relatively low levels, is more impairing than either substance alone.

Drug in Combination with Alcohol	Prohibited Concentrations
THC	2.5 ng THC or more/mL of blood in combination with 50 mg of alcohol/100 mL of blood

### 3.4.4 Limiting the Intervening Drug Defence and the “Innocent” Intervening Exception (subsection 320.14(6))

The legislation enacts an “innocent intervening drug” defence to avoid criminalizing individuals who consume the impairing drugs after driving, but before blood testing in “innocent” situations. It would be a defence to the charge if the following conditions are met:

- The person consumed a drug after ceasing to operate the conveyance; and
- The person had no reasonable expectation that they would be required to provide a sample of blood.

Unlike the criteria for the “innocent intervening drink”, the criteria for the drug legal limit exception does not require a third condition of requiring a BDC consistent with being under the limit at the time of driving. This is because, unlike alcohol, it is not possible to determine at what rate drugs are absorbed and eliminated from the body. As such, a driver who has consumed drugs would not be able to establish that the level of drugs in their blood was consistent with their consumption and with being under the prohibited BDC at the time of driving.

This limitation placed upon an “intervening drug” defence signifies the Government’s determination to deter drivers from consuming drugs in situations where they should reasonably expect to provide a blood sample. There is nothing in the legislation that shifts the burden of proving this defence to the accused. Where there is an air of reality to a claim such innocent conduct has occurred, the Crown would then have the burden of disproving the “intervening drug” defence.

As noted in the *Charter* statement, “bolus drinking” and post-driving consumption that may obstruct the investigation of an over 80 BAC offence are both categories of reckless, morally

culpable conduct. The same applies to bolus consumption of drugs or consuming drugs after driving where the person reasonably expects that there may be a demand for a blood sample to prove the BDC offence. Prohibiting this conduct serves the Government's objective of combatting impaired driving and is a consideration to support the consistency of these provisions with the *Charter*.<sup>39</sup>

### 3.4.5 Scientific Foundation (Offences)

Detecting and proving impairment caused by drugs is different and more complex than detecting and proving impairment caused by alcohol. Alcohol is an exceedingly simple molecule with predictable impairing effects. Essentially, as alcohol is consumed, the BAC rises; the higher the BAC, the more profound the impairment and the greater the risk of a fatal accident. The same correlation does not exist for drugs, which have various impairing effects and impacts on driving behaviour. Alcohol is unique in its simplicity, and as such it is difficult to draw direct parallels between the criminal law approach to alcohol-impaired driving and drug-impaired driving. It is also unrealistic to expect that the tools used to investigate drug-impaired driving will operate in the same way as those available for alcohol where there is a known correlation between breath alcohol concentration and BAC.

It was recognized several times during Parliamentary consideration of this Act that the science with respect to drugs is more complex than it is for alcohol. However, as the Minister of Justice and Attorney General of Canada stated in her remarks before the Senate Standing Committee on Legal and Constitutional Affairs, "[it] would not be prudent to delay this initiative, in my view, in the hopes that science will provide different or new conclusions. We will continue to invest in and monitor scientific developments in this area and will be responsive to any changes."<sup>40</sup>

There is no dispute that THC can impair the ability to drive. However, the relationship between the concentration of THC in the blood and degree of impairment is more complex than with alcohol. If cannabis is smoked, the THC level in the blood rapidly rises and then declines quickly as the THC redistributes to the fatty tissues (sometimes before smoking is finished). As the THC level drops, impairment can persist such that a person can be significantly impaired even though they have a low level of THC in their blood. If cannabis is ingested (e.g., as an edible food product), the level of THC increases and declines more slowly than if it is smoked. Further, in chronic or regular users (including medical users), detectable levels of THC can persist in the blood (often called a "body burden") long after the impairing effects have worn off.

The Government receives scientific advice on alcohol and drug-impaired driving from two volunteer sub-committees of the CSFS: the ATC and the DDC. The DDC has produced a number of publicly available documents on drug-impaired driving. These include:

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<sup>39</sup> Department of Justice, *supra* note 7.

<sup>40</sup> Senate, *supra* note 8.

- The final report on Drug Per Se limits outlining considerations and recommendations for enacting criminal offences for driving over a prohibited BDC<sup>41</sup>; and ,
- The Standards and Evaluation Procedures for oral fluid drug screening equipment which sets the requirements that drug screening equipment must meet before it can be recommended for use<sup>42</sup> ; and,
- Report on Drug Screening Equipment – Oral Fluid which provides general information about oral fluid drug screening equipment.<sup>43</sup>

The BDC offence levels (commonly known as “per se” offences), including those for THC, are based, in part, on the report of the DDC. It should be noted that the DDC did not make a recommendation for THC levels; rather, they outlined the pros and cons of two possible approaches (2ng THC/mL and 5ng THC/mL), taking into consideration the scientific literature. The levels also take into account the approach taken in other jurisdictions, including in particular the jurisdictions where cannabis has been legalized. With respect to THC, the Executive Summary of the final DDC report on Drug Per Se limits<sup>44</sup> indicates the following:

- THC impairs the ability to operate a motor vehicle; however, establishing a BDC level does not imply that all drivers below this limit are not impaired and that all drivers above this limit are impaired;
- Unlike alcohol, the effects of THC do not correlate well with THC blood concentrations;
- Impairment due to THC is related to the amount, route of administration, the time elapsed since use, and the inter-individual variability;
- THC is the most frequently encountered drug in Canadian drivers, after alcohol, and the two are often detected in combination in drivers; and,
- The 5 ng THC/mL BDC limit is based upon impairment considerations as this level of THC can be expected to be associated with recent use, while the 2 ng THC/mL BDC limit is based upon public safety considerations, although drivers may be impaired at this low level as well.

During her February 14, 2018 appearance before the Senate Standing Committee on Legal and Constitutional Affairs, the Chair of the DDC, Dr. Amy Peaire, testified that given the wide variety of drugs that can impair individuals in different ways, “we must be careful not to try to oversimplify drug-impaired driving by expecting it to be directly analogous to alcohol-impaired driving, or by considering all drugs as a single category”. Dr. Peaire also testified that while the link between THC blood concentrations and impairment is not straightforward, the largest link is

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<sup>41</sup> CSFS Report, *supra* note 4.

<sup>42</sup> CSFS Standards, *supra* note 10.

<sup>43</sup> CSFS Oral Fluid, *supra* note 11.

<sup>44</sup> CSFS Report, *supra* note 4.

“between the presence of THC in the body and impairment”. She further indicated that higher concentrations of THC are generally linked to more recent use and the more recently cannabis has been used, the more likely the individual is to be impaired.<sup>45</sup>

### **3.5 Fail or Refuse to Comply with a Demand (subsection 320.15(1))**

The offence of failing or refusing to comply with a demand has been re-enacted. The aggravated offences of refusing to comply with a demand in situations of bodily harm and death are now in the same section. Under the previous regime, these offences were found in several different subsections of the impaired driving provisions.

There are a number of key changes to the elements of these offences. The simpliciter offence has been amended to clarify the necessary fault element for proof of the offence. Previously, the offence of failure or refusal to comply with a demand did not state the necessary mental fault element required for conviction. The provision now provides that knowledge that the demand had been made is sufficient to prove the mental element.<sup>46</sup>

The offences of refusing to comply in cases involving bodily harm and death have also been amended (subsections 320.15(2) and (3)). The objective element of “ought to know” has been replaced with the subjective fault element of “recklessness” in relation to the consequences of the accident. This will require the prosecution to prove that an accused who failed or refused to provide a sample either knew they had been involved in an accident where there had been bodily harm or a death, or they were reckless as to whether they had been.

Recklessness is a well-recognized standard for criminal intention. In several cases, the Supreme Court of Canada has confirmed that recklessness is a subjective standard,<sup>47</sup> meaning that the accused must have perceived a significant risk and proceeded in the face of that risk.

The element that the driver must have “caused” the accident that resulted in bodily harm or death has been changed so that the driver must only have been “involved” in an accident. This removes the challenge for the police of determining who caused the accident, which may not always be readily apparent, especially at the scene of a traffic accident with injuries or deaths.

The provision that a person cannot be charged with more than one offence for this conduct, if they refuse several times in the course of the same investigation, has been re-enacted.

### **3.6 Failure to Stop After an Accident (subsection 320.16(1))**

The offence of leaving the scene of an accident has been re-enacted, but with a few key changes. The offence now clearly articulates the required fault elements for proof of this offence: the driver must know or be reckless as to whether or not they were involved in an accident before they could be convicted of leaving the scene of an accident. Additionally, the requirement that the Crown must prove that a driver who leaves the scene of an accident did so

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<sup>45</sup> Dr. Amy Peaire, *supra* note 13.

<sup>46</sup> These changes should be read in conjunction with the recent repeal of subsection 794(2) of the *Criminal Code* in S.C., 2018, c. 29. Subsection 794(2) provided that the burden of proving an exemption or other exculpatory proviso was on the accused.

<sup>47</sup> See *R v Sansregret*, [1985] 1 SCR 570, and *R v Hamilton*, [2005] 2 SCR 432.

with the specific intent to avoid civil or criminal liability has been removed. Instead, the accused could raise a reasonable excuse to avoid conviction.

### **3.7 Flight from a Peace Officer (section 320.17)**

The simpliciter offence of flight from police has been re-enacted, but it has been amended to include flight from police in vessels to capture this dangerous conduct. Where bodily harm or death is caused while fleeing police, the offender may be charged with dangerous operation causing bodily harm or death, and flight from police.

### **3.8 Operating a Conveyance While Prohibited (section 320.18)**

The simpliciter offence of operating a conveyance while prohibited has been re-enacted. As under the previous provision, there are no aggravated offences of operating while prohibited causing bodily harm or death.

### **3.9 Offences No Longer in Force**

The “dangerous driving during flight from police causing bodily harm or death” offences and the street racing offences have not been re-enacted. These offences were originally enacted to provide a higher maximum penalty for dangerous driving causing bodily harm or death. The increase in the maximum penalties for dangerous driving makes these offences unnecessary. Street racing is an aggravating factor for the purposes of sentencing.

Additionally, the offences of failure to keep watch on a person towed and taking an unseaworthy vessel or an unsafe aircraft on a voyage were removed. These offences are more regulatory than criminal in nature and were rarely charged. They can be dealt with by existing criminal negligence or dangerous operation provisions in the most serious cases.

## **4. PENALTIES AND PROHIBITIONS**

Part VIII.1 enacts some new and higher mandatory minimum fines as well as some new and higher maximum terms of imprisonment. Mandatory minimum penalties (MMPs) also now apply to dangerous operation causing bodily harm and causing death as well as fleeing the scene of an accident causing bodily harm and death. A chart of the penalties and prohibitions can be found in Annex 2.

### **4.1 Mandatory Minimum Penalties (MMP) (sections 320.19, 320.2, and 320.21)**

MMPs have been part of the *Criminal Code* impaired driving regime since the first offence was enacted in 1921. The original offence of driving while intoxicated had an MMP of 7 days imprisonment on a first offence, 30 days imprisonment on a second offence, and 90 days imprisonment on a third or subsequent offence. These MMPs were last increased in 2008 to the current levels: \$1,000 fine for a first offence, 30 days imprisonment for a second offence, and 120 days imprisonment for a third or subsequent offence. The MMPs in the impaired driving regime have been upheld under the *Charter* in several instances.<sup>48</sup>

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<sup>48</sup> See *R v Dookie*, 2012 ONCJ 719, *R v Kumar*, [1993] BCJ No 2266, *R v Garcia*, [2004] OJ No 1713, and *R v Lloyd*, [2016] 1 SCR 130.

A first-time offender who has a BAC between 120 and 150 is subject to a mandatory minimum fine of \$1,500. Where the BAC is at or over 160 or where there is a refusal, a first time offender is subject to a mandatory minimum fine of \$2,000. The higher mandatory minimum fines reflect, in part, the concern expressed with respect to severely impaired drivers by the House of Commons Standing Committee on Justice and Human Rights in its 2009 Report.<sup>49</sup> The Committee recommended introducing specific penalties for drivers with high BACs as these drivers pose the greatest danger to public safety.

#### **4.2 Maximum Penalties (sections 320.19, 320.2 and 320.21)**

The maximum penalty of imprisonment for all of the simpliciter transportation offences has been increased to two years less a day (from 6 or 18 months) on summary conviction and to ten years (from five years) on indictment. The ten-year maximum makes it possible for the prosecutor to bring an application for an offender to be designated a Dangerous Offender (DO) or a Long Term Offender (LTO). This may be appropriate in cases of persistent repeat offending, particularly where the driver refuses treatment.

A noteworthy change is that transportation offences causing bodily harm have been hybridized. This will allow the Crown to decide whether to proceed by summary conviction or by indictment, taking into consideration such factors as the severity of the injuries and the accused's criminal and driving record. Where the Crown proceeds by summary conviction, the maximum penalty of imprisonment would be two years less a day. Where the Crown proceeds by indictment, the maximum penalty would be 14 years imprisonment (up from ten years). This is consistent with the previous offences of dangerous driving causing bodily harm while fleeing the police and while street racing.

However, the hybridization of these offences does not change the fundamental principle of sentencing that requires a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender (section 718.1). Rather, it will give prosecutors the discretion they need to choose the most efficient way to prosecute, evaluated on a case-by-case basis. This will reduce the amount of court time consumed by less serious offences, while freeing up court resources for more serious offences.

#### **4.3 Obligation of Crown to Consider a Dangerous Offender Application (section 752)**

Eight transportation offences have been added to the definition of "designated offences" in section 752 of the *Criminal Code*.<sup>50</sup> Adding these offences to this definition will, in appropriate circumstances, trigger the requirement for the Crown to consider whether to seek a dangerous offender (DO) or long-term offender (LTO) designation.

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<sup>49</sup> House of Commons, *supra* note 23.

<sup>50</sup> Dangerous Operation (section 320.13), Operating While Impaired (paragraph 320.14(a)), "at or over 80" (paragraph 320.14(b)), the hybrid offence of being over a prohibited BDC (paragraph 320.14(c)), Being over a prohibited BDC and BAC in combination (paragraph 320.14(d)), Fail or Refuse to Comply section (320.15), Failure to Stop After an Accident (section 320.16) and Flight from Police (section 320.17).

The summary conviction BDC offence is not included, as there is no situation in which a person convicted of this offence could be sentenced to 2 years or more. The offence of operating while prohibited, although a serious offence, is not included as the conduct associated with this offence is not inherently dangerous. For example, a person who is driving while prohibited may be sober and respecting the rules of the road but be pulled over by the officer to check the driver's licence, registration, insurance and sobriety.

#### **4.4 Aggravating Factors for the Purpose of Sentencing (section 320.22)**

Section 320.22 contains a non-exhaustive list of aggravating factors, which a court must consider when imposing a sentence for any of the conveyance offences. Having a BAC of 120 mg/100 mL is not an aggravating factor for a first offence of impaired driving simpliciter, as 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.

#### **4.5 Exemption from an MMP and Postponement of Sentencing (section 320.23)**

Under the previous law, a driver could receive a conditional discharge after being found guilty of impaired driving if they successfully completed a "curative" treatment program in relation to drugs or alcohol. However, this provision only came into force in a province if the Attorney General of that province made a request to the Governor in Council. The curative discharge was not in force in British Columbia, Ontario, Quebec, and Newfoundland and Labrador. This led to criticisms that the provision was not national in scope and disadvantaged individuals in the provinces where it was unproclaimed.

Part VIII.1 provides a uniform, national approach: in cases where there was no bodily harm or death, the court can delay sentencing to permit the offender to attend a treatment program that is approved by the province or territory in which they reside. The provision further provides that the offender must consent, as the treatment must be voluntary. The prosecutor must also consent, as it must be an appropriate case, taking into account such factors as the offender's criminal and driving record and whether the offender has previously had treatment.

If the offender successfully completes the treatment program, the court may decline to impose the MMP or the mandatory prohibition order (discussed below). However, the court is not permitted to direct a discharge under section 730 of the *Criminal Code*. The offence for which the person was convicted will remain on their criminal record and will be a prior offence if there is a subsequent impaired driving conviction.

If the court decides to postpone sentencing, it must make a prohibition order during the treatment.

#### **4.6 Prohibitions and Provincial Ignition Interlock Programs (section 320.24)**

Part VIII.1 maintains the previous approach to prohibition orders (see charts in Annex 2) with some changes. It encourages the use of ignition interlocks by reducing the mandatory minimum amount of time a person must wait before they can apply to the province to be admitted to an interlock program. On a first offence, there is no minimum waiting period. The mandatory

minimum wait time on a second offence is three months and on a third offence is six months. The province will decide whether to accept the application and enrol the person in the program.

Additionally, the court is not required to bring to the attention of the accused the specific *Criminal Code* provision that 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, subsection 320.24(6) only requires the court to ensure that the offender has read the order or received a copy.

Subsection 320.24(5.1) addresses an issue that has arisen following the Supreme Court of Canada's decision in *R v Lacasse*.<sup>51</sup> In that case, the Court interpreted the legislation to mean that a prohibition order commences following the end of the period of imprisonment. However, from a practical perspective, this interpretation has been very difficult to implement because it is not always clear when an offender's sentence of imprisonment ends, and when a prohibition order should begin. For example, would it commence at statutory release, parole, or at warrant expiry? In addition, incarcerated offenders sometimes receive unescorted day passes into the community; if the prohibition order did not apply during the term of imprisonment, an offender would not be prohibited from driving during those outings.

The *Criminal Code* is now clear that a prohibition order comes into force when it is made. If a person is given a custodial sentence, the prohibition lasts for the length of the prohibition, plus the entire time for which they are sentenced (i.e., when the warrant has expired). As such, courts will have to determine the total length of the prohibition desired. For example: an offender is convicted of impaired driving causing bodily harm; the Crown proceeds by indictment and a custodial sentence of two years is imposed. If the court determines that the person should be off the road for five years from the time of sentencing, it should order a three-year prohibition (two-year sentence plus three-year prohibition).<sup>52</sup>

## **5. INVESTIGATIVE MATTERS**

Part VIII.1 makes a number of changes to the way the impaired driving offences can be investigated but many of the procedures are the same.

### **5.1 Mandatory Alcohol Screening (subsection 320.27(2))**

One of the key changes is the introduction of mandatory alcohol screening (MAS). Essentially, a police officer who has lawfully stopped a driver (e.g., pursuant to their powers under provincial highway traffic legislation) may demand that a driver provide an ASD sample without first requiring that they must have a reasonable suspicion that the person has alcohol in their body.

This is different from the previous law, where the police could only demand an ASD sample if they had a reasonable suspicion that the driver had alcohol in their body.

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<sup>51</sup> [2015] 3 SCR 1089, 2015 SCC 64.

<sup>52</sup> This example is for illustrative purposes only, and is not intended to reflect appropriate sentences or prohibitions in actual cases.

As noted by the House of Commons Standing Committee on Justice and Human Rights in its 2009 Report, developing the required suspicion “is not always practical and there are no reliable means of detecting alcohol consumption by observation alone”.<sup>53</sup> The Committee noted that suspicion of alcohol can be difficult to develop in a brief interaction at the side of the road and, if an impaired driver escapes detection at a checkpoint, it can serve to reinforce drinking and driving behaviour and increase the likelihood of its recurrence. Further, some studies have indicated that police under the suspicion-based approach, may fail to detect as many as half of all drivers who are above the limit.<sup>54</sup>

The former Minister of Justice and Attorney General of Canada spoke about MAS several times during Parliamentary consideration of Bill C-46. During the Second Reading debate in the House of Commons she indicated:

After having made a lawful traffic stop, mandatory alcohol screening would simply permit a police officer to demand a preliminary breath sample. Under current law, a police officer must have reasonable suspicion before the officer can demand a breath sample, but research shows that up to as many as 50% of drivers who are over the legal limit are able to escape detection by police.<sup>55</sup>

While a new proposal for Canada, mandatory alcohol screening is already law in Australia, New Zealand, Ireland, and many European countries. It has led to a significant reduction in the number of deaths and injuries related to impaired driving. I am expecting that it will have the same effect in Canada. The reason is simple. Mandatory alcohol screening will change the mindset of drivers. No longer will drivers be able to convince themselves they can evade police detection of their alcohol consumption if stopped.

...

Ireland presents one of the most compelling examples. In the four years following the enactment of mandatory alcohol screening, fatalities on Irish roads decreased by 40%, and total charges for impaired driving diminished at a similar rate. In short, drivers quit thinking they could beat the system and simply gave up on driving while impaired. In the face of such compelling evidence, I feel I have an obligation to all Canadians to propose this approach for Canada.<sup>56</sup>

Further, when she appeared before the Standing Committee on Justice and Human Rights she indicated:

As Minister of Justice and the Attorney General of Canada, I feel it is my obligation to take any and all reasonable measures within my authority to reduce the incidence of impaired driving, with the ultimate goal of reducing road accidents. I am confident that the mandatory alcohol screening will be effective at reducing deaths and injuries on our roads and highways. I'm also confident that mandatory alcohol screening is constitutional.

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<sup>53</sup> House of Commons, *supra* note 23.

<sup>54</sup> JK Wells, “Drinking Drivers Missed at Sobriety Checkpoints” (1997) 58(5) *Journal of Studies on Alcohol* 513 at 516.

<sup>55</sup> *Ibid.*

<sup>56</sup> House of Commons, Second Reading, *supra* note 2 at 1005 (Hon Jody Wilson-Raybould).

Constitutional compliance is about striking the appropriate balance. Mandatory alcohol screening is minimally intrusive, but the benefits in lives saved will be immeasurable. Simply put, I change the mindset of drivers, who will no longer be able to convince themselves that they can evade police detection of their alcohol consumption if stopped.<sup>57</sup>

As indicated in the *Charter* Statement, there are a number of considerations that 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 driver's 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.<sup>58</sup>

This support for the constitutionality of MAS was echoed by constitutional expert Professor Peter W. Hogg before the House of Commons Standing Committee on Justice and Human Rights. He stated that it would withstand section 8, 9 and 10 *Charter* challenges because it aims to prevent dangerous activities and promote public safety.<sup>59</sup>

### **5.1.1 Operational Requirements for Mandatory Alcohol Screening**

MAS is subject to a number of key operational requirements. First, it only applies to alcohol and not to drugs.

Second, MAS only applies to motor vehicles. There are a number of reasons for this, but primarily it relates to the fact that there is a lack of clear evidence that MAS is necessary for other modes of transportation and there is not a framework of strict regulations governing drug and alcohol consumption for drivers like there is for operators of other modes of transportation (e.g., pilots or railway engineers).

Third, before MAS can be demanded, an officer must have the ASD at hand (i.e., in their car or on their person). An officer could not make this demand in situations where they have to call the police station and have the ASD brought to them.

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<sup>57</sup> House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 42-1, No 61 (13 June 2017) at 1535 (Hon Jody Wilson-Raybould) [House of Commons Committee].

<sup>58</sup> Department of Justice, *supra* note 7.

<sup>59</sup> House of Commons Committee, *supra* note 57, No 62, (18 September 2017) at 1705 (Peter W. Hogg, scholar in Residence, Blake, Cassels & Graydon LLP, and Professor Emeritus, Osgoode Hall Law School).

Fourth, the driver must be operating the motor vehicle. In most cases this will result in a demand being made during routine check stops or routine traffic stops. Drivers will simply be asked to provide a breath sample and, if they are under the provincial administrative and criminal limits, there will be no further investigation. The expression “is operating” has been interpreted by the courts and this provision does not change that interpretation.<sup>60</sup>

Finally, before demanding a preliminary breath sample on an ASD, the officer must be in lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law.

There were concerns raised by several stakeholders with respect to the risk of racial profiling. “Racial profiling” has been described in jurisprudence as “criminal profiling based on race”, “the phenomenon whereby certain criminal activity is attributed to an identified group in society on the basis of race or color [sic] resulting in the targeting of individual members of that group. In this context, race is illegitimately used as a proxy for the criminality of general criminal propensity of an entire racial group.”<sup>61</sup>

As the former Minister of Justice and Attorney General of Canada indicated in her remarks before the House of Commons Committee on Justice and Human Rights, “[w]hile the issue of racial profiling is a serious concern to our government, mandatory alcohol screening will not have an impact on this practice. Mandatory alcohol screening would not alter the responsibility that law enforcement has towards training and oversight to ensure fair, equal, and appropriate application of the law.”<sup>62</sup>

Furthermore, the Standing Committee on Justice and Human Rights amended the preamble of Bill C-46 to ensure it clearly articulates that all investigative powers must be exercised in accordance with the *Charter*.

The Supreme Court considered the possibility of the police abusing their power when it upheld random stopping to check sobriety in *R v Ladouceur*.<sup>63</sup> As Cory, J. wrote (at paragraph 60) for the majority when considering the proportionality between the effects of random stops on *Charter* rights and the objective of reducing the carnage caused by impaired drivers:

The concern at this stage is the perceived potential for abuse of this power by law enforcement officials. In my opinion, these fears are unfounded. There are mechanisms already in place which prevent abuse. Officers can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon

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<sup>60</sup> See, for example, *R v Campbell*, [1988] OJ No 1652 (Ont CA).

<sup>61</sup> *R v Brown*, [2003] OJ No 1251 (Ont CA).

<sup>62</sup> House of Commons Committee, *supra* note 57 at 1535 (Hon Jody Wilson-Raybould).

<sup>63</sup> [1990] 1 SCR 1257.

reasonable and probable grounds. Where a stop is found to be unlawful, the evidence from the stop could well be excluded under s. 24(2) of the *Charter*. (emphasis added)

As the courts have previously recognized, a stop motivated by racial profiling would constitute an improper purpose and would invalidate the stop, and everything that flowed from the stop.<sup>64</sup> Moreover, the Senate Legal and Constitutional Affairs Committee added to the requirement in section 31.1 of the Act for a three-year review that there be an evaluation whether the implementation and operation of the provisions “have resulted in differential treatment of any particular group based on a prohibited ground of discrimination”.

## **5.2 Testing based on reasonable suspicion (drugs and alcohol) (subsection 320.27(1))**

In addition to MAS, Part VIII.1 retains the power for the police to demand roadside tests of an operator of any conveyance on a reasonable suspicion of alcohol or drugs in their body (subsection 320.27(1)).

Practitioners will note a change with respect to the modernization of the language of this provision. “Forthwith” has been replaced with “immediately” in the context of demanding and administering the ASD and ADSE tests. This change is consistent with the interpretation of forthwith in jurisprudence<sup>65</sup> 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. It is also consistent with the French version, which uses the term “immédiatement” and remains unchanged.

### **5.2.1 Alcohol**

Under Part VIII.1, as before, if the police officer has a reasonable suspicion that the driver has alcohol in their body, they can demand the driver either provide an ASD sample or perform the SFST. A failure on the SFST or on the ASD is likely to give rise to reasonable grounds to believe that an offence has occurred and the officer can demand an AI test.

### **5.2.2 Drugs**

Part VIII.1 also provides that, when an officer has a reasonable suspicion that the driver has drugs in their body, they can demand an SFST test and/or a test on ADSE. At this time, ADSE is limited to oral fluid screeners, but the legislation has been worded more broadly so that, as other technology becomes available, new equipment could be approved by the Attorney General of Canada without requiring a legislative amendment.

Oral fluid drug screeners indicate the presence of drugs in the oral fluid of a subject. Requiring that an officer have reasonable suspicion that the driver has drugs in their body in order to demand an oral fluid sample for drugs reflects the difference in the technology of the two devices. Unlike the ASD for alcohol, which gives results in seconds that reliably indicate BAC, oral fluid drug screeners take longer to indicate the presence of a drug in oral fluid. In

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<sup>64</sup> See, for example, *R v Khan*, [2004] OJ No 3819.

<sup>65</sup> See for example, *R v Woods*, [2005] 2 SCR 205, 2005 SCC 42.

addition, unlike with alcohol, the concentration in oral fluid cannot be converted to a concentration of the drug in the blood.

Due to the nature of immunoassay-based technology, the new legislation does not provide that the result on an oral fluid drug screener can form the basis of a criminal charge. Instead, a positive result would only provide the police officer with information that is highly suggestive that the driver recently consumed cannabis. Most cannabis users would not be expected to test positive on an oral fluid drug screener four hours after cannabis use.

If the oral fluid screener provides a positive result for any of the drugs for which it is approved at the side of the road, it will, in combination with the observations of the officer that led to the ADSE demand, assist in developing reasonable grounds to believe that either a drug-impaired driving offence or a BDC offence has been committed and provide the officer with grounds to demand either a DRE or a blood sample or both.

Although drug screening technology may have a weaker link to BDC than alcohol screening has to BAC, the link is nevertheless strong enough to support the use of this technology in assisting police officers to determine whether there are grounds to make a demand for DRE and/or a blood sample.

The Oral Fluid Standards and Evaluation Procedures<sup>66</sup> developed by the DDC have set the drug screening cut-off levels at: 25 ng of THC/mL of oral fluid; 50 ng of cocaine/mL of oral fluid; and 50 ng of methamphetamine/mL of oral fluid. As an oral fluid drug screener only indicates presence at these levels, the person could have concentrations in oral fluid well above these cut-off levels. These levels are intended to maximize the likelihood that the drugs found are the result of recent consumption, and therefore that the drugs will be found in the blood above the prohibited levels.<sup>67</sup>

With respect to THC, the impairing effects of cannabis are closely linked to how recently the substance has been consumed. There is general scientific agreement that THC in the oral fluid is caused by contamination from recent smoking or consumption of a THC-infused edible. Therefore, if the ADSE indicates that a driver has THC in their oral fluid at the cut off level of 25 ng, it is likely that they have recently consumed cannabis, that there will be THC in their blood, and that the driver may be above the proscribed BDC.

The prohibited BDC levels for methamphetamine and cocaine are set at any detectable level. As such, it is highly probable that a positive screen on the oral fluid drug screener will result in a finding of those drugs in the blood.

Therefore, it is expected that the information that gives the officer reasonable suspicion that a driver has drugs in their body, combined with a positive result on the oral fluid drug screener, will assist in developing reasonable grounds to believe that a drug-impaired or a BDC offence

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<sup>66</sup> CSFS Standards, *supra* note 10.

<sup>67</sup> CSFS Oral Fluid, *supra* note 11.

has been committed, which will permit them to move the investigation forward, either to a blood sample or a DRE or both.

Like the ASDs and the AIs, the ADSEs would only be approved for use by the Attorney General of Canada by Ministerial Order, following a recommendation by the DDC that a particular screener meets their standards and evaluation procedures and is suitable for use by law enforcement.

The provisions do not preclude the administration of more than one of the roadside screening tests, in appropriate circumstances.

As indicated in the *Charter* Statement, there are a number of considerations that 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.<sup>68</sup>

#### **5.2.2.1 International Experience**

Oral fluid drug screeners are widely used in other jurisdictions, including in the UK and Australia.

In 2017, the UK released a study of the first year of its new drug driving framework, which contains similar measures (i.e., they prohibit driving with 2 ng of THC/mL of blood and authorize police officers to use drug screeners). In addition, the UK legislation provides that an officer can demand a blood sample if, based on the results of the oral fluid drug screener, they have reasonable grounds to believe (called reasonable cause) that a driver has a drug in their body. Therefore, in practice, a positive result on the oral fluid drug screening device leads directly to a blood sample. The study indicated that, in the first year following the implementation of this legislation, in 70% of the 4,292 cases where a blood sample was taken after a positive oral fluid screen, the blood sample was over the 2 ng THC/mL limit.<sup>69</sup> The detection threshold on the drug screeners in the UK is set at 10 ng THC/mL of oral fluid, which is lower than the 25 ng threshold required by the DDC.

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<sup>68</sup> Department of Justice, *supra* note 7.

<sup>69</sup> UK Department of Transport, *supra* note 17.

### **5.2.2.2 Scientific Foundation (Drug Screeners)**

The DDC has adopted and endorsed the conclusions of a recent assessment of oral fluid drug screeners published online in the Canadian Society of Forensic Science Journal in 2016. Based on this report, the DDC has advised that oral fluid drug screeners could be a valuable tool in the detection of driver drug use in Canada.<sup>70</sup>

They employ immunoassay-based technology to identify target drugs in oral fluid (immunoassay technology is widely used in home pregnancy tests). The drug screeners detect presence (essentially a “yes” or “no” answer) of select impairing drugs, including THC, in oral fluid. However, unlike the ASD for alcohol, oral fluid drug screeners are unable to provide direct evidence of the level of drugs in the blood, nor do they provide evidence that the driver is impaired.

Due to the nature of immunoassay-based technology, the new legislation does not provide that the result on an oral fluid drug screener can form the basis of a criminal charge. Instead, a positive result would only provide the police officer with information that is highly suggestive that the driver recently consumed cannabis. Most cannabis users would not be expected to test positive on an oral fluid drug screener four hours after cannabis use.

### **5.3 Demands for Breath Samples (subparagraph 320.28(1)(a)(i))**

The law relating to taking samples of breath and blood to determine BAC remains essentially unchanged. If the peace officer has reasonable grounds to believe that a driver is impaired by alcohol or “at or over 80”, they can demand a sample of breath on an AI or, if for some reason that is impracticable, they can demand a sample of blood and require the person to accompany the officer for that purpose. The demand must be made, and the driver must comply, as soon as practicable.

However, as the timeframe of the offence has been changed - such that the BAC must be at or over 80 within two hours of driving - there is no need for the first breath test on the AI to be completed within two hours of driving for a certificate to be admitted in a court as proof of BAC.

### **5.4 Demands for a DRE (paragraph 320.28(2)(a))**

The law relating to a DRE is essentially unchanged, although there have been some modifications to clarify and strengthen the process.

Paragraph 320.28(2) provides the power for an evaluating officer to demand a bodily sample if they have reasonable grounds to believe the person’s ability to operate a motor vehicle is impaired based on a DRE. Under the previous law, the reasonable grounds to believe that the person’s ability to operate a motor vehicle was impaired had to be developed “based on the evaluation”. These words are not re-enacted in subsection 320.28(4). This ensures that the evaluating officer can use all of their observations, not just those specifically related to the DRE steps, when determining whether or not they have grounds to demand a bodily sample. For

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<sup>70</sup> Beirness, *supra* note 18.

example, if the person is constantly twitching that may indicate they are under the influence of a stimulant, although it may not necessarily relate to any of the prescribed DRE steps.

There is also a power for an evaluating officer to demand a breath sample by means of an AI if this demand has not already been made under subsection 320.28(1). This change addresses a challenge encountered under the previous legislation where an AI demand could not be made if there had already been an ASD demand. For example, in some jurisdictions, a “WARN” on an ASD indicates that the person has a BAC of 50 to 99 mg/100 mg of blood but the ASD result cannot be used in court to prove BAC. Where the evaluating officer believes that alcohol is a factor, it is essential that there be an AI analysis to prove the person’s BAC. Even a low BAC combined with another drug, particularly THC, can produce impairment.

### **5.5 Demands for Blood by Investigating Officer (paragraph 320.28(2)(b))**

Under the previous law, only evaluating officers were authorized to demand a bodily sample (including a blood sample) following a DRE. Paragraph 320.28(2)(b) authorizes any police officer who has reasonable grounds to believe a drug-impaired driving offence or a BDC offence has occurred to demand a sample of blood or a DRE or both.

This change will facilitate the timely collection of blood samples, which is the only way to prove a BDC offence. Since levels of a drug in the bloodstream can decline rapidly after consumption, particularly for smoked cannabis, obtaining a blood sample in a timely manner is critical to proving these offences. As soon as an officer has developed reasonable grounds to believe that an offence has been committed, the officer can demand and obtain a blood sample. The delays associated with the DRE process would make it impossible in many cases to obtain the blood sample within two hours of driving. Further, these delays cannot be compensated for by back calculating the rate at which the BDC declines, because, unlike alcohol, rates at which drugs are eliminated from the body vary widely based on a number of variables. These considerations were also cited in the *Charter* statement as supporting the consistency with the *Charter*.<sup>71</sup>

#### **5.5.1 Persons Qualified to take Blood Samples (subsection 320.28(6))**

Under the previous law, only medical practitioners (i.e., medical doctors) or those operating under their direct supervision were permitted to draw blood pursuant to a police demand. As drawing blood in a timely manner is critical to preserving the evidence, in particular for the BDC offences, subsection 320.28(6) provides that a qualified blood technician can take blood in ordinary cases rather than requiring the supervision of a doctor. Qualified blood technicians are to be designated by the provincial attorneys general and are only authorized to take blood if they believe that there is no danger to the person’s health. Requiring the oversight of a doctor is a time-consuming process, which often involves transporting a suspected drug-impaired driver to a hospital.

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<sup>71</sup> Department of Justice, *supra* note 7.

## 5.6 Warrants to Obtain Blood Samples (subsection 320.29(1))

Part VIII.1 re-enacts, with some notable changes, the warrant provision authorizing the collection of blood from a person who cannot consent and has been involved in an accident causing bodily harm or death.

First, it extends the time in which the police can seek to obtain a warrant from four hours to eight hours. This extension of time recognizes that, in these situations, police often have to deal with the aftermath of the collision before seeking the blood warrant.

Second, the grounds for granting the warrant have also changed. Under the previous warrant provision, a justice had to be satisfied that there were reasonable grounds to believe that the person had committed the offence of driving while impaired or driving while over the legal limit and that they were involved in a collision causing bodily harm or death before they could issue a warrant. The new provisions require that a justice be satisfied that:

- there are reasonable grounds to believe that the person was involved in an accident that resulted in bodily harm or death,
- there are reasonable grounds to suspect that the person has drugs or alcohol in their body, and
- a medical doctor is of the opinion that the person cannot consent to the taking of the blood and that taking the blood sample will not endanger the person's health.

Accidents where individuals have been injured or killed are the most serious and it is important to ascertain whether or not alcohol or drugs were involved.

As indicated in the *Charter* Statement, there are a number of considerations that support consistency of these changes 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.<sup>72</sup>

## 6. EVIDENTIARY MATTERS

### 6.1 Proof of BAC – Breath Samples (subsection 320.31(1))

There are several changes in the provisions dealing with proof of BAC but the underlying principles remain the same. The main difference is that the procedures that must be followed to ensure an accurate BAC reading are listed. If those procedures are followed, and the Crown can prove this beyond a reasonable doubt, then BAC is conclusively proven.

As noted in the statement of principles, Parliament has confidence in the accuracy and reliability of instruments that are approved by the Attorney General of Canada after being evaluated and recommended by the ATC.

Als 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 results of a system calibration check 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, eliminating the possibility of human error in reading or transcribing the results. They provide a printout showing the results of the system blank tests, the system calibration checks 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.

Subsection 320.31(1) makes the results of a breath sample analysis by an AI conclusive proof of the BAC at the time of testing if the prosecution can prove the following beyond a reasonable doubt:

1. There were two subject tests, 15 minutes apart;
2. The two subject tests were within 20 mg/100 mL of one another;
3. A system blank test was performed before each subject test, the results of which were not more than 10 mg/100 mL; and,
4. A system calibration check was performed before each subject test using a certified alcohol standard and the results were within 10% of the target value.

These are the operational procedures recommended by the ATC that, if followed, ensure that the breath test of a person has produced accurate results.<sup>73</sup> If the legislated conditions are proven, BAC at the time of testing is conclusively proven.

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<sup>72</sup> Ibid.

<sup>73</sup> Canadian Society of Forensic Science Alcohol Test Committee, [Recommended Operational Procedures \(2018\)](#). This document should not be confused with two other documents produced by the ATC:

Certain expressions that reflected older technology or added to the complexity of the provisions have not been re-enacted. For example, the requirements in paragraph 258(1)(c) of the *Criminal Code* that samples of breath be taken “pursuant to a demand under subsection 254(3)” and that the sample was “received directly” into an AI do not appear in section 320.31. The accuracy of the AI is not affected by whether the breath sample is obtained pursuant to a demand that is made as part of an impaired by alcohol investigation or as part of a drug - impairment evaluation or by consent. The requirement that the sample be received “directly” into the AI is a reflection of historical instruments that required that a balloon first be filled with breath and then attached to the instrument for analysis. No such instruments were ever approved for use in Canada, and as such, this requirement has been removed.

As indicated in the *Charter* Statement, there are a number of considerations that 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.<sup>74</sup>

## **6.2 Proof of BAC and BDC - Blood Samples (subsection 320.31(2))**

Similar to the previous law, a person who wants to challenge the result of a laboratory analysis of blood must point to evidence tending to show that the analysis was performed improperly, and cannot rely on consumption evidence alone.

As under the previous law, where a second blood sample has been taken, the accused can apply to have that sample independently analyzed. The previous process for taking and retaining a second sample of blood remains. The changes to the provision reflect modernized drafting techniques.

## **6.3 Presumption of BAC – Sample Taken More than Two Hours After Operating (subsection 320.31(4))**

Due to the reformulation of the offence of operating a conveyance with a BAC at or over 80 within two hours of driving, there is no longer a need for the “presumption of identity” as it existed under the previous law. However, subsection 320.31(4) contains a new presumption

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- *Evaluation standards for equipment*: Manufacturers of ASDs and AIs must meet these standards if the ATC is to recommend to the Attorney General that their equipment be approved for use.
  - *Recommended Best Practices for a Breath Alcohol Testing Program*: Police forces should carry out training and maintain their equipment as recommended to correct possible problems before they manifest themselves in the field.

<sup>74</sup> Department of Justice, *supra* note 7.

for situations where the first breath test or blood test was conducted more than two hours after driving.

In this situation, the presumption states a driver's BAC within two hours of driving is presumed to be that which was determined at the time of testing plus an additional 5 mg for every complete interval of 30 minutes in excess of those two hours.

The ATC advises that the elimination of alcohol from the human body is stable and uniform across the population. It is scientifically accepted that alcohol is eliminated from the body at a rate of 10 to 20 mg per hour. The mathematical formula presumes that alcohol is eliminated at a slowest rate, and therefore provides a lower result than would be expected in the vast majority of cases.

This presumption will avoid the unnecessary expense of having a toxicologist perform a back calculation of BAC within two hours of driving and the Crown calling the toxicologist to testify.

As indicated in the *Charter* Statement, there are a number of considerations that support the consistency of this section with the *Charter*:

The level of 5 mg/100mL 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/100mL 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.<sup>75</sup>

### 6.3.1. Examples of the Presumption as Applied to Hypothetical Scenarios

**Example 1:** A driver is pulled over at 12 a.m. and fails a MAS. The driver is transported to the police station, and the first breath sample is taken at 2:15 a.m., 15 minutes after the close of the two-hour window. The driver blows 200 mg of alcohol/100 mL of blood. As a full interval of 30 minutes has not yet elapsed, there is no change to the BAC. As such, the BAC for the purposes of the offence would be 200 mg of alcohol/100 mL of blood.

**Example 2:** A driver is found in care or control of a motor vehicle at 12 a.m., the officer smells alcohol and demands an ASD sample. The driver is transported to the police station, and the first breath sample is taken at 4:15 a.m., 2 hours and 15 minutes after the close of the two-hour window. The driver blows 110 mg of alcohol/100 mL of blood. As the first sample was taken more than two hours after the driver ceased to operate the conveyance, 5 mgs would be added for each full interval of 30 minutes. In this scenario, there are four complete 30-minute intervals.

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<sup>75</sup> *Ibid.*

As such, 20 mgs of alcohol (5 mg x 4 complete intervals of 30 minutes = 20 mgs) would be added to the BAC of 110 mg, for a BAC of 130 mg of alcohol/100 mL of blood.

**Example 3:** A driver is involved in an accident at 12 a.m. and flees the scene. The police find the driver later at her house and she fails an ASD test. The driver is transported to the police station, and the first breath sample is taken at 5:15 a.m., 3 hours and 15 minutes after the close of the two-hour window. The driver blows 60 mg of alcohol/100 mL of blood. There are six 30-minute intervals. As such, 30 mg of alcohol (5 mg x 6 complete intervals of 30 minutes = 30 mgs) would be added to the BAC of 60 mg, for a BAC of 90 mg/100 mL of blood.

#### **6.4 Admissibility of Evaluating Officer's Opinion (subsection 320.31(5))**

The legislation has been clarified to ensure that the evidence of an evaluating officer conducting the DRE is admissible at trial, without first qualifying the evaluating officer as an expert. This clarification reflects the confidence that Parliament has in the specially trained evaluating officers. It also reflects the Supreme Court of Canada's decision in *R v Bingley*,<sup>76</sup> which held that the opinion evidence of an evaluation officer is admissible without first qualifying them through an expert witness hearing.

#### **6.5 Presumption in DRE cases (subsection 320.31(6))**

Currently, some courts are reluctant to make the link between the results on a toxicological sample in a DRE case and the observed impairment by the arresting officer. The law has been changed to enact a presumption in the DRE context to draw the inferential link between the presence of drugs identified by the DRE as causing impairment at the time of the evaluation and the impairment observed at the time of driving. Subsection 320.32(6) provides that, if an evaluating officer identifies a type of drug as being in the system of a person and causing impairment and a drug of that type is confirmed by testing the bodily sample in a laboratory, it is presumed that the drug was also present in the person's body at the time when they were operating the conveyance and the drug caused the signs of impairment observed by the peace officer at the roadside.

The presumption can be rebutted by the accused if they raise a reasonable doubt, for example, by presenting evidence that the signs of impairment could have been caused by something other than the drug.

As indicated in the *Charter* Statement, there are a number of considerations that support 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

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<sup>76</sup> *Bingley*, *supra* note 20.

impairment is also information that is uniquely within the knowledge of the accused and can be used to rebut the presumption.<sup>77</sup>

### **6.6 Admissibility of Roadside Statements (subsection 320.31(9))**

Previously, there was uncertainty with respect to the use that could be made of information that a driver was required to provide the police after a traffic accident under provincial law. Subsection 320.31(9) clarifies 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 breath demand on an ASD and an AI.

As indicated in the *Charter* Statement, there are a number of considerations that 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.<sup>78</sup>

### **6.7 Certificates**

#### **6.7.1 Content of Certificates (subsection 320.32(1))**

Rather than having provisions for several types of certificates each listing what is to be included in that certificate as was formerly the case, subsection 320.32(1) is a general provision regarding certificates being used as proof of the facts alleged.

Certificates can continue to be used, with any necessary updates to reflect changes in section numbers, or other administrative updates.

#### **6.7.2 Procedure with Respect to Cross-Examination on a Certificate (section 320.32)**

There is a change in procedure when the accused seeks to have the person who signed the certificate cross-examined. Section 320.32 requires that the accused 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 at trial that is beyond the facts set out in the certificate. The accused must provide 30-days' notice to the prosecutor, and the hearing on the application must be at least 30 days prior to the trial.

The provision is intended to ensure that a person who signed the certificate is not required to attend at the trial for a fishing expedition or in the hope that the person will not be available on the trial date.

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<sup>77</sup> Department of Justice, *supra* note 7.

<sup>78</sup> *Ibid.*

## **6.8 Disclosure with Respect to Subject Breath Tests (section 320.34)**

Section 320.34 specifies what the prosecution is required to disclose to the defence in relation to whether the breath tests of the accused provided accurate results. Essentially, the new legislation requires what the ATC considers relevant.<sup>79</sup> If an accused seeks further disclosure, they must satisfy a judge that additional material is likely to be relevant to the issue of whether the AI was in proper working order when it analyzed the accused person's breath and provided a BAC. As noted above, the accused must provide 30-days' notice to the prosecutor, and the hearing on the application must be at least 30 days prior to the trial.

It is recognized that it is unusual for the *Criminal Code* to specify what information is required to be disclosed. This area of the law is governed by the common law, specifically the Supreme Court of Canada case *R v Stinchcombe*.<sup>80</sup> However, in the wake of the 2008 amendments that restricted the "two-beer" defence, and the 2012 Supreme Court of Canada decision in *St-Onge*<sup>81</sup>, there has been uncertainty regarding what information is required to be disclosed to the accused in relation to whether the AI was in proper working order.

These new provisions reflect Parliament's confidence in the reliability of AIs and its acceptance of the ATC's position that materials such as maintenance records of AIs are scientifically irrelevant to determining the validity of subject breath test. This provision is consistent with the Supreme Court of Canada's October 2018 decision in *R v Gubbins*.<sup>82</sup>

As indicated in the *Charter* Statement there are a number of considerations that support 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.<sup>83</sup>

## **6.9 Presumption of Operation (section 320.35)**

The former presumption of "care or control" has been re-enacted, but updated to reflect modernized language. If a person is found in the driver's seat of a conveyance, they are presumed to be in operation of the conveyance and therefore can be charged with impaired driving. No changes are made with respect to rebutting the presumption.

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<sup>79</sup> Canadian Society of Forensic Science Alcohol Test Committee, "Alcohol Test Committee Position Paper: Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results" (2012) 45:2, *Canadian Society of Forensic Science Journal* at 101.

<sup>80</sup> [1991] 3 SCR 326.

<sup>81</sup> *St-Onge*, *supra* note 31.

<sup>82</sup> 2018 SCC 44.

<sup>83</sup> Department of Justice, *supra* note 7.

## **7. GENERAL PROVISIONS**

### **7.1 Unauthorized Use of Bodily Samples (section 320.36)**

Section 320.36 continues to prohibit the unauthorized use of bodily substances or the disclosure of the results of a driver's SFST or DRE that have been taken for the purposes of the impaired driving regime.

Specifically, the samples can only be used for the purposes of the impaired driving regime, or the administration or enforcement of a federal or provincial Act related to drugs and/or alcohol and/or to the operation of a conveyance.

This provision is intended to guard against the improper use of bodily samples or evaluation results. For example, a blood sample taken pursuant to an impaired driving investigation may not be analysed for the purposes of extracting a driver's DNA.

The section also prohibits the use or disclosure of the results of an evaluation or a physical coordination test or an analysis of a bodily substance except for the administration or enforcement of a federal or provincial law. If the results are made anonymous, they can be disclosed for statistical or research purposes.

### **7.2 Refusal to Take a Sample (section 320.37)**

Section 320.37 re-enacts the provision that no medical practitioner or qualified technician will face any criminal liability (e.g., a charge of obstructing justice), for refusing to take a sample. This provision has been slightly modified to clarify that the exemption from liability for failure to take a sample only applies if the medical practitioner or qualified technician has a reasonable excuse for refusing to do so. The exemption recognizes that, although medical practitioners and qualified technicians are expected to comply with the law, including the taking of blood samples, when required or authorized to do so, there may be situations, (e.g., a medical emergency in a hospital setting) which would justify a doctor in refusing to take a blood sample.

It also provides that no medical doctor or qualified technician will face any criminal or civil liability for anything done with reasonable care and skill (e.g., if a blood draw is carried out in accordance with standard procedures but nevertheless results in an infection).

### **7.3 Regulation-Making Power (section 320.38)**

Section 320.38 contains the regulation-making power of the Governor in Council. It re-enacts the current power to prescribe the qualifications of evaluation officers, the roadside tests that assist in determining impairment by alcohol or a drug and the tests to be used by an evaluating officer to determine impairment.

This provision also authorizes the Governor in Council to make regulations prescribing the BDC for the three new BDC offences. This is a more efficient and flexible way to respond to the evolving science of impairing drugs (e.g., new drugs could be added and existing BDC levels could be changed more quickly).

The provision permitting incorporation of other materials by reference has not been re-enacted. It was never used, as the intended material to be incorporated (i.e., material relating to DREs from the International Association of Chiefs of Police) does not necessarily reflect Canadian law and jurisprudence.

#### **7.4 Power to Approve Devices (section 320.39)**

Section 320.39 contains the legislative authority for the Attorney General of Canada to make Ministerial Orders to approve roadside alcohol screening devices, roadside drug screening devices, instruments to measure BAC, and containers for receiving and storing blood samples. Under the previous legislation, the authority to make Ministerial Orders was implicit in the definitions of the various devices. Modern legislative drafting convention is to explicitly include an authority for the Attorney General to make Ministerial Orders.

#### **7.5 Power to Designate (section 320.4)**

Section 320.4 contains the legislative authority for the Attorney General of a province to designate analysts and qualified technicians for the following purposes:

- operating an AI;
- taking blood samples;
- analysing bodily samples;
- certifying that a standard alcohol solution is suitable for use.

Under the previous legislation, the authority to designate analysts and qualified technicians was implicit in the definitions of the various devices; modern legislative drafting convention is to explicitly provide authority to make these designations.

### **8. TRANSITIONAL PROVISIONS**

Section 32 of the Act provides that the elements related to the proof of BAC at the time of testing (i.e., the presumption of accuracy) and disclosure will apply to any case before the courts when Part VIII.1 comes into force. It is not intended to impact the presumption of identity, or other elements that support a prosecution of the previous “over 80” offence. It responds to the majority in *R v Dineley*,<sup>84</sup> which found the 2008 amendments addressing the two-beer defence were not applicable to cases before the courts when the legislation came into effect. The majority stated: “There are no transitional provisions that provide express guidance as to whether the Amendments apply retrospectively, that is, to conduct which occurred before the Amendments came into force.”

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<sup>84</sup> [2012] 3 SCR 272 at para 3, 2012 SCC 58.

## ANNEX 1 – Chart of Offences

The new Part contains 10 simpliciter offences, 7 offences of causing bodily harm, and 7 offences of causing death.

<b>Simpliciter</b>	<b>Causing Bodily Harm</b>	<b>Causing Death</b>
Dangerous operation of a conveyance <b>(section 320.13(1))</b>	Dangerous operation causing bodily harm <b>(subsection 320.13(2))</b>	Dangerous operation causing death <b>(subsection 320.13(3))</b>
Operating a conveyance while impaired by alcohol or a drug or a combination of alcohol and a drug <b>(paragraph 320.14(1)(a))</b>	Operation causing bodily harm <b>(subsection 320.14(2))</b>	Operation causing death <b>(subsection 320.14(3))</b>
Having a BAC of 80 or more within two hours of driving <b>(paragraph 320.14(1)(b))</b>	Operation causing bodily harm <b>(subsection 320.14(2))</b>	Operation causing death <b>(subsection 320.14(3))</b>
Having a prohibited blood drug concentration (BDC) within two hours of driving <b>(paragraph 320.14(1)(c))</b>	Operation causing bodily harm <b>(subsection 320.14(2))</b>	Operation causing death <b>(subsection 320.14(3))</b>
Having a prohibited BAC and BDC in combination within two hours of driving <b>(paragraph 320.14(1)(d))</b>	Operation causing bodily harm <b>(subsection 320.14(2))</b>	Operating causing death <b>(subsection 320.14(3))</b>
Having a prohibited BDC that is lower than the BDC set out under 320.14(1)(c) <b>(paragraph 320.14(4))</b>		
Refusing to comply with a demand <b>(subsection 320.15(1))</b>	Accident resulting in bodily harm <b>(subsection 320.15(2))</b>	Accident resulting in death <b>(subsection 320.15(3))</b>
Failure to stop after accident <b>(subsection 320.16(1))</b>	Accident resulting in bodily harm <b>(subsection 320.16(2))</b>	Accident resulting in death <b>(subsection 320.16(3))</b>
Flight from peace officer <b>(section 320.17)</b>		
Operation while prohibited <b>(section 320.18)</b>		

## ANNEX 2 – Penalties

The following chart outlines the penalty structure in Part VIII.1 for simpliciter offences.

<b>Simpliciter Offence</b>	<b>Penalty on Summary Conviction</b>	<b>Penalty on Indictment</b>	<b>Prohibition on Summary Conviction</b>	<b>Prohibition on Indictment</b>
Dangerous Operation  <b>(subsection 320.13(1))</b>	Maximum 2 years less a day	Maximum 10 years imprisonment	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
Operation While Impaired  <b>(paragraph 320.14(1)(a))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 10 years imprisonment	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 10 years imprisonment	<b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)	<b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 10 years imprisonment	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)
“80 or Over” Within Two Hours of Driving  <b>(paragraph 320.14(1)(b))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 10 years imprisonment	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)

	<p><b>Higher fines for High BAC:</b></p> <p>BAC 120 mg or over: minimum fine of \$1,500</p> <p>BAC 160 mg or over: minimum fine of \$2,000</p>	<p><b>Higher fines for High BAC:</b></p> <p>BAC 120 mg or over: minimum fine of \$1,500</p> <p>BAC 160 mg or over: minimum fine of \$2,000</p>		
	<p><b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day imprisonment</p>	<p><b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 10 years imprisonment</p>	<p><b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)</p>	<p><b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)</p>
	<p><b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day imprisonment</p>	<p><b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 10 years imprisonment</p>	<p><b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)</p>	<p><b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)</p>
<p>Prohibited BDC Within Two Hours of Driving (hybrid)</p> <p><b>(paragraph 320.14(1)(c))</b></p>	<p><b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.</p>	<p><b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 10 years imprisonment</p>	<p><b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)</p>	<p><b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)</p>
	<p><b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day imprisonment</p>	<p><b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 10 years imprisonment</p>	<p><b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)</p>	<p><b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)</p>

	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day imprisonment	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 10 years imprisonment	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)
Prohibited BDC and BAC Within Two Hours of Driving  <b>(paragraph 320.14(1)(d))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 10 years imprisonment	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day imprisonment	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 10 years imprisonment	<b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)	<b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day imprisonment	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 10 years imprisonment	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)
Prohibited BDC Within Two Hours of Driving (straight summary conviction)  <b>(subsection 320.14(4))</b>	Maximum \$1,000 fine	N/A	Discretionary order of not more than one year	N/A

Refusing to Comply with a Demand  <b>(subsection 320.15(1))</b>	<b>1<sup>st</sup> Offence:</b> minimum fine of \$2,000 and maximum 2 years less a day imprisonment	<b>1<sup>st</sup> Offence:</b> minimum fine of \$2,000 and maximum 10 years imprisonment	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)	<b>1<sup>st</sup> Offence:</b> minimum 1 year and maximum 3 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day imprisonment	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 10 years imprisonment	<b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)	<b>2<sup>nd</sup> Offence:</b> minimum 2 years and maximum 10 years (plus any term of imprisonment)
	<b>3<sup>rd</sup> Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day imprisonment	<b>3<sup>rd</sup> Offence:</b> minimum 120 days imprisonment and maximum 10 years imprisonment	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)	<b>3<sup>rd</sup> Offence:</b> minimum 3 years (plus any term of imprisonment)
Failure to Stop After an Accident  <b>(subsection 320.16(1))</b>	Maximum 2 years less a day imprisonment	Maximum 10 years imprisonment	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
Flight from Police  <b>(section 320.17)</b>	Maximum 2 years less a day imprisonment	Maximum 10 years imprisonment	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
Operating While Prohibited  <b>(section 320.18)</b>	Maximum 2 years less a day imprisonment	Maximum 10 years imprisonment	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)

The following chart outlines the penalty structure in Part VIII.1 for offences involving bodily harm.

<b>Offence Causing Bodily Harm</b>	<b>Penalty on Summary Conviction</b>	<b>Penalty on Indictment</b>	<b>Prohibition on Summary Conviction</b>	<b>Prohibition on Indictment</b>
Dangerous Operation  <b>(subsection 320.13(2))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 14 years imprisonment.	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 14 years imprisonment		
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 14 years imprisonment		
Operation While Impaired  <b>(subsection 320.14(2))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 14 years imprisonment.	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 14 years imprisonment		

	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 14 years imprisonment		
“at or over 80” Within Two Hours of Driving”  <b>(subsection 320.14(2))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 14 years imprisonment.	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 14 years imprisonment		
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 14 years imprisonment		
Prohibited BDC Within Two Hours of Driving (hybrid)  <b>(subsection 320.14(2))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 14 years imprisonment.	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 14 years imprisonment		

	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 14 years imprisonment		
Prohibited BDC and BAC Within Two Hours of Driving  <b>(subsection 320.14(2))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 14 years imprisonment	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 14 years imprisonment		
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 14 years imprisonment		
Refusing to Comply with a Demand  <b>(subsection 320.15(2))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 14 years imprisonment	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 14 years imprisonment		

	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 14 years imprisonment		
Failure to Stop After an Accident  <b>(subsection 320.16(2))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 2 years less a day imprisonment.	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum 14 years imprisonment.	Maximum 3 years (plus any term of imprisonment)	Maximum 10 years (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 2 years less a day	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum 14 years imprisonment		
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 2 years less a day	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum 14 years imprisonment		

The following chart outlines the penalty structure in Part VIII.1 for offences involving death.

Offence Causing Death	Penalty	Prohibition
Dangerous Operation  <b>(subsection 320.13(3))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum life imprisonment	Any duration that court considers appropriate (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum life imprisonment	
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum life imprisonment	
Operation While Impaired  <b>(subsection 320.14(3))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum life imprisonment	Any duration that court considers appropriate (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum life imprisonment	
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum life imprisonment	
“at or over 80” Within Two Hours of Driving  <b>(subsection 320.14(3))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum life imprisonment	Any duration that court considers appropriate (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum life imprisonment	
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum life imprisonment	
Prohibited BDC Within Two Hours of Driving  <b>(subsection 320.14(3))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum life imprisonment	Any duration that court considers appropriate (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum life imprisonment	
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum life imprisonment	

Prohibited BDC and BAC Within Two Hours of Driving  <b>(subsection 320.14(3))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum life imprisonment	Any duration that court considers appropriate (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum life imprisonment	
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum life imprisonment	
Refusing to Comply with a Demand  <b>(subsection 320.15(3))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum life imprisonment	Any duration that court considers appropriate (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum life imprisonment	
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum life imprisonment	
Failure to Stop After an Accident  <b>(subsection 320.16(3))</b>	<b>1<sup>st</sup> Offence:</b> minimum \$1,000 fine and maximum life imprisonment	Any duration that court considers appropriate (plus any term of imprisonment)
	<b>2<sup>nd</sup> Offence:</b> minimum 30 day imprisonment and maximum life imprisonment	
	<b>3<sup>rd</sup> and Subsequent Offence:</b> minimum 120 days imprisonment and maximum life imprisonment	

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