Canadian Criminal Law and Impaired Driving

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Abstract
This article outlines the current criminal legislation directed against alcohol and drug driving in Canada. It also traces the major elements in the historical development of this criminal legislation, beginning with the 1921 amendment to the Criminal Code of Canada. Comments in this article are the author’s own and do not necessarily represent the position of the Department of Justice (Canada).

Introduction
The Constitution Act, 1867 divides legislative powers in Canada between the federal Parliament and provincial legislatures. The constitutional, legislative authority for criminal law and procedure is assigned to Parliament. Legislative authority for the administration of justice within the province, the establishment of provincial courts, property and civil rights within the province, and licensing are assigned to each province. In 1892, Canada’s Parliament enacted the first “home-grown” codification of criminal law within the British Commonwealth and it came into force in 1893. As amended from time to time, this Criminal Code remains in effect and has application across Canada. The sine qua non of a Code offence is that incarceration is included within the range of potential penalties. Although the federal Parliament enacts the provisions of the Criminal Code, the responsibility to prosecute Code offences has been assigned, in the provinces, to the Attorney General of each province. In the three territories, the Attorney General of Canada is responsible for the prosecution of Criminal Code offences.

Discussion
Offences, Procedures and Penalties
Section 253(a) of the Criminal Code creates the offence of operating (or having care and control of) a motor vehicle, vessel, aircraft or railway equipment while the ability to operate is impaired by alcohol or a drug. Impairment is tested against the average operating ability of the average operator rather than against the accused’s personal abilities when sober. Courts have held that a combination of alcohol and drugs that impairs will meet the definition of the offence, even if the alcohol or drugs would not impair when taken separately.

Section 253(b) of the Criminal Code creates a per se offence in relation to alcohol only. It is a criminal offence to operate (or have care and control of) a motor vehicle, vessel, aircraft, or railway equipment with a blood alcohol concentration (BAC) that exceeds 80
milligrams of alcohol in 100 milliliters of blood. It is noted that all provinces, except Quebec, have chosen to create a provincial driving license suspension for violations of a provincial “exceeds 50mg.\%” BAC level (exceeds 40 mg.\% in Saskatchewan). When Criminal Code and provincial sanctions are viewed together, Canada is similar to western European nations and most Australian states where penalties for driving in the 51-80 mg.\% BAC range do not include the possibility of incarceration and where some higher BAC range attracts possible penalties that can include incarceration.

A related offence is refusing to provide a breath sample on an “approved screening device”, upon demand by a peace officer who has a reasonable suspicion that there is any alcohol in the operator’s body. Another related offence is refusing to provide a breath sample on an “approved instrument”, or, in certain circumstances, a blood sample, upon demand by a peace officer who has reasonable and probable grounds to believe that the operator has committed a section 253 offence in the previous 3 hours. (A fail result on an “approved screening device” can be used to form the grounds required to make a demand for a breath sample on an “approved instrument”. However, the “approved screening device” result cannot be used in court to prove the 253(a) offence.) In the case of a breath sample, a ratio is applied to convert the “alcohol in breath” result to a BAC.

Under section 254 of the Criminal Code, where a peace officer has the reasonable and probable grounds required to demand a breath sample on an approved instrument but, because of physical condition, the operator is incapable of providing the sample, or, it would be impractical to obtain the sample, the peace officer may demand a blood sample. A medical doctor must be of the opinion that taking the blood sample would not endanger the life or health of the operator and the blood sample must be taken under the supervision of a medical doctor. Under section 256 of the Code, where the peace officer believes that an operator, in the previous 4 hours, has committed a section 253 offence in relation to alcohol or a drug that involved a death or injury, and where the operator is unconscious or otherwise unable to consent to the taking of blood, the peace officer may apply for a judicial warrant. The warrant authorizes the taking of a blood sample where a medical doctor is of the view that the life or health of the operator would not be endangered and where the sample is taken under the supervision of a medical doctor. Section 258 of the Code provides that a blood sample that is taken for alcohol testing (under section 254, under 256 or otherwise with the consent of the accused) may be further tested for the presence of a drug.

Under section 258, in any proceeding involving an offence under section 253, the result of analysis of a bodily substance may be entered into evidence. As an evidentiary shortcut, where breath or blood samples are taken pursuant to a peace officer’s demand under section 254, there is a presumption that the lower BAC at the time the samples were provided is the same as the BAC at the time of the alleged offence, absent any evidence to the contrary. This presumption obtains if: two breath samples were taken, if the first was taken not less than 2 hours after the alleged offence, if the samples were taken at least fifteen minutes apart, and if they were analyzed on an “approved instrument” by a “qualified technician”. This presumption, absent any evidence to the contrary, applies similarly to a blood sample if: it was taken under the supervision of a
medical doctor, a second sample was taken for the accused’s own analysis, and the samples were taken directly into “approved containers” not more than 2 hours after the alleged offence. The Code also provides for this evidence to be entered by certificate, where certain conditions are met, otherwise, witnesses must give their evidence in court.

The Canadian Charter of Rights and Freedoms is part of the Canadian constitution, the supreme law against which all other laws are tested. Canadian courts have upheld the ability of peace officers to detain motorists at organized, impaired driving check stops as a reasonable limit on the Charter rights against unreasonable search and seizure and also against unreasonable arrest or detention. Courts have also held that peace officers may, as a reasonable limit on a person’s Charter Rights, where there is provincial legislation, randomly stop a driver to check vehicle equipment or license and registration documents. They may embark on a criminal investigation where their observations during a stop reveal a suspicion of alcohol in the driver’s body. There is no provision in the Criminal Code for purely random stops or for purely random breath testing, without any suspicion of alcohol in the body. Canadian courts have held that an operator’s Charter right to obtain legal counsel upon detention is reasonably limited where the “approved screening device” sample must be given forthwith to the peace officer. However, where an “approved instrument” sample or a blood sample is demanded, the detained operator must be given the right to obtain legal counsel without delay.

It is important to note that the two basic offences found in section 253 of the Criminal Code are complementary. On a section 253(a) charge, it is no defence to say that the accused’s BAC did not “exceed 80 mg.%. This is because the offence is defined by actual impairment of the ability to drive. On a section 253(b) charge, it is no defence to say that the accused had no signs of actual impairment and exhibited no substandard driving because the BAC at the time of driving defines this offence.

Statistics Canada has indicated that in 1999, alcohol and drug driving cases represented 13% of all Criminal Code charges. Some 77% of these cases ended with a conviction. This conviction rate is the highest among Criminal Code offences. However, some prosecutors indicate, anecdotally, that section 253(b) trials represent some 30-40% of all Criminal Code trial time. Typically, at a section 253(b) trial, defence counsel will focus upon whether peace officers had the necessary grounds to demands samples, whether they gave the accused the right to obtain legal counsel without delay, whether the breath testing equipment was working properly and whether the equipment was used properly. In cases where the Crown prosecutor seeks to rely on a presumption that the BAC at the time of testing is the same as the BAC at the time of operating, the accused may attempt to bring forward “evidence to the contrary”. This can involve evidence of consumption and expert extrapolation of that evidence to the BAC at the time of the alleged offence. If the accused’s consumption evidence is believed, the presumption is lost and the Crown prosecutor is unlikely to have other means available to prove the section 253(b) offence.

The penalty ranges for a criminal offence under section 253(a), 253(b) or the refusal provisions in section 254 are the same. These are “dual procedure” offences. The Crown prosecutor may choose to proceed by summary conviction procedure (less serious, with
no preliminary inquiry possible) or by indictable procedure (more serious – for example, the accused may elect trial by judge and jury, which is preceded by a preliminary inquiry). The chart below illustrates the penalty ranges.

**Table 1:** The range of *Criminal Code* penalties (fine, imprisonment, driving prohibition)

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<th>Summary/Indictment</th>
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<th>Summary/Indictment</th>
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<td></td>
<td>Min./Max.</td>
<td>Min.</td>
<td>Max.</td>
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<tr>
<td><strong>Fine</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>1st offence</td>
<td>$600/2000*</td>
<td>none</td>
<td>6 months/5 years</td>
</tr>
<tr>
<td>2nd offence</td>
<td>none/2000*</td>
<td>14 days</td>
<td>6 months/5 years</td>
</tr>
<tr>
<td>Subsequent</td>
<td>none/2000*</td>
<td>90 days</td>
<td>6 months/5 years</td>
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<td></td>
<td></td>
<td></td>
<td>3 years/lifetime</td>
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* $2000 is the maximum fine where the Crown prosecutor elects to proceed by summary conviction. Where the Crown prosecutor proceeds by indictment on a repeat offence, there is no fine maximum but a judge typically will impose imprisonment and the mandatory driving prohibition, without adding a fine.

Where the accused commits an offence under section 253(a) and thereby causes death, the maximum period of incarceration is life imprisonment. Where the accused commits an offence under section 253(a) and thereby causes injury to any person, the maximum period of incarceration is 10 years. With a 253(a) conviction for causing death, the maximum period of driving prohibition is a lifetime ban. With a 253(a) conviction for causing injury to any person, the maximum period of driving prohibition is 10 years.

The driving prohibition commences upon release from any period of incarceration that is imposed. In addition to these *Criminal Code* penalties, an offender will face higher insurance costs and provincial driving license suspension periods that may exceed the *Criminal Code* period of driving prohibition imposed by a court as part of the criminal sentence. The prohibition from driving will affect the offender’s social life and may affect the offender’s working life. A conviction under the *Criminal Code* may bar the offender from visiting other nations and it may adversely affect some career aspirations.

**Historical Development**

The untimely death of the fabulously wealthy Canadian Senator, George Fulford, during a visit to the United States in the first decade of the twentieth century, dramatically highlighted for ordinary citizens the collision risks of “horseless carriages” where alcohol was not involved. If George Fulford could die in a motor vehicle collision, then it could happen to anyone.

**1921** - Parliament created the summary conviction offence of “driving while intoxicated” to address the obvious increased risk of collision presented by drunk drivers.

**1925** - Parliament amended the *Criminal Code* to include “intoxication by a narcotic” within the intoxicated driving provision.
1930 – Parliament gave the Crown prosecutor the election to proceed with an intoxicated driving charge by indictment or by summary conviction. On summary conviction for a first offence, the penalty was a period of imprisonment of not less than 7 days and not more than 30 days. On indictable procedure for a first offence, a conviction dictated a period of imprisonment of not less than 30 days and not more than 3 months.

1925 to 1951 - Parliament made other amendments, which were relatively minor.

1951 - Two developments had occurred that led Parliament to make important amendments to the provisions. First, in order to obtain convictions for the “driving while intoxicated offence”, evidence of gross impairment was required and it was often difficult to find such evidence. Therefore, the offence of “driving while impaired by alcohol or any drug” (now section 253(a)) was added in 1951 to address this difficulty. The procedure for this offence was governed by the Crown’s election. Both the summary conviction and indictment sides of the “impaired driving” offence, generally, carried lesser penalties than those for “driving while intoxicated”. The second development was the advancement of forensic science with regard to testing bodily substances for the presence of alcohol. Norway had set a “legal limit” of 50 mg.% in 1936 and Sweden had set a “legal limit” of 80 mg.% in 1941. Canada did not immediately follow this lead but, in 1951, it did make chemical analysis of bodily substances admissible in evidence. There was no Code requirement to warn a suspect that the results from volunteered samples might be used in court but there was no obligation on a suspect to provide any sample and a refusal to provide a volunteered sample could not (and cannot) be mentioned in court.

1969 – Parliament added the “exceeds 80 mg.%” per se offence (now 253(b)) as a summary conviction offence. Also in 1969, Parliament provided peace officers the authority to demand a breath sample on an “approved instrument”. Parliament made refusal of this demand a summary conviction offence. At the same time, Parliament repealed the “driving while intoxicated offence”, originally enacted in 1921. (Dr. Robert Borkenstein had developed his “Breathalyzer” in 1955 and the “Grand Rapids study”, published in 1964, had demonstrated the statistical link between increased BAC and increased crash risk, especially where the BAC exceeds 80 mg.%). Founded in 1966, the Alcohol Test Committee of the Canadian Society of Forensic Science had been instrumental in providing information to the Justice Standing Committee of the House of Commons that led to the amendments.)

1976 - Parliament provided peace officers with the authority to demand a breath sample on an “approved screening device”. It made refusal of this demand an offence. At the same time, Parliament made the “over 80 mg.%” offence and “refusals” dual procedure offences. Parliament also harmonized the penalties for: impaired driving, driving while “over 80 mg.%” and the refusal offences.

1985 - Parliament added the offences of impaired driving causing death (which then carried a maximum penalty of 14 years imprisonment) and impaired driving causing bodily harm. The elements in these two offences are easier for the Crown to prove than the elements for manslaughter or for criminal negligence causing death or bodily harm. The latter two offences, which were used prior to the 1985 legislation, can still be used in alcohol and drug driving incidents, on the right facts. Parliament also created authority for a peace officer to seek a judicial warrant to obtain a blood sample from an unconscious driver, through medical intervention. The officer must have reasonable
grounds to believe that the suspect driver committed an alcohol-related impaired driving offence and that injury or death had resulted from a collision involving the driver. (In 1983, the Law Reform Commission of Canada, in its 21st report, had called for a Criminal Code amendment making it easier for a peace officer to obtain a blood sample from a driver who is unable to consent to the taking of blood.) A few penalty adjustments were also made.

1987-1997 – Parliament made some half a dozen amendments to the provisions in this period. Included among these were: extending section 253 offences to cover the railway mode of transportation, extending the time for the section 256 blood warrant from 2 hours to 4 hours, clarifying that the Code’s driving prohibition only starts running upon the offender’s release from any imprisonment, and ensuring that defence evidence of the accused’s BAC at the time of testing must be not simply different than the BAC at the time of driving but it must tend to show that the BAC at the time of driving would have been below the “legal limit” in order to qualify as “evidence to the contrary”.

1999 and 20000 – With Bill C-82 of 1999 and Bill C-18 of 2000, Parliament implemented all 10 recommendations for specific Criminal Code amendments made by the House of Commons Standing Committee on Justice and Human Rights in its May 1999 report on the alcohol and drug driving provisions of the Code. Six of the amendments related to penalties: the minimum fine on a first offence rose from $300 to $600; the minimum driving prohibition on 1st, 2nd and 3rd offence rose to 1, 2, and 3 years, respectively (with the possibility of a reduction for a first offender who participates in a provincial “ignition interlock device” program for the remainder of the prohibition period); a judge in the sentencing hearing must consider a BAC exceeding 160 mg.% as an aggravating factor; the maximum penalty for impaired driving causing death rose to life imprisonment; a court may make a term within a probation order requiring attendance for treatment; and a court may make a term within a probation order requiring participation in a provincial “interlock” program.

The remaining 4 amendments were: the time for a peace officer to demand a breath sample on an approved instrument rose from 2 hours to 3 hours, drug-impaired driving was added to the grounds on which a peace officer may seek a warrant to obtain a blood sample from an unconscious driver involved in an injurious/fatal collision, new offences were created for leaving the scene of an accident knowing that a death/injury had occurred, and the maximum penalty for driving while disqualified rose from 2 years to 5 years imprisonment, where the Crown proceeds by indictment.

(The Standing Committee also recommended that federal/provincial/territorial officials examine ways to improve the Code’s provisions regarding drug driving investigations and regarding the enforcement and prosecution of alcohol and drug driving offences. This work is underway.)

2001 – Parliament extended the possibility of reducing the period of absolute driving prohibition for repeat offenders, where the offender uses an “ignition interlock device” under a provincial program for the remainder of the driving prohibition period.