Reforming Canada’s new drug-impaired driving law: The need for per se limits and random roadside screening

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Abstract

Context
The issue of drug-impaired driving has recently risen to prominence in Canada. Survey data, roadside screening studies and post-mortem reports indicate that driving after drug use is commonplace and is now more prevalent among young people than driving after drinking. Although drug-impaired driving has been a criminal offence since 1925, police were not given specific means of enforcing the law until 2008. Unfortunately, the 2008 Criminal Code amendments, which authorized police to demand Standardized Field Sobriety Tests and Drug Recognition Evaluations, have not had their desired effects. The measures have proved to be costly, time-consuming and cumbersome, and are readily susceptible to challenge in the courts. Accordingly, the charge rates for drug-impaired driving remain extremely low.

Objectives
To review alternative enforcement models for drug-impaired driving that have been adopted in other jurisdictions, and to recommend a model that will improve apprehension and conviction rates and thereby deter drug-impaired driving. The model must be consistent with Canada’s social, political and constitutional frameworks.

Key Outcomes
Canada should adopt a system of random roadside saliva screening, similar to the model used in Victoria, Australia. For drivers who test positive, more sensitive evidentiary testing should be conducted at a police station, after the driver has been afforded the right to counsel.

Discussion and conclusions
The 2008 Criminal Code amendments were an important first step, but will not significantly improve apprehension or conviction rates for drug-impaired driving. It is preferable to set per se limits for the most commonly-used drugs, enforceable through a system of screening and evidentiary tests. This will be more efficient and cost-effective, and will result in more reliable evidence for criminal trials. Although this system will inevitably be subject to constitutional challenge, existing case law suggests that it should be upheld as a reasonable limit on constitutional rights.

Introduction
Drug-impaired driving is an issue that warrants serious attention in Canada. Driving after drug use has become more common during the past 15 years (Mann et al., 2010; Simpson, Singhal, Vanlaar, & Mayhew, 2006). Perhaps of greatest concern, several provincial, regional and national surveys indicate that many young people routinely drive after drug use (Asbridge, Poulin, & Donato, 2007; Patton, Mackay, & Broszeit, 2005; Poulin & McDonald, 2007). Indeed, more young Canadians report driving after using cannabis than after drinking (Paglia-Boak, Adlaf, & Mann, 2011, p. 15). For example, in the Canadian Addiction Survey, 39.8% of those aged 15-24 reported driving within two hours of using cannabis during the past 12 months, compared to 20.9% who reported driving under the influence of alcohol (Canada, Minister of Health, 2007, p. 95). In addition, the mean number of times that
respondents admitted to driving “under the influence of cannabis” in the past year was 10, compared to 1.6 for alcohol.

These survey data are reaffirmed by roadside surveys (Brault, Dussault, Bouchard, & Lemire, 2004; Beirness & Beasley, 2011) and post-mortem toxicology tests (Mercer & Jeffrey, 1995; Bouchard & Brault, 2004). For example, a 2011 study involving almost 6,000 drivers who were fatally injured from 2000 to 2007 found that 54.6% were positive for alcohol and/or drugs (Beasley, Beirness, & Porath-Waller, 2011, p. 1). Alcohol alone was present in 21.9% of the cases, drugs alone were present in 18.5%, and alcohol and drugs were present in 14.2%. In the drug-positive cases, 41% were positive for two or more drugs (p. 10). The high rates of concurrent drug and alcohol use and of poly-drug use are troubling because these substances’ combined effects may be multiplicative. Thus, it seems clear that drug-impaired driving merits legislative attention.

Prior to the 2008 Criminal Code amendments, the prosecution of drug-impaired driving cases was typically based on the arresting officer’s testimony regarding the accused’s driving, behaviour, demeanor, and statements. However, even when an accused was obviously impaired, and there was evidence of recent drug use, it was typically still necessary to bring expert evidence linking the drug use to the accused’s impairment. As one judge remarked, “the preferred practice [is] for the Crown to call expert medical or scientific evidence regarding the effects of drugs.... the court cannot take judicial notice of the effects of various drugs” (R v Rosskopf, para. 18). This made drug-impaired driving an onerous and uncertain offence to prosecute. Indeed, a 2003 Department of Justice report indicated that prosecuting a drug-impaired driving offence based on the observations of a non-expert police officer (such as one on routine patrol) was “nearly impossible” (Department of Justice, 2003, p. 4).

The 2008 Criminal Code amendments

The difficulties in prosecuting drug-impaired driving offences prompted Parliament to introduce two new enforcement measures in 2008. First, police are authorized to demand a Standardized Field Sobriety Test (SFST) if they reasonably suspect that a driver has any alcohol or drugs in his or her body. This is a relatively low threshold test, which is based on the same grounds as the demand for breath tests on approved screening devices (ASDs). As with ASD tests, the results of SFSTs can only be used to screen drivers at roadside and to provide grounds for demanding subsequent evidentiary breath tests or Drug Recognition Evaluation (DRE).

Second, the 2008 amendments established formal procedures for gathering evidence of drug use and impairment from suspected drug-impaired drivers. They authorized police to demand a DRE from a driver who they have reasonable grounds to believe has, within the preceding three hours, driven while impaired by a drug or a combination of drugs and alcohol. The results of the DRE are admissible at trial, if the DRE was conducted in accordance with the requirements of the relevant regulations and the driver was afforded the right to counsel.

Developed and used in the United States since the 1970s, DRE is designed to determine if an individual’s ability to drive is impaired by one of seven categories of drugs.1 The Criminal Code provides that DREs can only be conducted by an “evaluating officer,” who must be accredited by the International Association of Chiefs of Police. The process of training,

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1 The seven categories of drugs are: central nervous system depressants; inhalants; dissociative anesthetics; cannabis; central nervous system stimulants; hallucinogens; and narcotic analgesics.
certifying and maintaining the certification of evaluating officers is rigorous and expensive. It was estimated that the cost of training each evaluating officer in Canada is $17,000, and that a total of 800 officers have been trained. However, with transfers and retirements, there were only 491 evaluating officers conducting DREs as of September 2012.  

DRE consists of several physiological and divided attention tests, at the conclusion of which the evaluating officer completes a written opinion as to whether the suspect’s ability to drive is impaired and, if so, by what category of drugs. The officer can then demand a sample of blood, urine or saliva for analysis. A drug-impaired driving charge will only proceed to trial if the bodily sample confirms the evaluating officer’s conclusions. It has been reported that a typical DRE in Canada lasts 30-45 minutes, and entails the collection of over 100 separate pieces of information (Porath-Waller, Beirness, & Beasley, 2009, p. 517).

While DRE may be accurate in identifying drug-positive suspects, it is of far less value in proving that the suspect’s ability to drive was in fact impaired by drugs. Most of the steps in the DRE focus on drug presence and not on the impairment of driving ability. Unfortunately, there are no studies on the relationship between failing a DRE and actual impairment of driving skills, as measured by laboratory, driving simulator, and closed access roadway tests. This problem has not gone unnoticed by the Canadian courts.

**DRE in the Canadian courts**

The Canadian courts remain sceptical about the link between the mere presence of drugs in a driver’s system and the actual impairment of driving ability. In a recent Saskatchewan case (*R v Perillat*), the investigating officer smelled an “overwhelming odour” of marijuana coming from the accused’s vehicle. The accused admitted to smoking marijuana 2½ hours earlier, and showed the officer the “roach” on her centre console. The results of both the SFST and DRE were indicative of marijuana use, which was confirmed by a urine test. However, at the accused’s trial for impaired driving, the judge was not convinced that her ability to drive was actually *impaired* by marijuana. The judge explained:

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

> Constable Schafer’s evidence does not explain the accused’s test results and how they relate to the accused’s ability to drive a motor vehicle or how they relate back to the time of driving. Without testimony on these points, I am left with many questions. For example, what signs of impairment would one expect to see in someone who has been using marijuana? How long after using marijuana would you expect to see these signs and how long would they last? Can the results of Drug Recognition Evaluation tests taken over one and one-half hours after the time of driving be reliably related back to the time the accused pulled into the check stop? Was the accused’s performance in some of the tests just as consistent with someone who has poor balance or poor co-ordination as it was with someone who had used marijuana? (*R v Perillat*, paras. 24, 26)

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2 Email communication from D Beirness, Senior Research and Policy Analyst, CCSA, to A Murie, CEO, MADD Canada (24 September 2012).

3 This does not include the time necessary to conduct the preliminary roadside SFST, transport the suspect to the police station, or allow him or her to consult with counsel. When these aspects are included, the process takes close to two hours from testing to completion.

4 It is only the four divided attention tests (the walk-and-turn, the one-leg-stand, the Romberg balance, and the finger-to-nose tests) that directly assess the impairment of skills thought to be important for driving.
In acquitting the accused, the judge also stressed the absence of any evidence that the accused had been driving in an erratic, improper or impaired manner.

**Criminal Justice Statistics**

Even with approximately 500 officers conducting DREs, the number of persons charged with a drug-impaired driving offence has been disappointing. There were 944 drug-impaired driving charges in 2011, which constituted only 1.4% of all impaired driving charges (60,414) (Statistics Canada, 2013). While the total number of persons charged with a drug-impaired driving offence increased by almost 15% from 2009 to 2010, it increased by less than 4% from 2010 to 2011. This means that only a tiny percentage of drug-impaired drivers are ever charged. The Canadian Centre for Substance Abuse has estimated that drivers make 15.6 million trips per year after using cannabis (CCSA, online). Even if all 944 drug-impaired driving charges involved cannabis, a driver would have had to make more than 16,500 trips after using cannabis to have been charged with a single drug-impaired driving offence.⁵

**Alternatives to DRE**

In addition to the behavioural-based enforcement approach used in Canada, drug use can be detected through the testing of blood, saliva or urine. Ideally, the testing protocol for drugs would parallel the existing *Criminal Code* breath-testing provisions for alcohol. That is, preliminary screening would be conducted at roadside, with further evidential testing conducted at the police station after the accused has been afforded the right to counsel. However, testing for drug impairment is more complex than testing for alcohol impairment. First, not all drugs necessarily or consistently cause impairment. Second, the non-active metabolites of some drugs stay in a driver’s system long after their impairing effects have worn off. Third, until recently, there was no quick, inexpensive and non-invasive means of screening drivers for drug use at roadside. Finally, while there is a broad consensus on the impairing impact of alcohol at various BAC levels, views differ regarding the specific level at which the various drugs impair driving ability. Consequently, the scheme for enforcing alcohol-impaired driving cannot simply be adopted for drug-impaired driving.

**Zero tolerance and per se limits**

Other jurisdictions have approached this problem in two main ways. In some jurisdictions, it is an offence to drive with any amount of a specified drug in one’s system (the “zero tolerance” approach). At least a dozen American states have adopted this approach (Lacey, Brainard, & Snitow, 2010). When combined with chemical testing, zero tolerance laws have been shown to increase charge rates for drug-impaired driving. Both police and prosecutors report that zero tolerance laws have made it easier to prosecute drug-impaired driving cases. These laws provide a clear and unambiguous message, and can be enforced objectively by police without extensive specialized training. However, a zero tolerance approach may not garner much public or political support in Canada, given that drivers may test positive for a drug even though their ability is not impaired. In addition, a zero tolerance law may be perceived as a back-door attack on drug use, rather than a drug-impaired driving measure.

Given the potentially negative policy implications of a zero tolerance law in Canada, the preferable alternative is to establish criminal *per se* limits for given drugs, at a level at which the driving ability of most drivers would be impaired. This approach allows the government

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⁵ Admittedly, these 15.6 million trips include people who were not impaired by cannabis at the time of driving. However, it excludes those who were impaired by other drugs.
Reforming Canadian drug-impaired driving law

to focus on the drugs that are most commonly used, most likely to cause impairment, and that can be detected at roadside by means of a relatively quick and inexpensive test.

**Enforcing per se limits**

It is not enough to prohibit driving with a set amount of drugs in one’s body. As with alcohol-impaired driving, the police need the authority and means to conduct toxicological drug tests on drivers. Considering other demands on criminal justice resources, police need enforcement procedures that are straightforward and cost-effective, but nevertheless constitutionally valid. In some jurisdictions, toxicological tests are conducted in a relatively small number of cases. For instance, although Arizona has a zero tolerance law, the likelihood of a driver being chemically tested for drugs is minimal (Lacey et al, 2010). Police must have probable cause to stop the vehicle and have grounds to initiate a drug-impaired driving investigation. This is a protracted and exacting process, and depends heavily on the officer’s personal observations. Such a system is unlikely to dramatically increase drug-impaired driving charges.

In contrast, several European countries (Beirness, Swan, & Logan, 2010) and Australian states have introduced random roadside screening for specified drugs. In these jurisdictions, the police typically have authority to demand that any driver take a saliva test at roadside. If the driver tests positive, he or she will then be required to undergo additional, evidentiary testing. Like random breath testing (RBT), which also exists in these jurisdictions, random drug screening allows the police to test a large number of drivers in a relatively short period of time. For drivers who test negative, there is only a modest delay and slight inconvenience.

The Australian state of Victoria provides a useful model for Canada. The *Road Safety (Drugs Driving) Act, 2003* and *Road Safety (Drugs) Act, 2006* prohibit drivers from operating a motor vehicle with any level of methamphetamine, THC or MDMA (ecstasy) in their systems. The legislation authorizes police to randomly demand an oral fluid screening test from any driver at roadside. If the driver tests positive for any of the target drugs, he or she is required to accompany police to a testing vehicle where a second saliva sample is taken. The second sample is tested by a specially trained and qualified police officer. If the second sample also tests positive for a targeted drug, it is sent to a laboratory for confirmatory analysis, and the driver is immediately prohibited from driving for a specified time. The driver will only be charged if the laboratory analysis confirms the presence of a targeted drug. If the second test is negative, the driver will be released, after a total detention of approximately 15 minutes. Preliminary analysis of Victoria’s drug-testing framework has shown positive results. All 489 drivers prosecuted pursuant to the legislation between December 2004 and December 2006 were convicted (Boorman & Owens, 2009, p. 21).

Nevertheless, the approach in Victoria would need to be modified to be consistent with Canada’s legal and social framework. First, as described, a zero tolerance approach is likely to be seen as back-door enforcement of the federal drug offences, and would capture drivers who are not actually impaired by the drug while driving. Consequently, per se limits would need to be established. Second, Canadian police are not generally equipped with roadside testing vehicles, so suspected drug-impaired drivers would need to be taken to a police station for further evidentiary testing. Moreover, drivers would need to be informed of and allowed to exercise their constitutional right to legal counsel before evidentiary testing took place. Finally, the current Canadian law does not allow for the random roadside screening of drivers.

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6 The driver must exhibit visible signs of impairment but have a low BAC, thereby ruling out alcohol as the source of impairment; or there must be other obvious signs of recent drug use (eg drug paraphernalia).

7 Another 17 were convicted of refusing to provide a sample.
for either alcohol or drugs. The authors have repeatedly called for RBT legislation (Solomon, Chamberlain, Abdoullaeva, Tinholt & Chiodo, 2011a; Solomon, Chamberlain, Abdoullaeva, & Tinholt, 2011b), and do not repeat those arguments here. The case for random drug screening is as compelling as the case for RBT. Indeed, there may be less opposition to drug screening than to RBT, given that it would target drugs that are already being used illegally.

**Constitutional Issues**

Like most changes to enforcement practices, the random stopping of drivers and random saliva screening for drugs will undoubtedly give rise to challenges under the *Canadian Charter of Rights and Freedoms*. The most likely challenges would be based on section 9 (arbitrary detention), section 10(b) (the right to counsel), and section 8 (unreasonable search or seizure). As we have explained elsewhere, random toxicological screening will undoubtedly be found to be arbitrary and a violation of the right to counsel (Solomon et al, 2011a). However, consistent with the Supreme Court’s decisions regarding roadside ASD testing and SFST, these drug-related violations should be justified under section 1 of the *Charter* as reasonable limits “prescribed by law [that] can be demonstrably justified in a free and democratic society” (R v Hufsky; R v Ladouceur; R v Thomsen; R v Orbanski).

There is somewhat less certainty as to whether random saliva screening would violate the right to be free from unreasonable search and seizure. This will depend on whether drivers have a reasonable expectation of privacy with respect to saliva testing. While there is undoubtedly some expectation of privacy, this expectation is qualified given that driving is a licensed activity that involves considerable risk and requires that one’s ability to drive not be impaired (R v Wise). Further, providing a saliva sample at roadside is minimally intrusive. The test does not involve pain, discomfort or indignity, and reveals no personal information about the driver except for the presence of certain drugs in his or her system. The test is used solely for screening purposes and is not admissible in criminal proceedings. When put in the context of the random screening procedures used at every Canadian airport, at border crossings, at many courts and other government facilities, which commonly involve physical searches of one’s person and luggage, we believe that random roadside saliva testing should be found to be a reasonable search under the *Charter* (Chamberlain, Solomon & Kus, 2013).

**Conclusion**

The sharp increases in drug-impaired driving pose a major traffic safety risk in Canada, particularly for young drivers. Although the enactment of SFST and DRE legislation gave police authority to investigate drug-impaired driving, it has proven to be inadequate. Thus, the federal government should move from its exclusive reliance on SFST and DRE, and work toward enacting a system of roadside saliva testing for the most commonly-used illicit drugs. The accuracy and affordability of the drug screening tests will likely continue to improve and Canada should take advantage of these advances. Once sufficient scientific consensus has been reached, Canada should enact appropriate *per se* limits that are akin to the .05% and .08% BAC limits for drinking and driving.

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8 In order to demand a breath test on an ASD or SFST, police must reasonably suspect that a driver has alcohol or drugs in his or her body. *Criminal Code, section 254(2).*

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


R v Hufsky, [1988] 1 Supreme Court Reports 621.

R v Ladouceur, [1990] 1 Supreme Court Reports 1257.

R v Orbanski; R v Elias, [2005] 2 Supreme Court Reports 3.

R v Perillat, 2012 SKPC 135 (Saskatchewan Prov Ct).


R v Thomsen, [1988] 1 Supreme Court Reports 640.

R v Wise, [1992] 1 Supreme Court Reports 527.


