

Subject: *Criminal Code* Driving Prohibitions and Section 12 of the *Charter**

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INTRODUCTION

In 1999, the federal government increased the mandatory driving prohibitions for impaired driving offenders to one, two and three years for first, second and subsequent offences, respectively. Longer driving prohibitions had been strongly advocated by, among others, the Traffic Injury Research Foundation, the Addiction Research Foundation, the Canadian Association of Chiefs of Police, the Canadian Police Association, and the Canadian Resource Centre for Victims of Crime. The amendment was also supported by a growing body of traffic safety research that consistently demonstrates the effectiveness of longer driving prohibitions as an instrument of both general and specific deterrence. Moreover, it brought the federal prohibitions more in line with the provincial sanctions for convicted impaired drivers. All provinces, except New Brunswick, already had minimum licence suspensions of at least one year for first offenders, and most provinces had even lengthier sanctions for second and subsequent offenders. Finally, the new, longer federal driving prohibitions are consistent with overwhelming public opinion in support of tougher penalties for convicted offenders.

However, just over a year later, Hunter J. held in *R. v. Rallison* that the *Criminal Code*'s mandatory one-year prohibition for first offenders, as well as Ontario's corresponding one-year provincial licence suspension constitute cruel and unusual punishment contrary to

section 12 of the *Canadian Charter of Rights and Freedoms*. The decision was based primarily on the offender's personal circumstances, and was restricted to the particular offender involved. Although he did not rule on the general constitutionality of these provisions, it is clear from Hunter J.'s tone and analysis that he disapproves of the mandatory federal prohibition and provincial licence suspension. Due to the judgment's sweeping and, in our view, inappropriate generalizations, it is inevitable that other offenders will begin to challenge their driving prohibitions and suspensions as cruel and unusual. We can only hope that other judges are more thorough in their legal and empirical research, and less sympathetic to those who perpetrate Canada's leading criminal cause of death.

Before embarking on an analysis of the judgment in *Rallison*, we would like to express our skepticism concerning the application of section 12 to provincial licence suspensions. These suspensions are typically characterized as administrative sanctions, and are imposed to reflect the driver's unfitness to hold a licence. Thus, they do not conform to the conventional concept of "punishment," to which section 12 usually applies. Although there is surprisingly little case law on this point, the one case in which it is addressed held that a six-month licence suspension for driving while suspended "does not constitute punishment within the meaning of s. 12 and, in any event, is neither cruel nor unusual."

Moreover, in many cases, the courts have summarily denied section 12 remedies to those challenging administrative sanctions. For example, the Newfoundland Supreme Court rejected the application of section 12 to a liquor licence suspension in *Billard v. Liquor Licensing Board (Nfld.)*, stating that "it is far-fetched to suggest it applies to the cancellation of a licence such as the appellant had.... The loss of a licence may create even some hardship but it

does not subject the appellant to cruel and unusual treatment or punishment.” Similarly, in *Arsenault et al. v. Charlottetown (City)*, it was held that the loss of a taxi licence was a civil remedy and was not subject to section 12.

While we do not question the application of section 12 to *Criminal Code* driving prohibitions, we are not convinced that it applies to any corresponding action by provincial licensing authorities. Consequently, we have limited our analysis to the *Criminal Code* provisions and driving prohibitions. Nevertheless, we believe that the evidence supporting the use of driving prohibitions applies equally to licence suspensions, and that neither would be cruel and unusual within the meaning of section 12.

SECTION I: SUPREME COURT OF CANADA JUDGMENTS

The *Charter* prohibition against cruel and unusual punishment was recently addressed by the Supreme Court of Canada in *R. v. Morrisey*. The Court summarized previous judgments and outlined the elements of a section 12 analysis. In particular, the Court emphasized that there is no constitutional remedy where a sentence is “merely disproportionate.” Rather, the primary purpose of section 12 is to protect Canadians “against punishment which is so excessive as to outrage our society’s sense of decency.” Indeed, Gonthier J. reiterated in *Morrisey* the warning he first made in *R. v. Goltz* that “the test is not one which is quick to invalidate sentences crafted by legislators.”

The Supreme Court has identified two types of situations in which a penalty may be found to violate section 12. The first situation addresses punishments that are generally constitutional, but may be cruel and unusual in certain cases because of their effects on a

particular offender. Second, if the court finds that the penalty is not disproportionate for the particular offender, it will proceed to consider whether the penalty would be grossly disproportionate in a reasonable hypothetical situation. This second type of analysis is most useful where the offence covers a broad spectrum of offenders, conduct and moral blameworthiness. In such cases, it is more likely that a minimum sentence could be inappropriate for some offenders whose conduct falls within the least serious category of cases, and whose life situations would render the punishment unduly harsh.

For example, in *R. v. Smith*, the Supreme Court of Canada considered whether the minimum seven-year prison sentence for importing a narcotic was cruel and unusual punishment under section 12. This minimum punishment applied to “importing,” which is broadly defined to include bringing any quantity of any “narcotic” across the border. Given the range of drugs and sweeping scope of the conduct involved in the offence, the Court found that the penalty would be grossly disproportionate for the hypothetical “small offender.” Indeed, we would agree. While society would not likely be outraged if a member of organized crime were sentenced to seven years’ imprisonment for importing large amounts of heroin for the purpose of trafficking, it would almost certainly be outraged if the same sentence were imposed on a young first offender who returned from spring break with a single “joint” in his pocket.

Unfortunately, in attempting to define these two different lines of analysis, the Supreme Court has produced unnecessarily complex tests for section 12. According to *Morrissey*, a court should first consider whether the punishment at issue is grossly disproportionate for the particular offender. The relevant factors to consider at this stage were outlined by Lamer J. in *Smith* and reiterated in *Morrissey*. They include “the gravity of the offence, the personal

characteristics of the offender and the particular circumstances of the case.”

In addition, Gonthier J. noted several “contextual” factors that should be considered, including “the actual effect of the punishment on the individual, the penological goals and sentencing principles upon which the sentence is fashioned, the existence of valid alternatives to the punishment imposed, and a comparison for other crimes in the same jurisdiction.” In our view, the introduction of these “contextual” factors gives judges largely unfettered discretion by creating a hodge-podge of now relevant variables, at least some which trial courts may be ill-equipped to assess and balance. In the place of principled analysis, the current framework invites vague “policy analysis” that simply reflects the judges’ personal biases in favour of or against particular offences, punishments and offenders. It gives individual judges room to criticize penalties that have been carefully crafted by legislators, and to single-handedly develop new penalties without any substantive research or justification. Unfortunately, this seems to be what occurred in *Rallison*.

If the first stage of analysis leads to the conclusion that the punishment is grossly disproportionate for the particular offender, the court proceeds to arguments under section one regarding the objective of the legislation and its rational connection and proportionality to the punishment imposed. In the end, if the punishment cannot be justified under section one, it will not be imposed on that particular offender.

However, if the punishment is found not to be grossly disproportionate for the particular offender, the court will consider the general constitutionality of the punishment by reference to “reasonable hypothetical” situations. That is, if the court can contemplate reasonable hypothetical situations in which the punishment would be grossly disproportionate, its general

use will be found unconstitutional, unless it can be justified under section one. As explained, in *Smith*, the Supreme Court assessed the seven-year minimum prison sentence for importing a narcotic in terms of a hypothetical tourist bringing a single “joint” across the border. The hypothetical situations cannot be “far-fetched or marginally imaginable,” nor should they be “remote or extreme examples.” If the punishment is found grossly disproportionate in the hypothetical situation, and cannot be justified under section one, the entire provision will be struck down.

In addition to laying out the particular processes to be followed, the Supreme Court of Canada has given some general cautionary advice on section 12 analyses. For example, La Forest J., writing for a unanimous court in *R. v. Lyons*, commented that the “word ‘grossly’ ... reflects this Court’s concern not to hold Parliament to a standard so exacting, at least in the context of s. 12, as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender.” Similarly, Cory J. warned in *Steele v. Mountain Institution* that it “will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test ... is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*.” Thus, it is clear that a violation of section 12 should only be found in clear cases, and that courts should show some deference to the sentences prescribed by Parliament.

SECTION II: APPLICATION TO *RALLISON*

In *Rallison*, Hunter J. purported to follow the section 12 analysis Gonthier J. established in *Morrissey*. This included an examination of the gravity of the offence and the personal characteristics of the offender, as well as the penological goals and sentencing principles the penalty was designed to achieve. However, in our view, Hunter J. assigned far too little weight to the seriousness of the offence, and mischaracterized the penological goals that underlie mandatory driving prohibitions and provincial licence suspensions. Moreover, Hunter J. appears to have ignored the basic requirement for finding a punishment to be cruel and unusual, namely, that it is “grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable.” Finally, Hunter J. did not address any of the previous cases holding that the suspension of driving privileges does not violate section 12, whether imposed for provincial driving violations or for federal *Criminal Code* offences.

(a) Gravity of the Offence

In *Morrissey*, the Supreme Court stated that the first factor to be considered in a section 12 analysis is the gravity of the offence. This requires “an understanding of both the character of the offender’s actions, and the consequences of those actions.” For example, the defendant in *Morrissey* was convicted of criminal negligence causing death with a firearm. Thus, the Court concluded that both the consequences of his actions (death) and the character of those actions (a wanton and reckless disregard for human life and safety) were very grave.

Conversely, Hunter J.’s analysis of the gravity of the offence in *Rallison* greatly discounted the severity of impaired driving and the risks it causes. Hunter J. emphasized that

Mr. Rallison's actions had only created a danger, and that no injury resulted. The judge failed to note that the police stopped Mr. Rallison because he was driving erratically. More importantly, Hunter J. ignored the risks posed by impaired drivers, especially those with blood-alcohol concentrations (BACs) as high as Mr. Rallison's - 0.18%. Drivers, like Mr. Rallison, with BACs of 0.15% and higher are at approximately 250 times the risk of fatal crash as sober drivers. Indeed, 62% of fatally-injured drivers who had been drinking had a BAC in excess of 0.15%. Thus, Mr. Rallison created a substantial and serious risk to both himself and, further, all other users of the road. He exhibited the same "wanton and reckless disregard for human life and safety" as the offender in *Morrisey*. It is due to Mr. Rallison's good fortune and police intervention, not a lack of moral blameworthiness, that Mr. Rallison was not involved in a crash. Consequently, the court should have assigned far greater weight to the gravity of Mr. Rallison's conduct, not trivialized it because he did not cause a crash.

Indeed, this error in Hunter J.'s analysis becomes evident on examining the *Goltz* decision. In that case, the Supreme Court of Canada considered the constitutionality of the penalty for driving while subject to a provincial licence suspension - a minimum seven days' imprisonment and \$300 fine for a first offence in British Columbia. Gonthier J. did not hesitate to conclude that the offence was grave, even though it did not involve any actual crash or injuries in the particular case. In fact, unlike impaired driving, the offence of driving while suspended does not increase the risk of a crash. However, it was sufficient for Gonthier J. that the offence "may involve a risk to the lives and limbs of innocent users of the province's roads." This same analysis should apply with even greater weight to the offence of impaired driving, which involves a very clear and serious risk to the public. Thus, Hunter J. erred in discounting

the gravity of the offence because the alleged “consequence was only to create a danger... without an injurious result.”

In a similar vein, Hunter J. did not properly assess the general moral blameworthiness of impaired driving offenders. Hunter J. stated that “quite often a person under the influence of alcohol who operates a motor vehicle does not apply his mind to the purpose of intentionally creating a danger particularly because his judgement is impaired.” Later in the judgment, Hunter J. commented that “[t]he underlying offence committed here by Mr. Rallison was that of a crime of negligence or recklessness and not one of subjective intent.” Clearly, the judge has mischaracterized the *mens rea* requirement of impaired driving. While impaired driving is not a crime of specific intent, the Crown is required to prove that the accused voluntarily consumed alcohol and intended to have care or control of a motor vehicle. Mr. Rallison was not simply negligent or careless. He intentionally drank, indeed a very great deal, and then intentionally drove, thereby endangering all those in his path.

Hunter J. seems to imply that impaired drivers do not really intend to create a risk. Moreover, Hunter J. suggests that Mr. Rallison did not really believe himself to be impaired, and therefore was not morally blameworthy. This attitude minimizes the severity of impaired driving, and implies that Mr. Rallison’s behaviour did not warrant moral condemnation. It ignores that Mr. Rallison’s BAC was 0.18%, or two and one-quarter times the *Criminal Code* limit. Mr. Rallison did not simply have one or two drinks too many. Indeed, a typical 175-pound male would have to consume approximately 10 standard drinks in two hours to reach a BAC of 0.18%. This is the equivalent of two 26-ounce bottles of wine, 15 ounces of liquor or 10 bottles of beer. As indicated, drivers with such a high BACs are approximately 250 times more

likely to die in a crash than a sober driver. Parliament recently amended the *Criminal Code* to make such high BACs an aggravating factor in sentencing, thereby recognizing the greatly increased risks posed by, and heightened moral blameworthiness of, offenders like Mr. Rallison.

Finally, Hunter J.'s comments ignore the fact that an estimated 1,680 Canadians are killed and 74,000 are injured in alcohol-related crashes every year. Thus, impaired driving is, by far, Canada's leading criminal cause of death, and leading cause of alcohol-attributed mortality. Moreover, alcohol-related crashes have been estimated to cost Canadian society up to 10 billion dollars annually. Given these tragic and far-reaching consequences, it is both inappropriate and unreasonable to discount the gravity of impaired driving as a criminal offence.

(b) Particular Characteristics of the Offender and Circumstances of the Case

According to *Morrisey*, this stage of the test involves an inquiry into the circumstances of the offence, and an examination of any aggravating or mitigating circumstances. Hunter J. considered these factors very briefly. In our view, there was the clear aggravating factor of Mr. Rallison's high BAC. As indicated, a BAC of 0.18% presents a very serious risk to the public, and Parliament requires judges to consider it an aggravating factor in sentencing. However, Hunter J. did not discuss the heightened risks posed by Mr. Rallison. In fact, Rallison's high BAC was undercut by the sentence immediately following, which noted that there "was no accident nor any unusual driving behaviour beyond that which drew the officer's attention in the first place." As explained, the lack of a crash should not be considered a mitigating factor in cases of impaired driving *simpliciter*. Had Mr. Rallison been involved in a crash, his conduct might have warranted a charge for the more serious offence of impaired driving causing bodily

harm or death. The lack of a crash does not detract from the very serious risk the defendant's behaviour created. Indeed, police evidence indicated that Mr. Rallison was driving erratically, and that "immediate symptoms of impairment were apparent." The absence of a crash cannot be attributed to anything Mr. Rallison did to mitigate the offence.

Hunter J. also considered the fact that Mr. Rallison pleaded guilty, and showed remorse and contrition before the court. While these may well be considered as mitigating factors in appropriate circumstances, the police evidence of erratic driving and the uncontradicted evidence of a BAC two and one-quarter times the legal limit may have had more to do with the guilty plea than genuine remorse. At any rate, their presence does not outweigh the offender's high BAC in this case. Given the high and consistent breathalyzer results, it is not surprising that Mr. Rallison pleaded guilty. Indeed, a large majority of those charged with having a BAC above 0.08% plead guilty. This does not set Mr. Rallison apart as a particularly meritorious offender.

Finally, Hunter J. placed too much emphasis on the fact that Mr. Rallison was a first-time impaired driving offender. The *Criminal Code* imposes a mandatory one-year prohibition on all such first offenders, so a lack of prior offences does not justify a less onerous sentence in Mr. Rallison's case. Moreover, Hunter J. argued that the mandatory prohibition was "unduly harsh... where no propensity, as a first offender, has been established." While it is possible that Mr. Rallison was apprehended on the first and only occasion that he ever drove while impaired, statistics suggest that this is extremely unlikely. Canadian researchers have estimated that only one in every 445 impaired driving trips actually results in a *Criminal Code* charge, let alone a conviction. Some international statistics place the risk of arrest per impaired driving trip as low

as one in 2000. In addition, studies show that a substantial portion of impaired driving offenders, particularly those with high BACs, have established patterns of excessive drinking, and routinely drink and drive. These statistics suggest that Mr. Rallison had probably driven while impaired on at least several occasions prior to his arrest. Although we acknowledge that there is no evidence of a propensity for impaired driving in this case, given the statistics and his very high BAC, it is naïve to assume that this was Mr. Rallison's first ever impaired driving occasion.

(c) Actual Effect of the Punishment on the Offender

This aspect of the test “requires the court to consider how the offender will be personally affected by the actual punishment imposed.” This was Hunter J.’s primary consideration, and it is apparent that he was very sympathetic to the offender’s circumstances. Mr. Rallison owned a small excavating business, which required him to operate heavy equipment on public and private roads. Hunter J. assumed that, if Mr. Rallison were prohibited from driving for a year, he would incur a substantial loss of income, and could potentially lose his family business. As his wife does not work outside the home, there would be no income to support their three children.

In addition, Mr. Rallison lives in a rural community with no taxis or public transportation. He requires a motor vehicle not only for employment purposes, but also for “grocery shopping, medical appointments and daily social interaction.” His wife is unable to drive because of poor eyesight, and their one son who still lives at home is not yet old enough to drive. Hunter J. was of the opinion that this would leave Mr. Rallison and his family completely isolated from their

community, and was far too onerous a punishment for a first-time impaired driving offender.

We do not wish to minimize the significant consequences that the driving prohibition would have on Mr. Rallison. Nor do we doubt that offenders in rural communities are likely to suffer greater inconvenience than offenders in urban areas. Nevertheless, we believe that the actual effect of the punishment on Mr. Rallison was exaggerated. Any offender whose occupation requires a driver's licence is likely to suffer economic consequences as a result of an impaired driving conviction. However, it would be illogical to be more lenient on such offenders, since it is precisely their irresponsible and dangerous driving habits that gave rise to their penalties. It is absurd to suggest that offenders such as truck drivers, couriers and bus drivers should escape the driving prohibition that applies to all other motorists because it would have a greater impact on their employment. Indeed, it could be argued that those who drive trucks and other commercial vehicles for a living should be held to a higher, not lower, standard than non-professional drivers.

Moreover, although the driving prohibition will leave Mr. Rallison's immediate household without a legal driver, it does not follow that there are no alternatives. Where necessary, Mr. Rallison can likely obtain rides from family, friends or neighbours. In fact, his brother, who is employed by the family excavating business, lives nearby and could potentially provide transportation. In addition, just as those in urban areas may be required to hire taxis, Mr. Rallison could hire an individual to drive him to necessary appointments and engagements when he is unable to find other transportation. Granted, these alternatives may be inconvenient; however, they are not severely disproportionate to the inconvenience and expense incurred by offenders in more populated areas. In our view, Hunter J. overstated the case in concluding that

the driving prohibition and licence suspension would have a “crushing impact” on the particular offender.

(d) Penological Goals and Valid Alternatives

In *Rallison*, Hunter J. suggested that the one-year driving prohibition was too onerous, and that there were alternatives that would impair an offender’s rights less severely. In particular, Hunter J. proposed limited restrictions on driving, which would permit Mr. Rallison to drive for work, medical appointments or other specific circumstances. In addition, Hunter J. suggested that education and public service initiatives would “be of far more assistance both to the offender and his community.”

In doing so, Hunter J. mischaracterized the penological goals of the mandatory driving prohibition for convicted impaired drivers. Hunter J. was obviously skeptical about the general and specific deterrent effects of such prohibitions, and felt that, in particular, a one-year prohibition could not be justified by deterrence principles. Hunter J. stated, “there is simply no empirical evidence or logic to suggest that a minimum twelve month loss of licence achieves any further penological [*sic*] goal than one of two months or eight months or ten. It is entirely arbitrary.”

It is unclear how Hunter J. came to this conclusion. It appears that the judge’s own intuition was substituted for research or data. Contrary to Hunter J.’s assertions, traffic safety research consistently shows that driving prohibitions have a far greater specific deterrent impact than any other impaired driving sanction. Moreover, longer driving prohibitions are associated with more significant reductions in subsequent impaired driving convictions, alcohol-related

crashes, and total crashes. For example, an Australian study of 1,000 impaired driving offenders found that, controlling for all other factors, longer disqualifications corresponded to lower recidivism rates in the three years following conviction or release from prison. In fact, the study concluded that the optimum period of disqualification for many offenders is 18 months.

It may be argued that the suspended drivers' lower recidivism rate is attributable to the fact that they were prohibited from driving during part of the follow-up period, and thus, had less exposure to driving. However, as described below, the mere fact that offenders were legally prohibited from driving should not detract from the study's general findings with respect to specific deterrence. First, it should be noted that 65% to 75% of suspended drivers continue to drive, at least occasionally, during their suspension periods. Second, even if suspended drivers were driving less or abstaining from driving, the sanction had the desired effects of reducing convictions, and both alcohol-related and other crashes. Finally, over 90% of the offenders in the Australian study were suspended for less than three years. Thus, for the vast majority of the offenders, the specific deterrent effects of the suspensions reported in the study extended beyond the suspension period.

Similarly, a leading Canadian study on sentence severity examined the specific deterrent impact of Ontario's then three-month mandatory licence suspensions for first offenders. In the three years following conviction, offenders who received licence suspensions longer than the minimum had fewer traffic safety problems in all the outcomes studied: subsequent impaired driving convictions, alcohol-related collisions, and total collisions.

Finally, a major American study found that suspended drivers had significantly better survival rates and lower rates of impaired driving recidivism and crashes in the four years

following conviction than offenders who did not receive licence suspensions. Since it was estimated that at least 70% of licence suspensions were for only 12 months, the suspensions clearly had a significant specific deterrent impact both during and following the suspension period.

These and other studies suggest that the federal one-year driving prohibitions, coupled with the provincial suspensions, reduce impaired driving, impaired driving convictions, crashes and alcohol-related crashes among offenders. The research directly refutes Hunter J.'s concern that driving prohibitions cannot be justified on deterrence principles, and his unsubstantiated claim that "there is simply no empirical evidence" to suggest that longer prohibitions are more effective than shorter ones.

In addition to their specific deterrent effects, driving prohibitions and licence suspensions are the most effective means of achieving general deterrence of impaired driving. Traditionally, general deterrence is described as resulting from the perceived certainty, severity and celerity of punishment. That is, general deterrence is increased by the enhanced probability of arrest and conviction, the gravity of the penalty, and the swiftness with which the penalty is imposed on the driver. The mandatory one-year prohibition fulfils two of these criteria - certainty and severity. If, as implied by Hunter J., the length of the prohibition were left to the discretion of the judge in each case, the certainty of punishment would decrease, and the general deterrent effect of the prohibition would be severely weakened.

Indeed, studies show that mandatory licence suspensions are significantly more effective general deterrents than discretionary ones. For example, when discretionary suspensions were replaced with mandatory suspensions in Wisconsin, the average number of alcohol-related

crashes decreased by 25 per cent. Thus, the perceived “certainty” of the punishment appears to be critical to achieving general deterrence.

The perceived certainty of punishment would be greatly diminished if, as Hunter J. suggests, offenders were allowed to continue driving for specific purposes, such as employment. In a recent Australian study, the authors examined the effectiveness of so-called “restricted licences,” which allow convicted offenders to drive for employment or treatment purposes. The study found that offenders with restricted licences had significantly more crashes in the four years following conviction than offenders who were prohibited from driving. Interestingly, the restricted drivers were also nearly five times as likely to have a non-alcohol-related crash than prohibited drivers. This study indicates that restricted licences cannot be justified on a traffic safety basis.

Moreover, a survey of Australian offenders who received restricted licences revealed that almost 30% admitted to successfully driving in breach of the conditions on their licences. This creates a significant enforcement burden for the police. More importantly, it decreases both the general and specific deterrent effects of the driving prohibition. Convicted offenders would not feel the entire weight of their penalties, as many would continue to drive for personal and social purposes. In addition, the general deterrent effect is undermined, as potential offenders will not perceive the penalty as either certain or severe. It was for these reasons that the Canadian Council of Motor Transport Administrators (CCMTA) recently recommended removing work exemptions from the provincial and territorial licence suspensions regimes. Thus, Hunter J.’s suggestions are in direct conflict with the recommendations of Canada’s leading traffic professionals.

Similarly, Hunter J.'s confidence that "[e]ducation is and will continue to be the most effective way of altering social behaviour" is entirely without support in the traffic safety literature. While studies indicate that education and rehabilitation may be of some limited benefit, they consistently conclude that they should not be substituted for driving sanctions. For example, the Canadian study on sentence severity, described above, warned that, "while under appropriate conditions educational and rehabilitative countermeasures may have traffic safety benefits, reduction or elimination of license suspension as an incentive to enter these programmes cannot be supported on traffic safety grounds."

Furthermore, a California pilot project assigned some impaired driving offenders to a 12-month treatment program, while others received license suspensions. Over the 7-year evaluation period, offenders who participated in the treatment program had 30% more crashes than those who received licence suspensions. The authors concluded that "existing research also shows that licence suspensions are more effective than any known form of alcohol education or rehabilitation." Another study, conducted by an international leader in traffic safety research, concluded that "[o]nly one sanction, licence deprivation, is strongly supported in the research literature as effective in reforming the drunk driver."

Finally, a comprehensive study of the various policies aimed at reducing impaired driving warned that "skepticism over the reformatory capability of drunk driving education and therapy is warranted." The study reviewed numerous studies that consistently found licence action to be more effective than treatment programs in terms of both subsequent convictions and crashes. Of particular note to *Rallison*, the author suggested that "the best explanation for the persistence of most current programs of education and treatment may be the existence of

professional lobbies that are committed to them and the organizational need of courts to dispose of large numbers of drunk driving cases economically.” Nevertheless, while the study found the results of education programs to be “disappointing,” it noted that “license suspension and revocation policies are effective in incapacitating known drunk-driving offenders.”

Therefore, traffic safety research indicates that driving prohibitions are, by far, the most effective means of achieving general and specific deterrence and protecting the public from potential offenders. Studies show that alternative measures are not as effective, and may even be dangerous. Thus, in promoting these alternatives, Hunter J. did not assign sufficient weight to the penological goal of public safety.

(e) Gross Disproportionality

In *Morrisey*, the Supreme Court of Canada stated that a penalty will only be found to be cruel and unusual if it “is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable.” The Court reiterated the principle from *Goltz* that “the test is not one which is quick to invalidate the sentences crafted by legislators.” In our view, this test has not been satisfied with respect to the mandatory one-year driving prohibitions for first-time impaired driving offenders. Given recent consistent public opinion polls, it is difficult to see how the judge could have concluded that this sanction was abhorrent or intolerable for most Canadians. Indeed, it is much more likely that the Canadian public would find Hunter J.’s decision abhorrent or intolerable.

Although opinion polls are not without their limitations, the existing surveys consistently indicate that most Canadians believe that reducing impaired driving should be a high priority,

and that offenders should receive tougher sentences. For example, a 1997 survey conducted for MADD Canada found that 75% of Canadians believe that federal and provincial governments are not doing enough to reduce impaired driving, and 78% felt that a minimum jail sentence would deter people from drinking and driving. More recently, the 2000 *National Survey on Impaired Driving* reported that 54.6% of Canadians surveyed felt that Canada's drinking and driving laws are "not tough enough." Over 60% supported or strongly supported a mandatory 14-day jail sentence for first-time impaired driving offenders, and two-thirds supported or strongly supported a mandatory lifetime driving suspension for second offenders. Finally, and most pertinently, a 2001 national survey found that 91% of Canadians support or strongly support licence suspensions for impaired drivers.

Thus, a one-year prohibition for first offenders is, if anything, less onerous than what most Canadians consider to be appropriate. The research indicates that the general public is most unlikely to sympathize with offenders. Consequently, the driving prohibition lacks the most fundamental requirement of the section 12 analysis, and cannot credibly be found to be cruel and unusual punishment, regardless of the offender involved.

While a judge is certainly entitled to hold whatever personal opinion he or she may wish regarding the appropriateness of a legislated penalty, the test under section 12 of the *Charter* is framed in terms of how the Canadian public would perceive the punishment. Moreover, the public's view is quantifiable and should not be ignored, particularly where reliable data exist. With all due respect, judges ought not to presume to speak on the public's behalf, particularly in light of very clear evidence to the contrary.

(f) Reasonable Hypotheticals

According to the majority in *Morrisey*, even if the penalty is not grossly disproportionate for the particular offender, the court should proceed to consider whether it would be grossly disproportionate in reasonable hypothetical situations. If this second part of the analysis finds the punishment to be cruel and unusual, then it will be struck down unless it can be saved under section one.

Given Hunter J.'s conclusion that the driving prohibition was cruel and unusual with respect to Mr. Rallison, this second step of the analysis was not required. However, Hunter J. went on to consider reasonable hypothetical situations in *obiter*, and concluded that the driving prohibition would be cruel and unusual with respect to the "reasonable hypotheticals" he described. Therefore, had the analysis of reasonable hypotheticals been essential in the case, Hunter J. would have struck down mandatory driving prohibitions as *per se* cruel and unusual punishment.

Respectfully, we are not convinced that the one-year driving prohibition would be cruel and unusual punishment in the hypothetical situations discussed by Hunter J. The first hypothetical describes a 19 year-old high school student in a rural community who attends a school function where alcohol is being consumed by students, both legally and illegally. The offender decides to drive a group of students home who are clearly intoxicated, but whose designated driver has departed without them. The offender has consumed "what he believes is very little alcohol." However, he is stopped at a police checkpoint and is found to have a BAC of 0.105%. The resulting driving prohibition will prevent him from maintaining his summer job in the forestry industry, which requires him to drive on public roads. This, in turn, will hamper his

ability to raise funds for university. Hunter J. concludes that the prohibition “will severely restrict his ability to advance to university despite no prior record and an outstanding academic background.”

Several problems are apparent in this hypothetical. Hunter J. drafted the situation to evoke sympathy for the offender and downplay the seriousness of the offence. It is intended to create the impression that the offender should be viewed as a hero for offering to drive the individuals home instead of allowing them to drive themselves. A hero would have called a cab or a parent, rather than endangering himself, his friends and other users of the road. Clearly, the offender would not have been viewed as a hero if he had caused a crash that killed or seriously injured his passengers. In our view, the hypothetical is inappropriate, given the significantly elevated risk of crash among young drinking drivers.

Road crashes are the leading cause of death and injuries among Canadians aged 15 to 19. In fact, they account for over one-third of all deaths and over one-fifth of all injuries among this age group. Those aged 15-24 have double the rate of crash deaths, and nearly double the rate of crash injuries, as those aged 35-54. Moreover, a large percentage of these deaths and injuries are alcohol-related. For example, 40% of all teenage drivers killed and 23% of those seriously injured in road crashes had been drinking. One study estimated that, for male drivers aged 16-20, the relative risk of injury in a single-vehicle crash more than doubles for every 0.02% increase in BAC. The study further noted that a young male with a BAC between 0.08% and 0.099% (even lower than the driver’s BAC in Hunter J.’s reasonable hypothetical) is over 50 times more likely to die in a single vehicle crash than if he were driving sober. Given these significantly elevated risks, the courts should not condone impaired driving by young

people. No “hero” would expose his friends and other users of the road to such risks.

Furthermore, the effect of the prohibition in this hypothetical is greatly exaggerated. There are many students who hold part-time jobs for which a driver’s licence is not required, and a one-year prohibition will only exclude him from driving-related jobs for one year. In addition, the situation ignores alternative sources of funding that are available to Canadian students, including government loans, bursaries and scholarships. Indeed, if, as Hunter J. suggests, the offender had an “outstanding academic background,” one would expect that he would be a prime candidate for academic scholarships. And even if he were required to delay admission to university for one year, this would not affect his long-term prospects. It is a serious overstatement to imply that the offender’s life would somehow be ruined as a result of his “generous offer” to drive his fellow students home. Finally, it must not be forgotten that the student in this case committed a federal criminal offence, and posed a risk of death and injury to both his classmates and the general public.

We also question Hunter J.’s suggestion that impaired drivers stopped at police checkpoints are somehow less blameworthy than other impaired drivers, presumably because they were not exhibiting any abnormal driving behaviour and would not have been detected but for the random checkpoint. This attitude is also evident in paragraph 47 of the judgment, where Hunter J. compares “someone with a blood alcohol level of 90 milligrams per cent who exhibited minimal aberrant driving and who was stopped at a RIDE programme to someone who was ‘all over the road’.” This suggests that impaired drivers do not really pose a risk unless they are driving in an obviously erratic or dangerous manner. Hunter J. appears to be questioning the value of the statutory *per se* offence of driving with a BAC over 0.08%, even

though the *per se* offence has been a key feature of traffic safety legislation in the developed world for decades.

The judge's comments reflect a very outmoded view that equates impairment with alcohol-induced helplessness or stupor. Scientific research over the last 30 years has overwhelmingly established that a person becomes progressively impaired and is at greatly increased risk of crash well before they exhibit signs of severe intoxication. In fact, a recent study concluded that each 0.02% increase in BAC nearly doubles the risk of a fatal single-vehicle crash for drivers over 20. As indicated, most individuals who drive while impaired go undetected. However, this does not mean that they are any less impaired than drivers whose erratic driving immediately attracts police attention. Indeed, such a line of argument suggests that we should be unconcerned with impaired drivers until they have caused a crash. Thus, Hunter J.'s sympathetic attitude toward impaired drivers who are apprehended at police spotchecks is inappropriate. Even if Hunter J.'s sympathies were well-founded, they would hardly justify the conclusion that a one-year driving prohibition constitutes cruel and unusual punishment for the hypothetical offender.

Hunter J.'s second hypothetical is also problematic. He describes a woman in her mid-sixties who has just lost her husband of 25 years, and is caught driving with a BAC of 0.13%. She lives in a rural area with no taxis or public transportation and, like Mr. Rallison, she will be isolated from the community. Her family has moved away and she has little social support. Again, Hunter J. attempts to create the most sympathetic hypothetical offender imaginable.

While we believe that Hunter J. has again exaggerated the prohibition's alleged effects on the offender, our primary concern is with classifying this situation as a "reasonable"

hypothetical. Hunter J. stated that this situation occurs “with regularity in a rural and isolated community environment.” We are not convinced that this is the case. Drivers over 65 are much less likely than any other age group to drive while impaired. For example, the *Statistical Report on the Health of Canadians* indicated that less than 1% of those aged 65-74 admitted to driving after drinking too much. This is especially true in the case of women, who, in general, are only one-third as likely to drive after drinking as men. Therefore, even if women in rural areas do drive impaired “with regularity,” perhaps it is the attitudes and behaviours in these rural areas that need to be re-evaluated. Nevertheless, we seriously doubt that this is the case. Hunter J. is merely preying on our sympathies for a recently widowed elderly woman with few relatives and friends. He has not presented a reasonable hypothetical.

In our view, it is difficult to imagine a reasonable hypothetical situation in which the mandatory one-year prohibition would constitute cruel and unusual punishment. In fact, we feel that impaired driving is not an offence for which the reasonable hypothetical analysis is helpful. Instead, it may be more germane for offences that can encompass a “diverse range of circumstances,” as discussed in *Smith*. For example, in *R. v. Bill*, the British Columbia Supreme Court stated that “the offence of manslaughter can be based on an almost infinitely wide range of conduct... from near accident to near murder.” Thus, one could contemplate situations where the minimum four-year prison sentence for that offence might be grossly disproportionate.

However, this is not the case with the offence of driving with a BAC above 0.08%, which involves a relatively narrow set of circumstances. In all cases, it requires the offender to drink a significant amount of alcohol and then have care or control of a motor vehicle. Although

we agree with Hunter J. that offenders may have a range of BACs and display differing degrees of erratic driving, this does not amount to the “diverse range of circumstances” contemplated in the earlier cases. It will be extremely rare to find cases in which the impaired driving was accidental, unintentional or necessary. Moreover, one would assume that such offenders would not be convicted, due to a lack of *mens rea* or the defence of necessity. At any rate, these cases would not constitute “reasonable hypotheticals” capable of rendering driving prohibitions *per se* unconstitutional as cruel and unusual punishments.

CONCLUSION

The decision in *Rallison* exhibits a cavalier attitude towards a very serious criminal offence. Hunter J. seems to suggest that those who drive while impaired are not guilty of any moral wrongdoing, as they do not really intend to harm anyone. In fact, Hunter J. tries to evoke sympathy for these offenders, particularly if they are caught in a RIDE program, by portraying them as victims of an unduly harsh criminal justice system that does not consider the impact a driving prohibition will have on their lives. Hunter J. dramatically exaggerates the impact that a one-year driving prohibition has on the life of an offender. Unlike Hunter J., our sympathies lie with the families of those killed and injured by impaired drivers, and not the impaired drivers themselves.

The *Criminal Code*'s driving prohibition is intended to be inconvenient. It is intended to drive home to offenders that a driver's licence is a privilege extended to those who are willing to drive safely and responsibly. It is also intended to remove from Canada's roads those drivers who have demonstrated their willingness to put themselves and every other member of

the driving public at risk. Studies consistently show that driving prohibitions are the most effective means of preventing impaired driving recidivism, and play a significant role in the general deterrence of impaired driving. Driving prohibitions keep many impaired drivers off the roads. Given the substantial risks created by impaired drivers, it can hardly be said that a one-year prohibition, with all its traffic safety benefits, is grossly disproportionate to the offence.

The judgment in *Rallison* mischaracterized the nature of impaired driving and the penological goals that driving prohibitions are intended to achieve. It downplayed the severity of impaired driving, contained unsubstantiated and erroneous statements about the effectiveness of driving prohibitions, and championed education and treatment despite the research that casts serious doubts on their effectiveness. Moreover, Hunter J. presumed that the one-year prohibition would shock the conscience of the Canadian public, when empirical evidence clearly indicates that Canadians support tougher sanctions for impaired drivers, including longer licence suspensions.

An analysis that reasonably considers the dangers of impaired driving will inevitably lead to the conclusion that a one-year driving prohibition is not cruel and unusual punishment, or anything close to it, under section 12 of the *Charter*. The prohibition merely reflects the gravity of the offence and the penological goals of public safety and deterrence. To allow for anything less than the current mandatory prohibition, even in individual cases, trivializes the tragic consequences of impaired driving and reinforces the attitude that impaired driving is not a real crime. Tragically, it is this very discounting of the seriousness of impaired driving that helps explain why it remains, by far, the single largest criminal cause of death in Canada.