RATING THE PROVINCES AND TERRITORIES:

A National Study of Highway Traffic, Victims, and Insurance Legislation Relating to Impaired Driving

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Mothers Against Drunk Driving Canada

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INTRODUCTION

Mothers Against Drunk Driving (MADD) Canada has two major goals. It is committed to minimizing impaired driving deaths and injuries across Canada and to assisting the victims of these needless tragedies. One of the ways MADD Canada attempts to achieve these goals is by analyzing the current law and by advocating reforms in the law and its enforcement.

This task is made somewhat more complicated because the *Constitution Act, 1867*[1] gives both the federal and provincial governments authority to enact legislation affecting impaired driving. The federal government has broad legislative authority over criminal law and procedure.[2] In turn, the provinces have legislative authority over the administration of justice,[3] property and civil rights,[4] and the licensing of drivers.[5] Moreover, the provinces have constitutional authority to create offences in relation to their fields of constitutional authority.[6]

The federal impaired driving provisions are contained in the *Criminal Code*.[7] In the fall of 1998, MADD Canada prepared a detailed analysis of these provisions, including proposals for sweeping reforms. MADD Canada presented its brief to the House of Commons Justice and Human Rights Committee, which was reviewing the legislation.[8] Although Parliament did enact several amendments to the *Criminal Code*,[9] MADD Canada has continued working with the office of the Justice Minister,[10] seeking further reforms. These reforms include: the expansion of police authority to demand breath and blood samples from drivers involved in fatal or personal injury crashes; the use of passive alcohol sensors; streamlining criminal procedures to assist enforcement; and the need to make impaired driving issues, particularly enforcement, a priority among the federal and provincial justice ministers.

Clearly, much work remains to be done at the federal level. Nothing in this study should be interpreted as satisfaction with recent federal initiatives. Indeed, many provincial initiatives are more innovative and progressive than those of the federal government. Nevertheless, Canada's constitutional framework permits the provincial and territorial governments to have a significant impact on many aspects of impaired driving legislation.

MADD Canada believes that the provincial and territorial governments can, in their own jurisdictions, greatly reduce impaired driving deaths and injuries, and lessen the hardships on victims. It is not appropriate for the provinces and territories simply to wait for further *Criminal Code* amendments, when they currently have the legislative power to significantly improve the situation. Thus, this study should be seen as a recognition of the provinces' and territories' importance in fighting impaired driving and improving traffic safety.

The current study is intended to be the first in a series of periodic reviews of the provincial and territorial highway traffic, victims, and insurance legislation relating to impaired driving. In this initial study, we have focused on a limited number of key issues, rather than attempting a more wide-ranging analysis of the scores of provisions that may indirectly relate to impaired

driving and the treatment of its victims. Nevertheless, we have included some provisions that will improve overall traffic safety, such as graduated licensing, the removal of unfit vehicles, and general powers and duties of the relevant traffic safety officials.

This initial study is also limited to the provincial and territorial legislation. Consequently, other government initiatives, such as anti-impaired driving campaigns, and the priority and resources committed to apprehending, prosecuting and sentencing offenders, are not factored into the analysis. Nor have we taken into account the statistical information on alcohol availability and consumption, impaired driving injuries and deaths, and criminal charges and convictions. Nevertheless, some of this statistical information has been included at the end of each provincial and territorial report to provide background data and a baseline for future periodic reviews.

This study is divided into two major components. The first provides a model of key highway traffic (motor vehicle),[11] victims, and insurance provisions that MADD Canada believes would reduce impaired driving deaths and injuries and better serve victims of impaired driving. In preparing the model, we drew heavily on the innovative provisions found in current provincial and territorial legislation from across Canada. We also relied on the extensive body of research on highway traffic safety. Based on this model, we have prepared a rating guide, which will be used to assess the legislation in each province and territory.

The second component of the study includes individual summaries of the highway traffic, victims, and insurance legislation in each province, the Northwest Territories and the Yukon. No separate report was prepared for Nunavut, because the Northwest Territories *Motor Vehicle Act* continues to apply until it is amended or repealed by the Nunavut Legislative Assembly.[12] The study is limited to legislation that was in force as of December 31, 1999; subsequent amendments have not been included. However, where a province or territory had passed, but not proclaimed, legislation by December 31, 1999, the potential changes have been noted in the relevant report.

In each review, we examine six specific topics: licensing, police enforcement powers, licence suspensions, other licensing and enforcement programs, victims' rights, and insurance. Following this analysis, we provide some background information on alcohol consumption, impaired driving injuries and deaths, and impaired and related criminal charges and convictions. The same format has been adopted for all the reviews in order to facilitate comparison and analysis.

PART I: A MODEL OF HIGHWAY TRAFFIC, VICTIMS, AND INSURANCE LEGISLATION

UNDERLYING PRINCIPLES

In developing the model, we focused on pragmatic, achievable changes, rather than radical measures that would require wholesale shifts in legislative direction. It is important that the model elicit widespread public and political support, be administratively and financially feasible, and not generate a flood of successful challenges under the *Canadian Charter of Rights and Freedoms*.[13] While some *Charter* litigation is an inevitable fact of legislative reform, we have attempted to draft a model that accords with *Charter* values. As indicated, the proposed model draws heavily upon the innovative provisions in current legislation from across Canada.

Nevertheless, the proposed model may reflect a shift in tone or emphasis from the legislation in some jurisdictions. The model unequivocally puts highway traffic safety first. MADD Canada believes that the legislation should protect the overwhelming majority of the public that drives in a safe, sober and responsible fashion. Traffic crashes are the leading cause of death for 15 to 19 year-olds, and the second-leading cause of death for 20 to 44 year-olds.[14] Each day, an average of 4.5 Canadians are killed and 125 are injured in alcohol-related crashes.[15] Impaired driving remains the number one criminal cause of death in our country,[16] as well as the single leading cause of alcohol-attributed mortality.[17] Thus, despite the progress that has been made,[18] the current levels of alcohol-related crashes, injuries and deaths are unacceptable. Without significant changes in the legislation and its enforcement, substantial improvements in traffic safety are unlikely. In our view, the following four underlying principles, which we have incorporated into the model, are consistent with giving priority to traffic safety and better serving the needs of victims.

The provinces' and territories' right to intervene should not be limited to cases in which a driver has already killed or injured another, or to cases in which a driver has been convicted of a federal criminal offence. The traffic authorities must be empowered to take action to prevent tragedies, not just sanction those responsible after the event.

Whenever there is evidence to conclude that a driver is unable or unwilling to drive safely and responsibly, his or her licence should be suspended or revoked. In such cases, the onus should shift to the driver to demonstrate why his or her privilege to drive should be restored. This could be accomplished by showing that some successful corrective measures have been undertaken, such as a rehabilitation program or driver improvement course.

In addition, the police should also be given the necessary powers to prevent motor vehicle crashes. For example, the police should have clear authority to stop drivers to ensure that they are sober or otherwise fit to drive, and that they have a valid licence and insurance. The police need

broader investigatory authority to efficiently detect impaired drivers and to obtain admissible evidence documenting their condition. Where the police conclude that a driver is unfit to drive for any reason, they should have the power to suspend the driver's licence at roadside, regardless of whether any criminal or provincial charges are laid.

Wherever possible, this model advocates the use of administrative, rather than criminal, proceedings to govern licensing issues. Where both administrative and criminal action is appropriate, the right to impose administrative sanctions should not be tied exclusively to the outcome of the criminal proceedings. Thus, for example, the model proposes that the provincial or territorial Registrar (Superintendent)[19] of Motor Vehicles have broad authority in appropriate circumstances to suspend and revoke drivers' licences and disqualify drivers, independent of the criminal justice system.

We recognize that judicial proceedings are necessary for the adjudication of *Criminal Code* and provincial traffic offences. However, the criminal justice system is often slow, expensive and cumbersome to the point of discouraging the laying and prosecution of charges. A recent survey of police officers across Canada indicated that it took an average of 2.6 hours to process a single charge of driving with a blood-alcohol concentration (BAC) above 0.08%.[20] Forty-two percent of the officers acknowledged that they will sometimes or frequently release impaired driving suspects with a short-term licence suspension, rather than take them to the station for breathalyzer testing.[21] Furthermore, one-third of the officers indicated that, rather than taking any legal action against an impaired driving suspect, they sometimes or frequently exercise discretion and arrange for a ride or a taxi, or allow a sober passenger to drive.[22] The main reasons cited for not laying criminal charges were that they took too long to process and that there were insufficient personnel.[23]

Similarly, shortages of prosecutorial, judicial and court resources have led to constitutionally-impermissible delays in bringing suspects to trial, resulting in the dropping, withdrawal or dismissal of tens of thousands of criminal charges. In the seven months following the Supreme Court of Canada decision on impermissible delays,[24] over 40,000 criminal charges were dismissed or withdrawn in Ontario alone.[25]

Although some progress appears to have been made in streamlining the criminal justice system, administrative proceedings remain far more expedient, efficient and inexpensive. Indeed, administrative proceedings are more appropriate for issues relating to the licensing of drivers, the registration of vehicles, and insurance. These matters do not focus on moral blameworthiness, but rather on questions of fitness, driving record, vehicle compliance, and similar concerns. Typically, what is involved is a relatively simple factual determination, and not complex issues of credibility, conflicting evidence and questions of law.

Consequently, it is inappropriate to impose on these administrative and regulatory decisions the formal rules of criminal procedure and evidence, or the traditional and *Charter* safeguards that

apply to criminal prosecutions. Nevertheless, it should be emphasized that individuals are not unprotected under regulatory proceedings. They benefit from various statutory rights and the general safeguards of administrative law, including procedural fairness and natural justice. Moreover, they generally have a right to an internal review or appeal of the initial decision, and a right to seek judicial review.

There is one further advantage to adopting administrative, as opposed to judicial or quasi-judicial, proceedings. Judicial and quasi-judicial decision-makers[26] are immune from liability for negligence,[27] whereas administrative decision-makers can be held accountable for the negligent exercise of their duties and powers.[28] Thus, adopting administrative proceedings would ensure that individuals who are injured, for example, as a result of the Registrar's negligence in allowing an unfit driver to keep his or her licence, would not be made to bear that loss alone.[29] They would be permitted to seek redress from the Registrar in his or her official capacity.[30] This is consistent with the recent trend to expand the liability of all public authorities.[31] The prospect of civil liability should encourage the Registrar to carefully consider the public interest in traffic safety when exercising his or her authority in individual cases.

SECTION I: LICENSING

(a) The Nature of a Driver's Licence

The characterization of a driver's licence as either a right or a privilege determines how licences are obtained, suspended, revoked (cancelled)[32] and reinstated within a province. There is ample case law supporting the principle that driving is a privilege, and not a right protected under the *Charter*.[33] The highway traffic legislation should explicitly state that obtaining and holding a licence is a privilege. It is only appropriate that driving be a privilege, as it is a high-risk activity, occurring on public roads and requiring considerable skill. The legislation should also clearly state that the privilege of driving is subordinate to the government's paramount obligation to maintain highway traffic safety, and is subject to police powers to ensure that only licensed, sober, fit, and safe drivers are on the roads.

Defining driving as a privilege to be earned and maintained places the burden of proving competence on the licence applicant. Applicants should be required to demonstrate a minimum degree of responsibility, knowledge and skill before being granted a licence. They should be examined on their knowledge of traffic rules and road signs, and required to pass a road test. An applicant should also be required to establish that his or her physical condition, including vision, is compatible with the safe operation of a motor vehicle. There should be an affirmative duty on the applicant to disclose any physical, medical or psychological condition, including any problems with alcohol, drugs or medication, that could potentially interfere with driving.

Licensed drivers should have the burden of establishing ongoing competence. If a driver's licence has been suspended for a lengthy time, or revoked as a result of unfitness, a poor driving record, a serious provincial traffic offence, or a federal driving conviction, it should not be automatically reinstated at the end of the suspension or revocation period. The driver should be required to demonstrate to the Registrar why his or her licence should be reinstated by showing that appropriate corrective measures have been taken. For example, convicted impaired drivers should be required to successfully complete a prescribed education program, and an alcohol and drug assessment.

There needs to be a clear distinction between suspensions and revocations. Suspensions should be temporary in nature and reserved for less serious traffic or administrative violations. Conversely, revocations should be indefinite and should be imposed whenever a driver exhibits a condition, behaviour or attitude that is incompatible with the privilege of holding a licence. In order to be reinstated, all such drivers should be required to prove that their attitudes and behaviour have changed. Furthermore, any future misconduct should result in a lengthier waiting period before the driver can apply for reinstatement.

Moreover, it is crucial that licence suspensions and revocations are adequately enforced. This can be accomplished through enhanced police authority and vehicle-based sanctions, as shall be described. In addition to revocations for licensed drivers, the highway traffic legislation should provide for driving disqualifications (prohibitions) for those who do not currently hold a valid licence.[34] This would include unlicensed drivers and those whose licences have been suspended or revoked. A disqualification allows authorities to prevent such drivers from applying or re-applying for a licence for a fixed period of time. In our view, individuals who have failed to respect existing licensing provisions should be denied driving privileges and should face a higher burden of proof when they apply or re-apply for a driver's licence.

Individuals who drive while unlicensed, while subject to a provincial licence suspension, revocation, or disqualification, or while subject to a federal driving prohibition should face severe penalties, including additional periods of licence suspension, revocation or disqualification. These drivers are violating provincial licensing legislation and, often, federal criminal law. Moreover, they may have only limited third-party insurance, thereby casting the risk of loss on other users of the road. The legislation should impose an affirmative duty on owners of motor vehicles to ensure that they do not to allow unlicensed, suspended or disqualified individuals to drive. In addition to fines, the owners should be subject to vehicle-based sanctions, such as vehicle impoundment, which will be discussed later.

Research indicates that the minimum driving age affects the accident rate.[35] Raising the minimum driving age to 18 across Canada would reduce crash deaths and injuries among teenagers.[36] Nevertheless, we would not recommend adopting such a policy because it is unlikely to be supported by the public, and because similar benefits may be achieved by adopting a

comprehensive graduated licensing program. However, we do advocate adopting a minimum driving age of 16. Furthermore, the minimum should not be reduced for any reason, even if the applicant has enrolled in an approved driver education program.

Another alternative that would reduce crash involvement among young drivers would be to raise the minimum drinking age to 21 in all provinces. Currently, the minimum drinking age is 18 in Québec, Alberta and Manitoba, and 19 in all other provinces. The 21-year minimum drinking age was established by all American states during the late 1970s and early 1980s, and there has since developed an extensive body of research demonstrating its positive effects on traffic injuries and fatalities.[37] American studies consistently show that the higher minimum drinking age reduced both alcohol-related crashes and fatal collisions generally among those affected by the new laws.[38] Conversely, lowering the minimum drinking age resulted in significant increases in the rate of alcohol-related collisions.[39]

However, such a change may be politically unpopular, overly broad, and difficult to enforce in Canada. Regardless of the minimum legal drinking age, teenagers can obtain alcohol from a variety of sources, not just licensed outlets and establishments. Therefore, underage drinking continues to be a widespread problem in Canada. While recognizing the benefits of raising the minimum drinking age to 21 across Canada, it may be preferable, at least for the present, to directly address the alcohol-related crash problem among youth. Consequently, we would recommend that a 0.00% BAC restriction be enacted and rigorously enforced for all young and novice drivers as part of the graduated licensing program. This should help young and novice drivers to separate drinking from driving, and will help to reinforce safer driving habits even after these drivers become fully-licensed.

(b) Graduated Licensing

Research in Canada and abroad has established that graduated licensing programs reduce crash deaths and injuries among both young and novice drivers.[40] These studies also suggest that both age and inexperience are responsible for the increased risk of collision among beginning drivers.[41] For this reason, graduated licensing programs should apply to all new drivers, not just young drivers. These programs provide all beginning drivers with practical experience, while minimizing their exposure to risk. There should be three stages to the program.

In order to enter stage one, applicants should be required to pass a traffic rules and road signs test, and establish that they are fit to drive. As indicated, the minimum age for entry should be no lower than 16. Drivers should be required to remain at this stage for at least 12 months. They should be supervised at all times by a fully-licensed driver who is at least 21 and who occupies the front passenger seat. The adult supervisor assists in the learning process by monitoring and correcting the driver's actions. The number of passengers should be limited, as other passengers

tend to distract the driver. Such a provision protects not only the beginning driver,[42] but also his or her passengers.[43]

Drivers holding a stage-one licence should be prohibited from late-night driving. This helps ensure that beginning drivers do not have to cope with the added visibility problems posed by late-night driving, and with the presence of dangerous or impaired drivers, who tend to be more prevalent at night. Since it appears that a majority of night-time crashes among young drivers occur before midnight, earlier curfews (10 p.m.) are preferable to later ones (midnight).[44] Stage-one drivers should also be prohibited from driving on high-speed roads. These roads typically carry heavy traffic, including large trucks moving at high speeds, which can be overwhelming for a new driver. Moreover, crashes on high-speed roads are generally more serious than those occurring on lower-speed roads.[45]

Although MADD Canada recognizes the potential benefits of driver education programs, we do not include mandatory driver education as a cornerstone of graduated licensing. Research has failed to establish that the current driver education programs have a long-term positive impact on the likelihood of crashes.[46] Furthermore, we would advocate against shortening the minimum periods of the graduated licensing program just because the beginning driver participated in a driver education program. While the goals of driver education are admirable, the programs do not provide an adequate substitute for extensive, supervised, on-the-road driving experience.

One of the key components of the graduated licensing program is the requirement of abstaining from alcohol.[47] All stage-one and two drivers should be required to have a BAC of 0.00% when driving. Beginning drivers are already disadvantaged because of their inexperience,[48] and should not have their judgment further impaired by alcohol. This limitation should apply to all stage-one and two drivers, regardless of age. While older beginning drivers may be more mature and more experienced with alcohol than young beginning drivers, they still lack driving experience, and this is reflected in their crash rates.[49]

The 0.00% BAC requirement should extend beyond the graduated licensing program until a driver is 21. Young beginning drivers usually lack both driving experience and experience with alcohol. Moreover, young people tend to be risk-takers and are less cautious than their older counterparts.[50] In any event, young drivers who drink are at a far greater risk of death and injury than older drivers with comparable BACs.[51] Given that these elevated alcohol-related crash rates decrease at about the age of 21,[52] the 0.00% BAC restriction should continue even after the driver completes the graduated licensing program, until he or she reaches 21.

The supervising driver should also be subject to a 0.00% BAC restriction. Alcohol consumption would impair the supervising driver's ability to monitor the beginning driver's conduct and respond quickly and appropriately to any urgent situation that developed. Moreover, permitting the supervising driver to have consumed alcohol sets a very poor example for the beginning driver. In order to ensure that these provisions can be enforced, the provincial

legislation should specifically authorize the police to demand breath samples from any beginning driver or supervisor, if there is reason to suspect that he or she has any alcohol in his or her body.

To progress to stage two, a driver should be required to successfully complete a stage-one road test. The requirements and passing standard for this road test should reflect the fact that successful candidates would be permitted, with limited exceptions, to drive unsupervised. Stage-two drivers would be allowed to drive unsupervised, except on high-speed roads and late at night. In these two circumstances, they would have to be accompanied by a sober, supervising driver. The 0.00% BAC restriction would remain in effect. Drivers would be required to remain at stage two for a minimum of 12 months, giving them at least 24 months of some form of supervised driving in the graduated licensing program.[53]

In order to obtain a stage-three licence, the applicant would be required to successfully complete an "exit road test," which would include a portion on a high-speed road.[54] The successful applicant would then be granted full driving privileges, except for the 0.00% BAC requirement, which would remain in effect until the driver turned 21. Stage three would last for two years. During this period, drivers would be subject to lower demerit point thresholds than more experienced drivers.[55] This would assist the Registrar in identifying potentially at-risk new drivers and in taking remedial action before they have a serious crash.

Drivers who violate the 0.00% BAC restriction should have their licences revoked and be required to successfully complete a remedial alcohol education program before being allowed to re-apply for a licence. If reinstated, these drivers should be required to begin again at stage one. In addition, drivers who are involved in at-fault crashes, or who commit other serious violations of the program, such as driving unsupervised, should be required to restart the program.[56]

(c) Powers and Duties of the Registrar of Motor Vehicles

The legislation should clearly state that the Registrar's paramount obligation is to ensure highway traffic safety. More specifically, the Registrar should have a statutory duty not to issue a licence to any applicant who lacks or may lack the skills, knowledge, experience, ability, or willingness to drive in a safe and responsible manner. Applicants should bear the burden of demonstrating that they qualify for the privilege of holding a driver's licence.

Applicants should be required to submit to whatever medical, vision, knowledge, skill, or road tests the Registrar considers reasonably appropriate to ensure public safety. The Registrar should also have explicit authority to require applicants to provide any information that may relate to their suitability to drive, such as their past driving history in a different jurisdiction and all relevant medical conditions. As indicated, applicants should have an affirmative duty to disclose any medical or other condition that may potentially interfere with the safe operation of a motor vehicle.

A parallel set of provisions should apply to current drivers. Thus, the Registrar should have a duty to suspend or revoke the licence of any driver who the Registrar reasonably believes is unfit, unable or unwilling to drive safely and responsibly. Drivers should be required to undergo any relevant medical, vision, knowledge, skill, or road tests, and to submit requested information. The legislation should require a licence revocation for any driver who has provided false information or has failed to disclose information as required. The Registrar should also have authority to impose any limits or conditions on a driver's licence that he or she reasonably believes are necessary to maintain safety. Finally, the Registrar should have broad discretion to disqualify drivers, or to suspend or revoke their licences, if they have unsatisfactory driving records or medical, psychological, drug, or alcohol problems that interfere with driving.

The legislation should impose a duty on social workers, psychologists, optometrists, doctors, and other medical professionals to report to the Registrar any client or patient 16 or older who has or may have a condition that would significantly interfere with the safe and responsible operation of a motor vehicle. The failure to report as required should constitute an offence under the traffic legislation. Practitioners should also be held potentially liable for any damages or losses that result from their failure to report. The Registrar should be required to investigate all reports received and should have a duty to notify the practitioner's governing college or body of any failure to report as required.

The Registrar should be prohibited from issuing a licence to any applicant, and have a duty to revoke the licence of any driver, who has failed to pay any traffic-related fine or civil judgment within a reasonable time. The Registrar should have the legal power to impound and sell the vehicle of applicants or drivers who fail to satisfy any such outstanding debts. Whatever deterrent effect a fine or civil judgment has would be abrogated if drivers could regain driving privileges in spite of their outstanding debts.

Where there is a risk to public safety, the Registrar should have the authority to act expeditiously, without first having to give notice or hold a hearing. Nevertheless, in such circumstances, the applicant or driver should be notified as soon as possible of the Registrar's decision. The affected party should have a right to seek an internal review and should be informed of this right.

Most provincial legislation gives police officers and inspectors the power to stop and inspect vehicles. The Registrar should be given parallel authority to order inspections and, where necessary, order a vehicle to be impounded or repaired to ensure that it is roadworthy and in compliance with the legislation. The burden of proof should be on the owner and driver to establish that a vehicle is roadworthy, safe and in compliance with the legislation.

(d) Demerit Point System

The legislation should create a demerit point system to record and provide a basis for assessing a driver's record of provincial traffic violations. This record has important implications for both general traffic safety and impaired driving. Research indicates that those who drink and drive tend to have poor driving records for other traffic offences.[57] Moreover, given existing enforcement resources and practices, a significant number of drinking drivers may only face charges for provincial offences. As previously stated, a significant number of officers reported that they frequently or sometimes lay only a provincial traffic charge, such as careless driving, even if there are grounds for an impaired driving charge under the federal *Criminal Code*. Indeed, it has been estimated that only 1 in every 445 impaired driving trips results in a *Criminal Code* charge, let alone a conviction.[58] Thus, a demerit point system would help to identify high-risk drivers, a significant number of whom are likely to drink and drive.

The demerit points should be recorded as part of a driver's permanent record maintained by the Registrar or the Ministry of Transportation. It is important that the demerit points assigned to a particular offence be carefully tailored to reflect the risk posed by the conduct.[59] The demerit point penalties should be significant for the more serious provincial traffic offences, such as driving while suspended or disqualified, leaving the scene of an accident, wilfully attempting to evade police pursuit, driving without insurance, driving an unregistered vehicle, racing, and careless driving. As we will later discuss, these offences warrant licence suspensions in addition to any demerit point penalty. Other offences, such as parking infractions and minor violations of the rules of the road, should result in lesser point penalties.

The system should provide for progressive sanctions at prescribed demerit point levels. For example, the first intervention typically involves a warning letter, and the second entails an interview. Depending on the results of the interview and a review of the driver's entire record, the Registrar is often given authority to suspend the driver's licence. In our view, the third intervention should result in an automatic licence suspension. Once the driver's licence has been reinstated, he or she should be put in a probationary category, in which subsequent demerit point penalties result in lengthier suspensions. The demerit point thresholds for beginning drivers should be lower than the levels for fully-qualified, experienced drivers. This will permit preventative action to be taken with beginning drivers, who are already at greater risk than their more experienced counterparts.

The demerit point system should operate independently from the Registrar's broad duties and powers to disqualify drivers, and to suspend or revoke drivers' licences. While the Registrar could consider demerit points when deciding if drivers are unfit or have unsatisfactory driving records, the Registrar should be free to make such decisions based on other factors and information as well. In addition, the demerit point system should operate in conjunction with the provincial insurance legislation. Thus, drivers who accumulate demerit points should also face

higher insurance premiums.

SECTION II: POLICE ENFORCEMENT POWERS

Introduction

Given the complex interplay between provincial enforcement powers and the *Criminal Code* breath and blood-testing provisions, a summary of the federal sections is provided at the outset. In discussing some of the proposed provincial enforcement powers, it will be necessary to describe the current difficulties that they were designed to address. Finally, it should be emphasized that the proposed provincial powers and sanctions are intended to operate in addition, and not as an alternative, to the existing *Criminal Code* sections.

The *Criminal Code* Breath and Blood-Testing Provisions

The *Criminal Code* authorizes the police to demand breath samples from drivers in two types of situations. First, the police can require a breath sample for analysis on an approved screening device (ASD) from any driver whom they reasonably suspect has alcohol in his or her body.[60] ASDs are small, hand-held, breath-testing machines that are typically carried in police patrol cars, and are generally used to administer roadside tests. The manner of driving, the odour of alcohol on the driver's breath, difficulties answering the officer's questions, clumsiness in handing over requested documents, and the driver's admission that he or she was just at a bar could all create a reasonable suspicion that the driver had consumed alcohol. The police need not believe that the driver is drunk, impaired or committing an offence.

Second, the police can demand breath samples for analysis on an approved instrument (commonly referred to as a "breathalyzer") from any driver who they have reasonable grounds to believe has committed the offence of impaired driving or driving with a BAC above 0.08%.[61] These grounds for demanding breath samples are far more limited than those for ASD testing. Breathalyzers are larger, more sophisticated machines than ASDs, and are typically kept at police stations or in specially-equipped vans.

The results of an ASD test are not admissible in criminal proceedings as evidence of a driver's BAC. Nevertheless, the results often provide the police with the legal grounds for demanding a breathalyzer test. As indicated, an officer needs only a reasonable suspicion that a driver has alcohol in his or her body to demand an ASD test. Since ASDs are typically set to register a "fail" at a BAC of 0.10%, a driver's failure on the ASD provides the police with reasonable grounds to demand a breathalyzer test. Thus, ASDs can be used to test large numbers of suspected drinking drivers at roadside, only some of whom will be required to take a breathalyzer test. Breathalyzer results are admissible in criminal proceedings and are deemed, in

the absence of evidence to the contrary, to be proof of the driver's BAC at the time of the offence.[62]

The *Criminal Code* authorizes the police to demand blood samples from a driver if they have grounds for a breathalyzer demand and they reasonably believe that the driver is physically incapable of providing breath samples or it is impractical to obtain them.[63] A driver who fails or refuses to provide breath or blood samples without a reasonable excuse is guilty of a federal criminal offence, which carries the same penalties as impaired driving and driving with a BAC above 0.08%. In certain limited circumstances, the police can obtain a judicial warrant authorizing a health professional to take blood samples from a suspect who is incapable of responding to a demand for a breath sample.[64]

(a) Authority to Stop Vehicles and Demand Documentation

In *R.* v. *Dedman,*[1985] 2 S.C.R. 2, the Supreme Court of Canada held that the police have a common law power to stop motor vehicles to conduct random spot checks, commonly known as "R.I.D.E." programs. However, the court seemed to limit this power to the use of organized spot checks. Thus, provincial legislation is still required to give the police clear statutory authority to stop vehicles at random.[65] Failing to stop when directed to do so and wilfully attempting to evade police pursuit should be provincial offences. Given the risks involved, the latter offence should be punishable by an automatic licence revocation and a lengthy driving disqualification. At police request, drivers should be required to identify themselves and present their licence, insurance and ownership documents. The police should be authorized to arrest, without a warrant, drivers who fail to identify themselves or to provide the requested documents, and drivers who the police reasonably believe have provided false information or documents. These powers are essential to enforce provincial licence suspensions and federal driving prohibitions against impaired driving offenders who continue to drive.

(b) Authority to Use Passive Alcohol Sensors

As indicated, in order to demand that a driver submit to an ASD test, the police must reasonably suspect that the driver has alcohol in his or her body. Currently, the police question the driver, try to detect the odour of alcohol on the driver's breath, and rely on their other unaided senses in making this determination. Two problems have become evident.

First, some Canadian judges have applied a very rigorous and, in our view, inappropriate standard for breath and blood-testing and readily reject police testimony as to their observations.[66] Typically, this results in the exclusion of critical evidence, including any breathalyzer readings[67] and blood-test evidence.[68] This, in turn, results in the charges against the accused being dropped. Second, the current approach, in fact, fails to detect significant numbers of drinking drivers. Two

American studies suggest that the police miss about half of the legally-intoxicated drivers that they stop and question in spot checks.[69]

Several American states have introduced passive alcohol sensors to assist the police in detecting alcohol on the breath of drivers. These small devices collect and analyze a sample of air near the driver's face. A positive reading indicates that alcohol is present and would create at least a reasonable suspicion that the driver had been drinking. In the context of Canadian law, a positive response on a passive alcohol sensor could quickly and easily provide an officer with a "reasonable suspicion" that the driver has alcohol in his or her body, which would authorize the officer to demand an ASD test. The passive alcohol sensor could not be used to establish a driver's BAC; it would simply provide the officer with a "better nose" to detect the presence of alcohol.[70]

Using passive alcohol sensors would allow motorists to be processed through spot checks quickly, with minimum inconvenience, while significantly improving the detection of drinking drivers. It is for these reasons that the legislation should specifically authorize the police to use passive alcohol sensors.[71]

(c) Authority to Demand Physical Co-ordination Testing

The legislation should authorize the police to demand a physical co-ordination test from any driver they reasonably suspect has any alcohol or drugs in his or her body. A driver's refusal or failure to comply, without a reasonable excuse, should constitute a serious provincial offence, punishable by an automatic licence revocation and a lengthy driving disqualification. The police should be specifically authorized to videotape the co-ordination test.

Mandatory physical co-ordination testing would assist police enforcement efforts in several ways. First, it could be used as an alternative to an ASD test to establish the necessary grounds for demanding a breathalyzer test under the *Criminal Code*. If an ASD were not readily available,[72] the results of a standardized physical co-ordination test, coupled with the officer's observation, would provide a far stronger basis for demanding a breathalyzer test than the officer's observations alone.[73]

Second, unequivocal legislation would clarify the current uncertainty concerning police authority to demand physical co-ordination tests and the consequences of a suspect's refusal. While Québec's legislation specifically authorizes physical co-ordination tests, most of the provincial highway traffic statutes are silent on the issue.[74] Thus, although the police have common law authority to request a physical co-ordination test, a driver can refuse to take the test without incurring a penalty. General provisions in some of the provincial traffic acts have been interpreted as authorizing the police to request that a suspect take a physical co-ordination test, without first informing him or her of his or her right to counsel.[75] However, in other provinces,

the courts have held that the police must inform a driver of his or her right to counsel before he or she performs the physical co-ordination test.[76]

Third, and probably most important, physical co-ordination testing can provide evidence establishing that the suspect's ability to drive is impaired by alcohol and/or drugs.[77] The police commonly complain that judges refuse to accept their evidence that the accused's ability to drive was impaired by alcohol.[78] Standardized physical co-ordination testing, conducted by trained officers using standardized record-keeping procedures and supported by a videotape record, would greatly enhance the weight given to an officer's testimony.[79]

Fourth, the results and videotape of the physical co-ordination tests may be essential if a breathalyzer is unavailable, the breathalyzer test cannot be conducted within the prescribed time, or there is some other successful challenge to the breathalyzer results. Similarly, the physical co-ordination test and videotape may also be pivotal if a driver is impaired solely by drugs or by a combination of drugs and alcohol in circumstances in which the driver's BAC is below 0.08%.

(d) Authority to Demand Breath Samples From Drivers Involved in Crashes

The provincial legislation should authorize the police to demand an ASD test from any driver involved in a crash that results in death or bodily injury. Drivers who are incapable of providing a breath sample should be required to provide a blood sample for analysis. A failure or refusal to take the required test should constitute a serious provincial offence, punishable by an automatic licence revocation and lengthy driving disqualification.

In 1985, Parliament enacted the new offences of impaired driving causing death and impaired driving causing bodily harm, because impaired drivers who killed or injured others were only being convicted of impaired driving or driving with a BAC above 0.08%. These new offences carried lengthy maximum sentences and federal driving prohibitions that were believed to reflect the seriousness of the crimes. Unfortunately, these offences have not achieved their intended goals.

The available data establish that only a small fraction of impaired drivers who kill or injure are charged with, let alone convicted of, the more serious offences.[80] Instead, the majority of these offenders are apparently still being convicted of the lesser offences of impaired driving or driving with a BAC over 0.08%. This situation undermines the seriousness of impaired driving, angers and frustrates victims, defeats the purpose of the 1985 amendments, and protects those impaired drivers who commit the most serious crimes and represent the greatest risks to the public.

It has been estimated that alcohol is involved in about 42% of all motor vehicle fatalities and 20% of motor vehicle hospitalizations.[81] The mere occurrence of a crash involving death or bodily injury would create a reasonable suspicion, in many cases, that at least one of the drivers had been drinking. Thus, provincial legislation making the right to demand an ASD test automatic in these

crashes represents a relatively modest change in the current law, but one that would greatly simplify the law and improve enforcement. This proposal must be assessed in the context of the existing enforcement difficulties, the ongoing risks of alcohol-related deaths and injuries on the roads, and the high rates of alcohol involvement in fatal and serious crashes. In our view, the proposal is also wholly consistent with the primary goal of highway traffic legislation, namely, public safety, and the fact that holding a driver's licence is a privilege.

(e) Authority to Inspect and Remove Unfit Vehicles

There is some evidence to suggest that convicted impaired drivers whose vehicles are seized or impounded may obtain low-cost, mechanically unsafe vehicles for their driving purposes. Therefore, the legislation should give the police authority to stop and inspect any vehicle at random to ensure that it is roadworthy and in compliance with the act and regulations. The police should have a legal duty to seize, impound or immobilize vehicles, or to seize or invalidate the licence plates, if the vehicle is unsafe. The police should also have legal authority to order the driver or owner to repair a vehicle to bring it into compliance with the legislation. The owner or driver should be required to prove that the necessary repairs were completed before the vehicle is released or the licence plates returned.

SECTION III: LICENCE SUSPENSIONS

(a) Roadside Licence Suspensions

The police should be required to suspend the licence of any driver for 24 hours if he or she registers a BAC of 0.05%[82] or higher on an ASD, breathalyzer or blood test, or if he or she fails to provide breath or blood samples, or refuses to take a physical co-ordination test, without a reasonable excuse. The police should also have a duty to impose a 24-hour licence suspension on any driver who they reasonably believe is impaired by alcohol or drugs, or is otherwise unfit to drive. If there is no sober, licensed passenger who is willing to drive and the vehicle cannot be safely parked, it should be towed and stored at the driver's or owner's expense.

The police should also have a duty to suspend the licence of beginning drivers who breach the 0.00% BAC restriction on their licences. Although the licences of such drivers would also be revoked, it is important that they be removed from the road before the administrative sanction comes into force. Furthermore, if the supervisor accompanying a beginning driver breaches the prescribed BAC restriction, the supervisor's licence should be suspended for 24 hours. In these circumstances, the beginning driver could not continue driving unless someone else were able to take over as the qualified supervisor.

The police should be required to file a report of the roadside suspension with the Registrar, and it should become part of the driver's permanent record. A driver who receives two or more roadside suspensions within a one-year period should have his or her licence suspended for 90 days. The Registrar should also consider a driver's record of roadside suspensions in deciding whether he or she has an unsatisfactory driving record, is unfit to drive, or should be required to submit to an alcohol assessment or medical examination.

(b) Administrative Licence Suspensions (ALS)

The police should be required to issue a 90-day administrative licence suspension to any driver who registers a BAC above 0.08% on a breathalyzer or blood test, or who fails to take the required test without a reasonable excuse.[83] Although the driver should be entitled to a review of this suspension, the legislation should limit the grounds for a review. The Registrar should be required to confirm the suspension if he or she is satisfied that the driver's BAC was above 0.08% or that the driver failed to provide breath or blood samples, without a reasonable excuse. If not, the Registrar should be required to revoke the suspension. In any case, the 90-day suspension should come into effect, whether or not the driver has sought a review.

The ALS legislation should operate independently of any related criminal proceedings. Thus, drivers should be subject to a 90-day licence suspension whether or not they have been charged or convicted under the *Criminal Code*. Since the ALS program imposes an immediate administrative sanction, it will discourage suspects from delaying their criminal trials in an effort to keep their licences. In fact, the ALS legislation provides suspects who are likely to be convicted under the *Criminal Code* with an incentive to address the criminal charge as soon as possible. Delaying the criminal proceedings results in the offender having to serve the 90-day ALS separately from the subsequent federal driving prohibition and automatic provincial licence suspension.

(c) Automatic Provincial Licence Suspensions and Revocations for Federal Drinking and Driving Offences

Drivers convicted of certain *Criminal Code* driving offences are subject to federal driving prohibitions.[84] However, the provinces and territories should impose mandatory licence suspensions and revocations on these offenders, in addition to those required under the *Criminal Code*. The provincial and territorial sanctions should apply not only to driving while impaired, driving with a BAC above 0.08%, failing to provide samples, and impaired driving causing bodily harm or death, but also to dangerous driving, dangerous driving causing bodily harm or death, failing to remain at the scene of a crash, and driving while prohibited or suspended. Finally, sanctions should also be imposed for manslaughter and criminal negligence causing bodily harm

or death, if the offence arose from the use of a motor vehicle.

For a first offence of driving while impaired, driving with a BAC above 0.08%, failing to provide samples and dangerous driving, the automatic provincial licence suspension should be one year. A second conviction within 10 years should result in a licence revocation and a minimum driving disqualification of five years. A third conviction within a 10-year period should result in a licence revocation and an indefinite driving disqualification.[85] Third offenders should be allowed to apply to have the driving disqualification lifted after 10 years, if they successfully complete and pay for any required remedial program. However, the burden of proof should remain on the offenders to convince the Registrar that they no longer pose a risk and that, despite their convictions, they deserve an opportunity to apply for a licence. In our view, these suspensions or revocations should not be subject to exceptions, whether based on participation in education, treatment or interlock programs, or on claims of hardship.

Those convicted of any of the more serious *Criminal Code* offences — failing to remain at the scene of a crash, driving while prohibited or suspended, impaired driving causing bodily harm or death, dangerous driving causing bodily harm or death, manslaughter and criminal negligence causing bodily harm or death — should be subject to an automatic licence revocation and a five-year driving disqualification. The disqualification should only begin to run once the offender has finished serving any prison sentence. A second conviction within 10 years should result in an indefinite driving disqualification. Second offenders should be allowed to apply to have the disqualification lifted after 10 years, if they successfully complete any prescribed remedial program and convince the Registrar that they do not pose a risk.

Those convicted of any four *Criminal Code* driving offences, or three of the more serious offences, should be subject to a permanent driving disqualification that is not subject to review or reconsideration. Such a pattern of irresponsible conduct warrants a permanent disqualification. Moreover, at a certain point, the interests of public safety justify refusing the privilege of driving to those who repeatedly demonstrate that they are unwilling or unable to drive in a safe, responsible and sober manner.

(d) Suspensions and Revocations for Serious Provincial Offences

The demerit point system is an appropriate means of sanctioning drivers for minor and technical violations of the traffic legislation. However, in addition to demerit point penalties, the most serious provincial traffic offences warrant either suspensions, or revocations coupled with driving disqualifications. As indicated, we believe that the provincial offences warranting these sanctions include: careless driving, racing, wilfully evading police pursuit, leaving the scene of a crash, driving without valid insurance, failing to provide required breath or blood samples,[86] and failing to take a required physical co-ordination test.

Similar sanctions should be imposed for driving while subject to suspension, revocation or disqualification. In these cases, the licence sanctions for the new offence should be applied only after the original suspension, revocation or disqualification has been served.

(e) Court-Imposed Suspensions for Provincial Offences

Several Canadian jurisdictions authorize the judge that convicts a driver of an offence to impose a licence suspension separate from the suspension required by the highway traffic legislation. While we appreciate the purpose of such provisions, they should not detract from the Registrar's powers to suspend or revoke licences, independent of the criminal justice system. As indicated, the Registrar's discretionary powers should not be dependent on the driver being charged with, or convicted of, a driving offence.

SECTION IV: OTHER LICENSING AND ENFORCEMENT PROGRAMS

(a) Alcohol Interlocks

Each province and territory should establish an alcohol interlock program. An interlock is a small breath-testing unit that is connected to the engine to prevent a vehicle from being driven if the driver's BAC is above a low pre-set BAC, usually 0.02% or 0.04%. The driver must blow into the instrument to provide the breath sample, from which his or her BAC is determined. If the sample is below the pre-set level, the driver will be able to start the vehicle or, depending on the type of interlock, set it in motion.[87] The level should be set at 0.02% to reinforce the importance of separating drinking and driving. Setting the level at 0.04% may be interpreted as approval for driving after drinking – a message which is not appropriate, particularly for those already convicted of at least one drinking and driving offence.

The current devices are quite sophisticated and contain various anti-circumvention features.[88] Interlocks contain data logs that record all attempts to drive the vehicle, the driver's BACs and any efforts to tamper with the device. Research indicates that impaired driving offenders with interlocks on their vehicles had a significantly lower recidivism rate than offenders who did not.[89]

Interlocks should not be used as an alternative to the existing federal or provincial sanctions, nor to shorten the length of an offender's suspension, revocation or disqualification. Rather, they should be a mandatory component of a prescribed remedial program for all repeat impaired driving offenders and for first offenders who register a BAC above 0.16%.[90] Moreover, the Registrar should have the discretion to order an interlock for any other drivers that the Registrar reasonably believes are at a significant risk of drinking and driving. The driver should bear the cost of installing and maintaining the interlock. The duration of the interlock order should be two

years for first offenders and indefinite for repeat offenders. The latter should be permitted to apply to the Registrar to have the interlock order rescinded after five years, upon proof that they no longer have a drinking and driving problem. After considering the offender's entire driving record, treatment history and the interlock data log, the Registrar should have discretion to rescind the order, if he or she is convinced that the offender no longer poses a significant risk of drinking and driving.

Drivers in an interlock program require ongoing supervision. The data log should be downloaded and reviewed every 30 to 60 days, and the accuracy of the machine should be checked. A pattern of attempts to drive with a prohibited BAC may indicate that the driver requires additional treatment and that the interlock order should be extended. Evidence of tampering with the device should result in the revocation of the driver's licence and a driving disqualification. It should be left to the Registrar to decide whether the driver should be given another opportunity to drive with an interlock after the disqualification period ends. Finally, the legislation should provide that driving an unequipped vehicle when subject to an interlock order constitutes driving while disqualified.

(b) Remedial Programs

The provinces and territories should establish a comprehensive remedial program involving three components — education, assessment and treatment. Most education programs include information on the effects of alcohol and drugs on behaviour, the relationship between alcohol consumption and BAC, and the current impaired driving legislation.[91] Some also provide information on making responsible lifestyle choices. The assessment programs are designed to determine if a driver has an alcohol or drug problem and, if so, the nature of that problem.[92] The treatment programs are designed to assist the individual in recognizing that he or she has an alcohol or drug problem and in overcoming that problem.[93] Regardless of the personal benefits an individual may derive from the remedial program, its ultimate goal is to minimize the likelihood that the individual will drive after drinking or taking drugs.[94]

The Registrar should have discretion to require any driver who he or she reasonably believes has an alcohol or drug problem to successfully complete any component or components of the remedial program. In addition, any driver convicted of an impaired driving offence should be required to successfully complete a prescribed education program as a precondition to licence reinstatement. An assessment should be required of repeat offenders, first offenders who had BACs of 0.16% or higher, and offenders convicted of impaired driving causing death or bodily harm. If the assessment indicates that the offender requires treatment, then its successful completion should also be a precondition to licence reinstatement.

The costs of participating in the assessment and education programs should be borne by the

driver. However, the public health system should cover the cost of any medical treatment that an offender requires for his or her alcohol or drug problems. Successful completion of the prescribed remedial program should be a requirement, but not a guarantee, of licence reinstatement. The burden of proof should remain on the driver to convince the Registrar that he or she is fit to drive and will do so in a safe, sober and responsible fashion.[95] Thus, for example, the mere fact that the individual attended all the required sessions falls far short of discharging the requisite burden of proof. The legislation should clearly establish that participation in the remedial program is not an alternative to the existing federal or provincial sanctions, but rather, a requirement of licence reinstatement.

(c) Vehicle Seizure and Impoundment

The police should be required to impound any uninsured vehicle and any vehicle driven by an unlicensed, disqualified or prohibited driver.[96] The impoundment period should be 45 days for a first offence and 90 days for a second offence. If the driver is also the owner of the vehicle, a third offence within a 10-year period should result in the seizure and forfeiture of the vehicle.[97] The driver and the owner should be liable for all towing and storage costs, which would constitute a lien on the vehicle. The towing and storage company should have the right to sell the vehicle to recover its costs if it has not been paid within 60 days of the end of the impoundment period.

The owner of the vehicle should have the right to recover from the culpable driver any costs the owner paid as a result of the impoundment.[98] Nevertheless, the vehicle should not be released before the end of the impoundment period unless the owner can prove that the car was taken without implicit or explicit permission or that he or she took reasonable steps to verify that the driver had a valid licence. It should be sufficient for the owner to prove that he or she relied on what reasonably appeared to be a valid, government-issued driver’s licence. The provinces and territories should also establish a system that permits an owner to determine if a prospective driver has a valid licence.

SECTION V: VICTIMS’ RIGHTS

(a) Information Provided to Victims

The legislation should define the term “victim” to include anyone who suffers physical, property, or economic loss as a result of conduct that forms the basis of a federal criminal or provincial offence. Thus, a person may be a “victim” whether or not the offender is ever apprehended, charged or convicted. The definition should also include spouses, parents, siblings,

and children of the primary victims who suffer emotional harm or trauma resulting from the injury to their loved ones. It is important that victims' rights be phrased in imperative, rather than permissive, language. The provision of information to victims should be mandatory, and not phrased as being subject to the availability of resources.

The provincial victims' legislation should require justice personnel to offer victims of federal and provincial offences general information on the criminal justice system, their role and rights within the system, and the relevant legislation. Victims should also be offered specific information about the case, including: the name of the accused; the status of the investigation; the charges that have been laid and any decisions made about them; the date, place and time of the criminal proceedings; the outcome of the proceedings; and the sentence.

Under the federal *Corrections and Conditional Release Act*,[99] the Commissioner of Corrections must, upon request of the victim, disclose the commencement date and duration of the offender's sentence.[100] The Commissioner must also disclose the offender's eligibility and review dates for temporary absence and parole. Moreover, he or she may disclose the location of the penitentiary where the offender is in custody, and the date of the offender's parole, where the Commissioner believes that the interests of the victim outweigh the offender's right to privacy.[101] Under the *Act*, the victim is also entitled to attend parole hearings as an observer, unless there are demonstrated security or privacy concerns that warrant a refusal. The victim may provide submissions to the Parole Board in advance of the hearings, but this is limited to written or taped statements.[102]

Provincial and territorial legislation should give victims parallel rights with respect to offenders serving sentences of less than two years' imprisonment. These offenders are held in provincial correctional institutions, which are not governed by federal legislation. In these cases, the victim should still be informed of and given the right to receive the name of the institution where the offender is in custody; the date, time and location of any parole hearings; the offender's release date; and other details about his or her release. The victim should also be informed of his or her right to attend any parole hearing and present an updated victim impact statement.

(b) Victim Services

The legislation should provide equal access to victim services across the province or territory. These services should include the provision of informational materials for victims, support services, and referrals to counselling and legal resources in the community. The victim services agency should also provide training on victim issues to justice personnel. The legislation should protect victims from intimidation and retaliation, and ensure that they are provided with courtroom accommodation separate from the accused and his or her witnesses. Employers should be prohibited from discharging, suspending or otherwise penalizing victims who are absent from

work to testify, attend trial, or meet with justice personnel who are investigating or prosecuting the offence.[103]

The legislation should give victims the right to present an oral victim impact statement prior to the sentencing of the offender. Although the *Criminal Code* grants this right to victims of federal offences,[104] provincial and territorial legislation is required to create a parallel right in the case of serious provincial traffic offences. A victim impact statement allows the victim to explain to the judge how his or her life has been affected physically, financially and emotionally by the offender's actions. The victim should be informed of the right to make this statement, and should be given time to prepare it, even if an adjournment is required.[105] The legislation should require a judge to consider the victim impact statement, although it would not be binding on the judge in imposing the sentence. Finally, victims should be permitted to present an updated victim impact statement at any parole hearings.

The legislation should require victims to be treated with courtesy and respect. Victims who believe that their rights under the legislation have been violated should be allowed to seek review and redress from the provincial ombudsman or other official. Depending on the results of the review, the ombudsman should be authorized to recommend disciplinary proceedings against the relevant justice personnel, and to order that an apology be made to the victim.[106] If the review indicates systemic problems, the ombudsman or official should be empowered to make recommendations for change. However, a breach of the victim's rights under the legislation should not result in a declaration that the criminal proceedings against the accused were invalid.

(c) Victim Compensation

The provincial victims of crime legislation should provide compensation for both federal and provincial offences. Victims should be eligible for compensation even if no suspect is apprehended or if the accused is not convicted. An individual may be the victim of a crime, even if the particular accused is found not guilty. For the purposes of compensation, a "victim" should be defined to include any person who is directly injured physically or emotionally, and his or her spouse, parents, siblings, and children. Compensation should be provided for both pecuniary losses, such as medical costs and lost wages, and for non-pecuniary losses, such as pain and suffering, emotional trauma, humiliation, and grief.[107]

While the level of government-funded criminal injury compensation will never be comparable to that available in private civil litigation, the compensation awards should be substantial. In our view, establishing a maximum of $100,000 per victim and a limit of $250,000 per incident would be appropriate.[108] The compensation fund should have a right to sue the perpetrator to recover the money it has paid to the victims. In addition to any other right of recovery, the fund should be able to obtain an order to seize and dispose of the perpetrator's

vehicle to satisfy any outstanding judgment. Moreover, the perpetrator's licence should be revoked until the judgment is paid. If the fund recovers more from the perpetrator than it provided, the excess should be paid to the victim.

Currently, most of the criminal injury compensation legislation either specifically excludes victims of impaired, dangerous or criminally negligent driving from recovery, or does not include them in the list of eligible victims. The result is the same in both cases: victims of impaired driving are denied recovery. Instead, the legislation should specifically permit these victims to recover criminal injury compensation. Drinking and driving is, by far, the single largest criminal cause of death,[109] and probably one of the top two or three criminal causes of injury[110] in Canada. These victims are as worthy and needy of compensation as the victims of other crimes. In our view, there is no justification for excluding the victims of impaired, dangerous or criminally negligent driving from the criminal compensation system.

SECTION VI: INSURANCE

(a) Minimum Insurance Requirements

Driving without insurance should be a serious provincial offence, and should be subject to a significant fine, vehicle impoundment, licence revocation, and lengthy driving disqualification. Those who drive without insurance impose the risk of uncompensated losses and injuries on all other users of the roads. Although governments and insurance companies provide some protection through uninsured automobile coverage or uninsured automobile funds, compensation under these schemes is limited to the minimum third-party liability coverage. Thus, in serious crashes, much of the financial burden is borne by the public purse through the health care, rehabilitation and social services provided to the victims. The police should be given the right to arrest, without a warrant, any driver who they have reasonable grounds to believe is uninsured. They should also be authorized to seize the vehicle.

With the exception of Québec, the mandatory minimum amount of third-party coverage is $200,000 across Canada. Québec requires only $50,000 of third-party coverage, but this covers only property damage.[111] These mandatory minimums were, for the most part, established more than 15 years ago, when damage awards were significantly lower. Increases in wages, and in health care, rehabilitation and living costs have rendered these minimums inadequate. The current third-party minimums frequently cast the financial burden of the at-fault driver's negligence on the injured victim and the state. The more serious the crash, the more likely it is that the victim and the state will have to subsidize the at-fault driver, and the more likely it is that the subsidy will be substantial. The mandatory minimum third-party coverage should be $500,000. This is

not unreasonable, since many drivers already carry $1,000,000 in third-party coverage.[112] As stated, the Registrar should be required to revoke the licence of any drivers who fail to fully compensate those they have injured.

(b) Impact of a Driver's Record on Insurance Premiums

A driver's insurance premiums should reflect his or her record of traffic offences and at-fault accidents. This can be accomplished in several ways. A formal system can be established to assign points for specific offences and types of accidents, and to mandate the imposition of minimum premium surcharges at certain point totals. Alternatively, the insurance companies could be authorized to establish their own systems to reflect these factors in a driver's insurance premiums.[113] Regardless of the approach, the goal is to ensure that safe, sober and responsible drivers do not pay higher premiums to underwrite the true insurance costs of their irresponsible counterparts.

(c) Factors Limiting Insurance Coverage

In most jurisdictions, a driver who causes a crash while disqualified or prohibited, or while his or her licence is suspended or revoked, will have his or her insurance coverage severely limited. Typically, such drivers are denied recovery for damages to their vehicles, and recovery for their own injuries and financial losses is limited.[114] Moreover, their third-party coverage is limited to the provincial minimum, no matter how much additional third-party coverage they had purchased. As well, the driver's insurance company can recover from him or her all the costs associated with the crash, including any damages it paid to third parties.

However, similar restrictions on impaired drivers who cause crashes exist only in Saskatchewan, Manitoba and British Columbia. In those provinces, an impaired driver's third-party coverage is limited to the provincial minimum, and the driver's insurance company can recover from him or her all the benefits it has paid to third parties. In all other Canadian jurisdictions, impaired driving will not be treated as an exclusion from third-party liability. Although impaired drivers in these jurisdictions may face restrictions on their no-fault accident benefits or vehicle damage coverage,[115] their insurers are still required to cover their third-party liability to the full extent of the insurance contract.

It may well be justifiable to limit impaired or suspended drivers' rights to recover for damages to their own vehicles or for their personal injuries and financial losses. Similarly, it may be appropriate to permit insurance companies to recover from such drivers for any damages they have to pay to third parties. However, insurance companies should be required to compensate third parties to the full extent of the insurance contract, even if the insured at-fault driver was impaired or suspended at the time. In our view, this risk should be borne by the insurance

company that has been paid for the coverage, rather than by the innocent victim.

The legislation should require insurance companies to bring to the attention of all of its insured drivers and owners the insurance consequences of driving while impaired or suspended. In our experience, few people understand that such conduct exposes them to potentially devastating liability claims. Similarly, vehicle owners do not appreciate that they have virtually open-ended liability for the conduct of those permitted to drive their vehicles. Thus, if the driver subsequently gets drunk and causes an accident, or does not have a valid licence, the owner is exposed to liability without the full protection of his or her insurance.

CONCLUSION

In the preceding model of highway traffic, victims and insurance legislation, we have outlined provisions that we believe would contribute to reducing impaired driving deaths and injuries in Canada. These include: clearer duties and broader powers for the Registrar of Motor Vehicles, graduated licensing, more effective police enforcement powers, more comprehensive and rigorous licence suspension provisions, the use of alcohol interlocks, and the development of comprehensive remedial measures programs. Moreover, we have advocated better access to information and compensation for victims of Canada's number one criminal cause of death. Many of these initiatives have been implemented in some Canadian and other jurisdictions. Other components of the model are based on traffic safety research, or reflect specific concerns expressed by the Canadian enforcement and traffic safety community.

The model proposes relatively modest changes — changes that are compatible with the legislative and constitutional framework that currently governs highway traffic, victims and insurance issues in Canada. Perhaps the most striking feature of the model is the consistent and unequivocal priority that it assigns to traffic safety. In our view, the human and financial costs involved more than justify this focus.

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1. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

2. *Ibid*., s. 91(27). The criminal law power is often termed a "plenary power" of the federal government. *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1937] A.C. 368 at 375-76 (P.C.). A valid criminal law must be framed in terms of a prohibition coupled with a penalty, and must serve a typical criminal law purpose, such as public peace, order, safety, health, and morality. See *Re Validity of Section 5(a) of the Dairy Industry Act,* [1949] S.C.R. 1, aff'd *Canadian Federation of Agriculture* v. *Attorney-General for Quebec*, [1951] A.C. 179 (P.C.). Given the broad scope of the criminal law power, the federal government has constitutional authority to enact stringent prohibitions against drinking and driving. Thus, for example, Parliament could make it a criminal offence to drive with a blood-alcohol concentration (BAC) above 0.00%, and subject offenders to mandatory jail terms, heavy fines and lengthy driving prohibitions.

3. *Ibid*., s. 92(14). This includes the administration of the courts and the prosecution of *Criminal Code* cases. Moreover, this head of power gives the provinces authority over police enforcement practices and the allocation of police resources.

4. *Ibid*., s. 92(13). This is the broadest of all provincial heads of power, governing almost every relationship between citizens. Thus, the provinces have enacted statutes relating to the civil liability of vehicle owners and drivers, including insurance and fatal accidents legislation. This head of power also gives the provinces control over the regulation of particular trades, industries and professions within the province. *Citizens Insurance Co.* v. *Parsons* (1881), 7 A.C. 96 (P.C.); *Attorney-General for Canada* v. *Attorney-General for Alberta*, [1916] 1 A.C. 588 (P.C.); *Carnation Co*. v. *Quebec Agricultural Marketing Board*, [1968] S.C.R. 238; and *Canada (Attorney General)* v. *Law Society of British Columbia*, [1982], 2 S.C.R. 307. This includes the manufacturing and marketing of alcohol, the place and age of consumption, the price of alcohol, and the regulation of licensed outlets, including days and hours of operation. See *Hodge* v. *The Queen* (1883), 9 A.C. 117 (P.C.); *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1896] A.C. 348 (P.C.); *Labatt Breweries of Canada Ltd.* v. *Canada (Attorney General)*, [1980] 1 S.C.R. 914; and *Rio Hotel Ltd.* v. *New Brunswick (Liquor Licence Board)* (1987), 44 D.L.R. (4th) 663 (S.C.C.).

5. It is well established that the provinces' power over property and civil rights alone or in conjunction with their power over matters of a merely local or private nature (s. 92(16)) gives them broad authority to regulate driving within their territory, including eligibility to drive and the grounds for licence suspensions and revocations. See, for example, *Prince Edward Island (Provincial Secretary)* v. *Egan*, [1941] 1 S.C.R. 5 [hereinafter *Egan*]; *Ross* v. *Canada (Registrar of Motor Vehicles)*, [1975] 1 S.C.R. 5 [hereinafter *Ross*]; *Paganelli* v. *Ontario (Registrar of Motor Vehicles)* (1987), 6 M.V.R. (2d) 252 (Ont. Gen. Div.) [hereinafter *Paganelli*]; *Leclair* v. *R*. (1990), 25 M.V.R. (2d) 47 (Man. Q.B.); and *Horsefield* v. *Ontario(Registrar of MotorVehicles)* (1999), 44 O.R. (3d) 73 (C.A.) [hereinafter *Horsefield*].

6. *Constitution Act, 1867*, *supra* note 1, s. 92(15). This is also a broad authority, and includes the enactment of penalties, such as fines and imprisonment, but only for the purpose of enforcing otherwise valid provincial law. The Supreme Court of Canada has repeatedly upheld the constitutional validity of the provincial traffic offences under this head of power. See, for example, *Egan, supra* note 5; *Ross, supra* note 5, [1975] 1 S.C.R. 5; *O'Grady* v. *Sparling*, [1960] S.C.R. 804; *Mann* v. *R.*, [1966] S.C.R. 238; and *R.* v. *Art* (1987), 39 C.C.C. (3d) 563 (B.C. C.A.).

7. R.S.C. 1985, c. C-46. These include the offences and penalties for: impaired driving (s. 253(a)); driving with a BAC above 0.08% (s. 253(b)); refusing to provide breath or blood samples without a reasonable excuse (s. 254(5)); impaired driving causing bodily harm (s. 255(2)) or death (s. 255(3)); and driving while prohibited or suspended under provincial law for a federal *Criminal Code* offence (s. 259(4)).

8. *Federal Drinking and Driving Law: Proposals for Change* (Mississauga: MADD Canada, 1999). The proposals included: mobile digital breath testing; the use of passive alcohol sensors; mandatory physical co-ordination testing; mandatory breath testing of drivers involved in fatal and personal injury crashes; increasing the time the police have to demand breath and blood samples; and tiered penalties based on the offender's BAC. MADD Canada also recommended mandatory assessment and treatment for convicted impaired drivers, and the use of alcohol interlocks as a mandatory term of probation. Finally, MADD Canada proposed streamlining the criminal justice system by adding impaired driving, driving with a BAC above 0.08%, and failing to provide samples without a reasonable excuse to the list of *Criminal Code* offences that are subject to the absolute jurisdiction of the provincial courts. This would allow prosecutors to proceed by indictment, and thereby have access to longer maximum

penalties, without having to incur all of the costs, delays and other disadvantages of proceeding by indictment.

9. *An Act to amend the Criminal Code (impaired driving and related matters),* S.C. 1999, c. 32. For the most part, the amendments focused on increasing the minimum penalties and driving prohibitions for convicted impaired drivers. They also require judges to consider a BAC of 0.16% or higher as an aggravating factor in sentencing, which means that they should increase the penalty that they would have otherwise imposed.

10. For example, representatives of MADD, the Canadian Police Association, the Canadian Association of Chiefs of Police, and the Traffic Injury Research Foundation met with federal officials in Ottawa on September 10, 1999.

11. Some provinces have called this legislation the *Motor Vehicle Act*, rather than the *Highway Traffic Act*. However, for the purposes of this report, we will refer to all of this legislation as highway traffic legislation.

12. *Nunavut Act*, S.C. 1993, c. 29, s. 29. The Nunavut Legislative Assembly has not yet indicated any intention to amend the Northwest Territories highway traffic legislation.

13. Part I of the *Constitution Act, 1982,* being Schedule to the *Canada Act 1982*, (U.K.), 1982, c. 11 [hereinafter the *Charter*].

14. S. Tremblay & A. Kemeny, "Drinking and Driving: Have We Made Progress?" (1998) *Canadian Social Trends* 20 at 20.

15. This figure is based on the estimate that 1,680 people die and 74,000 are "injured" in alcohol-related crashes each year. D.J. Beirness, D.R. Mayhew & H.M. Simpson, *DWI Repeat Offenders: A Review and Synthesis of the Literature* (Ottawa: Health Canada, 1997) at 11 [hereinafter *DWI Repeat Offenders*]. The statistics on alcohol-related crash injuries are often difficult to interpret because the term "injury" may be used to refer to all injuries reported at the scene, only injuries requiring hospital treatment or only injuries requiring admission to hospital. The above study estimated the number of injuries based on information from numerous sources, including accident reports, and hospital and health care data. The term "injury" refers to the total number of all kinds of injuries.

16. *Ibid*. As indicated, 1,680 Canadians are killed each year as a result of impaired driving. Based on Statistics Canada figures, there were 586 homicides in 1997, including all murder, manslaughter, and infanticide. Online: Statistics Canada Homepage www.statscan.ca. Thus, the death rate for impaired driving is nearly three times that for homicide.

17. E. Single *et al.,* "Morbidity and Mortality Attributable to Substance Abuse in Canada" (1999) *American Journal of Public Health* 385. See also E. Single *et al., The Costs of Substance Abuse in Canada* (Ottawa: Canadian Centre on Substance Abuse, 1996) at 32.

18. Although there were significant reductions in alcohol-related crash deaths from the record highs of the early 1980s, this downward trend came to an abrupt halt in 1990. Since then, alcohol-related crash deaths have increased slightly. *DWI Repeat Offenders, supra* note 15 at 10. The percentage of fatally-injured drivers who are legally impaired continues to hover around 40%.

19. While some provinces refer to this official as the Superintendent of Motor Vehicles, we will use the

term "Registrar" to indicate all such officials, to avoid confusion.

20. B. Jonah *et al*., "Front-line Police Officers' Practices, Perceptions and Attitudes about the Enforcement of Impaired Driving Laws in Canada" (1999) 31 *Accid. Anal. and Prev.* 421 at 426 [hereinafter "Police Officers' Perceptions"].

21. *Ibid*.

22. *Ibid*.

23. *Ibid*.

24. *R.* v. *Askov* (1990), 79 C.R. (3d) 273.

25. D. MacIntosh, "Pre-Charge Delay: Askov Trends" (1992) 1 N.J.C.L. 268 at 268.

26. The definitive test for determining if a decision is judicial or quasi-judicial was articulated in *M.N.R.* v. *Coopers and Lybrand*, [1979] 1 S.C.R. 495. The Court stated that the key criteria are whether there was a requirement of a hearing, the process was adversarial, the decision affects individual rights or obligations, and there was an obligation to apply substantive rules to individual cases. The more the role of the decision-maker resembles that of a judge, the more likely it is that the decision will be viewed as being quasi-judicial, and thus immune from liability in negligence.

27. See *Calvert* v. *Law Society of Upper Canada* (1981), 121 D.L.R. (3d) 169 at 175 (Ont. H.C.J.); and *Sirros* v. *Moore*, [1974] 3 All E.R. 776 (C.A.).

28. Administrative decisions do not enjoy the blanket immunity of judicial and quasi-judicial decisions. However, some administrative decisions, namely, policy decisions, are still immune from liability in negligence if they are made in good faith. Other administrative decisions are classified as operational decisions, and can be the subject of a negligence suit. The Supreme Court set out the distinction between policy and operational decisions in *Just* v. *British Columbia*, [1989] 2 S.C.R. 1228 [hereinafter *Just*]. Policy decisions are generally made by higher-ranking officials, and involve the exercise of discretion regarding large-scale financial, social and political issues. Conversely, operational decisions are made on a more routine basis, and generally involve the day-to-day operations of a particular agency. Thus, the government may be immune from liability for a policy decision regarding overall highway maintenance in its jurisdiction. Nevertheless, the government could be held liable if it adopted a maintenance policy and then negligently failed to maintain a particular stretch of road.

29. Naturally, the plaintiff would still have to prove all of the other elements of a negligence claim, namely that: the Registrar breached the required standard of care; the Registrar's negligence caused the plaintiff's loss; the loss was not too remote in law to be recoverable; and the loss was one that is recoverable in negligence law.

30. Legislation governing various administrative agencies often permits legal action against the agency for the negligence of its employees, while granting the employees personal immunity. See, for example, *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22, s. 12, which provides that no action can be instituted against the Minister and employees "for any act done in good faith in the execution or intended execution of his or her duty or for any alleged neglect or default in the execution in good faith of his or her duty."

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31. For a summary of the liability of public authorities, see P.M. Perell, "Negligence Claims Against Public Authorities" (1994) 16 Advocates' Q. 48; L.A. Reynolds & D.A. Hicks, "New Directions for the Civil Liability of Public Authorities in Canada" (1992) 71 Can. Bar Rev. 1; and M.K. Woodall, "Private Liability of Public Authorities for Negligent Inspection and Regulation" (1992) 37 McGill L.J. 83. Public authorities have been held liable for negligent highway maintenance, *Just, supra* note 28; failure to enforce building codes, *Kamloops (City)* v. *Nielsen*, [1984] 2 S.C.R. 2; and negligent maintenance of fire hydrants, *Laurentide Motels* v. *Beauport (City)*, [1989] 1 S.C.R. 705.

32. Some provinces use the term "cancellation" rather than "revocation." For the purpose of this report, the two terms will be used interchangeably.

33. In particular, driving is not an aspect of the liberty interest protected under section 7. See *R.* v. *Pontes* (1995), 100 C.C.C. (3d) 353; *Paganelli, supra* note 5; *Horsefield*, *supra* note 5; and *Buhlers* v. *British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C. C.A.).

34. Some provinces use the term "prohibition" rather than "disqualification." However, these provincial "prohibitions" should not be confused with the federal driving prohibitions imposed under s. 259 of the *Criminal Code*. To avoid confusion, this report refers to the provincial sanction as a "disqualification," while the term "prohibition" is reserved for the federal penalty.

35. In one study, the crash rate among 16 year-olds per million miles driven was 43, compared with 30 among 17 year-old drivers and 15 among 18 and 19 year-old drivers. A.F. Williams, "Magnitude and Characteristics of the Young Driver Crash Problem in the United States" in H. Simpson, ed., *New to the Road: Reducing the Risks for Young Motorists* (Los Angeles: University of California Brain Information Service/Youth Enhancement Service, 1996) at 19.

    Although the rationale behind a low initial licensing age is that it increases the amount of supervised driving before gaining a full licence, some studies suggest that a low minimum driving age may encourage individuals to drive illegally (i.e., unlicensed or unsupervised) at an even younger age. One study found that, in Mississippi and Louisiana, where the minimum driving age is only 15, 38% and 32% of unlicensed young males reported driving once a week or more. However, in states where the minimum driving age was 16 or higher, only 14% to 18% of young males reported such illegal driving. A.F. Williams, A.K. Lund & D.F. Preusser, "Driving Behavior of Licensed and Unlicensed Teenagers" (1985) 6 *Journal of Public Health Policy* 379. Another study of states that reduced the minimum driving age to 15 found that three-quarters of beginners who were fatally injured in crashes were driving without a licence or without the required supervision. A.F. Williams *et al*., "Analysis of the Fatal Crash Involvement of 15 Year-old Drivers" (1997) 28 *Journal of Safety Research* 49.

36. Foreign studies demonstrate that higher licensing ages result in improvements to traffic safety. For example, Victoria has the highest licensing age, 18, of any Australian state. It also has the lowest rate of fatal and personal injury crashes per licensed driver. See H.L. Ross, *Confronting Drunk Driving: Social Policy for Saving Lives* (New Haven: Yale University Press, 1992) at 131. Similarly, New Jersey has the highest licensing age (17) of American states, and also the lowest relative risk of crash for young drivers. Conversely, Delaware had the highest relative crash rate, with a minimum licensing age of only 15 years, 10 months. Moreover, 58% of teenagers surveyed in Delaware admitted to driving on public roads before obtaining a driver's licence. Only 35% of teenagers in New Jersey reported such illegal driving. S.A. Ferguson *et al*., "Differences in Young Driver Crash Involvement in States with Varying Licensure Practices" (1996) 28 *Accid. Anal. and Prev.* 171 at 174, 177.

37. See, for example, L.D. Filking & J.D. Flora, *Alcohol-Related Accidents and DUIL Arrests in Michigan: 1978-1979* (Ann Arbor: University of Michigan, Highway Safety Research Institute, 1978). This study, completed shortly after the change in the minimum drinking age, found an 11% to 24%

reduction in alcohol-related crash involvement among 18 to 20 year-old drivers.

A more recent, long-term study found that states that raised the drinking age from 18 to 21 experienced a 26.3% decline in the rate of alcohol-involved single vehicle nighttime crashes per licensed driver over ten years. See P.M. O'Malley & A.C. Wagenaar, "Effects of Minimum Drinking Age Laws on Alcohol Use, Related Behaviors and Traffic Crash Involvement Among American Youth: 1976-1987" (1991) 52 *Journal of Studies on Alcohol* 478 at 487.

38. For example, a study of crash statistics conducted by the National Highway Traffic Safety Administration found an estimated reduction of 13% in fatal crashes per licensed driver affected by the law change. R.D. Arnold, *Effect of Raising the Legal Drinking Age on Driver Involvement in Fatal Crashes: The Experience of Thirteen States* (Washington, D.C.: National Highway Traffic Safety Administration, 1985) at 17. A follow-up study found that the sustained reduction in fatal crash involvement was 12%, even a decade after the change. That study also estimated the cumulative number of lives saved by the higher drinking age in thirteen states to be between 7,433 and 8,142. K. Womble, *The Impact of Minimum Drinking Age Laws on Fatal Crash Involvements: An Update of the NHTSA Analyses* (Washington, D.C.: National Highway Traffic Safety Administration, 1989) at 5. Similar results were found nationally, but the study was limited to 13 states because only they met the requirement of having fatal accident data for three complete years before and after the law change.

39. See, for example, R.L. Douglass & J.A. Freedman, *Alcohol-Related Casualties and Alcohol Beverage Market Response to Beverage Alcohol Availability Policies in Michigan. Volume 1 Final Report* (Ann Arbor: University of Michigan Highway Safety Research Institute, 1977); A.F. Williams *et al*., "The Legal Minimum Drinking Age and Fatal Motor Vehicle Crashes" (1975) *Journal of Legal Studies* 219; and R.B. Voas & J. Moulden, "Historical Trends in Alcohol Use and Driving by Young Americans" in H. Weschler, ed., *Minimum Drinking Age Laws* (Lexington: Lexington Books, 1980).

However, several authors have demonstrated that the gains attributable to a higher minimum drinking age may have been overstated, and it should not be viewed as the ultimate solution to the young driver crash problem. See E. Vingilis & K. DeGenova, "Youth and the Forbidden Fruit: Experiences with Changes in Legal Drinking Age in North America" (1984) *J. Crim. Justice* 161. Although substantial decreases in the youth alcohol-related crash problem accompanied the raising of the drinking age in the United States, they were paralleled by similar decreases in Canada, where the drinking age remained at 18 or 19. Thus, some experts have suggested that the changes resulted from a number of factors, including economic trends, shifts in social norms, and other general measures aimed at reducing impaired driving. See D.R. Mayhew & H.M. Simpson, *New to the Road. Young and Novice Drivers: Similar Problems and Solutions?* (Ottawa: Traffic Injury Research Foundation, 1990) at 134-35 [hereinafter *New to the Road*].

40. One study reported that after only a few years of graduated licensing, Ontario beginners experienced a 31% reduction in the crash rate, and Nova Scotia beginners experienced a 37% reduction. D.R. Mayhew & H.M. Simpson, *Youth and Road Crashes* (Ottawa: Traffic Injury Research Foundation, 1999) at 30 [hereinafter *YOuth and Road Crashes*]. Similarly, deaths and injuries among 15 to 17 year-old drivers in New Zealand reportedly dropped by about 25%. H.M. Simpson & D.R. Mayhew, *Reducing the Risks for New Drivers: A Graduated Licensing System for British Columbia* (Victoria: Ministry of the Attorney General, Motor Vehicle Branch, 1992) at 27 [hereinafter *Reducing the Risks*]. See also J.D. Langley, A.C. Wagenaar & D.J. Begg, "An Evaluation of the New Zealand Graduated Driver Licensing System" (1996) 28 *Accid. Anal. an d Prev.* 139.

41. See, for example, *Reducing the Risks*, *ibid*. at 9-11; and *New to the Road, ibid.* at 103-112; and N.P. Gregersen *et al.*, "Sixteen Years Age Limit for Learner Drivers in Sweden – an Evaluation of Safety Effects" (2000) 32 *Accid. Anal. and Prev.* 25.

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42. The presence of passengers is not only a source of internal distractions, but also a potential source of peer pressure to engage in risky behaviour. J.R. Treat *et al.*, *Tri-Level Study of the Causes of Traffic Accidents: Final Report*, vol. 1 (Washington, D.C.: National Highway Traffic Safety Administration, 1979). Restricting the number of passengers to the number of seatbelts is not particularly helpful in this regard, because it may still permit the beginning driver to have as many as three or four teenage passengers, in addition to the supervising driver. Research indicates that the more passengers, the greater the risk. D.F. Preusser, S.A. Ferguson & A.F. Williams, "The Effect of Teenage Passengers on the Fatal Crash Risk of Teenage Drivers" (1998) 30 *Accid. Anal. and Prev.* 217.

43. A study of youth and road crashes in Canada found that nearly 80% of fatally-injured teenage passengers were travelling in a vehicle operated by a young driver. *Youth and Road Crashes, supra* note 40 at vi.

44. An American study indicated that three-quarters of night-time crashes and more than half of the night-time fatalities among 16 and 17 year-olds occur between 9 p.m. and midnight. A.F. Williams, *Protecting New Drivers: 10 Components of Graduated Licensing that Make Sense* (Arlington: Insurance Institute for Highway Safety, 1996) at 5. About half of all teenage motor vehicle deaths and 64% of all injuries occur at night, even though teens drive less during night-time hours. *Youth and Road Crashes, supra* note 36 at 14.

    In Ontario, drivers between the ages of 16 and 24 account for only 30.5% of all night-time drivers, but 47.7% of night-time driver deaths. Thus, their relative risk of a night-time crash is significantly higher than that of older drivers. *New to the Road, supra* note 39 at 61.

45. In addition, young drivers are more likely to be in single-vehicle crashes than older drivers. These typically occur on highways, freeways and roads with high speed limits. *New to the Road, ibid.* at 32. Unfortunately, road restrictions for new drivers have not been widely implemented; therefore, the impact of these restrictions is not well documented. *Reducing the Risks*, *supra* note 40 at 33. However, early reports from Ontario, which prohibited beginning drivers from driving on all 400-series (high speed) highways, indicated that there was a 61% decrease in the collision rate for beginning drivers on these highways. P. Boase & L. Tasca, *Graduated Licensing System Evaluation, Interim Report '98* (Toronto: Ministry of Transportation of Ontario, 1998) at 4. Of course, if the road restriction were fully obeyed, the collision rate for beginning drivers on these highways would be zero.

46. For example, a large experimental study in DeKalb County, Georgia had disappointing results. The "DeKalb study," performed in the late 1970s and early 1980s, was intended to demonstrate the benefits of enhanced high school driver education. Sixteen thousand students were divided into three groups. The first participated in the "Safe Performance Curriculum," a state-of-the-art education program lasting 72 hours. The second group took a basic driver education course called "Pre-Driver Licensing," lasting only 20 hours. The control group was not formally enrolled in driver education. The results showed that driver education had only a small, short-lived positive effect on new drivers. Although students with driver education had fewer crashes per licensed driver than the control group, this difference was not sustained beyond six months of licensed driving. J.R. Stock *et al.*, *Evaluation of the Safe Performance Secondary School Driver Education Curriculum Demonstration Project: Final Report* (Columbus: Batell Columbus Laboratories, 1983).

    Another study found that driver education may result in significant over-estimation of skill by participants. Young drivers taking a mandatory skid training course in Sweden were divided into two groups: insight and skills training. The strategy used with the insight group was to make drivers aware of their limited and unpredictable braking and avoidance skills. Conversely, the skills group practised braking and avoidance manoeuvres repeatedly around the same course, at increasing speeds. While the groups performed equally in terms of "actually observed skill," the skills group had a higher subjective

estimation of driving capabilities. Thus, the author suggests that, in order to be effective, driver education programs must reinforce to new drivers that their skills are limited, and that they need to drive with larger safety margins. Unfortunately, the author also notes that most young drivers believe themselves to be more skilled than other drivers, and therefore, underestimate their risk. See N.P. Gregersen, "Young Drivers' Overestimation of their Own Skill – An Experiment on the Relation Between Training Strategy and Skill" (1996) 28 *Accid. Anal. and Prev.* 243 at 245-48.

See also L. Potvin, F. Champagne & C. Laberge-Nadeau, "Mandatory Driver Training and Road Safety: The Quebec Experience" (1988) 78 *American Journal of Public Health* 1206; L.S. Robertson, "Crash Involvement of Teenaged Drivers when Driver Education is Eliminated in High School" (1980) *American Journal of Public Health* 599; and N.P. Gregersen, "Systematic Co-operation Between Driving Schools and Parents in Driver Education, an Experiment" (1994) 26 *Accid. Anal. and Prev.* 453.

47. In 1997, 40% of all teen drivers killed in road crashes in Canada had been drinking. Three-quarters of these had a BAC above 0.08%, and 44% had a BAC in excess of 0.15%. *Youth and Road Crashes, supra* note 40 at vii.

48. Research on unsafe driving behaviour has shown that perceptual, cognitive and vehicle-handling skills are less developed in beginning drivers than in more experienced drivers. In addition, beginning drivers have a decreased ability to detect and recognize imminent hazards in the driving environment. J.A. Groeger & I.D. Brown, "Assessing One's Own and Others' Driving Ability: Influence of Sex, Age and Experience" (1989) 21:2 *Accid. Anal. and Prev.*155.

49. For example, 30 year-old beginners have a 41% higher collision rate than 30 year-olds with five years' experience. Similarly, 20 year-old beginners have a 28% higher collision rate than 20 year-olds with five years' experience. *Reducing the Risks, supra* note 40 at 6.

50. Research indicates that young drivers are more likely to speed, follow too closely, allow less time to merge with traffic, cross traffic lanes, and pass other vehicles. They also tend to over-estimate their driving abilities. J. Bergeron, "Behavioural, attitudinal and physiological characteristics of young drivers in simulated driving tasks as a function of past accidents and violations" (Paper presented to *New to the Road* Symposium, Halifax, 17-20 February 1991). Moreover, they are less likely to wear seatbelts. D.R. Mayhew *et al.,* "Youth, Alcohol and Relative Risk of Crash Involvement" 18:4 *Accident Analysis and Prevention* 273 [hereinafter "Relative Risk"].

A survey of grade 12 students at a suburban American high school found that 80% of young males reported driving at least 20 m.p.h. over the speed limit in the past year, and 50% admitted to racing and passing in a no-passing zone. Another 25% reported driving after drinking. J.J. Arnett, D. Offer & M.A. Fine, "Reckless Driving in Adolescence: 'State' and 'Trait' Factors" (1997) 29 *Accid. Anal. and Prev.* 57 at 59-60.

51. New drivers may have difficulty performing relatively simple driving tasks after having consumed even small amounts of alcohol. *Reducing the Risks, supra* note 40 at 32. D.R. Mayhew *et al*. have reported that 16 to 19 year-old drinking drivers have a higher relative risk of crash than older drinking drivers at all BAC levels. For example, 16 to 19 year-old drinking drivers with BACs of 0.015% to 0.049% already showed a marked increase in relative risk compared to non-drinking drivers of the same age, while the relative risk of older drivers at this BAC level was not significantly higher than non-drinking drivers. Moreover, 16 to 19 year-old drivers with BACs of between 0.050% and 0.079% are about nine times more likely to have a fatal crash than non-drinking drivers; whereas drinking drivers aged 20 and older with comparable BACs are only twice as likely to have a fatal crash as non-drinking drivers. Thus, the authors indicate that, while the relative risk of a fatal crash rises with increases in BAC for both groups, the rate of increase is greater for 16 to 19 year-olds. "Relative

Risk", *ibid*. at 282-83.

52. *Ibid*. at 281-83.

53. Studies show that the risk of collision declines significantly after two years of driving experience, so a minimum two-year period is justifiable. In fact, improvements in safety are still achieved after five years of driving. Therefore, an even longer period of supervised or restricted driving may also be warranted. *Reducing the Risks, supra* note 40 at 48.

54. The exit test should be designed to determine whether the driver possesses the necessary skills to drive on all roads, and to thereby motivate beginners to develop their skills. A.F. Williams & D.R. Mayhew, *Graduated Licensing: A Blueprint for North America* (Ottawa: Traffic Injury Research Foundation, 1999) at 6.

55. The threat of suspension generally has a deterrent value and discourages beginning drivers from taking deliberate risks. *Reducing the Risks, supra* note 40 at 16. While we recognize that suspensions can, at times, be counterproductive because they eliminate the driver's opportunities to gain practical experience, it must be remembered that stage-three drivers will have already had a minimum of two years' driving experience. Thus, a short-term suspension is warranted for beginning drivers who begin to develop poor driving records.

56. It should be noted that this licence revocation will not apply to drivers who commit minor traffic violations. Revoking the licences of such drivers would only detract from their ability to improve their skills and experience. Rather, the revocation would apply to drivers who deliberately violate the key conditions on their licences, or who show disrespect for licensing laws and traffic safety.

57. Convicted impaired drivers have more prior traffic crashes and receive more tickets than non-drinking drivers. B.A. Jonah & R.J. Wilson, "Impaired Drivers Who Have Never Been Caught: Are They Different from Convicted Impaired Drivers?" (1986) *Society of Automotive Engineers Technical Paper Series* 86. See also B.A. McMillen *et al*., "Personality Traits and Behavior of Alcohol-Impaired Drivers: A Comparison of First and Multiple Offenders" (1992) 17 *Addictive Behaviors* 407; and R.J. Wilson, *A National Household Survey on Drinking and Driving: Knowledge, Attitudes and Behaviour of Canadian Drivers* (Ottawa: Transport Canada, 1984).

58. *DWI Repeat Offenders, supra* note 15 at 4.

59. Otherwise, the system may penalize relatively safe drivers who do a great deal of driving, while missing drivers who pose the greatest risk to themselves and others. See E. Hauer, K. Quaye & Z. Liu, *On the Use of Accident or Conviction Counts to Trigger Action* (Washington, D.C.: National Academy Press, 1993); and E. Hauer *et al.,* "Estimating the Accident Potential of an Ontario Driver" (1991) *Accid. Anal. and Prev.* 133.

60. *Criminal Code*, *supra* note 7, s. 254(2).

61. *Ibid*., s. 254(3).

62. *Ibid*., s. 258(1)(c).

63. *Ibid*., s. 254(3)(b).

64. *Ibid*., s. 256(1). These warrants may only be issued if there are reasonable grounds to believe that a

person has committed the offence of impaired driving within the previous four hours, that he or she was involved in an accident causing death or bodily harm, and that the person is physically or mentally incapable of consenting to the taking of samples. Moreover, the taking of samples must not endanger the life or health of the person.

65. The constitutionality of such random traffic stops was upheld in the decision in *R.* v. *Ladouceur*, [1990] 1 S.C.R. 1257. Although such stops were held to constitute an arbitrary detention, contrary to s. 9 of the *Charter*, they were saved under s. 1 as being "demonstrably justified in a free and democratic society." Specifically, the court noted that random checks were the only means by which the police could detect and prosecute unlicensed, prohibited or uninsured drivers. This power to stop vehicles at random is crucial, given that three-quarters of all convicted impaired drivers are apprehended by routine police patrols, rather than by organized spot checks. A.C. Donelson, D.J. Beirness & D.R. Mayhew, *Characteristics of Drinking Drivers. Impaired Driving Report No. 1* (Ottawa: Department of Justice, 1985).

66. A survey of Canadian police found that one-third believed that judges gave greater credibility to the expert witnesses of the defence than to their evidence. Moreover, almost 80% of officers believed that drivers sometimes or frequently escaped conviction because of legal technicalities. Presumably, this would include a significant number of cases in which judges ruled that breathalyzer and blood-test results were inadmissible because the officer lacked the required grounds for the demand. "Police Officers' Perceptions", *supra* note 20 at 435.

67. For example, in the Swinson case, the accused driver crossed the centre yellow line, collided head-on with Robert Swinson's car and killed him. The accused was charged with impaired driving causing death. Even though the accused had the odour of alcohol on her breath, admitted to drinking, caused a fatal collision and there was no other explanation for the crash, the judge ruled that the police did not have sufficient grounds to arrest her and demand a breathalyzer test. Thus, the breathalyzer readings, which established that the accused's BAC (0.20%) was about two-and-a-half times the *Criminal Code* limit, were excluded and she was acquitted. MADD Canada, News Release, "MADD Canada National Board Outraged at Attorney General's Refusal to Appeal Unjust Court Ruling" (18 September 1995).

68. In the Wooley case, the accused crossed the centre line and crashed head-on with an oncoming vehicle, killing four of its occupants, including Wooley, and injuring the fifth. Even though the accused admitted in court to having consumed a cooler, two rye highballs and a shooter before driving, the judge ruled that the blood test ordered at the hospital was inadmissible because the police did not have reasonable and probable grounds to believe that she had committed an impaired driving offence. Without the blood test, the four charges of impaired driving causing death and the one charge of impaired driving causing bodily harm had to be dropped. Because the results were ruled inadmissible, there is no information available that indicates what the accused's BAC actually was. The accused also testified that she had worked a long shift before she went partying. Nevertheless, the judge found her not guilty of the four counts of dangerous driving causing death and the one count of dangerous driving causing bodily harm because he was not convinced beyond a reasonable doubt that she was driving in an unsafe manner. See R. Exner, "Dangerous driving acquittal sends 'wrong' message" The [Edmonton] Journal (7 November 1998).

69. These studies involved roadside surveys conducted downstream from police spot checks. Presumably, some of these undetected drivers have developed a tolerance for alcohol and fail to exhibit the obvious signs and symptoms of impairment, or have learned to avoid raising police suspicions. See S.A. Ferguson, J.K. Wells & A.K. Lund, "The role of passive alcohol sensors in detecting alcohol-impaired drivers and sobriety checkpoints" (1995) 11:1 *Alcohol, Drugs and Driving* 23; and I.S. Jones & A.K.

Lund, "Detection of alcohol-impaired drivers using a passive alcohol sensor" (1986) 14 *Journal of Police Science and Administration* 153. Escaping detection not only allows intoxicated drivers to continue driving, but reinforces their belief that they are not really impaired. This, in turn, encourages subsequent impaired driving episodes. *DWI Repeat Offenders, supra* note 15 at 62.

A Canadian study also suggested that police fail to detect a significant number of impaired drivers that they stop in R.I.D.E. programs. See E. Vingilis, E.M. Adlaf & L. Chung, "Comparison of Age and Sex Characteristics of Police-Suspected Impaired Drivers and Roadside-Surveyed Impaired Drivers" (1982) 14 *Accid. Anal. and Prev.* 425. See also E. Vingilis *et al*., "Psychosocial Characteristics of Alcohol-Involved Seriously Injured Drivers" (1994) 26 *Accid. Anal. and Prev.* 195.

70. Ethyl alcohol, the active ingredient in alcohol beverages, has no scent of its own. Rather, it is the other components of such beverages that give them their distinctive smell. Drinks vary in the type and intensity of their scents, and some officers are better at detecting these scents than others. *DWI Repeat Offenders, ibid*. at 63.

71. It could be argued that legislation is not required because, at this time, there is nothing prohibiting the police from using passive alcohol sensors. However, clear legislation would remove all doubt about police authority.

There is a second reason why clear legislation is necessary. Passive alcohol sensors would be used routinely, without prior judicial approval or specific evidence that the driver had been drinking or was committing an offence. Consequently, their use will likely be challenged and may be found to constitute an unreasonable search and seizure under s. 8 of the *Charter*. However, an infringement of the *Charter* may be justified or excused under s. 1 of the *Charter* if the infringement is a "reasonable" limit "prescribed by law" and is "demonstrably justified in a free and democratic society." Legislation specifically authorizing the police use of passive alcohol sensors would assist the Crown in meeting the first requirement of s. 1 — namely, that the search is "prescribed by law." A limit may be prescribed by law if it is "expressly provided for by statute or regulation, or results by necessary implication from the terms of statute or regulation or from its operating requirements" or "from the application of a common law rule." *R.* v. *Therens*, [1985] 1 S.C.R. 613 at 645.

72. Currently, immediate access to an ASD is often critical to the establishment of reasonable and probable grounds for demanding a breathalyzer test. In *R*. v. *Grant* (1991), 67 C.C.C. (3d) 268, the Supreme Court of Canada held that a 30-minute delay in the arrival of an ASD provided the driver with a reasonable excuse for refusing the test. Consequently, the suspect had to be acquitted of failing to provide a breath sample. However, if the police had been authorized to demand a physical co-ordination test, the results of that test may have provided them with grounds for demanding a breathalyzer test.

Although the issue is unresolved, there may be a second limitation on the use of ASDs. In *R*. v. *Pierman* (1994), 19 O.R. (3d) 704 at 708 (Ont. C.A.), Madam Justice Arbour suggested that s. 254(2) only authorizes the police to demand an ASD test from a person who is operating or has care and control of a motor vehicle. Therefore, the police may not be able to demand an ASD test from a suspect who has been removed from the immediate crash site for safety reasons or for medical attention. Thus, the authority to demand a physical co-ordination test may again be critical in these situations. The judgment in *Pierman* suggested that a delay in administering the ASD test will only be justified if the police have reason to believe that an immediate test would provide a sample of breath that is unsuitable for analysis, due to recent alcohol consumption. Arbour J.'s reasoning was affirmed by the Supreme Court of Canada in *R.* v. *Dewald*, [1996] 1 S.C.R. 68.

73. See *supra* notes 67 and 68. Moreover, a recent survey revealed that two thirds of police officers believe that a videotape of the co-ordination test would increase the chance of a guilty plea "a great deal." "Police Officers' Perceptions," *supra* note 20 at 426.

74. Thus, only in Québec is there a statutory penalty for failing to perform a physical co-ordination test. In other provinces, drivers are under no obligation to perform these tests, and cannot be penalized for refusing to participate.

75. See, for example, *R.* v. *Smith* (1996), 28 O.R. (3d) 75 (C.A.); and *R.* v. *Bonin* (1989), 47 C.C.C. (3d) 230 (B.C. C.A.). The courts stated that the police have the power to take steps to determine if there are reasonable and probable grounds to make a breathalyzer demand, and that this implicitly includes the power to request a physical co-ordination test, even though the driver does not have to comply. However, since the co-ordination test constitutes a detention, the accused is entitled to the right to counsel under s. 10(b) of the *Charter*. Nevertheless, the courts ruled that the officers' infringement of the accuseds' s. 10(b) rights was justifiable under s. 1 of the *Charter*. Given the short duration and minimum inconvenience of the test, the courts ruled that the infringement of the accuseds' rights was a reasonable limit that was justifiable in a free and democratic society. Thus, according to these cases, the police do not have to inform a driver of his or her right to counsel before requesting or conducting a physical co-ordination test.

76. See, for example, *R.* v. *Gallant* (1989), 48 C.C.C. (3d) 329 (Alta. C.A.); and *R.* v. *Baroni* (1989), 49 C.C.C. (3d) 553 (N.S. C.A.). While these cases were consistent with *Smith* and *Bonin* in that the police have the power to request a physical co-ordination test, the courts held that a denial of a driver's s. 10(b) rights was not justified under s. 1. Therefore, according to *Gallant* and *Baroni*, the police must inform of a driver of his or her right to counsel before conducting a physical co-ordination test. Thus, the driver is entitled to consult counsel, who may then inform the driver that he or she is under no obligation to comply with the officer's request.

77. If the police believe that they may wish to use the results and videotape of the co-ordination test in evidence to establish the accused's impairment, they should comply with section 10(b) of the *Charter*. The accused should be informed of his or her right to counsel and given an opportunity to contact counsel before the co-ordination test is undertaken. In *R.* v. *Milne* (1996), 28 O.R. (3d) 577, the Ontario Court of Appeal ruled that physical co-ordination tests constituted a "detention," thereby triggering the accused's right to counsel under s. 10(b) of the *Charter*. The Court also indicated that an infringement of this right was justified under s. 1 of the *Charter* if the purpose of the tests was merely to form the necessary "reasonable and probable grounds" to demand a breathalyzer test. However, the infringement would not be justified under s. 1 if the police wished to use the results of the physical co-ordination test to establish the accused's impairment at trial. Moldaver J.A. stated that physical co-ordination tests "were not meant to provide the police with a means of gathering evidence that could later be used to incriminate and convict the motorist of impaired driving at trial." *Ibid*. at 587.

Therefore, the results of co-ordination tests performed in violation of the accused's right to counsel will be ruled inadmissible if introduced to establish the accused's impairment. This decision was followed by the New Brunswick Court of Appeal in *R.* v. *Oldham* (1996), 49 C.R. (4th) 251. The Court held that a suspect should not be asked to give self-incriminating evidence without first being informed that he or she does not have to comply with the police officer's request. This reasoning will likely be followed in other jurisdictions as well.

78. In a recent survey of Canadian police officers, 29% felt that judges give greater credibility to defence witnesses than to police at impaired driving trials. In addition, two-thirds of officers surveyed felt that a videotape record of traffic stops would increase the likelihood of guilty pleas "a great deal." Finally, three-quarters of the officers felt that impaired drivers sometimes or frequently escape conviction due to a legal technicality. "Police Officers' Perceptions," *supra* note 20 at 432, 426 and 435.

79. The Oregon Department of Transportation recently conducted an experiment in this regard. Law

enforcement agencies were given video recorders to record traffic stops, particularly in cases of suspected impaired driving. The study found that cases involving this video evidence were resolved considerably sooner than those with no video record, and there was a greater number of dispositions favourable to the state. B. Jones, "In Vehicle Videotaping of Drinking Driver Traffic Stops in Oregon" (1999) 31 *Accid. Anal. and Prev.* 77 at 83.

80. Although a 1997 Health Canada survey reported that 1,680 people are killed as a result of impaired driving each year, there were only 133 charges for impaired driving causing death in 1996. S. Tremblay, "Impaired Driving in Canada, 1996" (1997) 17:2 *Juristat* at 10.

Moreover, if the Ontario data are any indication, only a relatively small percentage of these charges lead to a conviction for this offence. During the 1996-1997 reporting period, 31.1% of the charges for impaired driving causing death disposed of in the Ontario Court (Provincial Division) resulted in convictions. The charges were stayed or withdrawn in 40.5% of the cases, Presumably, a significant number of these cases involved the accused pleading guilty to a lesser offence in exchange for the dropping of the original charge. The remaining 28.4% of the charges were transferred to the Ontario Court (General Division). Since no statistics were available regarding the outcome of these cases, we do not know how many of them resulted in convictions. B. Caroll & R. Solomon, *Ontario Drinking and Driving Statistics* (Toronto: MADD CANADA Canada, 1998) at 6.

81. Traffic Injury Research Foundation, *Alcohol Use and Motor Vehicle Fatalities and Injuries in Canada* (Ottawa, unpublished memorandum, 23 February 1998).

82. Studies show that all skills relevant to driving are significantly impaired at a BAC of 0.05%. These include information processing, visual function, reaction time, and divided attention skills. H. Moskowitz & C. Robinson, *Effects of Low Doses of Alcohol on Driving-Related Skills: A Review of the Evidence* (Washington, D.C.: National Highway Traffic Safety Administration, 1988). For a review of the literature, see P. Howat, D. Sleet & I. Smith, "Alcohol and Driving: Is the 0.05% Blood Alcohol Concentration Limit Justified?" (1991) 10 *Drug and Alcohol Review* 151; and R. Mann *et al*., *Assessing the Potential Impact of Lowering the Legal Blood Alcohol Limit to 50 mg in Canada* (Toronto: Addiction Research Foundation, 1998).

83. Studies of ALS legislation have been positive. One study showed that it lowered impaired driving rates among both convicted offenders and the general public. Moreover, the authors reported that the recidivism rate was reduced among those given an ALS well past the suspension period. K. Stewart, P. Gruenewald & T. Roth, *An Evaluation of Administrative Per Se Laws: Final Report* (Washington, D.C.: National Institute of Justice, 1989). Another study reported that the introduction of ALS programs resulted in a 3-14% overall reduction in night-time crashes. The authors suggested that this reduction was a result of the general deterrent effect of the ALS provisions on all drivers. J.L. Nichols & H.L. Ross, "The effectiveness of legal sanctions in dealing with drinking drivers" (1990) 6:2 *Alcohol, Drugs and Driving* 33 [hereinafter "Legal sanctions"].

Results from the Manitoba ALS program are also encouraging. In the six years following the introduction of the program, there was a 12% net decrease in drinking driver fatalities, and an approximate 32% decrease in overall impaired driving charges. There was also a 69% decrease in crash involvement among accused impaired drivers during the 97 days following their charges. Moreover, the average number of elapsed days between the offence and the conviction was reduced from 114 to 55, demonstrating that ALS discourages drivers from delaying their criminal trials. Finally, impaired drivers who received ALS had a 44% lower recidivism rate over four years, compared to drivers without an ALS. D.J. Beirness, H.M. Simpson & D.R. Mayhew, *Evaluation of the Vehicle Impoundment and Administrative Licence Suspension Programs in Manitoba* (Ottawa: Transport Canada, 1997) at 34, 46, 55, and 59 [hereinafter *Manitoba Evaluation*].

84. In 1999, the *Criminal Code* was amended to increase the length of the federal driving prohibitions for the offences of impaired driving, driving with a BAC above 0.08%, and failing to provide breath or blood samples. The minimum driving prohibition is generally one year for a first offence, two years for a second offence and three years for a subsequent offence. For a first offence, the one-year prohibition may be reduced to three months if the offender agrees to participate in an alcohol ignition interlock program, where available. *An Act to amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32.

85. Some studies suggest that the effectiveness of licence suspensions in reducing recidivism declines with longer periods of suspension. In addition, drivers with lengthy suspension periods are more likely to drive while suspended. *DWI Repeat Offenders, supra* note 15 at 70. Nevertheless, licence suspensions continue to be associated with decreases in recidivism and crash rates for both first and repeat offenders. R. Mann *et al.,* "Sentence Severity and the Drinking Driver: Relationships with Traffic Safety Outcome" (1991) 23 *Accid. Anal. and Prev.* 483 at 486. The problem of driving while suspended can, perhaps, be best addressed by combining licence suspensions with vehicle-based sanctions, such as seizure, impoundment and forfeiture.

86. This should not be confused with the *Criminal Code* offence of failing to provide breath or blood samples, without a reasonable excuse. Rather, it refers to the provincial offence of failing to provide breath or blood samples for the purposes of the 0.00% BAC restrictions in the graduated licensing program. It applies to both beginning drivers and their supervisors.

87. Some types of interlocks are attached to the ignition to prevent the vehicle from being started, while other types are attached to the transmission to prevent the vehicle from being shifted into drive.

88. For example, many interlock devices require "rolling retests" – repeated breath tests at random intervals after the vehicle has been started. These retests help to prevent the vehicle from being started by a friend or passenger with a low BAC, to detect drivers whose BAC is still rising, and to prevent the driver from leaving the vehicle idling while he or she drinks. Failing to provide a sample within the allotted time may result in a warning or an alarm, and the driver may be required to report immediately to a service centre or program manager. Failure to do so will result in the interlock preventing further use of the vehicle. Other anti-circumvention features include: temperature and pressure sensors that prevent the use of filtered breath samples; "hum-tone" recognition; and breath pulse codes. These features are intended to prevent a bystander from providing a sample for the impaired driving offender. They are used to identify the offender, and require some practice to master. Thus, it is highly unlikely that a bystander could successfully provide a sample on a first attempt. Moreover, repeated failed tests result in a lockout of the system, and the driver will be unable to start the vehicle or shift it into drive. Finally, the wires and circuits on the interlock are sealed so that it is easy to detect any attempts to tamper with the device. D.J. Beirness, *Alcohol Ignition Interlocks* (Ottawa: Traffic Injury Research Foundation, 1996) at 7-8.

89. Various American studies show that the recidivism rate of impaired driving offenders in an interlock program is 28% to 65% lower than that of offenders who are not in a program. D. Beirness *et al*., *Evaluation of the Alberta Interlock Program: Preliminary Results* (Ottawa: Traffic Injury Research Foundation, 1997) at 1. In Alberta, roughly 10% of convicted impaired drivers have participated in the interlock program since it was introduced province-wide in 1994. Only 7.2% of participants had an impaired driving conviction in the 36 months following the program, compared to a 22.2% recidivism rate among non-participants. *Ibid*. at 3-4. It has been estimated that alcohol interlocks should reduce recidivism by 90%, compared to licence suspensions alone. See D.W. Collier, F.J.E. Comeau & I.R. Marples. "Experience in Alberta with Highly Sophisticated Anti-Circumvention Features in a Fuel Cell Based Ignition Interlock" in C.N. Kloeden & A.J. McLean, eds., *Proceedings*

of the 13th International Conference on Alcohol, Drugs and Traffic Safety, vol. 2 (Adelaide, South Australia: University of Adelaide, NHMRC Road Accident Research Unit, 1995) at 673.

Nevertheless, some studies show that the positive effects of interlocks are lost once the device is removed from the vehicle. For example, studies in both Ohio and North Carolina showed that there was no significant difference in the recidivism rates of offenders with and without interlocks once the interlock was removed. *Alcohol Ignition Interlocks, ibid*. at 33. However, this may be partially attributed to the fact that judges in these states assigned only the most serious offenders to interlock programs. Moreover, interlocks are largely successful in achieving their goal of preventing convicted impaired drivers from driving with high BACs. The increased recidivism after removal of the device may suggest a need to impose longer interlock orders and to incorporate interlocks into more comprehensive remedial programs that encourage more responsible lifestyle choices.

90. Under the 1999 amendments to the *Criminal Code*, a BAC above 0.16% must be considered by the court as an aggravating factor in sentencing. See *Criminal Code, supra* note 7, s. 255.1. This means that the court should order a more onerous sentence than it would otherwise impose in the case.

91. *DWI Repeat Offenders, supra* note 15 at 80.

92. Researchers indicate that individualized assessment is preferable to a system that assigns offenders to remedial programs based solely on the number of prior convictions or the offender's BAC at the time of arrest. This allows experts to take into account other relevant factors, such as the offender's personality, lifestyle and risk-taking behaviour. *Ibid.* at 79.

93. One study reported that between 50% and 65% of individuals receiving treatment show some evidence of improvement with their addictions at follow-up interviews. Half of these are either abstinent or have substantially reduced their consumption. M. Eliany & B. Rush, *How Effective are Alcohol and Other Drug Prevention and Treatment Programs? A Review of Evaluation Studies* (Ottawa: Health and Welfare Canada, 1992).

94. Impaired drivers who participated in some form of remedial program had an 8% to 9% lower recidivism and alcohol-related crash rate than drivers who did not participate in a program. E. Wells-Parker *et al*., "Final results from a meta-analysis of remedial interventions with drink/drive offenders" (1995) 90 *Addiction* 907.

For a comprehensive review of the literature pertaining to remedial programs, see R. Mann *et al.,* "A Critical Review on the Effectiveness of Drinking-Driving Rehabilitation Programmes" (1983) 15 *Accid. Anal. and Prev.* 441.

95. This burden of proof is not intended to be so severe that it is impossible to meet. Nevertheless, in our view, there should be some affirmative duty on the individual to prove his or her fitness to drive, rather than an automatic licence reinstatement upon completion of a prescribed remedial program.

96. American research indicates that up to 75% of convicted impaired drivers continue to drive at least occasionally during their periods of suspension. Merely extending the period of licence suspension may not be a sufficient deterrent for some offenders. Consequently, vehicle-based sanctions may be essential to discourage and at least temporarily prevent some unlicensed, disqualified and prohibited offenders from driving. See R.E. Hagen, E.J. McConnell & R.L. Williams, *Suspension and Revocation Effects on the DUI Offender* (Sacramento: Business and Transportation Agency, Department of Motor Vehicles, 1980); and "Legal sanctions", *supra* note 83.

Although some jurisdictions have introduced "zebra sticker" laws, where those caught driving while suspended have an invalidation sticker placed on their licence plates, these have not been particularly effective. Two-thirds of offenders merely transferred the title to their vehicles to family

members to obtain "clean" plates, and there was minimal delay in getting the vehicles back on the highway. Nevertheless, the study did show reductions in both moving violations and crash rates among suspended drivers. R. Voas, A.S. Tippetts & J.E. Lange, "Evaluation of a Method for Reducing Unlicensed Driving: The Washington and Oregon License Plate Sticker Laws" (1997) 29 *Accid. Anal. and Prev.* 627 at 629.

Conversely, impoundment programs seem to be more effective. For example, Ohio's impoundment program was found to reduce driving among suspended drivers by 50%, even 23 months after the end of the impoundment period. *DWI Repeat Offenders, supra* note 15 at 72. Another study of the Ohio program found that recidivism for driving while suspended was 100% higher for those offenders whose vehicles were not immobilized. In addition, it found that offenders whose vehicles were immobilized had lower recidivism rates for impaired driving after the end of the sanction, thereby demonstrating both a deterrent and a habituation effect for vehicle immobilization problems. See R. Voas, A.S. Tippetts & E. Taylor, "Temporary Vehicle Immobilization: Evaluation of a Program in Ohio" (1997) 29 *Accid. Anal. and Prev.* 635 at 639-40.

Manitoba's impoundment program has also had promising results. During the six years following the implementation of the program, there was a 35% overall decrease in the number of charges for driving while suspended. In addition, recidivism during the three months following the offence was reduced from 10.3% among drivers whose vehicles were not impounded to 6.3% among drivers whose vehicles were impounded. Finally, in the four years following the charge for driving while suspended, drivers who were subject to impoundment orders had a 27% lower recidivism rate than drivers suspended before the law came into effect. *Manitoba Evaluation, supra* note 83 at 48, 57, and 59.

97. An evaluation of Manitoba's vehicle impoundment program revealed that 20% of owners whose vehicles are impounded have previously had a vehicle impounded. *DWI Repeat Offenders, ibid.* at 71.

98. The Manitoba study indicated that, in 20% of the cases, vehicles seized from repeat offenders belonged to someone other than the offender. *Ibid.*

99. S.C. 1992, c. 20.

100. *Ibid.*, s. 26(1)(a).

101. *Ibid.*, s. 26(1)(b).

102. Victims are only entitled to present oral victim impact statements at parole hearings if the offender has been sentenced to life and is filing an application for parole after serving 15 years of his or her sentence. See *Criminal Code*, *supra* note 7, as am. by *An Act to amend the Criminal Code (victims of crime) and another Act in consequence*, S.C. 1999, c. 25, s. 745.63(1.1) [hereinafter *Victims Amendment*].

103. However, we believe that it is inappropriate for the legislation to require an employer to pay victims full salary while they attend a trial. If victims are to be paid wages while attending trial, this benefit, like all other aspects of the compensation package, should be decided through the normal negotiation process between the employer and the employee.

104. See *Criminal Code*, *supra* note 7, s. 722; and *Victims Amendment*, *supra* note 94, s. 17(1).

105. *Ibid.*, s. 722.2(1).

106. Under existing principles of Canadian tort law, a government official's breach of the victims legislation would not automatically create a common law right to recover damages. Instead, the

aggrieved victim would have to establish that the official's conduct was independently actionable as an intentional tort, negligence or some other recognized common law tort. See *Canada* v. *Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Nevertheless, the courts will often consider the defendant's breach of a statute in concluding that the defendant's conduct was actionable under common law tort principles. See, for example, *Horsley* v. *MacLaren*, [1972] S.C.R. 441; and *Jordan House Ltd*. v. *Menow*, [1974] S.C.R. 239.

107. We do not believe that it is appropriate at this time to extend compensation to cover property damage. This would expand the scope of recovery too far, and may place an undue strain on provincial finances. Moreover, property losses are generally covered by individual insurance policies.

108. Several jurisdictions have implemented a victim fine surcharge on provincial offences in order to help finance victim services and/or victim compensation. We do not disapprove of such schemes; however, we have no preference as to how these funds are raised. As a result, we have not included a victim fine surcharge in the model legislation. Our primary concern is that victims be treated fairly and compensated adequately.

109. See *supra* note 15.

110. As noted earlier, impaired driving is responsible for approximately 74,000 "injuries" each year in Canada. *Supra* note 15. This compares with a total of approximately 80,000 court cases in 1997-98 for violent *Criminal Code* offences (other than homicide) — assault, aggravated assault, sexual assault, abduction, and sexual abuse. The largest of these categories was assault, which accounted for 48,919 cases. Nevertheless, the number of court cases is likely very much lower than the actual number of injuries caused by such criminal acts in Canada. Many cases are likely unreported or never reach the courtroom. However, even allowing for unreported cases, impaired driving, with 74,000 estimated injuries, still appears to rank among the leading criminal causes of injury in Canada. C. Brookbank & B. Kingsley, *Adult Criminal Court Statistics, 1997-98* (Ottawa: Canadian Centre for Justice Statistics, 1998) at 3.

111. The minimum insurance requirements for Québec would initially appear inordinately low. However, under Québec's total no-fault system, an injured party claims benefits for physical injuries and death directly from the Société de l'assurance automobile du Québec, regardless of who was at fault. This includes income replacement, personal care and rehabilitation benefits, and even some non-pecuniary damages. Thus, the $50,000 third-party liability applies to property damage only. In other provinces, the $200,000 minimum third-party liability covers both physical injuries and property damage.

112. Regardless of the statutory minimum third-party coverage, vehicle owners and drivers are free to purchase additional optional insurance from their own insurance companies. We would preserve this structure in our model legislation.

113. We have no preference as to the scheme adopted by the province or territory, provided there is some means by which insurance premiums reflect a driver's at-fault accident and offence records.

114. Generally, an individual who drives while unlicensed or suspended breaches a statutory condition of his or her insurance. Therefore, his or her claim is invalid and his or her right to recover indemnity is forfeited. However, this usually does not apply to claims for medical and rehabilitation expenses and death benefits. See, for example, *Insurance Act,* R.S.P.E.I. 1988, c. I-4, ss. 219-221; and *Automobile Insurance Act*, R.S.N. 1990, c. A-22, ss. 7-9.

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115. For example, in Ontario, drivers who cause a crash and are convicted of impaired driving, driving with a BAC above 0.08%, or failing to provide breath or blood samples are unable to recover weekly accident benefits, including income replacement, home maintenance, and lost education expenses. *Frequently Asked Questions About Automobile Insurance in Ontario* (Toronto: Insurance Bureau of Canada, 1995).