

ONTARIO'S REVISED ADMINISTRATIVE LICENCE SUSPENSION PROGRAM

Introduction:

On May 1, 2009, Ontario brought into force amendments to its short-term administrative licence suspension (ALS) program for drivers with blood-alcohol concentrations (BACs) of between .05% and .08%. The suspension for a first infraction was increased from 12 hours to 3 days. A second infraction now results in a 7-day ALS and a mandatory remedial education program. Drivers with a third or subsequent infraction are subject to a 30-day ALS, a mandatory treatment program and a 6-month ignition interlock order. These amendments have generated an unwarranted public outcry from some defence lawyers and members of the media. Unfortunately, they mischaracterized the amendments, raised dubious constitutional arguments, and made statements that are factually incorrect.

Challenges:

(a) While the changes to Ontario's .05% ALS program are progressive, they are neither novel nor radical. Ontario has had a .05% ALS program since the early 1980s, but it was relatively weak compared to those in other provinces. For example, in most provinces a 24-hour licence suspension is imposed for a first infraction and it is reported to the Registrar (or Superintendent) of Motor Vehicles. Several provinces have escalating sanctions for repeat infractions. For instance, the Northwest Territories has a 30-day licence suspension for a second occurrence, and Saskatchewan provides a minimum 15- day suspension for a second infraction and a minimum 90-day suspension for subsequent infractions. Moreover, Newfoundland and Labrador, Manitoba and Saskatchewan imposed mandatory remedial programs on drivers who commit repeat infractions.

MADD Canada first advocated for comprehensive .05% ALS programs in its 2003 *Rating the Provinces and Territories Project*. Working with the Canadian Council of Motor Transport Administrators (CCMTA), MADD developed a model .05% ALS program, based on existing best practices in Canada. This model was subsequently adopted by the CCMTA and was a key

recommendation in MADD Canada's 2006 *Rating the Provinces and Territories Project*. Ontario's revised .05% ALS program incorporates many of the features of the CCMTA model, but not all of them. For example, the CCMTA model proposes a 7-14 day licence suspension for a first infraction, and 30, 45 and 60-day suspensions for second, third and subsequent infractions occurring within 3 years. It is noteworthy that Prince Edward Island just enacted a 7-day licence suspension for drivers with BACs of .05% and .08%, and escalating sanctions and mandatory remedial programs for drivers with repeat infractions. Thus, even by Canadian standards, Ontario's revisions are hardly novel or radical.

Indeed, relative to the law in most other countries, Ontario's amendments are extremely modest. As the following chart illustrates, most countries make it an offence, and not merely an infraction, to drive with a BAC of .05%. Furthermore, drivers are typically subject to substantial fines and lengthy licence suspensions for even a first offence.

BAC LIMITS FOR DRIVING WORLDWIDE*

BAC (mg/ml)	Countries
0	Armenia, Azerbaijan, Bahrain, Croatia, Czech Republic, Ethiopia, Hungary, Jordan, Nepal, Pakistan, Romania, Saudi Arabia, Slovak Republic, and United Arab Emirates.
0.1 – 0.4	Albania, Algeria, China, Estonia, Georgia, India, Japan, Lithuania, Moldova, Mongolia, Norway, Poland, Russia, Sweden, and Turkmenistan.
0.5	Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Cambodia, Costa Rica, Denmark, El Salvador, Estonia, Finland, France, Germany, Greece, Iceland, Israel, Italy, Kyrgyzstan, Latvia, Macedonia, Monaco, the Netherlands, Peru, Philippines, Portugal, Serbia, Slovenia, South Africa, South Korea, Spain, Switzerland, Taiwan, Thailand, Turkey, and Venezuela.
0.6 – 0.7	Bolivia, Ecuador, and Honduras.
0.8	Botswana, Brazil, Canada, Ghana, Guatemala, Ireland, Jamaica, Kenya, Luxembourg, Malaysia, Malta, Mexico, New Zealand, Nicaragua, Paraguay, Singapore, Uganda, United Kingdom, United States, and Zimbabwe.

***There are inconsistencies in the reported BAC limits for some countries.**

Sources: International Center For Alcohol Policies (ICAP), *Blood Alcohol Concentration Limits Worldwide* (Washington, D.C.: ICAP, 2005); E. Wren, *Drunk Driving Blood Alcohol Limits Worldwide* (New York: Drive and Stay Alive, Inc., 2005); and Eurocare, *Drinking and Driving in Europe: A Report to the European Union* (St. Ives: Eurocare, 2003).

(b) Several lawyers have argued that Ontario does not have constitutional authority to enact the revised .05% ALS program. They contend that the amendments constitute criminal law, which falls within the exclusive jurisdiction of Parliament. This argument had previously been raised regarding the provinces' 1-year ALS for federal impaired driving offenders and their 90-day ALS for drivers with BACs above .08%. The courts have consistently and unequivocally rejected these challenges.

The provinces have broad authority to enact laws pursuant to their power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. In addition, they have authority under s. 92(16) over matters of a merely local or private nature. It is well established that s. 92(13), either alone or in conjunction with s. 92(16), gives the provinces sweeping powers to regulate driving within their jurisdictions, including eligibility to drive and grounds for licence suspensions and revocations. These principles have been established in a long series of Supreme Court of Canada cases dating back to 1941. As aptly stated in a more recent Ontario case:

The responsibility for the regulation of highway traffic, including authority to prescribe the conditions and manner of the use of motor vehicles on highways and the licensing system in relation thereto is a provincial matter. The authority to issue such licences carries with it the authority to suspend or cancel them upon conditions.

In light of these cases, it is difficult to see how anyone could credibly argue that Ontario's revised ALS legislation is unconstitutional. Moreover, the existing short-term .05% ALS programs have never been successfully challenged, even those which include increased sanctions and remedial programs for drivers with repeat infractions.

(c) Finally, it is necessary to address the misleading statements made about the revised .05% ALS program. First, it has been argued that the approved screening devices (ASD) used to measure BACs at roadside can give false high readings if the driver smoked a cigarette, chewed gum or used mouthwash prior to providing a sample. Proponents of this argument state that drivers can be subject to onerous sanctions based on inaccurate evidence. ASDs are sophisticated scientific instruments that must be approved by the Alcohol Test Committee and meet the rigorous testing standards established under federal regulation. ASD readings are not influenced by smoke, gum, mouthwash or similar substances. Nor has their accuracy been successfully challenged on such grounds in the more than 25 years in which they have been routinely used for roadside testing under federal and provincial law.

Second, it has been argued that drivers with BACs of .05% would not be impaired. However, international medical and traffic safety studies spanning five decades have established that driving skills and performance are adversely affected by relatively small amounts of alcohol. As early as 1960, a British Medical Association report stated that "a [.05% BAC] while driving a motor vehicle is the highest that can be accepted as entirely consistent with the safety of other road users." More recently, a review of 109 studies on the effects of low doses of alcohol concluded that there is "strong evidence that impairment of some driving-related skills

begins with any departure from a zero BAC.” Those skills and abilities considered to be most crucial for driving were among the most sensitive to alcohol. Virtually every leading medical, accident prevention and traffic safety organization in the world supports BAC limits of .05% or lower.

Third, it has been argued that a .05% ALS program would interfere with “social or moderate drinking”. A .05% limit would not interfere with what most Canadians would consider to be social drinking. As the following chart illustrates, it takes considerably more than a drink or two for the average person to reach a BAC of .05%.

**BACS FOR MALES AND FEMALES IN RELATION TO TIME,
WEIGHT AND STANDARD CANADIAN DRINKS***

	Standard Drinks	2 hours			3 hours		
		170 lbs	185 lbs	200 lbs	170 lbs	185 lbs	200 lbs
Males	2	.0185%	.0146%	.0112%	.0035%	.000%	.000%
	3	.0428%	.0369%	.0319%	.0278%	.0219%	.0169%
	4	.0671%	.0592%	.0525%	.0521%	.0442%	.0375%

	Standard Drinks	2 hours			3 hours		
		120 lbs	130 lbs	140 lbs	120 lbs	130 lbs	140 lbs
Females	2	.0514%	.0451%	.0398%	.0364%	.0301%	.0248%
	3	.0921%	.0827%	.0746%	.0771%	.0677%	.0596%

*Based on 13.46 grams of alcohol, drinking on an empty stomach and a metabolism rate of a .015% decrease in BAC per hour.

Source: R. Solomon and E. Chamberlain, “Calculating BACs for Dummies: The Real-World Significance of Canada’s 0.08% Criminal BAC Limit for Driving” (2003) 8(2) Canadian Criminal Law Review at 224.

Conclusion:

Ontario’s revised .05% ALS program is one of the best in the country and the province should be praised, not condemned, for this significant traffic safety initiative.