

**Impaired Driving Causing Death, Mandatory
Minimum Sentences, Deterrence, and the *Charter***

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INTRODUCTION

On June 16, 2015, the federal government introduced Bill C-73, the *Dangerous and Impaired Driving Act*,¹ which would create a mandatory minimum sentence of six years imprisonment for impaired driving causing death. In addition to other sentencing issues,² the Bill addressed substantive³ and evidentiary matters⁴ concerning both alcohol and drug-impaired driving, but these provisions received relatively little media attention. Bill C-73 was introduced several days before the parliamentary session ended and consequently died on the order paper. The timing of the Bill was apparently driven by political factors related to the calling of the fall federal election. With the election of a Liberal majority government on October 19, 2015, it is extremely doubtful that the six-year mandatory minimum or other controversial elements of Bill C-73 will be re-introduced.

The proposed mandatory minimum continues the trend in *Criminal Code*⁵ amendments increasing the penalties for the impaired driving offences. Successive federal governments increased these sanctions in 1985, 1999, 2000, and 2008, claiming that they were “cracking down” or “taking a tough stand” on impaired driving.⁶ The 2000 amendments are the most relevant for present purposes because they increased the maximum sentence for impaired driving causing death to life imprisonment and the maximum for impaired driving causing bodily harm

¹ Second session, Forty-first Parliament, 2015, cl. 5 (first reading 16 June 2015).

² For example, the Bill would increase the maximum sentence for the transportation offences which did not involve death or bodily harm, make the maximum sentence for the offences which involved bodily harm 14 years if tried by indictment, and increase the sanctions for repeat offenders. Any transportation offence would constitute a prior offence for any other transportation offence, thereby increasing the number of offenders who could be sentenced as repeat offenders. *Ibid.*

³ The Bill would amend all of the transportation offences, namely dangerous and impaired driving, fleeing police pursuit, failure to stop after a crash, and driving while prohibited. The transportation offences would be included in a new and separate part of the *Criminal Code*. The offence of driving with a blood-alcohol concentration (BAC) in excess of .08% would be changed to having a BAC above .08% within two hours of driving. This change would eliminate the “bolus or last drink” defence and strictly limit the “intervening drink” defence. *Ibid.*

⁴ The Bill would simplify the process of proving a driver’s BAC, limit disclosure relating to evidentiary breath testing machines, eliminate the need for expert evidence regarding evidentiary breath tests, and recognize that drug recognition evaluators are experts in assessing whether a person’s ability to drive is impaired by drugs. It would also increase the situations in which the police could demand a roadside breath test and standard field sobriety testing and make it easier to obtain blood samples from hospitalized impaired driving suspects. *Ibid.*

⁵ R.S.C. 1985, c. C-46.

⁶ See respectively, *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19; *An Act to amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32; *An Act to amend the Criminal Code (impaired driving causing death and other matters)*, S.C. 2000, c. 25; and *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, S.C. 2008, c. 6.

to 10 years imprisonment.⁷ Prompted by MADD Canada and other victims groups, the federal government eliminated conditional sentences of imprisonment (house arrest) in 2008 for specified categories of crimes, including impaired driving causing death or bodily harm.⁸ These developments contributed to increases in both the average prison term for impaired driving causing death and the percentage of custodial sentences that were imposed in these cases.

As in the past, the need to deter impaired driving figured prominently in the government publicity for Bill C-73.⁹ The proposed six-year mandatory minimum raises challenging issues for MADD Canada. One of MADD Canada's two goals is to support victims of impaired driving and their families, many of whom feel with good reason that the criminal justice system ignores their interests. However, other issues warrant consideration before deciding whether to support the proposed six-year mandatory minimum or a more modest minimum, or whether to refrain from taking any position on the matter.

We begin with a brief review of the charges, convictions and sentences for impaired driving causing death, and the research on whether increased prison sentences have a significant deterrent impact. The potential advantages and disadvantages of enacting the proposed mandatory minimum are then discussed, before we turn to the question of whether it would be struck down under the *Canadian Charter of Rights and Freedoms (Charter)*.¹⁰

CHARGES, CONVICTIONS AND SENTENCES

(a) Charges and Convictions

Although the data are dated and not without limitations,¹¹ it is evident that the great majority of impaired drivers who kill another person in a crash are not charged with impaired driving causing death and that most of those charged are not convicted of this offence. As Chart I illustrates, these poor charge and conviction rates have been longstanding problems. In 2010, the latest year for which national data are available, there were an estimated 1,082 impairment-

⁷ *Criminal Code*, *supra* note 5, s. 255(2)-(3.2).

⁸ *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, S.C. 2007, c. 12, s. 1.

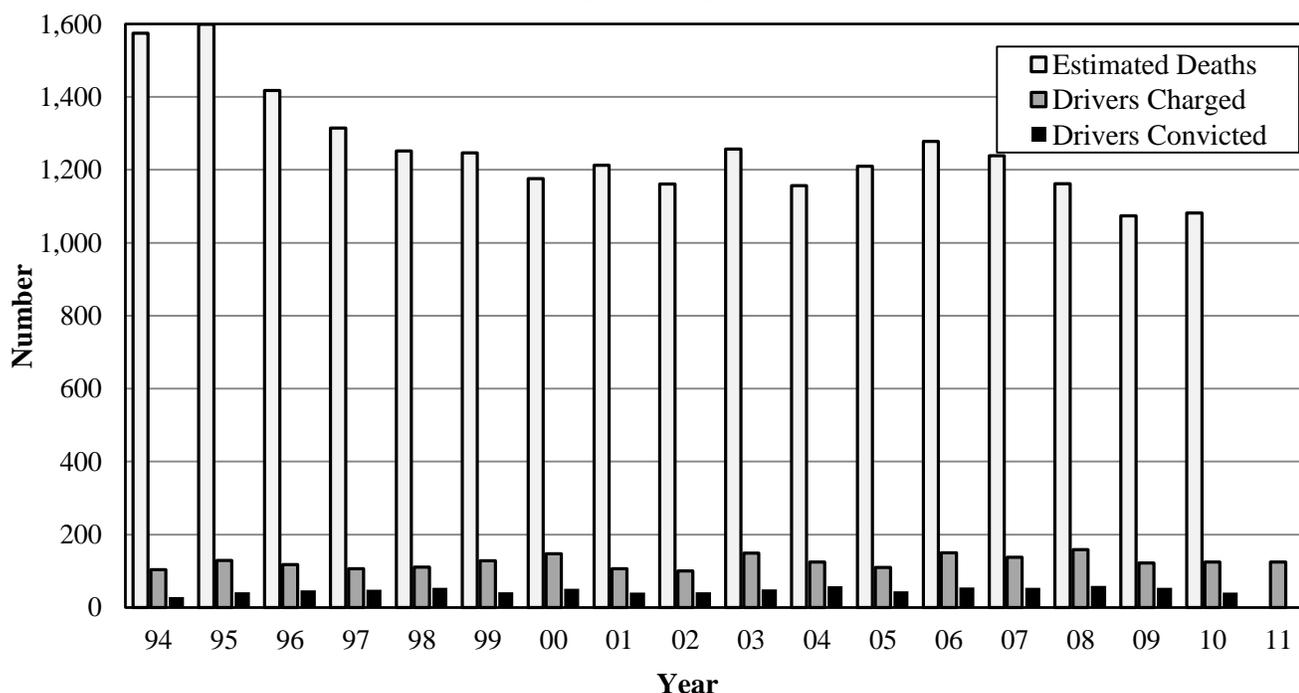
⁹ See for example, CBC, "Peter MacKay proposes tougher penalties, fewer loopholes for impaired driving", *CBC News* (15 June 2015), online: <<http://www.cbc.ca/news/politics/peter-mackay-proposes-tougher-penalties-fewer-loopholes-for-impaired-driving-1.3114583>>; and Department of Justice, "Government of Canada announces plan to crack down on impaired driving", Government of Canada (16 June 2015), online: <<http://news.gc.ca/web/article-en.do?nid=988139>> [MacKay 2015]. Indeed, the preamble to Bill C-73 lists deterrence as one of its goals.

¹⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

¹¹ For a discussion of the gaps and limits in the data, see generally R. Solomon & A. Berger, *Impairment-Related Traffic Deaths and Injuries, and Associated Charges, Dispositions and Sentences: Canada, 1986-2012* (Oakville, Ont.: MADD Canada, 2013) [Solomon 2013].

related traffic fatalities, but only 125 charges and 48 convictions for impaired driving causing death.¹² Even accounting for multi-fatality crashes and impaired drivers who were killed, only a fraction of the surviving impaired drivers were charged with impaired driving causing death. Of those charged, fewer than 40% were convicted of this offence. The charge and conviction rates for impaired driving causing bodily harm are far lower. In 2010, there were an estimated 63,821 impairment-related traffic injuries, but only 747 charges and 321 convictions for impaired driving causing bodily harm.¹³

Chart I: Impairment-Related Traffic Deaths, and Charges and Convictions for Impaired Driving Causing Death: 1994-2010*



*Death and charge data are reported by calendar year, and conviction data are reported by fiscal year.

(b) Sentences

As Chart II illustrates, the sentencing amendments and the elimination of conditional sentences for impaired driving causing death increased the percentage of these offenders who received prison sentences. The option of imposing a conditional sentence of imprisonment came into force in 1996 and was available for any offence that did not carry a minimum prison term.¹⁴ Judges imposing a prison sentence of less than two years could permit that sentence to be served in the community, if he or she was satisfied that the conditional sentence would not endanger

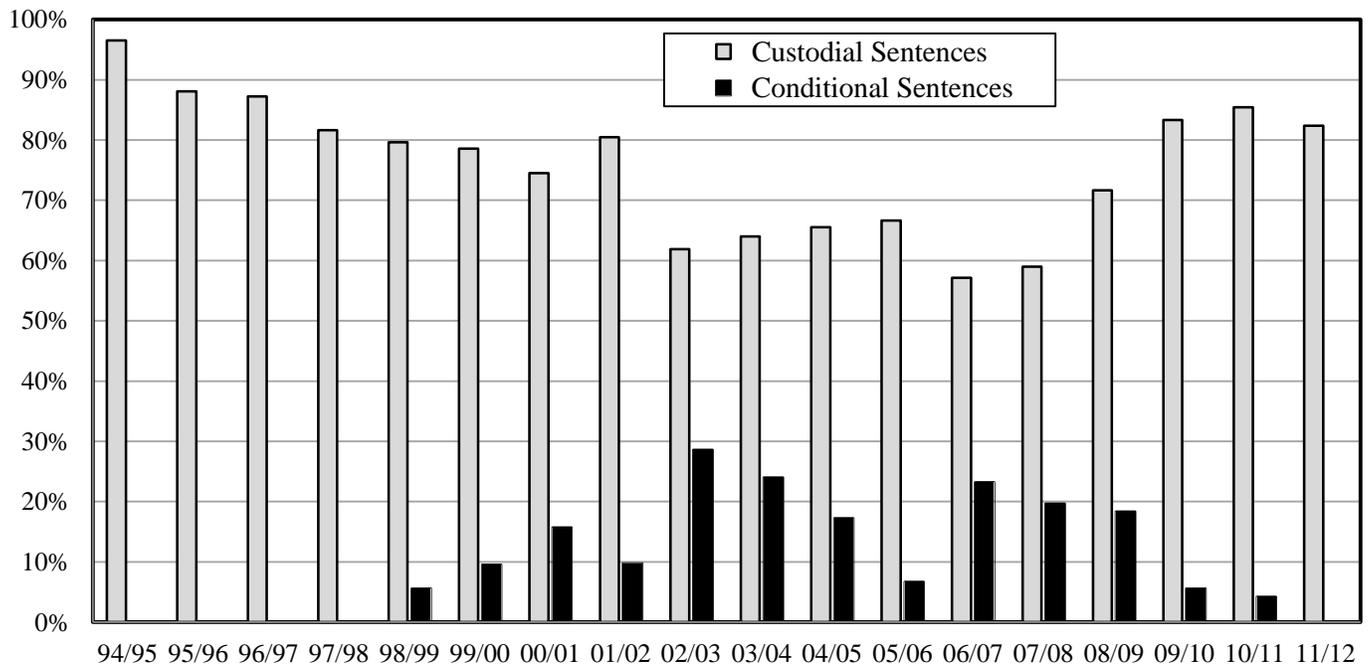
¹² *Ibid.*, at 3.

¹³ *Ibid.*, at 8.

¹⁴ *Criminal Code*, *supra* note 5, s. 742.1.

public safety and would be consistent with the “fundamental purpose and principles of sentencing.”¹⁵ Offenders serving conditional sentences were subject to mandatory conditions, but judges had broad discretion to impose additional optional conditions, including abstaining from alcohol and drug use, and attending a provincially-approved treatment program. As of July 1, 2008, amendments precluded conditional sentences for specified categories of offences, including impaired driving causing death or bodily harm.¹⁶

Chart II: Percentage of Convictions for Impaired Driving Causing Death that Result in Custodial and Conditional Sentences: Canada, 1994-2012



While the least serious impaired driving offences (*i.e.* driving while one’s ability is impaired by alcohol and/or a drug, driving with a blood-alcohol concentration (BAC) above .08%, and failing to take a required test)¹⁷ are subject to a minimum sentence, the most serious offences (*i.e.* impaired driving causing death or bodily harm) are not. Impaired driving victims, their families and the public have repeatedly called for the enactment of mandatory minimum prison terms for these offences. Members of victims groups that had called for a five-year mandatory minimum for impaired driving causing death were present in the House of Commons when Bill C-73 was introduced and participated in the press conference that the Justice Minister held following the session.

As Chart III illustrates, the length of prison terms for impaired driving causing death has

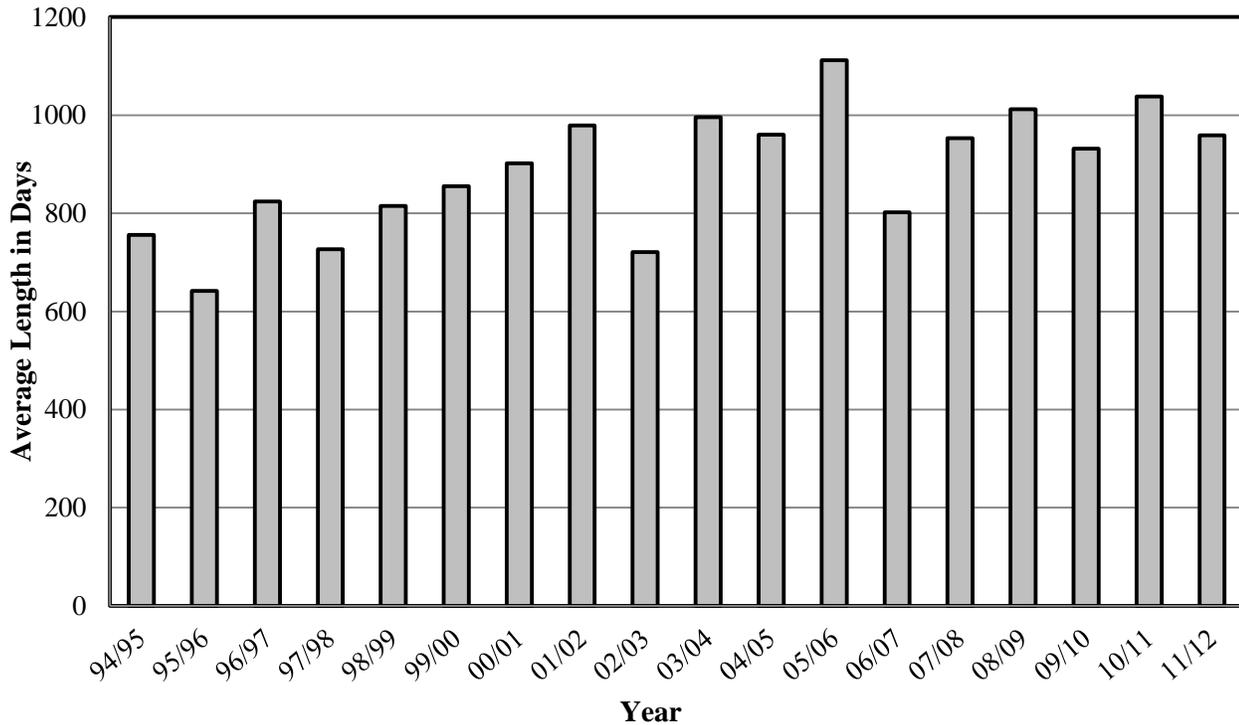
¹⁵ *Ibid.*

¹⁶ *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, S.C. 2007, c. 12, s. 1.

¹⁷ *Criminal Code*, *supra* note 5, s. 255(1)(a).

increased somewhat in recent years.¹⁸ Nevertheless, the average custodial sentence for impaired driving causing death in 2011/12 was considerably less than three years,¹⁹ which is far shorter than what MADD Canada believes is necessary to reflect the seriousness of the offence.²⁰

Chart III: The Average Length of Custodial Sentences for Impaired Driving Causing Death: Canada, 1994/95 to 2011/12



SENTENCING AND DETERRENCE

The media, politicians and others often argue for increasing sentences as a means of deterring both the offender (specific deterrence) and others who might otherwise engage in the conduct (general deterrence). However, research during the last 35 years establishes that increasing penalties for impaired driving does not in itself have a significant specific or general

¹⁸ Similar to the pattern with impaired driving causing death, the percentage of custodial sentences for impaired bodily harm increased during this period. However, the mean length of custodial sentences for impaired driving causing bodily harm in 2010/11 and 2011/12 were generally shorter than those imposed in the preceding eight years. Solomon 2013, *supra* note 11 at 14.

¹⁹ *Ibid.*, at 6.

²⁰ MADD Canada has suggested that a three to four-year prison term is appropriate for offenders who plead guilty and do not have a prior impaired driving conviction within the past ten years. MADD Canada has proposed longer custodial sentences for offenders who have prior impaired driving convictions or BACs above .16%, or who do not plead guilty. MADD Canada, *Sentencing for Impaired Driving*, online: <http://www.madd.ca/media/docs/ADD_Canada_Sentencing_Framework_FINAL.pdf>.

deterrent impact. Rather, the evidence indicates that the perceived and actual risk of apprehension (certainty of sanction) and to a lesser extent the swiftness with which the sanction is imposed (celerity of sanction) are the key factors in deterrence.²¹

In a series of books and articles on impaired driving initiatives in a number of jurisdictions, H. Ross concluded that increasing penalty severity, without increasing the certainty of apprehension, did not have a deterrent impact on impaired driving.²² In one article, he framed the issue in the following terms:

People drive while impaired by alcohol even though the ultimate “penalty” for this action may be death – with the probability of about 1 in 330,000 miles of impaired driving. If “capital punishment” can be overlooked at extremely low levels of certainty, one can understand why jail sentences and license forfeitures can be overlooked even when the probability of punishment is somewhat greater.²³

In a 1986 study, R. Voas found that imposing more punitive sentences on impaired driving offenders was associated with worse subsequent driving records.²⁴ R. Homel reached a similar conclusion in his comprehensive 1988 study of impaired driving countermeasures in New South Wales, stating that “...if anything longer periods of imprisonment encouraged reoffending.”²⁵ A Washington State study concluded that a new law imposing mandatory jail terms for impaired driving was associated with higher rates of recidivism than the previous law.²⁶

²¹ For a discussion of certainty of apprehension in deterring impaired driving, see H. Ross, *Deterring the Drinking Driver* (Lexington, Mass.: Lexington Books, 1982) at 109-10 [Ross 1982]; R. Tay, “General and Specific Deterrent Effects of Traffic Enforcement: Do we have to Catch Offenders to Reduce Crashes?” (2005) 39(2) *Journal of Transport Economics and Policy* 209; K. Beck, J. Fell & A. Yan, “A Comparison of Drivers with High Versus Low Perceived Risk of Being Caught and Arrested for Driving Under the Influence of Alcohol” (2009) 10(4) *Traffic Injury Prevention* 312; S. Ferguson, “Alcohol-Impaired Driving in the United States: Contributors to the Problem and Effective Countermeasures” (2012) 13(5) *Traffic Injury Prevention* 427; and J. Yao, M. Johnson & K. Beck, “Predicting DUI Decisions in Different Legal Environments: Investigating Deterrence With a Conjoint Experiment” (2014) 15(3) *Traffic Injury Prevention* 213.

²² See for example Ross 1982, *ibid.*, at 91-97; H. Ross, *Confronting Drunk Driving: Social Policy for Saving Lives* (New Haven, Conn.: Yale University Press, 1992), at 56-63; and H. Ross & R. Voas, “The New Philadelphia Story: The Effects of Severe Punishment for Drunk Driving” (Washington, D.C.: AAA Foundation for Traffic Safety, 1989).

²³ H. Ross, “Social Control Through Deterrence: Drinking-And-Driving Laws” (1984) 10 *Annual Review of Sociology* 21, at 32-33.

²⁴ R. Voas, “Evaluations of jail as a penalty for drunk driving” (1986) *Alcohol, Drugs, and Driving: Abstracts and Reviews* 47.

²⁵ R. Homel, *Policing and Punishing the Drinking Driver: A Study of General and Specific Deterrence* (New York: Springer-Verlag, 1988), at 250.

²⁶ P. Salzberg & S. Paulsrude, “An evaluation of Washington’s driving-while-intoxicated law: Effect on drunk driving recidivism” (1984) 15(3) *Journal of Safety Research* 117.

A 1988 study of Tennessee legislation imposing short mandatory jail sentences on impaired driving offenders found that it had an initial impact on impaired driving recidivism, but no impact on alcohol-related crashes.²⁷ A review of 32 American states that enacted short mandatory minimum jail terms and/or mandatory minimum fines for first offenders from 1976 to 2002 reported that the jail terms had little impact and that the fines had a possible impact in some states.²⁸ A Canadian study published in 1990 examined the relationship between the type of sentence and post-conviction crashes and impaired driving convictions, controlling for demographic and driving record factors. The authors reported that while licence suspensions were consistently associated with traffic safety benefits, “increasing [the] severity of other aspects of punishment seemed unrelated to outcome or was associated with increased safety problems.”²⁹

Consistent with accepted principles of sentencing law, it may be argued that the sentences currently imposed for impaired driving causing death need to be increased to ensure that they adequately reflect the gravity of the offence and the harms that result. In contrast, the research indicates that lengthy prison terms cannot be justified in the name of specific or general deterrence and may even be counterproductive in terms of recidivism.

ADVANTAGES AND DISADVANTAGES OF MANDATORY MINIMUM SENTENCES

The enactment of a six-year mandatory minimum sentence would have both positive and negative consequences. One benefit of the mandatory minimum is that it would address the sense of injustice felt by many victims of impaired driving and their families. Assuming that the proposal is reintroduced, enacted and upheld under the *Charter*, it would radically alter sentencing for impaired driving causing death. For example, the percentage of offenders receiving custodial sentences would have increased in 2011/12 from approximately 82%³⁰ to 100%, and the average prison sentence would have increased about 2½ times.³¹ The enactment of the mandatory minimum would also convey the message that impaired driving is unacceptable and that impaired causing death is a serious crime.

²⁷ R. Jones *et al.*, *Field Evaluation of Jail Sanctions for DWI* (Washington, D.C.: National Highway Traffic Safety Administration, 1988).

²⁸ A. Wagenaar *et al.*, “General deterrence effects of U.S. statutory DUI fine and jail penalties: Long-term follow-up in 32 states” (2007) 39(5) *Accident Analysis and Prevention* 982.

²⁹ R. Mann *et al.*, “Sentence Severity and the Drinking Driver: Relationships with Traffic Safety Outcome” (1991) 23(6) *Accident Analysis and Prevention* 483.

³⁰ Solomon 2013, *supra* note 11, at 7.

³¹ *Ibid.*, at 5.

Even if the mandatory minimum were only four years, for example, it would remove discretion at the low and middle ranges of current sentences and minimize the likelihood that an offender would receive an unduly lenient sentence. Mandatory minimum sentences also greatly reduce sentencing disparities, ensuring greater consistency and fairness. This development accords with accepted sentencing principles, namely that the sentence in any particular case should be comparable to those imposed on similar offenders for like offences in similar circumstances.³²

Nevertheless, there are several concerns with mandatory minimum sentences. First, there is a risk that the minimum sentence will become the default sentence in all but the worst cases. In other words, the minimum sentence would become the norm, rather than a sentence that is reserved for the least serious offenders. This would not be a problem if the minimum sentence were six years because it would far exceed the length of the current average custodial sentence. However, this would be a concern if the mandatory minimum were only 18 months, which is significantly shorter than the current average prison term. In other words, the enactment of any mandatory minimum below the current average custodial sentence could result in shortening the length of the prison terms actually imposed.

Second, the enactment of a six-year mandatory minimum may discourage the police and prosecutors from laying charges for impaired driving causing death. Several researchers have suggested that onerous mandatory minimums encourage accuseds to plead not guilty, increase pressures on prosecutors to plea bargain for lesser charges, result in more trials, and discourage judges and juries from entering convictions.³³ These and other factors would further reduce the already low charge and conviction rate for impaired driving causing death. Again, enacting a shorter mandatory minimum prison sentence would mitigate these problems.

Third, while sentencing issues are important, the focus on having “tough laws” draws attention away from having effective laws. For example, in contrast to most comparable developed democracies, Canada has failed to enact proven preventive measures, such as comprehensive random breath testing (RBT) legislation³⁴ and a criminal BAC limit of .05%.³⁵ Research from various countries around the world indicates that these two measures alone would

³² *Criminal Code*, *supra* note 5, s. 718.2(b).

³³ Ross 1982, *supra* note 21, at 109; and T. Babor, *Alcohol No Ordinary Commodity: Research and Public Policy*, 2nd ed. (Oxford: Oxford University Press, 2010), at 173.

³⁴ For review of effectiveness of RBT, see R. Solomon *et al.*, “The Case for Comprehensive Random Breath Testing Programs in Canada: Reviewing the Evidence and Challenges” (2001) 49(1) *Alberta Law Review* 37 [Solomon].

³⁵ For review of the effectiveness of lowering criminal BAC limits, see E. Chamberlain & R. Solomon, “The case for a 0.05% criminal law blood alcohol concentration limit for driving” (2002) 8(Supp. III) *Injury Prevention* iii1.

likely decrease impaired driving deaths and injuries in Canada by 30% or more.³⁶ Successive Canadian governments have shown little interest in these proven countermeasures, opting instead for increasing sentences and addressing narrow prosecutorial concerns.

As Chart I illustrated, Canada's extremely poor charge and conviction rate for impaired driving causing death has not been adequately addressed. Sentencing concerns in the limited number of cases resulting in a conviction should not be allowed to overshadow the fact that each year thousands of impaired drivers who cause fatal or personal injury crashes are not even charged, let alone convicted, of impaired driving causing death or bodily harm.

The *Criminal Code*'s breath and blood-testing provisions are so narrowly defined that the great majority of hospitalized impaired drivers escape criminal liability.³⁷ For example, a 2004 British Columbia study involving six hospitals found that the average BAC of the alcohol-positive hospitalized drivers was .156%.³⁸ Nevertheless, only 11% of the hospitalized drivers with BACs above .08% were convicted of any *Criminal Code* impaired driving offence, despite the fact that the police listed alcohol as a contributing factor in 71% of these cases.³⁹ Similarly, only 16% of alcohol-impaired drivers admitted to an Alberta tertiary care trauma centre following a crash between 1995 and 2003 were convicted of any federal impaired driving offence, even though their average BAC was .19% or almost 2½ times the *Criminal Code* limit.⁴⁰ The authors of a 2012 Nova Scotia study reported that only 23% of hospitalized impaired drivers were even charged with any *Criminal Code* impaired driving offence.⁴¹

Aside from the injustice of serious offenders escaping appropriate, and in many cases any, criminal sanction, they have a high recidivism rate and pose a significant ongoing risk to the public. For example, a British Columbia study reported that 30.7% impaired drivers hospitalized following a crash had a subsequent alcohol-related crash, impaired driving conviction or alcohol-related administrative licence suspension within 4½ years.⁴² An Ontario study published in 1996 reported that 40% of impaired drivers hospitalized after a crash

³⁶ Solomon, *supra* note 34 and *ibid*.

³⁷ For a comprehensive review of this issue, see E. Chamberlain & R. Solomon, "Enforcing Impaired Driving Laws Against Hospitalized Drivers: The Intersection of Healthcare, Patient Confidentiality, and Law Enforcement" (2010) 29 Windsor Review of Legal and Social Issues 45.

³⁸ R. Purssell *et al.*, "Proportion of injured alcohol-impaired drivers subsequently convicted of an impaired driving criminal code offence in British Columbia" (2004) 6(2) Canadian Journal of Emergency Medicine 80.

³⁹ *Ibid.*, at 84.

⁴⁰ M. Goecke *et al.*, "Characteristics and conviction rates of injured alcohol-impaired drivers admitted to a tertiary care Canadian Trauma Centre" (2007) 30(1) Clinical and Investigative Medicine 26.

⁴¹ W. Fieldus & E. Cane, "Impaired driving charges in injured impaired drivers requiring treatment in an emergency department" (2012) 14(5) Canadian Journal of Emergency Medicine 290.

⁴² R. Purssell *et al.*, *supra* note 38.

acknowledged driving while impaired within the following year.⁴³

THE CHARTER AND BILL C-73

The Supreme Court of Canada and the previous Conservative government were engaged in an ongoing battle over criminal law policy on various issues, including access to medical marijuana,⁴⁴ physician-assisted suicide and euthanasia,⁴⁵ safe-injection sites⁴⁶ parole eligibility,⁴⁷ and prostitution.⁴⁸ The courts have been particularly critical of legislation that would limit their discretion, as evidenced by the recent litigation over mandatory victim surcharges,⁴⁹ statutory limits on giving credit for pre-conviction incarceration⁵⁰ and mandatory minimum sentences. While the formal legal arguments are framed in terms of statutory interpretation and the requirements of the *Charter*, the underlying issue often appears to be the wisdom of the challenged provision, rather than its meaning or constitutionality.

The acrimonious relationship between the Conservative government and the Supreme Court had attracted adverse media attention.⁵¹ Nevertheless, there are no signs that somewhat similar policy battles will abate in the immediate future. If Bill C-73 is enacted, the six-year minimum sentence will be challenged under, among other things, section 12 of the *Charter*, which guarantees everyone the right not to be subjected to cruel and unusual treatment or punishment.

A six-year mandatory minimum in all impaired driving causing death cases, regardless of the offender's age, criminal record or BAC, would be very onerous relative to the mandatory minimum sentences for other serious *Criminal Code* offences. For example, manslaughter, which

⁴³ E. Vingilis *et al.*, "Psychosocial Sequelae of Motor Vehicle Collisions: A Follow-up Study" (1996) 28 *Accident Analysis and Prevention* 637.

⁴⁴ There has been a series of major successful court challenges to the medical marijuana access provisions stretching back to 2000, the latest of which is *R. v. Smith*, 2015 SCC 34.

⁴⁵ *Carter v. Canada (Attorney General)*, 2015 SCC 5.

⁴⁶ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

⁴⁷ *Canada (Attorney General) v. Whaling*, 2014 SCC 20.

⁴⁸ *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

⁴⁹ In *R. v. Tinker*, 2014 ONCJ 208, the Court relied on section 7 of the *Charter* to strike down legislation which doubled the victim surcharges and mandated their imposition. This decision was reversed, but other challenges to the surcharge legislation are likely. *R. v. Tinker*, 2015 ONSC 2284.

⁵⁰ See *R. v. Carvery*, 2014 SCC 27 and *R. v. Summers*, 2014 SCC 26, in which the Court interpreted the legislation in a way that appeared to thwart the government's intent.

⁵¹ See for examples, V. Naughton, "Harper vs the Supreme Court of Canada", *Global News* (12 May 2014), online: <<http://globalnews.ca/news/1325937/harper-vs-the-supreme-court-of-canada/>>; and T. Hopper, "A scorecard of the Harper government's wins and losses at the Supreme Court of Canada", *National Post* (15 April 2015), online: <<http://news.nationalpost.com/news/canada/scoc-harper-gov-scorecard-741324>>.

is a category of culpable homicide, carries a minimum sentence of four years imprisonment, but only if a firearm is used in committing the offence.⁵² Similarly, aggravated sexual assault (*i.e.* sexual assault involving wounding, maiming, disfiguring or endangering the complainant's life) carries a five-year mandatory minimum, but only if a restricted or prohibited firearm is used, or if any firearm is used and the offence is committed on a criminal organization's behalf.⁵³ The fact that the proposed minimum for impaired driving causing death would be relatively onerous does not necessarily mean that it violates the *Charter*.

However, based on the recent Supreme Court of Canada decision in *R. v. Nur*,⁵⁴ the proposed six-year minimum would almost certainly be struck down under section 12. The majority of the Supreme Court stated that there are two separate bases for concluding that legislation infringes section 12. First, a provision would violate section 12 if it imposed a cruel and unusual (*i.e.* grossly disproportionate) punishment on the offender in the case. Second, a provision would infringe section 12 if there are reasonably foreseeable circumstances in which it would impose a grossly disproportionate punishment on offenders in other cases. In regard to these hypothetical scenarios, the majority stated that "the reasonable foreseeability test is not confined to situations that are likely to arise in the general day-to-day application of the law. Rather, it asks what situations may reasonably arise."⁵⁵

In *Nur*, the majority concluded that the three and five-year mandatory minimum sentences for the firearms offences imposed on the offenders were appropriate in the circumstances of their cases. Nevertheless, the majority held that the minimums violated section 12, because they could result in imposing a grossly disproportionate sentence on other offenders in firearms cases. The majority cited examples, such as offenders who violated the technical or licensing provisions of the firearms offences, or offenders who came into possession innocently or mistakenly.⁵⁶ The three dissenting justices held that the mandatory minimums did not infringe section 12 of the *Charter* and bluntly criticized the majority for second-guessing "Parliament based on hypotheticals that do not accord with experience or common sense."⁵⁷

Despite the split decision in *Nur*, the majority and minority of the Supreme Court would most likely conclude that a six-year mandatory minimum would be grossly disproportionate in

⁵² *Criminal Code*, *supra* note 5, s. 236(a).

⁵³ *Ibid.*, s. 273(2)(a)(i).

⁵⁴ 2015 SCC 15.

⁵⁵ *Ibid.*, at para. 68.

⁵⁶ *Ibid.*, at paras. 82, 83, 103, and 104.

⁵⁷ *Ibid.*, at para. 199.

many of the impaired driving causing death cases that come before the courts.⁵⁸ Given that 18% of those convicted of impaired driving causing death in 2011/12 received no prison sentence, the courts are unlikely to view any across-the-board mandatory minimum custodial sentence, let alone six years, as warranted in every case. The courts would probably reach the same decision about most of the offenders who had received custodial sentences in the two to three-year range. Considering the courts' vehement opposition to limits on their sentencing discretion, they will not take kindly to being forced to double or triple the prison sentences that they are accustomed to imposing in impaired driving causing death cases.

It is possible that a six-year mandatory minimum might survive a *Charter* challenge, but only if it was strictly limited to cases in which there were several serious aggravating factors. For example, it could be argued that a six-year mandatory minimum would not be grossly disproportionate in an impaired driving causing death case if the offender attempted to flee the scene, was prohibited or disqualified from driving at the time of the offence, and/or had previous impaired driving convictions. However, based on the majority's reliance in *Nur* on "reasonably foreseeable hypotheticals," we are not optimistic that even a narrowly defined six-year mandatory minimum would survive a *Charter* challenge. The hypotheticals relied upon to strike down a narrowly defined six-year mandatory minimum could include a young first offender who flees in a panic, an offender whose prior conviction occurred in the distant past, or an offender who is profoundly disabled in the fatal crash.⁵⁹

CONCLUSION

For organizations like MADD Canada, the enactment of a substantial mandatory minimum sentence for impaired driving causing death would serve important symbolic purposes. It would reinforce the principle that impaired driving is a serious crime that generates a devastating toll of preventable deaths and injuries in Canada. It would redress the concerns of victims and their families that the criminal justice system does not appropriately take into account the profound losses that they have suffered.

However, as discussed, there are several serious drawbacks to calling for mandatory minimum sentences. Given the research, lengthy mandatory minimum sentences cannot be justified in terms of specific or general deterrence. Moreover, MADD Canada should consider

⁵⁸ In reaching this conclusion, the court may rely on the fact that the six-year mandatory minimum for impaired driving causing death would be onerous relative to the existing mandatory minimums for other serious *Criminal Code* offences.

⁵⁹ An Ontario judge, relying on the reasonable hypothetical approach, recently struck down the 6-month minimum jail term for growing between 6 and 200 marijuana plants for the purpose of trafficking as constituting cruel and unusual punishment. S. Fine, "Ontario judge strikes down mandatory minimum sentence for pot growing" *Globe and Mail* (29 September 2015), online: <<http://www.theglobeandmail.com/news/national/ontario-judge-strikes-down-mandatory-minimum-sentence-for-pot-owing/article26580311/>>.

whether it wishes to take a public position on a provision which might never be enacted. Even if enacted, the six-year mandatory minimum would be highly controversial and stands virtually no chance of surviving a *Charter* challenge. The same fate would most likely befall almost any mandatory minimum sentence that included a significant period of incarceration.

MADD Canada is left with no ideal options. Endorsing legislation that it knows or ought to know is unconstitutional undermines the organization's legal credibility. If MADD Canada tries to propose an alternative that complied with the *Charter*, it would be limited to a mandatory minimum sentence that would be dramatically lower than the current average custodial sentence. Aside from alienating impaired driving victims and their families, this approach might decrease the average length of the custodial sentences that are imposed on the offenders.

Based on many of these same factors, MADD Canada had decided several years ago not to call for the enactment of a mandatory minimum for impaired driving causing death. Given the recent Supreme Court of Canada decisions and our review of the deterrence research, MADD Canada's decision makes even more sense now than it did then. The length of custodial sentences for impaired driving causing death have been rising, albeit more slowly than MADD Canada believes is appropriate. MADD Canada's current approach of calling for longer custodial sentences to reflect the seriousness of the crime is preferable to supporting the enactment of a six-year mandatory minimum sentences that would invariably be struck down under the *Charter*.