

**AN OVERVIEW OF FEDERAL DRUG-IMPAIRED
DRIVING ENFORCEMENT AND PROVINCIAL
LICENCE SUSPENSIONS IN CANADA**



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INTRODUCTION

Until recently, Canada's traffic safety initiatives focused on alcohol-impaired driving. The issue of drug-impaired driving has only risen to prominence in the last decade. Statistics indicate that driving after drug use is common. Indeed, it appears to be more prevalent among young people than driving after drinking.¹ A national survey published in 2007 indicated that 40% of 15-24 year olds reported driving under the influence of cannabis in the past 12 months, compared to 21% who reported driving under the influence of alcohol. Moreover, the mean number of times that respondents admitted driving under the influence of cannabis in the past year was 10, compared to 1.6 for alcohol.² Studies involving roadside saliva testing for the commonly-used drugs³ and research on fatally-injured drivers are equally troubling.⁴

Although drug-impaired driving was first prohibited in 1925,⁵ it was not until 2008 that the police were given specific authority to enforce this federal criminal offence. In 2008, the *Criminal Code* was amended to authorize the police to demand "physical coordination tests"⁶ (*i.e.* standard Field Sobriety Testing or SFST) and a drug "evaluation" (*i.e.* Drug Recognition

¹ See for example, M Asbridge, C Poulin & A Donato, "Motor vehicle collision risk and driving under the influence of cannabis: Evidence from adolescents in Atlantic Canada" (2005) 37 *Accid Anal and Prev* 1025 at 1029. See also DJ Beirness & CG Davis, *Driving Under the Influence of Cannabis: Analysis drawn from the 2004 Canadian Addiction Survey* (Ottawa: Canadian Centre on Substance Abuse, 2006); and A Paglia-Boak et al, *Drug Use Among Ontario Students 1977-2009: Detailed OSDUHS Findings* (Toronto: Centre for Addiction and Mental Health, 2009) at 173-79.

² Nearly 40% of the respondents also reported having been a passenger in a vehicle driven by someone who was under the influence of cannabis. *Canadian Addiction Survey (CAS): Substance Use by Canadian Youth* (Ottawa: Health Canada, 2007) at 95.

³ DJ Beirness & EE Beasley, *Alcohol & Drugs Use Among Drivers: British Columbia Roadside Survey 2010* (Ottawa: Canadian Centre on Substance Abuse, 2011). These drugs were: amphetamines, benzodiazepines, cannabis, cocaine, methamphetamines, and opiates. *Ibid* at 5.

⁴ EE Beasley, DJ Beirness & AJ Porath-Waller, *A Comparison of Drug- and Alcohol-involved Motor Vehicle Driver Fatalities* (Ottawa: Canadian Centre on Substance Abuse, 2011) at 1. The data were drawn from a merger of two databases: the National Fatality Database, which contains coroners' information on the toxicological tests performed on fatally-injured drivers; and the National Collision Database, which records detailed information about the circumstances of motor vehicle crashes occurring on public roads. Unfortunately, drug testing of fatally-injured drivers is not as routine as alcohol testing, so the estimate was based on a less-than-complete data set

⁵ *An Act to Amend the Criminal Code*, SC 1925, c 38, s 5. The 1925 provision prohibited driving under the influence of "narcotics." In 1951, this criminal provision was broadened to include driving while under the influence of any drug. *An Act to Amend the Criminal Code*, SC 1951, c 47, s 14(1) and (2).

⁶ *Criminal Code*, RSC 1985, c C-46, s 254(2)(a). The applicable regulation defines the tests in terms of the three-part Standard Field Sobriety Test: *Evaluation of Impaired Operation (Drugs and Alcohol) Regulation*, SOR/2008-196, s 2.

Evaluation or DRE) from suspected drug-impaired drivers in certain limited circumstances.⁷ While long overdue, the current enforcement approach is cumbersome, expensive and time-consuming.

The perception among young people that they can drive after drug use with relative impunity is all too accurate. Enforcement statistics indicate that both the federal and provincial governments need to restructure their approach to drug-impaired driving.

SECTION I: FEDERAL DRUG-IMPAIRED DRIVING ENFORCEMENT

Even though approximately 800 officers have been trained as certified Drug Recognition Evaluators, the number of federal drug-impaired driving charges has been disappointing. As Table 1 illustrates, the number of drug-impaired driving charges in 2010 constituted only 1.4% of the total impaired driving charges laid. Thus, despite the 2008 amendments and the millions of dollars spent on training officers, drug-impaired driving remains grossly under-enforced.

Table 1: The Number of Persons Charged With a Federal Drug-Impaired Driving Offence by Jurisdiction: 2008-2010

Prov/Terr	Total Number of Persons Charged		
	2008	2009	2010
NL	19	36	51
PE	1	5	5
NS	18	39	69
NB	13	67	37
QC	3	51	98
ON	66	317	322
MB	7	21	27
SK	8	45	57
AB	29	86	132
BC	23	128	112
YK	0	0	0
NT	0	1	4
NU	1	0	1
Canada (total impaired)	188 (65,822)	796 (68,399)	915 (65,183)

Source: Statistics Canada, *CANSIM Table 252-0051, Incident-based crime statistics, by detailed violations* (Ottawa: Statistics Canada, 2012).⁸

⁷ *Ibid*, s 254(3.1). The *Evaluation of Impaired Operation (Drugs and Alcohol) Regulation*, SOR/2008-196, s 3 sets out the various components of the DRE.

While the total number of persons charged with a drug-impaired driving offence increased by almost 15% from 2009 to 2010, it is not clear if this trend will continue. Even if drug-impaired driving charges tripled, it would still constitute less than 5% of the total impaired driving charges.

As surprising as it may seem, there is no information on the outcome of these drug-impaired driving cases. Statistics Canada does not currently provide specific data on drug-impaired driving cases by type of decision or by type of sentence. Rather, these data are included in total impaired driving cases “by type of decision”⁹ and “by type of sentence.”¹⁰ Thus, we have no way of knowing the number of charges dropped prior to trial, the conviction rate of cases that go to trial, or the sentences that are imposed in cases in which there is a guilty disposition.

Although we have not undertaken a systematic review of the reported cases, Canadian judges may not accept at face value that “failing” the DRE provides sufficient proof that the accused’s ability to drive was impaired at the time of driving. For example in *R v Perillant*,¹¹ the accused was acquitted, despite admitting that she had smoked cannabis before driving, apparently “failed” several elements of the DRE, and tested positive for cannabis. The judge stated:

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

...

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

⁸ Note that *CANSIM Table 252-0051* is subject to numerous qualifications and limitations.

⁹ Statistics Canada, *CANSIM Table 252-0053, Adult criminal courts, number of cases and charges by type of decision* (Ottawa: Statistics Canada, 2012).

¹⁰ Statistics Canada, *CANSIM Table 252-0056, Adult criminal courts, number of cases and charges by type of decision* (Ottawa: Statistics Canada, 2012).

¹¹ 2012, SKPC 135 (CanLII).

who has poor balance or poor co-ordination as it was with someone who had used marijuana?¹²

This case and others that adopt a similar approach do not augur well for drug-impaired driving prosecutions. Cases will become far more contentious and vulnerable to successful challenge if the prosecutor has to adduce expert evidence in each case explaining the relationship between the accused's performance on the various elements of the DRE and the accused's alleged drug impairment at the time of driving.¹³ Indeed, these problems with the DRE may help to explain why most comparable countries have or are in the process of enacting drug *per se* limits for the commonly-used illicit drugs.

SECTION II: PROVINCIAL AND TERRITORIAL DRUG-IMPAIRED DRIVING INITIATIVES

With the exception of Québec, all of the provinces and territories impose administrative licence suspensions and other sanctions on drivers who have a blood-alcohol concentration (BAC) of .05% or more (.04% BAC in Saskatchewan) or who are reasonably believed to be impaired by alcohol.¹⁴ The Canadian Council of Motor Transport Administrators (CCMTA) has developed and promoted a model .05% BAC policy.¹⁵

In contrast, only six jurisdictions have enacted specific short-term administrative sanctions for drug-impaired driving in the absence of a *Criminal Code* charge.¹⁶ Two other jurisdictions

¹² *Ibid* at paras 24 and 26.

¹³ See for example *R v Jansen*, [2010] OJ No. 529 (Ont CJ), a case in which the judge demanded exactly this type of evidence. More specifically, the judge stated at para 61:

The hurdle for the Crown in these cases is to relate back the findings of the evaluation, and the subsequent chemical analysis, to the time of the driving. In alcohol impairment cases, we frequently see the use of the breath tests mandated by the Code for which there are the statutory presumptions of accuracy and identity. The enactment of these presumptions by Parliament was based upon careful consideration of the science of breath alcohol testing, and of absorption and elimination rates as it relates to alcohol. In the case of drugs, the Crown does not have the benefit of the statutory presumptions, and must by cogent evidence relate back the findings of its expert evidence, and the consequent analysis, to the time of driving. In this case, the delay between the time of driving to the time of the evaluation and the urine sample being taken was 2 hours or greater.

The judge in *R v Perillant* 2012, SKPC 135 (CanLII) referred to, and relied upon, this paragraph in acquitting the accused. *Ibid* at para 25.

¹⁴ R. Solomon et al, *The 2012 Provincial and Territorial Review* (Oakville: MADD Canada, 2012) at 90 [*The 2012 Review*].

¹⁵ CCMTA, *STRID Model for Short-Term Suspensions* (Ottawa: CCMTA, 2005).

¹⁶ *The 2012 Review*, *supra* note 14.

have enacted general administrative sanctions for drivers who fail a SFST or refuse to take the test.¹⁷ Moreover, the drug-impaired administrative sanctions are generally less onerous than the alcohol-related sanctions.¹⁸ As Table 2 illustrates, only three of the eight jurisdictions with specific or general drug-related administrative licence suspensions report them separately from their alcohol-related suspensions. The 2011 data, albeit extremely limited, indicate that British Columbia accounted for almost 98% of the known drug-related administrative sanctions.

Table 2: Drug-Related Administrative Licence Suspensions by Jurisdiction: 2011

Prov/Terr	Drug-Related Administrative Licence Suspensions	
	Grounds	Number
NL	Reasonable grounds to believe driver's ability is impaired by a drug or combination of drugs and alcohol	Not known
PE	No drug-related administrative program	
NS	No drug-related administrative program	
NB	No drug-related administrative program	
QC	No alcohol or drug-related administrative program	
ON	No drug-related administrative program	
MB	Based on SFST, believe driver is unable to drive safely; refuses SFST; or is so impaired by alcohol or drugs as to be unable to provide a sample or take SFST	48
SK	Refusal to undergo, or a failure of, a SFST	61
AB	Reasonably suspect driver's physical or mental ability is affected by a drug	Not known
BC	Reasonable grounds to believe driver's ability is affected by a drug	4,457
YK	Reasonable grounds to believe driver's ability is impaired by drugs or another substance	Not known
NT	Reasonable grounds to believe driver's ability is impaired by drugs or fatigue	Not known
NU	Reasonable grounds to believe driver's ability is impaired by drugs or fatigue	Not known

Sources: R. Solomon et al, *The 2012 Provincial and Territorial Review* (Oakville: MADD Canada, 2012) at 90; and personal correspondence with A. Murie, CEO MADD Canada (September 2012)

¹⁷ *Ibid.* These general provincial administrative sanctions were made possible by the introduction of the 2008 *Criminal Code* SFST amendments. Section 254(2)(a) of the *Criminal Code* authorizes officers to demand a SFST from a driver who they reasonably suspect has any alcohol or drugs in his or her body.

¹⁸ *The 2012 Review*, *supra* note 14 at 92.

CONCLUSIONS

- The 2008 *Criminal Code* SFST and DRE amendments have generated relatively few charges, despite the widespread prevalence of drug-impaired driving.
- Statistics Canada does not provide any data on drug-related convictions, and thus there is no way of determining the number or percentage of drug-impaired driving charges that result in convictions. Nevertheless, there is reason to believe that drug-impaired driving prosecutions may become unduly complicated, time-consuming, expensive, and vulnerable to successful challenges.
- Only six jurisdictions have enacted specific short-term administrative sanctions for drug-impaired driving, with two others having a general short-term licence suspension related to failing, or refusing to participate in, a SFST.
- The number of drug-related administrative licence suspensions can only be determined in three jurisdictions.
- It appears that only British Columbia imposes a significant number of drug-impaired administrative licence suspensions.

RECOMMENDATIONS

- Canada needs to move away from its reliance on SFST and DRE for investigating, apprehending and prosecuting drug-impaired driving suspects. The current approach is cumbersome, time-consuming, expensive, and vulnerable to challenge.
- Canada should implement a system of random roadside saliva testing, coupled with more sophisticated testing tied to *per se* drug limits for the commonly-used illicit drugs. This would bring Canada's law more into line with that of most comparable countries and the world leaders in traffic safety.
- Statistics Canada needs to introduce separate codes to permit the reporting of drug-impaired driving cases that come to court, the outcome in these cases and the sentences that are imposed in those cases in which there is a guilty disposition.
- The CCMTA should adopt a model administrative licence suspension program for drug-impaired driving that is parallel to the model that it developed for alcohol-impaired driving.
- Prince Edward Island, Nova Scotia, New Brunswick, Québec, and Ontario need to enact a short-term administrative licence suspension program for drivers who: are reasonably suspected to be impaired by drugs; test positive for drugs or refuse to take a roadside saliva test; or fail or refuse to take a SFST.

With the exception of British Columbia, the provinces and territories need to expand and strengthen their drug-impaired administrative licence suspension programs.

- With the exception of British Columbia, the provinces and territories need to adopt better systems for tracking drug-impaired administrative suspensions and sanctions.