

**SENTENCING FOR IMPAIRED DRIVING CAUSING  
DEATH: CANADA, 1994/95-2015/16  
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## Introduction

Chart I and Graph I provide information on the number of persons convicted of impaired driving causing death, the types of sentences they received, and the percentage of offenders who were given custodial sentences and conditional sentences of imprisonment. Chart II and Graph II set out the mean length of the custodial sentences imposed on those convicted of impaired driving causing death.

The offence of impaired driving causing death was first enacted in 1985.<sup>1</sup> In order to address remaining gaps in the law, two new impaired driving offences involving death were added to the *Criminal Code* in 2008.<sup>2</sup> Both of these new indictable offences carry the same penalties as the pre-existing offence of impaired driving causing death.

The first offence entails driving with a blood-alcohol concentration (BAC) above .08% and causing a crash involving death.<sup>3</sup> This new offence makes it somewhat easier for the Crown to obtain a conviction because it does not require proof that the accused's ability to drive was impaired by alcohol, but rather only that his or her BAC exceeded .08%. Nor must it be proven that the crash was caused by the accused's illegal BAC.

The second offence enacted in 2008 entails failing or refusing, without a reasonable excuse, to submit to a required breath or blood test, physical coordination test (*i.e.* Standardized Field Sobriety Test or SFST) or drug recognition evaluation (DRE) when one knows or ought to know that he or she has caused a crash involving death.<sup>4</sup> Previously, most impaired drivers who killed someone and then refused to take a required test could only be convicted of refusing to take the test. By doing so, the driver denied the police the evidence needed to lay the more serious charge of impaired driving causing death. This new offence eliminated the tactical benefits of refusing a test because, as indicated, it carries the same penalties as impaired driving causing death.

However, the 2008 amendments did not address the major problem, namely the lack of police authority to obtain breath or blood evidence from accused in fatal crashes.<sup>5</sup> Consequently, these new

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<sup>1</sup> *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 36.

<sup>2</sup> *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 21(3).

<sup>3</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 255(3.1) [*Criminal Code*].

<sup>4</sup> *Ibid*, s. 255(3.2).

<sup>5</sup> Even if the police strongly suspect that a surviving driver is impaired by alcohol, it is extremely difficult for them to obtain BAC evidence, particularly if the driver is taken to a hospital. Thus, relatively few hospitalized impaired drivers are charged with, or convicted of, any federal impaired driving offence. For example, a 2004 British Columbia study involving six hospitals found that only 11% of hospitalized drivers with BACs of more than .08% were convicted of any *Criminal Code* impaired driving offence, despite the fact that the average BAC of the alcohol-positive drivers was .156%. Similarly, between 1995 and 2003, only 16% of alcohol-impaired drivers admitted to an Alberta tertiary care trauma centre following a crash were convicted of any federal impaired driving offence, even though their average BAC was .19% or almost 2½ times the *Criminal Code* limit. See respectively: 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 at 80; and 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 at 26.

See generally 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.

offences have had a limited impact on charges and convictions.<sup>6</sup> In fact, as Chart I illustrates, the total number of convictions for impaired driving involving death has fallen in the years following the enactment of the two new offences. The relatively small number of charges and convictions for these new offences has not been separately reported in the Charts and Graphs, but rather included in the totals for impaired driving causing death. Unless otherwise indicated, the phrase “impaired driving causing death” is used in the remainder of this document to refer to all three impaired driving offences involving death.

**(a) Completed cases and persons convicted of impaired driving causing death<sup>7</sup>**

Like the charge data, the conviction data include adults, youth, and incidents involving motor vehicles, vessels and aircraft. However, unlike the charge data, the case and conviction data are reported by fiscal year and must be custom-ordered and purchased from Statistics Canada.<sup>8</sup> Moreover, there are major problems with, and gaps in, the conviction data.

First, given the different reporting periods and the time lag between the laying of a charge and its disposition, the conviction data cannot be aligned with the charge data. While some accused may plead guilty on first appearance or be tried within several months, other cases can take years to resolve, particularly those involving impaired driving causing bodily harm or death. For example, assume that a person is charged with impaired driving causing death in November 2013 and is convicted in April 2015 following various *Charter* challenges, a preliminary hearing, a jury trial, sentencing, and appeals. The impaired driving causing death charge would be reported in the 2013 “persons charged” data in Statistics Canada, *CANSIM Table 252-0051: Incident-based crime statistics, by detailed violations annual (number unless otherwise noted)*.<sup>9</sup> The conviction would be included in the grand total of the 2015/16 impaired driving “guilty dispositions” reported in Statistics Canada, *CANSIM Table 252-0053: Adult criminal courts, number of cases and charges by type of decision annual (number)*.<sup>10</sup>

Second, when first reported, the data understate the total number of completed cases and convictions in that fiscal year. For example, it was first reported that there were 27 convictions in the adult and youth

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<sup>6</sup> The new offences involving death have not had the same effect as the comparable new offences involving bodily harm. As charges for having a BAC > .08% and causing a crash resulting in bodily harm (s. 255(2.1)) increased, charges for the pre-existing offence of impaired driving causing bodily harm (s. 255(2)) decreased. Rather than increasing total charges, the new offence of impaired driving causing bodily harm appears to be used in lieu of the pre-existing offence. In 2015/16, 30.6% of the total bodily harm cases were based on having a BAC > .08% and causing a crash resulting in bodily harm, and 68.6% were based on the pre-existing offence of impaired driving causing bodily harm. In contrast, less than 9% of the total death cases were based on having a BAC > .08% and causing a crash resulting in death. See references *infra* note 8.

<sup>7</sup> The term “persons convicted” includes an accused found guilty of the offence, an included offence, an attempt of the offence, or an attempt of an included offence. This category also includes court cases where an absolute or conditional discharge has been imposed.

<sup>8</sup> Statistics Canada, Canadian Centre for Justice Statistics, *Adult criminal courts, completed guilty cases by type of sentence, for select Impaired Driving Offences, Canada, 1994/1995 to 2015/2016* [2017 Custom-ordered Report, Adult]; and *Youth courts, completed guilty cases by type of sentence, for select Impaired Driving Offences, Canada, 1994/1995 to 2015/2016* (Ottawa: Statistics Canada, 2017) [2017 Custom-ordered Report, Youth].

<sup>9</sup> Statistics Canada, *CANSIM Table 252-0051: Incident-based crime statistics, by detailed violations annual (number unless otherwise noted)* (Ottawa: Statistics Canada, 2017).

<sup>10</sup> Statistics Canada, *CANSIM Table 252-0053: Adult criminal courts, number of cases and charges by type of decision annual (number)* (Ottawa: Statistics Canada, 2017).

courts for impaired driving causing death in the 2014/15 fiscal year.<sup>11</sup> However, this was revised to 31 in the latest custom-ordered Statistics Canada reports,<sup>12</sup> presumably due to the failure of the courts to report all of the 2014/15 convictions in a timely manner. Consequently, care must be taken in interpreting the decrease in convictions from 31 in 2014/15 to 28 in 2015/16,<sup>13</sup> because it may well be due to the late reporting of the remaining 2015/16 convictions.

Third, the conviction data typically contain numerous, often technically-complex endnotes that qualify the data, or alert the reader to omissions or other problems. The two custom-ordered documents together contain 39 endnotes, most of which are relevant to impaired driving causing death convictions. Some of the relevant endnotes are not particularly consequential, while others address major deficiencies in the data. For example, the endnotes indicate that: the Manitoba provincial courts did not report from 1994/95 to 2004/05; the British Columbia provincial and superior courts only began reporting in 2000/01; and the Prince Edward Island, Québec, Ontario, Manitoba, and Saskatchewan superior courts do not provide any case or disposition data.<sup>14</sup> Given this patchwork of reporting, it is difficult to determine the extent to which cases and convictions for impaired driving causing death are understated. The failure of the superior courts to report is particularly concerning because they often hear the most serious impaired driving cases, such as impaired driving causing death.

#### **(b) Sentence Types**

A person convicted of impaired driving causing death typically receives more than one type of sentence. For example, offenders who receive a conditional discharge or a suspended sentence must also be placed on probation.<sup>15</sup> Thus, the sanctions in Chart I are not mutually exclusive and the total percentage of sentence types will exceed 100.

##### **(i) Conditional Sentence of Imprisonment**

As illustrated in Chart I and Graph I, the number and percentage of offenders receiving custodial sentences for impaired driving causing death fell with the introduction of conditional sentences of imprisonment. The option of imposing a conditional sentence of imprisonment came into force in the fall of 1996. A judge imposing imprisonment for less than two years may allow the sentence to be served in the community if he or she is satisfied that it would not endanger public safety and would be consistent with the “fundamental purpose and principles of sentencing.”<sup>16</sup> In 2008, amendments were enacted precluding conditional sentences for specified categories of criminal offences, including impaired driving

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<sup>11</sup> Statistics Canada, Canadian Centre for Justice Statistics, *Adult criminal courts, completed guilty cases by type of sentence, for select Impaired Driving Offences, Canada, 1994/1995 to 2014/2015*; and *Youth courts, completed guilty cases by type of sentence, for select Impaired Driving Offences, Canada, 1994/1995 to 2014/2015* (Ottawa: Statistics Canada, 2016). These custom-ordered documents were purchased to prepare last year’s statistical reports.

<sup>12</sup> *2017 Custom-ordered Report, Adult*, and *2017 Custom-ordered Report, Youth*, *supra* note 8.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* There are numerous other gaps in the conviction data. For example, information on municipal court cases are, for unexplained reasons, “excluded from the information that Québec transmits to Statistics Canada.”

<sup>15</sup> *Criminal Code*, *supra* note 3, ss. 730(1) and 731(1)(a).

<sup>16</sup> *Ibid.*, s. 742.1(a).

causing death or bodily harm.<sup>17</sup> As a result, the number and percentage of custodial sentences rose.

(ii) “Other” Sentence Types

In addition to the sentence types listed in Chart I, adults and youth may be subject to “other” available sanctions. In 2015/16, these “other sentences” accounted for 40% of the types of sentences imposed on adults and youth for an impaired driving causing death offence.<sup>18</sup> For adult offenders, the “other” sanctions include: absolute and conditional discharges; suspended sentences; community service orders; and prohibition orders.<sup>19</sup> For young offenders, the “other” available sanctions include: absolute and conditional discharges; community service orders; intensive support and supervision orders; restitution orders; prohibitions; counselling programs; deferred custody; attendance at non-residential programs; and reprimands.<sup>20</sup>

(iii) Custodial Sentences

Chart II provides information on the mean length of custodial sentences and is also based on custom-ordered documents from Statistics Canada.<sup>21</sup> Note that the length of time an offender is actually incarcerated may be far shorter than the custodial sentence imposed by the judge. There are three reasons that help to explain this discrepancy.

First, judges are required to give offenders credit for time spent in custody prior to conviction which was typically 1.5 to 2 days’ credit for every day of pre-conviction incarceration. This pre-conviction credit is subtracted from the custodial sentence imposed by the judge. In 2009, Parliament limited credit for time served to one day for every day imprisoned prior to conviction. However, judges were authorized to grant up to 1.5 days credit if they could establish that “the circumstances” justified it.”<sup>22</sup> Nevertheless, the courts continued to routinely award 1.5 days credit, based on the harshness of pre-sentence detention and the fact that it did not count towards earned remission and parole eligibility.<sup>23</sup>

Second, offenders are generally credited with 15 days earned remission for every month served if they have obeyed the prison rules.<sup>24</sup> This period of earned remission is subtracted from the offender’s sentence. Third, most offenders are eligible to apply for full parole after serving between one-third and two-thirds of their sentence.<sup>25</sup>

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<sup>17</sup> *Ibid*, s. 742.1(e)(i).

<sup>18</sup> *2017 Custom-ordered Report, Adult* and *2017 Custom-ordered Report, Youth*, *supra* note 8.

<sup>19</sup> *2017 Custom-ordered Report, Adult*, *ibid*.

<sup>20</sup> *2017 Custom-ordered Report, Youth*, *supra* note 8.

<sup>21</sup> *2017 Custom-ordered Report, Adult* and *2017 Custom-ordered Report, Youth*, *supra* note 8.

<sup>22</sup> *Criminal Code*, *supra* note 3, s. 719(3.1).

<sup>23</sup> In April 2014, the Supreme Court of Canada unanimously held that the loss of earned remission and parole eligibility alone would almost always constitute circumstances requiring enhanced credit, even if the conditions in the remand centre were not particularly harsh. *R. v. Carvery*, 2014 SCC 27; and *R. v. Summers*, 2014 SCC 26.

<sup>24</sup> See *Prison and Reformatories Act*, R.S.C. 1985, c. P-20, s. 6.

<sup>25</sup> *Corrections and Conditional Release Act*, S.C. 1992, ss. 119 and 120.

## Conclusion

In 1985, Parliament enacted the indictable offences of impaired driving causing bodily harm and impaired driving causing death. The government was concerned that impaired drivers who killed or injured others were only being convicted of a simple impaired driving offence, rather than the more serious offences of manslaughter, criminal negligence causing death and criminal negligence causing bodily harm.<sup>26</sup> The new offences were intended to be easier to prove than manslaughter and criminal negligence<sup>27</sup> and carried lengthier maximum penalties than the simple impaired driving offences.<sup>28</sup> The 2008 amendments creating the new impaired driving offences causing bodily harm and death were intended to serve similar purposes.<sup>29</sup>

However, the 1985 and 2008 amendments have clearly not achieved their intended goal, particularly when viewed in the context of the approximately 1,000 Canadians who are killed each year in impairment-related crashes.<sup>30</sup> In contrast, only 107 drivers were charged with an impaired driving causing death offence in 2015, and only 28 (26%) drivers were convicted in the 2015/16 fiscal year.<sup>31</sup> Thus, even discounting for impaired drivers who killed only themselves and multi-fatality crashes, the charge and conviction rates for impaired driving causing death are very low.

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<sup>26</sup> Canada, *House of Commons Debates*, 33 Parl., 1st Sess., (20 December 1984) at 1384 (Hon. John Crosbie).

<sup>27</sup> See Canada, Department of Justice, Policy Sector and Legislative Services Branch, *Impaired Driving Case Study* (Ottawa: Department of Justice, 2000).

<sup>28</sup> The maximum penalty for impaired driving causing bodily harm and death were 10 and 14 years' imprisonment, respectively. In 2000, the maximum sentence for impaired driving causing death was increased to life. *An Act to amend the Criminal Code (impaired driving causing death and other matters)*, S.C. 2000, c. 25, s. 2.

<sup>29</sup> *Tackling Violent Crime Act*, S.C. 2008, c. 6, s. 21(3).

<sup>30</sup> The most recent national crash data indicate that, in 2013, approximately 2,430 Canadians died in crashes on public roads involving at least one highway vehicle, and that alcohol and/or drugs were involved in 59.7% (1,451) of these fatalities. These figures do not include: alcohol and/or drug-related crash deaths occurring on private property, Crown land, military bases, or roads administered by First Nations; or crash deaths involving only ATVs, snowmobiles, farm tractors, and other non-highway vehicles. Nor do the figures include alcohol and/or drug fatalities involving boats and other vessels, railroad equipment and aircraft. However, while most of the alcohol-related fatal crashes involved an individual who was impaired or very impaired, there is no comparable information on the likely causal role, if any, of drugs in the drug-related fatal crashes.

In light of the available data, MADD Canada has estimated that more than 1,000 Canadians are killed in alcohol or drug-related crashes each year. See R. Solomon, C. Ellis & C. Zheng, *The Presence of Alcohol and/or Drugs in Motor Vehicle Fatalities, by Jurisdiction: Canada, 2013* (Oakville, Ontario: Mothers Against Drunk Driving (MADD) Canada, 2017).

<sup>31</sup> R. Solomon, C. Ellis & C. Zheng, *Impaired Driving Causing Death: Charges, Cases and Convictions: Canada 1994-2015/16* (Oakville, Ontario: Mothers Against Drunk Driving (MADD) Canada, 2017).

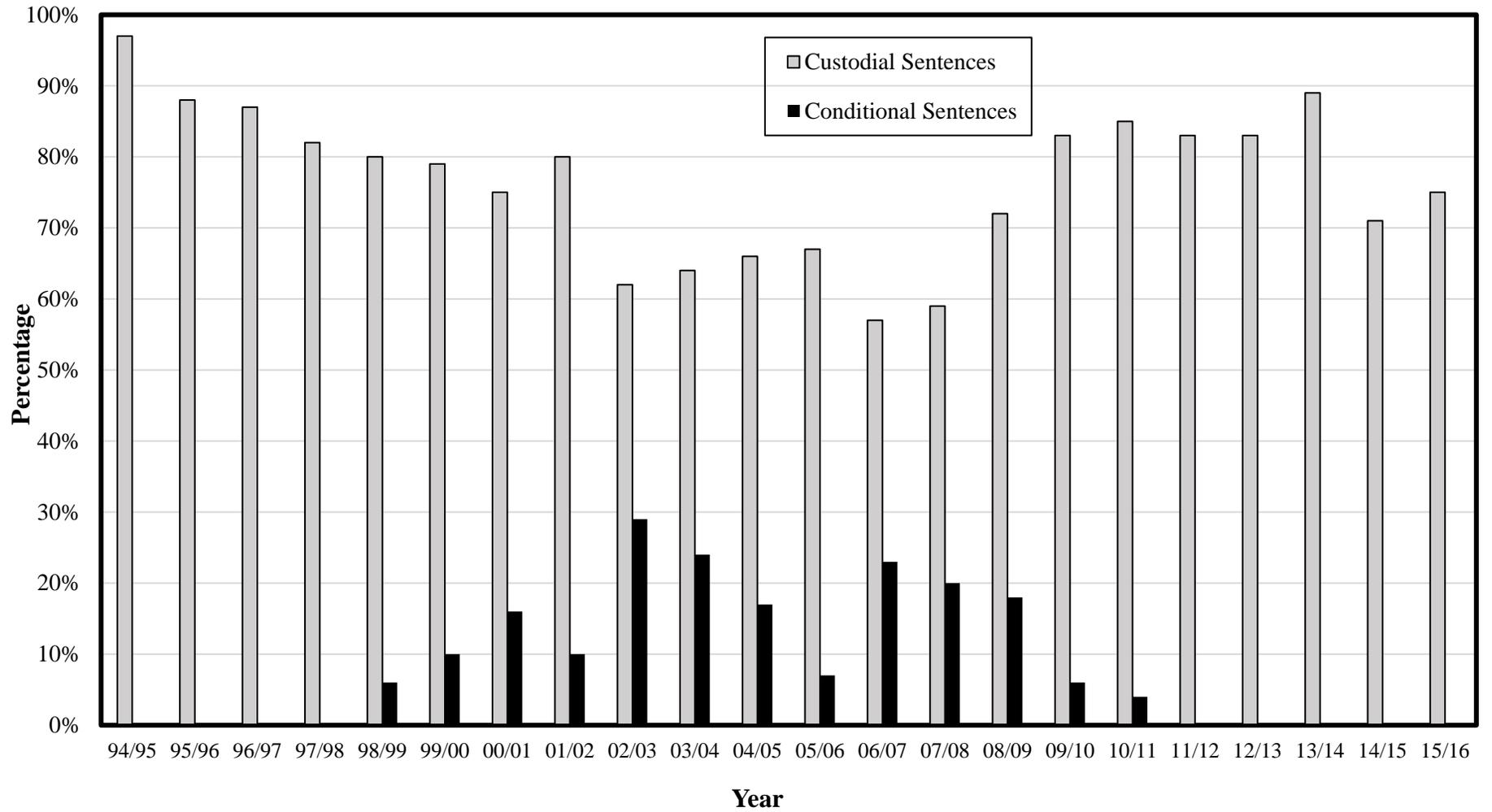
**Chart I: Selected Sanctions for Impaired Driving Causing Death:  
Canada, 1994/95-2015/16**

Year	Persons Convicted	Sentence Type*									
		Custody		Conditional Sentence		Probation		Fine		Other	
		No.	%	No.	%	No.	%	No.	%	No.	%
1994/95	29	28	97%	0	0%	12	41%	0	0%	4	14%
1995/96	42	37	88%	0	0%	22	52%	2	5%	11	26%
1996/97	47	41	87%	0	0%	20	43%	1	2%	12	26%
1997/98	49	40	82%	0	0%	22	45%	4	8%	16	33%
1998/99	54	43	80%	3	6%	21	39%	1	2%	36	67%
1999/00	42	33	79%	4	10%	14	33%	2	5%	24	57%
2000/01	51	38	75%	8	16%	17	33%	4	8%	31	61%
2001/02	41	33	80%	4	10%	14	34%	0	0%	33	80%
2002/03	42	26	62%	12	29%	17	40%	2	5%	38	90%
2003/04	50	32	64%	12	24%	11	22%	3	6%	47	94%
2004/05	58	38	66%	10	17%	18	31%	3	5%	49	84%
2005/06	45	30	67%	3	7%	10	22%	2	4%	21	47%
2006/07	56	32	57%	13	23%	15	27%	3	5%	34	61%
2007/08	61	36	59%	12	20%	20	33%	1	2%	43	70%
2008/09	60	43	72%	11	18%	14	23%	2	3%	35	58%
2009/10	54	45	83%	3	6%	11	20%	1	2%	35	65%
2010/11	48	41	85%	2	4%	12	25%	0	0%	33	69%
2011/12	35	29	83%	0	0%	9	26%	1	3%	25	71%
2012/13	48	40	83%	0	0%	10	21%	1	2%	31	65%
2013/14	40	35	88%	0	0%	7	18%	0	0%	23	58%
2014/15	31	22	71%	0	0%	3	10%	0	0%	15	48%
2015/16	28**	21	75%	0	0%	4	14%	1	4%	18	64%

\* These offenders typically receive more than one type of sentence. In other words, the sanctions are not mutually exclusive and the percentages will exceed 100.

\*\* The convictions for 2015/16 will inevitably be revised upwards to reflect the late reporting of the remaining 2015/16 convictions.

**Graph I: Percentage of Impaired Driving Causing Death Convictions Resulting in Custodial and Conditional Sentences: Canada, 1994/95-2015/16**



**Chart II: Mean Length of Custodial Sentences for Impaired Driving  
Causing Death: Canada, 1994/95-2015/16\***

<b>Year</b>	<b>Persons Convicted<sup>2,3</sup></b>	<b>Custodial Sentences<sup>6</sup></b>	<b>Mean Length<sup>7</sup> [Days]**</b>
1994/95	29	28	756
1995/96	42	37	642
1996/97	47	41	824
1997/98	49	40	727
1998/99	54	43	815
1999/00	42	33	855
2000/01	51	38	902
2001/02	41	33	979
2002/03	42	26	721
2003/04	50	32	996
2004/05	58	38	960
2005/06	45	30	1,112
2006/07	56	32	802
2007/08	61	36	953
2008/09	60	43	1,012
2009/10	54	45	935
2010/11	48	41	1,021
2011/12	35	29	912
2012/13	48	40	1,055
2013/14	40	35	1,053
2014/15	31	22	1,079
2015/16***	28	21	1,205

\* The calculations for 2008/09 to 2015/16 include the offences of: impaired driving causing death; having a BAC > .08% and causing a crash involving death; and failing/refusing to provide a required sample or take a required test and causing a crash involving death.

\*\* The Chart includes both adults and youth. Note that in the small number of youth cases, the custodial sentences tend to be considerably shorter than those imposed on adults.

\*\*\* The conviction total for 2015/16 will inevitably be revised upwards to reflect the late reporting of the remaining 2015/16 convictions.

**Graph II: Mean Length of Custodial Sentences for Impaired Driving  
Causing Death: Canada, 1995/95-2015/16**

