

**SENTENCING FOR IMPAIRED DRIVING CAUSING
BODILY HARM: CANADA, 1994/95-2015/16
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**R. Solomon, Distinguished University Professor,
C. Ellis, J.D. 2018 & C. Zheng, J.D. 2019
Faculty of Law, Western University**

Introduction

Chart I and Graph I provide information on the number of persons convicted of impaired driving causing bodily harm, 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 bodily harm.

The offence of impaired driving causing bodily harm was first enacted in 1985.¹ In order to address remaining gaps in the law, two new impaired driving offences involving bodily harm were added to the *Criminal Code* in 2008.² Both of these new indictable offences carry the same penalties as the pre-existing offence of impaired driving causing bodily harm.

The first offence entails driving with a blood-alcohol concentration (BAC) above .08% and causing a crash involving bodily harm.³ 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 bodily harm.⁴ Previously, most impaired drivers who injured 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 bodily harm. This new offence eliminated the tactical benefits of refusing a test because, as indicated, it carries the same penalties as impaired driving causing bodily harm.

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 injury crashes.⁵ Consequently, these new

¹ *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19, s. 36.

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

³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 255(2.1) [*Criminal Code*].

⁴ *Ibid*, s. 255(2.2).

⁵ 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. Pursell *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)

offences have had a limited impact on charges and convictions.⁶ In fact, as Chart I illustrates, the total number of convictions for impaired driving involving bodily harm has fallen in the years following the enactment of the two new offences. The 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 bodily harm. Unless otherwise indicated, the phrase “impaired driving causing bodily harm” is used in the remainder of this document to refer to all three impaired driving offences involving bodily harm.

(a) Completed cases and persons convicted of impaired driving causing bodily harm⁷

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.⁸ 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 bodily harm 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 bodily harm 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)*.⁹ 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*

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.

⁶ As charges for having a BAC > .08% and causing a crash resulting in bodily harm increased, charges for the pre-existing offence of impaired driving causing bodily harm decreased. Rather than increasing total charges, this new offence 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. See references *infra* note 8.

⁷ 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.

⁸ 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].

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

decision annual (number).¹⁰

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 200 convictions in the adult and youth courts for impaired driving causing bodily harm in the 2014/15 fiscal year.¹¹ However, this was revised to 234 in the latest custom-ordered Statistics Canada reports,¹² 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 234 in 2014/15 to 220 in 2015/16,¹³ 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 bodily harm 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.¹⁴ Given this patchwork of reporting, it is difficult to determine the extent to which the number of cases and convictions for impaired driving involving bodily harm are understated. The superior courts' failure to report is particularly concerning because they often hear the most serious impaired driving cases, such as impaired driving causing bodily harm.

(b) Sentence Types

A person convicted of impaired driving causing bodily harm 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.¹⁵ Thus, the sanctions in Chart I are not mutually exclusive and the total percentage of sentence types will exceed 100.

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

¹¹ 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.

¹² *2017 Custom-ordered Report, Adult and 2017 Custom-ordered Report, Youth*, *supra* note 8.

¹³ *Ibid.*

¹⁴ *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."

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

(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 bodily harm 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.”¹⁶ In 2008, amendments were enacted precluding conditional sentences for specified categories of criminal offences, including impaired driving causing bodily harm or death.¹⁷ 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 30% of the types of sentences imposed on adults and youth for an impaired driving causing bodily harm offence.¹⁸ For adult offenders, the “other” sanctions include: absolute and conditional discharges; suspended sentences; community service orders; and prohibition orders.¹⁹ 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.²⁰

(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.²¹ 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.”²² 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

¹⁶ *Ibid*, s. 742.1(a).

¹⁷ *Ibid*, s. 742.1(e)(i).

¹⁸ *2017 Custom-ordered Report, Adult and 2017 Custom-ordered Report, Youth, supra* note 8.

¹⁹ *2017 Custom-ordered Report, Adult, ibid*.

²⁰ *2017 Custom-ordered Report, Youth, supra* note 8.

²¹ *2017 Custom-ordered Report, Adult and 2017 Custom-ordered Report, Youth, supra* note 8.

²² *Criminal Code, supra* note 3, s. 719(3.1).

parole eligibility.²³

Second, offenders are generally credited with 15 days earned remission for every month served if they have obeyed the prison rules.²⁴ 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.²⁵

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.²⁶ The new offences were intended to be easier to prove than manslaughter and criminal negligence²⁷ and carried lengthier maximum penalties than the simple impaired driving offences.²⁸ The 2008 amendments creating the new impaired driving offences involving bodily harm and death were intended to serve similar purposes.²⁹

However, the 1985 and 2008 amendments have clearly not achieved their intended goal, particularly when viewed in the context of the tens of thousands of Canadians who are injured each year in impairment-related crashes. In contrast, only 525 drivers were charged with impaired driving causing bodily harm in 2015, and only 220 (42%) drivers were convicted in the 2015/16 fiscal year.³⁰ Thus, even discounting for impaired drivers who only injured themselves and crashes that injured more than one victim, the charge and conviction rates for impaired driving causing bodily harm are extremely low.

²³ 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.

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

²⁵ *Corrections and Conditional Release Act*, S.C. 1992, ss. 119 and 120.

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

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

²⁸ 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.

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

³⁰ *Table 252-0051*, *supra* note 9.

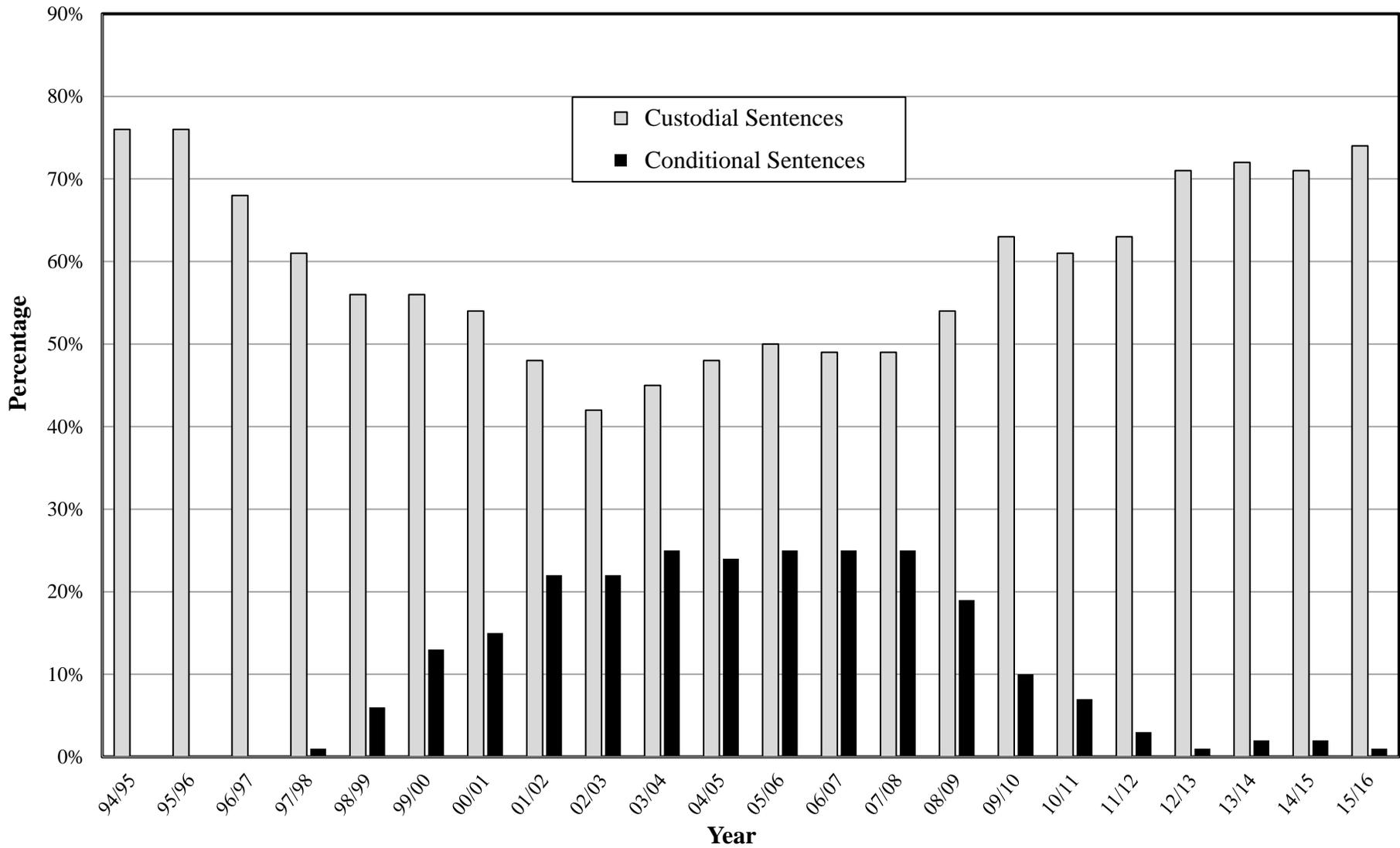
**Chart I: Selected Sanctions for Impaired Driving Causing Bodily Harm:
Canada, 1994/95-2015/16**

Year	Persons Convicted	Sentence Type*									
		Custody		Conditional Sentence		Probation		Fine		Other	
		No.	%	No.	%	No.	%	No.	%	No.	%
1994/95	316	240	76%	0	0%	158	50%	69	22%	96	30%
1995/96	379	287	76%	0	0%	218	58%	83	22%	124	33%
1996/97	392	266	68%	0	0%	238	61%	111	28%	101	26%
1997/98	378	232	61%	4	1%	202	53%	101	27%	97	26%
1998/99	340	191	56%	21	6%	187	55%	81	24%	228	67%
1999/00	333	187	56%	43	13%	179	54%	74	22%	242	73%
2000/01	346	187	54%	52	15%	173	50%	85	25%	253	73%
2001/02	385	185	48%	83	22%	208	54%	64	17%	356	92%
2002/03	368	153	42%	81	22%	184	50%	94	26%	330	90%
2003/04	356	161	45%	90	25%	183	51%	89	25%	319	90%
2004/05	313	151	48%	74	24%	155	50%	78	25%	258	82%
2005/06	333	168	50%	84	25%	168	50%	53	16%	197	59%
2006/07	303	148	49%	77	25%	147	49%	50	17%	173	57%
2007/08	342	167	49%	85	25%	180	53%	54	16%	210	61%
2008/09	363	197	54%	68	19%	179	49%	53	15%	215	59%
2009/10	363	228	63%	36	10%	180	50%	62	17%	247	68%
2010/11	321	197	61%	22	7%	186	58%	58	18%	240	75%
2011/12	289	181	63%	9	3%	149	52%	57	20%	204	71%
2012/13	283	200	71%	4	1%	151	53%	49	17%	177	63%
2013/14	246	178	72%	4	2%	151	61%	41	17%	152	62%
2014/15	234	168	72%	3	1%	137	59%	44	19%	155	66%
2015/16	220**	162	74%	2	1%	135	61%	34	15%	158	72%

* 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 Bodily Harm Convictions Resulting in Custodial and Conditional Sentences: Canada, 1994/95-2015/16



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

Year	Persons Convicted^{2,3}	Custodial Sentences⁶	Mean Length⁷ [Days]**
1994/95	316	240	188
1995/96	379	287	181
1996/97	392	266	186
1997/98	378	232	182
1998/99	340	191	232
1999/00	333	187	233
2000/01	346	187	260
2001/02	385	185	259
2002/03	368	153	286
2003/04	356	161	266
2004/05	313	151	329
2005/06	333	168	333
2006/07	303	148	304
2007/08	342	167	319
2008/09	363	197	323
2009/10	363	228	290
2010/11	321	197	245
2011/12	289	181	281
2012/13	283	200	243
2013/14	246	178	235
2014/15	234	168	215
2015/16***	220	162	222

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

** The Chart includes both adults and youth. It should be noted that the small number of custodial sentences imposed on youth 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 Bodily Harm: Canada, 1995/95-2015/16**

