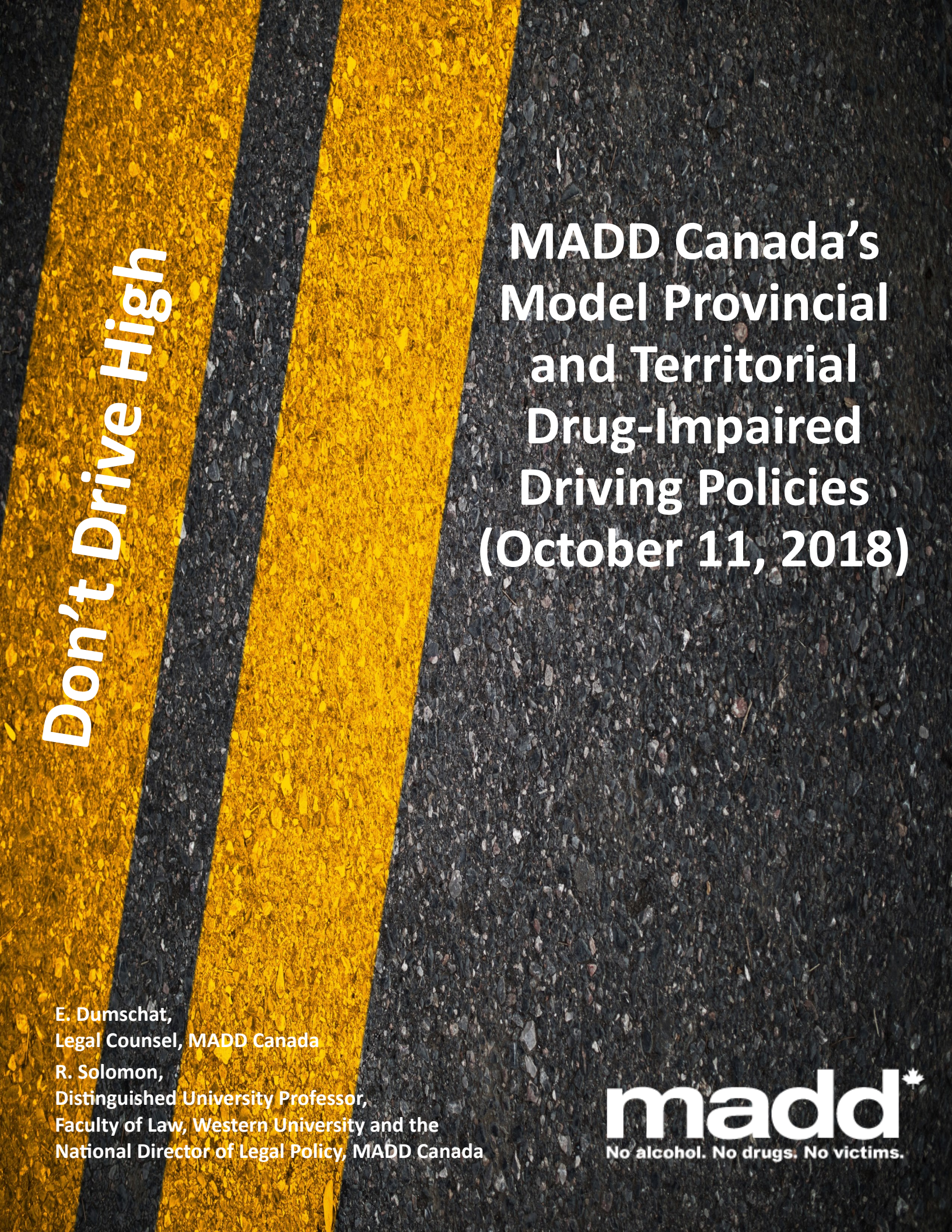

MADD Canada's Model Provincial and Territorial Drug-Impaired Driving Policies (October 11, 2018)

E. Dumschat,
Legal Counsel, MADD Canada
R. Solomon,
Distinguished University Professor,
Faculty of Law, Western University and the
National Director of Legal Policy, MADD Canada

madd
No alcohol. No drugs. No victims.

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*This report has been generously supported by the **Alexa Middelaer Memorial Fund**, created in honour of 4 ½ year old Alexa Middelaer. Alexa and her aunt were standing outside a pasture in May 2008, feeding carrots to a horse which Alexa regularly visited, when they were hit by an impaired driver. Alexa was killed and her aunt suffered life-threatening injuries. In the years since, Alexa's family have dedicated themselves to raising awareness and preventing impaired driving. Those efforts include: Alexa's Team, which recognizes police officers for their efforts to remove impaired drivers from the roads; and Alexa's Bus, the development of customized buses with specially-designed interiors that contain all the space and equipment required to collect evidence and process impaired drivers on site. For more information on Alexa's story and the incredible advocacy, awareness and prevention efforts being conducted in her memory, please visit: http://www.tsf-bcaa.com/5.html .*

MADD Canada's Model Provincial and Territorial Drug-Impaired Driving Policies

Introduction

The federal government's constitutional authority over criminal law and procedure[1] provides the legislative basis for the *Criminal Code* impaired driving provisions.[2] In turn, the provinces and territories[3] have constitutional authority over the administration of justice, highways, vehicles, licences, and the alcohol and hospitality industries within their boundaries.[4] Given their concurrent legal authority, both levels of government can enact effective measures to minimize impaired driving. Consequently, MADD Canada has undertaken one major policy initiative focused on federal law and a second initiative focused on provincial law. The goal of both initiatives is the same, namely to identify, and to support the federal and provincial governments in enacting, evidence-based measures that will minimize impaired driving.

This study of provincial drug-impaired driving is part of a broader MADD Canada initiative which is generally referred to as *The Rating the Provinces and Territories Project*. Research began in 1998, and the first set of comprehensive recommendations and reports were released in 2000. Subsequent comprehensive reports were published every three years, and progress reports were released in many of the intervening years. MADD Canada's recommendations were based on exhaustive reviews of the international traffic safety research[5] and the requirements of Canadian constitutional law, including the *Canadian Charter of Rights and Freedoms* (the *Charter*).[6] The reports highlight legislative measures which warrant priority consideration.

MADD Canada has worked directly with the provinces and territories during the last 20 years to encourage them to implement proven impaired driving countermeasures. Although *The Rating the Provinces and Territories Project* has addressed some drug-impaired driving issues, the focus to date has been on drinking and driving. As the following summary of MADD Canada's provincial and territorial legislative priorities illustrate, there is considerable overlap in the recommended drug and alcohol-

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1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(27) [*Constitution Act, 1867*].

2 R.S.C. 1985, c. C-46, ss. 251-260. Note that all references to the *Criminal Code* in this document are current as of the date of publication and do not take into account the renumbering of the sections that will take effect in December, 2018.

3 For ease of reference, the word province will be used to refer to both the provinces and territories unless otherwise indicated.

4 *Constitution Act, 1867, supra* note 1, s. 92(13)-(16).

5 See for example E. Chamberlain & R. Solomon, *Model Provincial and Territorial Impaired Driving Policies* (Oakville, ON: MADD Canada, 2009).

6 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

impaired driving countermeasures.

1. A comprehensive graduated licensing program ("GLP") lasting at least three years for all new drivers, which includes: express police powers to enforce it; passenger, nighttime and highway restrictions; a ban on using any electronic device; and mandatory roadside administrative licence suspensions (ALSs) and vehicle impoundments for breaches of the program conditions.
2. A .00% blood-alcohol concentration (BAC) limit for all drivers under 22 and all drivers with less than five years of driving experience; express police powers to enforce it; and mandatory roadside ALSs and vehicle impoundments for breaches.
3. A prohibition on being positive for cannabis and any non-medical drugs for all drivers under 22 and all drivers with less than five years of driving experience. The legislation should include express police powers to enforce the prohibition and mandatory roadside ALSs and vehicle impoundments for breaches. This drug-impaired driving prohibition should parallel the .00% BAC limit that most provinces have for drivers who are under 22 and drivers with less than five years of driving experience.
4. A seven-day .05% BAC ALS and vehicle impoundment program, which includes a $150-$300 licence reinstatement fee and the recording of the suspension on the driver's record. Drivers with a second or subsequent .05% infringement within five years should be subject to 30 and 60-day ALSs and vehicle impoundments, respectively, and remedial programs.
5. A parallel ALS and vehicle impoundment program for: drivers whose ability to drive, based on an oral fluid test, standardized field sobriety test (SFST) or drug recognition evaluation (DRE), is reasonably believed to be impaired by drugs or a combination of drugs and alcohol; and drivers who refuse to submit to a breath test, SFST, DRE, or other lawfully demanded test.
6. A mandatory alcohol interlock program for all drivers convicted of an alcohol-related federal impaired driving offence, which includes: reduced provincial and territorial suspensions to encourage participation; mandatory 7, 30 and 60-day ALSs and vehicle impoundments, and 1, 2 and 3-year extensions of the alcohol interlock order for first, second and subsequent violations of the program conditions; and reliance on the interlock data log readings and other behavioural criteria in relicensing.
7. Administrative vehicle impoundments for uninsured, unlicensed, suspended, prohibited, and disqualified drivers. Mandatory administrative vehicle forfeiture for drivers with three or more federal impaired driving or other *Criminal Code* traffic convictions within 10 years.
8. Mandatory remedial programs for all federal impaired driving offenders, and for drivers with a repeat short-term or 90-day, impairment-related ALS within 5 years.

A separate analysis of the provincial drug-related driving policies is timely. There have been sharp increases in the rates of both drug use and drug-impaired driving, particularly in regard to 15-24 year old cannabis users. Amendments to the *Criminal Code* have created new drug-impaired driving offences[7] and

[7] *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments*

broadened related police enforcement powers.[8] However, it is the cannabis legalization provisions in Bill C-45[9] that have most hastened the need for an in-depth examination of best practices related to preventing drug-impaired driving. These best practices often mirror those associated with alcohol-impaired driving. However, as will be explained below, drug-impaired driving poses several unique challenges. Put simply, a one-to-one adoption of the alcohol-impaired driving policies will not work in every circumstance.

Although this study addresses drug-impaired driving in general, the great majority of the research evidence and analysis focuses on cannabis. First, there is far more information on the patterns of cannabis use and driving than on the patterns of other drug use and driving. Second, 15-24 year olds, a consitutency that is already dramatically overrepresented in crash deaths, has the highest self-reported rates of driving after cannabis use. Third, cannabis is the most commonly-found drug among fatally-injured, drug-positive drivers. Finally, cannabis use and driving after use has increased sharply in recent years and this trend will likely continue given the legalization of the recreational cannabis market.

While the model drug-impaired driving policies are similar to the model alcohol-impaired driving policies, the context in which the drug policies arise is not. Consequently, considerable background information is provided before turning to the model provincial drug-related driving policies. Part I reviews the current patterns of cannabis consumption and driving after cannabis use in Canada. Part II discusses the current federal drug-impaired driving legislation and the related regulatory provisions. In our view, this background information highlights the critically important role that the provinces can play in minimizing driving after drug use. Part III outlines MADD Canada's model drug-related driving policies.

Part I: Drug Consumption and Driving After Drug Use in Canada

(a) Patterns of Drug Use in Canada

For the reasons outlined above, our focus is on cannabis. A 2012 survey indicated that more than 3.4 million Canadians aged 15 years or older used cannabis at least once in the past year and that 41% were weekly or daily users. While 15-24 year olds constituted 13% of the population, they accounted for 38% of the past-year users,[10] and had among the highest rates of weekly and daily use.[11] Statistics Canada reported

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to other Acts, 1st Sess., 42nd Parl., 2017, cl. 1 [Bill C-46].

8 *Ibid*, cl. 3(3)-(5).

9 *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, 1st Sess., 42nd Parl., 2017 [Bill C-45].

10 The survey did not include residents of the territories. M. Rotermann & K. Langlois, "Prevalence and correlates of marijuana use in Canada, 2012" (2015) 26(4) Health Reports 10 at 11-12 [Rotermann]; and Statistics Canada, *CANSIM Table 17-10-0005-01: Population estimates on July 1st, by age and sex* (Ottawa: Statistics Canada, 2018).

11 Rotermann, *ibid* at 12.

that the number of past-year cannabis users 15 years of age or older had risen to 4.9 million by 2015, which was a 44% increase from 2012.[12]

Both the rate of cannabis use and the percentage of frequent users appear to have increased since 2015. In a 2018 national survey, approximately 4.2 million (14%) Canadians aged 15 years of age and older reported using cannabis in the past three months.[13] Given this three-month timeframe, it is reasonable to assume that the number of past-year cannabis users in 2018 will likely exceed that in 2015. Moreover, 57% of the 2018 respondents reported being weekly (17%) or daily (40%) users.[14] These increases in occasional and frequent users are likely due to various factors, including the proliferation of illegal storefront "medical marijuana" shops in Vancouver, Toronto and other major cities, increased public acceptance of recreational cannabis use, and the ongoing publicity about its legalization.

The number of medically authorized users increased even more sharply than the number of illegal recreational users, rising from less than 29,000 at the beginning of 2013 to 130,000 by the end of 2016.[15] This number more than doubled in 2017.[16] If this trend continues, the number of medically authorized users will exceed 500,000 by the end of 2019. However, it is difficult to predict the impact that legalizing recreational cannabis use and the decreasing price of black market cannabis will have on future demand for medical authorizations.[17]

Several other factors warrant consideration regarding cannabis use. First, the black market price of cannabis has been falling since 1990,[18] with a 25% decrease in the average price per gram from 2012 ($9.09) to 2018 ($6.77). As of the second quarter of 2018, the average per gram price was only $4.99 for purchases of 28 grams or more.[19] A Public Safety Canada study reported that every 10% decrease in the

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12 Statistics Canada, "Study: Experimental Estimates of Cannabis Consumption in Canada, 1960 to 2015" The Daily (18 December 2017) 1, online: <http://www.statcan.gc.ca/daily-quotidien/171218/dq171218b-eng.pdf>.

13 Statistics Canada, *National Cannabis Survey, First Quarter 2018* (Ottawa: Statistics Canada, 2018), online: <https://www.statcan.gc.ca/daily-quotidien/180418/cg-b001-eng.htm> [*2018 Survey*].

14 *Ibid.* This compares to 41% of past-year users in the 2012 survey who reported using cannabis weekly or daily.

15 Health Canada, "ARCHIVED – Marihuana Medical Access Program (MMAR) Statistics 2013" (22 August 2014) at 2, online: <http://www.hc-sc.gc.ca/dhp-mps/marihuana/stat/index-eng.php>; and Canadian Centre on Substance Abuse (CCSA), *Cannabis (Canadian Drug Summary)* (Ottawa: CCSA, 2016) at 3, online: <http://www.ccsa.ca/Resource%20Library/CCSA-Canadian-Drug-Summary-Cannabis-2016-.en.pdf>.

16 Government of Canada, *Market Data*, at 2, online: <https://www.canada.ca/en/health-canada/services/drugs-health-products/medical-use-marijuana/licensed-producers/market-data.html>.

17 As outlined below, there have been substantial decreases in black market cannabis prices. As of 2017, the average price of medical cannabis was $2.00 per gram higher than the black market price. Public Safety Canada, *Research Summary: Price of Cannabis in Canada* (Ottawa: Public Safety Canada, 2017) at 2, online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2017-s005/2017-s005-en.pdf> [*Price of Cannabis*].

18 Statistics Canada, "Cannabis Economic Account, 1961 to 2017", The Daily (25 January 2018) at 1, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/180125/dq180125c-eng.htm>. While the price per gram fell an average of 1.7% per year, the consumer price index rose an average of 1.9%.

19 Statistics Canada, "StatsCannabis data availability: Crowdsourced cannabis prices, second quarter 2018", The Daily (6 July 2018) at 1, online: <https://www150.statcan.gc.ca/n1/daily-quotidien/180706/dq180706c-eng.

price of cannabis could cause a 4% to 6% increase in the amount of cannabis consumed.[20] Second, the THC content of dried cannabis has increased from an average of 3% in the 1980s to approximately 15% currently, with some strains containing up to 30% THC. Some of the cannabis derivatives and concentrates (*e.g.* hash oil, "shatter," "budder," and "wax") may contain up to 90% THC.[21]

Third, Canada already has among the world's highest rates of cannabis use among school-aged children. For example, a 2013 report examining 29 "rich" countries found that Canadian 11, 13 and 15-year olds had the highest rate of using cannabis in the past 12 months (28%).[22] Fourth, research indicates that the mean age of cannabis initiation among Canadian youth is low, roughly corresponding with the age at which many young people begin to drive.[23] These findings are concerning because motor vehicle crashes have long been the leading cause of death among 15-24 year old Canadians.[24] Moreover, the younger individuals are when they begin using cannabis, the more likely it is that they will develop cannabis dependence[25] and the more likely it is that they will report driving under the influence of cannabis.[26] These

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htm>.

20 *Price of Cannabis*, *supra* note 17.

21 Government of Canada, *About Cannabis*, online: <https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/about.html>.

22 United Nations Children's Fund (UNICEF) Office of Research, *Child Well-Being in Rich Countries: A Comparative Overview* (Florence: UNICEF, 2013) at 25, Figure 4.2d Cannabis, online: <https://www.unicef-irc.org/publications/pdf/rc11_eng.pdf>.

In a 2009/10 survey of 37 countries, Canada had the highest percentage of cannabis use in the past 30 days among 15-year old males and females. World Health Organization (WHO), *Social Determinants of Health and Well-Being Among Young People* (Copenhagen: WHO, 2012) at 167.

23 A 2015 national survey reported that the mean age of initiation among Canadian 16-19 year olds was 15.4 and among 20-24 year olds was 16.5. Government of Canada, *Canadian Tobacco, Alcohol and Drugs (CTADS): 2015, supplementary tables*, at "Table 11. Illicit drug use (past 12-month and lifetime), by age group and sex, 2015."

Similarly, a 2014/15 national survey reported the average age of initiation among grade 7-12 students was 14.2 years. Government of Canada, *Canadian Student Tobacco, Alcohol and Drugs Survey: detailed tables for 2014-15*, at "Table 13. Past twelve month use and mean age at first use of alcohol and cannabis, by grouped grades, grades 7-12, Canada, 2014-15," online: <https://www.canada .ca /en/health-canada/services/canadian-student-tobacco-alcohol-drugs-survey/2014-2015-supplementary-tables.html>.

24 Public Health Agency of Canada, *Injury in Review, 2012 Edition: Spotlight on Road and Transport Safety* (Ottawa: Public Health Agency of Canada, 2012) at 10.

25 The estimated lifetime rate of cannabis dependence among all users is 9%. This figure increases to more than 16% for those who begin using in adolescence. W. Hall & L. Degenhardt, "The Adverse Health Effects of Chronic Cannabis Use" (2013) 6 Drug Testing and Analysis 39 at 40.

26 The authors of one study concluded that, compared to those who began using cannabis at the age of 21 or older, those who started using cannabis before the age of 14 were four times as likely to have a history of cannabis dependence and three times as likely to report having driven under the influence of cannabis. Y. Strat, C. Dubertret & B. Foll, "Impact of age at onset of cannabis use on cannabis dependence and driving under the influence in the United States" (2015) 76 Accident Analysis & Prevention 1.

factors do not bode well for future patterns of cannabis use or cannabis-impaired driving.

(b) Driving After Drug Use

Recent Canadian survey data indicate that the reported rates of driving after drug use have been increasing particularly in regard to cannabis,[27] while the comparable rates for alcohol have been decreasing. In a 2017 survey, almost 40% of those who used cannabis in the past 12 months reported driving within two hours of use. Among this group, 46% had done so from 1 to 10 times in the past 12 months and 29% had done so more than 10 times. In addition, 15% reported driving within two hours of using cannabis in combination with alcohol. Seventy-nine percent of those who had used cannabis in the past 12 months reported riding in a vehicle driven by someone who had used cannabis within 2 hours. The comparable figure for those who had not used cannabis in the past 12 months was 27%.[28]

Recent roadside screening studies indicate that the percentage of drivers positive for drugs exceeds the percentage positive for alcohol, particularly among young drivers.[29] A 2012 British Columbia study reported that, while 6.5% of randomly-screened drivers were positive for alcohol, 7.4% were positive for drugs. Cannabis accounted for 43.6% of the drugs detected. The mean THC concentration in the 2012 samples (almost 30 ngs per ml of oral fluid) and the percentage of samples containing more than 40 ngs per ml (61.5%) were substantially higher than in a similar 2010 British Columbia roadside screening study.[30]

In a 2017 Ontario roadside survey, 4.4% of the drivers were positive for alcohol and 10.5% were positive for drugs.[31] Among the drug-positive drivers, 82% were positive for cannabis and 17.8% were

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[27] The percentage of drivers who acknowledged driving within two hours of having used cannabis in the past 12 months increased by 73% from 2002 to 2015 (1.5% to 2.6%). R. Robertson *et al*., "Prevalence and trends of drugged driving in Canada" (2017) 99 Accident Analysis & Prevention 236 at 238.

A 2012 national survey indicated that 18-19 year olds had the highest reported rate of driving after using cannabis, followed by 15-17 year olds. While 6% to 8% of youth reported driving after cannabis use, 15.8% reported being a passenger of a driver who had recently used cannabis. D. Beirness & A. Porath, *Clearing the Smoke on Cannabis: Cannabis Use and Driving – An Update* (Ottawa: CCSA, 2017) at 2 and 3 [Beirness & Porath].

[28] Government of Canada, *Canadian Cannabis Survey 2017 – Summary* (Ottawa: Government of Canada, 2017), online: <https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/canadian-cannabis-survey-2017-summary.html>.

[29] For example in a 2016 Manitoba roadside survey, 2.4% of the drivers were positive for alcohol, and 10.1% were positive for drugs. Cannabis was the most commonly-found drug (53%), followed by cocaine (31%). Manitoba Public Insurance, News Release, "Drug and Alcohol Roadside Survey confirms drug use by drivers" (15 March 2017) online: <https://www.mpi.mb.ca/en/Newsroom/NewsReleases/Pages/nr2017 march15.aspx>.

See also E. Beasley & D. Beirness, *Alcohol and Drug Use Among Drivers Following the Introduction of Immediate Roadside Prohibitions in British Columbia: Findings from the 2012 Roadside Survey* (Victoria: Office of the Superintendent of Motor Vehicles, 2014) at 11 and 23 [Beasley, 2014]; and D. Beirness, E. Beasley & K. McClafferty, *Alcohol and Drug Use Among Drivers in Ontario: Findings from the 2014 Roadside Survey* (Toronto: Ontario Ministry of Transportation, 2015).

[30] Beasley, 2014, *ibid*. The mean THC level in the 2010 samples was 23.2 ngs per mg and only 37.7% contained over 40 ngs per ml.

[31] D. Beirness & E. Beasley, *Alcohol and Drug Use by Drivers in Ontario: Findings from the 2017 Roadside*

positive for stimulants. Drivers aged 19-24 years were the most likely to test positive for drugs (19.2%), accounting for almost a third of all drug-positive drivers. One-quarter of the drivers who had been drinking were also positive for drugs. [32]

It is important to note that simply because a driver tests positive for cannabis does not mean that his or her ability to drive is impaired. However, the mean THC concentration among the cannabis-positive drivers in the 2010 and 2012 British Columbia roadside screening studies were well in excess of the levels associated with significant impairment of driving skills and elevated risks of crash.[33] As the authors of the 2010 British Columbia study stated, "[o]verall, the THC concentrations reported indicate that the vast majority of drivers who have used cannabis have consumed sufficient cannabis to impair their ability to operate a vehicle safely."[34]

The Canadian toxicology studies on fatally-injured drivers reinforce the previously described patterns of driving after drug use. The percentage of fatally-injured drivers testing positive for drugs has been increasing, while the percentage testing positive for alcohol has been decreasing.[35] In 2014, 55.4% of fatally-injured drivers were positive for drugs and/or alcohol. Thirteen percent were positive for alcohol alone, 26.9% were positive for drugs alone, and 15.5% were positive for both alcohol and drugs.[36]

The number of cannabis-positive, fatally-injured drivers increased more than 230% from 2000 to 2014.[37] In 2014, 19% of all fatally-injured drivers and 45% of the drug-positive, fatally-injured drivers were positive for cannabis. It was the most commonly-found drug among fatally-injured drivers in Canada as a whole and in six provinces which together accounted for over 90% of the population.[38]

If the American experience is any example, the legalization of the Canadian recreational cannabis market will likely significantly increase rates of driving after cannabis use. In Colorado, the percentage of

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Survey (Ottawa: Beirness & Associates, Inc., 2018) at iv.

[32] *Ibid* at 9.

[33] J. Wigmore, *Wigmore on Cannabis: The Forensic Toxicology of Marijuana for Lawyers and Other Medicolegal Professionals* (Toronto: Irwin Law Inc., 2018) at 106-93. The author provides a comprehensive review of the research literature on the effects of cannabinoids on driving ability.

[34] D. Beirness & E. Beasley, *Alcohol and Drug Use Among Drivers: British Columbia Roadside Survey 2010* (Ottawa: CCSA, 2011) at 13.

[35] More specifically, the percentage of fatally-injured drivers testing positive for drugs increased from 34% in 2000 to 42% in 2014, while the percentage testing positive for alcohol decreased from 35% to 29%. Note that these data are limited to drivers dying within 30 days of a collision on a public roadway involving at least one principal highway vehicle and do not include British Columbia. R. Solomon, C. Ellis & C. Zheng, *Cannabis and Other Drugs Among Drivers of Highway Vehicles Dying Within 30 Days of a Crash on a Public Road: Canada, 2014* (Oakville, ON: MADD Canada, 2018) at 1 [Solomon *et al*.].

[36] S. Brown, W. Vanlaar & R. Robertson, *The Alcohol and Drug-Crash Problem in Canada: 2014 Report* (Ottawa: Canadian Council of Motor Transport Administrators (CCMTA), 2017) at 47.

[37] Traffic Injury Research Foundation (TIRF) *Marijuana Use Among Drivers in Canada, 2000-2014* (Ottawa: TIRF, 2017) at 1.

[38] Solomon *et al*., *supra* note 35 at 2 and 3.

cannabis-positive drivers in fatal crashes, which had been falling in the state, increased almost 70% (5.9% to 10%) in the two years following the large-scale commercialization of lawful medical cannabis. In contrast, this percentage remained virtually unchanged in the 34 non-legalization states that were used as a comparator group.[39] Another study found that fatalities involving THC-positive drivers increased 44% in 2014, the year after Colorado legalized recreational cannabis use.[40]

Similarly, in Washington State, the number and percentage of THC-positive drivers involved in fatal crashes more than doubled in the year after recreational cannabis use was legalized.[41] A 2018 roadside study reported that the percentage of daytime drivers who "may be under the influence of marijuana" approximately doubled to nearly one in five.[42]

(c) Summary

The new cannabis-related driving provisions must be assessed in light of the recent patterns of use and rates of driving after cannabis use. The number of cannabis users and the incidence of driving after use have increased sharply. While the THC content of various cannabis products has been increasing, prices in the illicit market have been falling. Moreover, young people, a constituency that is already overrepresented in total and impairment-related crash deaths, generally have among the highest rates of past year, weekly and daily cannabis use, and the highest self-reported rates of driving after cannabis use.

All things being equal, Bill C-45's broad legalization measures will likely substantially increase cannabis use, driving after use and related crashes. However, the provinces and territories have enacted legislation which, to varying degrees, more strictly regulates the recreational cannabis market than Bill C-45. For example, all but two of the provinces and territories have set a lawful purchase age of 19 and all the jurisdictions prohibit minors from possessing any amount of cannabis.[43]

While some of the anticipated increases in cannabis use and cannabis-impaired driving may have occurred in the lead up to legalization, further increases are likely. In a 2018 national cannabis survey, 24%

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39 S. Salomonsen-Sautel *et al.*, "Trends in fatal motor vehicle crashes before and after marijuana commercialization in Colorado" (2014) 140 Drug and Alcohol Dependence 137 at 139-40. The authors also reported that there were no significant changes in the percentage of alcohol-impaired drivers in fatal crashes in either Colorado or the comparator states. *Ibid* at 140.

40 J. Reed, *Marijuana Legalization in Colorado: Early Findings* (Denver: Colorado Department of Public Safety, 2016) at 6.

41 B. Tefft, L. Arnold & J. Grabowski, *Prevalence of Marijuana Involvement in Fatal Crashes: Washington, 2010-2014* (Washington, DC: AAA Foundation for Traffic Safety, 2016) at 1.

42 D. Grondel, S. Hoff & D. Doane, *Marijuana Use, Alcohol Use, and Driving in Washington State: Emerging Issues With Poly-Drug Use on Washington Roadways* (Olympia, WA: Washington Traffic Safety Commission, 2018) at 1. The authors also reported sharp increases in the percentage of fatally-injured drivers testing positive for alcohol and one or more other drugs, most commonly THC. *Ibid*. This is particularly troubling, given the enhanced impairing effects of THC and alcohol. L. Downey *et al.*, "The effects of cannabis and alcohol on simulated driving: Influences of dose and experience" (2012) 50 Accident Analysis & Prevention 879.

43 R. Solomon, K. Mahdi & A. Sohrevardi, *The Provincial and Territorial Regulation of Recreational Cannabis* (Oakville, ON: MADD Canada, 2018).

of those who had used cannabis in the past three months stated that they would likely increase consumption after legalization. Moreover, 6% of those who had not used cannabis in the past three months stated that they would likely try or increase their consumption after legalization.[44]

Part II: Drug-Impaired Driving Law and Enforcement

(a) Canada's Drug-Impaired Driving Law Pre-2008

As in the case of drinking and driving, the provincial and territorial drug-impaired driving countermeasures need to dovetail with the related *Criminal Code* offences and enforcement powers. This part briefly summarizes the development of the current federal drug-impaired driving law and the pending *Criminal Code* amendments.

Although drug-impaired driving was first prohibited in 1925,[45] the police were not given any specific authority to gather related evidence. There are no data on the number of drug-impaired driving charges before 2008, because they were not separately recorded. Nevertheless, apparently very few charges were laid, even after the sharp rise in recreational drug use in the mid-1960s. Prior to the 2008 amendments, prosecution of drug-impaired driving cases was exceedingly onerous and the outcome was uncertain. The Standing Committee on Justice and Human Rights acknowledged this problem in 1999, when it lamented the lack of enforcement mechanisms in regard to suspected drug-impaired drivers.[46]

The prosecution of drug-impaired driving was typically based on an officer's testimony about the accused's driving and other behaviour.[47] However, even when a driver had consumed drugs and was obviously impaired, the Crown usually needed to introduce expert evidence to prove that the drug was the cause of the impairment.[48] Indeed, a 2003 Department of Justice report indicated that prosecuting a drug-

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44 *2018 Survey*, *supra* note 13. The impact of legalization will vary across Canada. Legalization may not make a huge difference in parts of Canada where illicit cannabis storefronts flourished openly, rates of use were already high and cannabis prices were relatively low. However, this is unlikely to be the case in other parts of the country where there were no cannabis storefronts, rates of use were low, cannabis prices were high, and the federal cannabis prohibitions were strictly enforced.

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

46 Standing Committee on Justice and Human Rights, *Toward Eliminating Impaired Driving* (J. Maloney, Chair) (Ottawa: Publications Service, 1999) at 24-26. The Committee did not feel it had sufficient information at that time to recommend specific drug-impaired driving reforms.

47 See *R. v. Rosskoph* (1995), 11 M.V.R. (3d) 62 (Man. Prov. Ct.), where the accused was convicted based on evidence of speeding, erratic driving, flushed face, lack of balance and co-ordination, slurred speech, belligerence, and his own admission that he had been chewing Tylenol with codeine all day.

48 As stated in *Rosskoph*, *ibid* at para. 16, "the preferred practice is for the Crown to call expert medical or scientific evidence regarding the effects of drugs.... [T]he court cannot take judicial notice of the effects of various drugs." See also *R. v. Hollahan*, [1970] 1 C.C.C. 373 (N.S. Co. Ct.) at paras. 16-17; *R. v. Kurgan* (1987), 2 M.V.R. (2d) 79 (Ont. Dist. Ct.) at paras. 10-14; *R. v. Beaulne* (1993), 46 M.V.R. (2d) 135 (Ont. Prov. Div.) at para. 9; and *R.*

impaired driving case based on the observations of a non-expert police officer (such as one who would make an arrest on routine patrol) was "nearly impossible."[49]

(b) The 2008 Amendments

In response to the growing prevalence of driving after drug use, the federal government amended the *Criminal Code* in 2008 to include two new drug-impaired driving enforcement measures. Section 254(2)(a) authorizes the police to demand that a driver participate in physical co-ordination testing (*i.e.* SFST)[50] if they have reason to suspect that he or she has any alcohol or drugs in his or her body. This threshold test is based on the same grounds as the demand for breath tests on approved screening devices (ASDs). As with ASD tests, the results of SFST can only be used to screen drivers and provide grounds for demanding evidentiary breath tests or a DRE.[51]

The 2008 amendment also authorized the police to demand a DRE from a driver whom they have reasonable grounds to believe has driven within the previous 3 hours while impaired by a drug or a combination of drugs and alcohol.[52] The DRE is designed to detect seven categories of drugs[53] and is made up of two components. The first involves various physiological, balance and divided attention tests, and the evaluating officer's written opinion on whether the suspect's driving ability was impaired by a drug and the category of drugs involved.[54] If the officer concludes that the suspect's driving ability was impaired, the officer may demand that the suspect provide a blood, urine or oral fluid sample. The second component is the analysis of the suspect's sample for one or more of the seven categories of drugs.[55] Charges will likely only proceed if the sample tests positive for the presence of the drug category identified in the evaluating officer's report.

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v. Caldwell, [2004] OJ No. 4769 (O.C.J.) (QL), aff'd. [2006] OJ No. 3280 (S.C.J.) (QL).

49 *Drug-Impaired Driving: Consultation Document* (Ottawa: Department of Justice Canada, 2003) at 4.

50 See *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, SOR/2008-196, s. 2 [*Impaired Operation Regulations*]. SFST is comprised of three components: the horizontal gaze nystagmus, walk-and-turn, and one-leg stand tests. See generally J. Stuster, *Development of a Standardized Field Sobriety Test (SFST) Training Management System* (Washington, DC: National Highway Traffic Safety Administration (NHTSA), 2001); and C. Stough *et al*., *An evaluation of the Standardised Field Sobriety Tests for the detection of impairment associated with cannabis with and without alcohol* (Payneham, South Australia: National Drug Law Enforcement Research Fund, 2006).

51 In the absence of justification, the Supreme Court of Canada has held that SFST entails a "detention," and thereby triggers the right to counsel under section 10(b) of the *Charter*. Since counsel is not typically provided before a SFST is undertaken, it can only be used as a screening test to determine if further evidentiary testing is warranted and not as evidence at trial. See *R. v. Orbanski; R. v. Elias*, [2005] 2 S.C.R. 3.

52 *Ibid*, s. 254(3.1).

53 The seven categories of drugs are central nervous system depressants, inhalants, dissociative anesthetics, cannabis, central nervous system stimulants, hallucinogens, and narcotic analgesics.

54 Most of these steps are listed, but not described, in *Impaired Operation Regulations*, *supra* note 50, s. 3.

55 *Criminal Code*, *supra* note 2, s. 254(3.4).

The results of the DRE are admissible in evidence in a drug-impaired driving criminal trial if the DRE was conducted in accordance with the stringent requirements of the regulations and the driver was afforded the right to counsel. The failure or refusal to take a SFST or DRE without a reasonable excuse constitutes a federal offence, which carries the same penalties as driving while impaired by a drug.[56]

While the SFST and DRE provisions finally gave the police some ability to collect evidence of drug-impaired driving, they have only modestly increased the law's deterrent impact. This is due to the inherent challenges of assessing drug impairment, and the complexity of the SFST and DRE protocols. The SFST and DRE process is exceedingly technical and takes about two hours. The DRE itself requires the evaluating officer to collect more than 100 separate pieces of information.[57]

A DRE can only be conducted by an "evaluating" officer and to qualify for this designation, an officer must be accredited and certified by the International Association of Chiefs of Police.[58] Training costs per evaluating officer are high ($17,000), as are the costs of maintaining this certification.[59] Presumably, as a result of these costs, the number of evaluating officers in Canada has been relatively low, and their distribution across the country and between urban and rural areas has been uneven.[60] Accordingly, ensuring that an evaluating officer is available within the three-hour window prescribed by the *Criminal Code* has been challenging.

Defence counsel have routinely challenged the basis of the officer's demand for a SFST, and the accuracy of the SFST and DRE process in determining whether an individual's ability to drive was impaired by a drug. These evidentiary problems have not gone unnoticed by the Canadian courts, which have remained skeptical about the link between the presence of drugs in a driver's system and the actual impairment of driving ability.[61]

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56 *Ibid*, s. 254(5).

57 For detailed discussion of the SFST and DRE process, see R. Solomon, E. Chamberlain & A. Kus, "Drug-Impaired Driving in Canada: Moving Beyond American Enforcement Models" (2013) 60 Criminal Law Quarterly 238 at 247-56 [Moving Beyond].

58 *Impaired Operation Regulations*, *supra* note 50, s. 1.

59 Email communication from D. Beirness, Senior Research and Policy Analyst, CCSA, to A. Murie, CEO, MADD Canada (24 September 2012).

60 In 2018, the federal government announced that it would provide $161 million over five years for new law enforcement training on drug-impaired driving, of which $81 million will be available to the provinces and territories. It is doubtful that this sum will be sufficient to offset the shortage of certified evaluation officers. Government of Canada, *Funding and research* (Ottawa: Government of Canada, 2018), online: <https: //www.canada.ca/en/services/policing/police/community-safety-policing/impaired-driving/funding- resear ch.html>.

61 Unlike the *Criminal Code*'s alcohol-impaired driving provisions, the drug-impaired driving provisions contain no presumptions that relate the results of the DRE to the accused's impairment at the time that he or she was driving. *Criminal Code*, *supra* note 2, s. 258(1)(c) and (g). See *R. v. Perillat* (2012), 403 Sask. R. 187 (Prov. Ct.); and *R. v. Jansen*, 2010 ONCJ 74, where the judges questioned how performance on the DRE was relevant to the issue of whether the accused's ability to drive was impaired at the time of driving.

For example, in *R. v. Abbasi-Rad*,[62] the judge expressed doubt about the inferences that could be drawn from the accused's performance on the DRE:

> Beyond [the DRE officer's opinion] though, there was little explanation about how the accused's performance on various DRE tests related to the issue of alleged impairment in the ability to drive. What does it mean if later during a test, one eye converges and the other doesn't? Something? Nothing?
>
> Even with some of the physical motor tests it's not plain how the results relate to impairment at the time of driving. There is no evidence about the relationship, if any, between performance on the one-legged-stand test and the ability to drive. With no baseline as to how the average sober person performs and no baseline as to how this particular accused with his injuries performs sober as opposed to when he's in an impaired state, it's not plain what to make of the results.[63]

The judge noted that the accused's performance on the physical co-ordination tests might have been due to fatigue or injuries he had suffered in a prior accident. While the DRE results in *Abbasi-Rad* were admittedly less compelling than in some other cases, the judge's comments about the need for baseline evidence relative to other sober drivers and the accused's own sober performance suggest a more deep-seated skepticism about the value of the DRE protocols and evaluating officer's expert evidence.[64]

As long as this judicial skepticism persists, the enforcement and prosecution of drug-impaired driving offences will remain a challenging, costly and time-consuming affair.[65] The limitations in the SFST and

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62 2016 ONCJ 542. The judge in the case, Kenkel J, is the author of two books on impaired driving law. *Impaired Driving in Canada*, 4th ed. (Markham: LexisNexis Canada, 2015), and *Impaired Driving in Canada – The Charter Cases*, 3rd ed. (Markham: LexisNexis Canada, 2016).

63 *Abbasi-Rad*, *ibid* at paras. 25-26.

64 There were conflicting decisions on the status of the evaluating officer and the admissibility of the DRE evidence. In one case, the evidence was rejected for failing to meet the minimum standards of reliability. *R. v. Wood*, 2007 ABQB 503 at paras. 82-83. In other cases, the Crown was required to prove that the evaluating officer was an expert before he or she would be permitted to provide opinion evidence on the DRE and on whether the accused's ability to drive was impaired by drugs. *R. v. Steeves*, 2010 NBPC 25, rev'd. on other grounds, 2011 NBCA 88; *R. v. Thomas*, 2012 BCPC 215; and *R. v. MacDonald*, 2012 NSPC 26.

In *R. v. Bingley*, 2017 SCC 12, the Supreme Court resolved these issues, concluding that DRE evidence given by a qualified evaluating officer is admissible at trial without the need for a special hearing to establish their expertise (a so-called "*Mohan voir dire*"). The Supreme Court stated: "By reason of his training and experience, a DRE [an evaluating officer] undoubtedly possesses expertise on determining drug impairment that is outside the experience and knowledge of the trier of fact. He is thus an expert for the purpose of applying the 12-step evaluation and determining whether that evaluation indicates drug impairment. His expertise has been conclusively and irrebuttably established by Parliament."

65 For instance in the successful prosecution in *R. v. MacDonald* (2012), 998 A.P.R. 146 (N.S. Prov. Ct.), the evaluating officer and a forensic toxicologist explained in detail the elements of the DRE protocol, the accused's performance on those elements and the impairing effects of cannabis use on driving ability. The toxicologist also discussed peer-reviewed studies of SFST and DRE at length, and explained why the judge should discount a study which defence counsel had relied on to challenge the DRE results. The trial lasted five days and the judgment was reserved for almost 3½ months. It is simply not practical to undertake such a prolonged and detailed review of the DRE protocol and evidence in every drug-impaired driving case.

DRE process are reflected in the impaired driving charge data. Although recent survey, roadside screening and post-mortem studies indicate that the prevalence of driving after drug use exceeds that for driving after drinking,[66] drug-impaired driving charges accounted for only 3.9% (1,925) of the total impaired driving charges (49,240) in 2016.[67]

Similarly, while an estimated 10.4 million trips were made in 2012 by drivers after using cannabis,[68] only 1,140 drivers were charged that year for any type of drug-impaired driving offence.[69] Assuming that half of these charges involved cannabis, a person could drive after using cannabis once a day for about 50 years before being charged with, let alone convicted of, a drug-impaired driving offence.[70]

The limited effectiveness of the SFST and DRE process prompted the new drug-impaired driving provisions amendments to the *Criminal Code* that came into force in 2018 following the passage of Bill C-46.[71]

(c) Bill C-46 and the Drug-Impaired Driving Amendments

Among other things, the Bill creates new drug-impaired driving offences by prohibiting driving with a stipulated amount of specified drugs in one's blood and authorizes the federal government to establish these new *per se* blood limits.[72] As in the case of the *per se* .08% BAC offence, the new *per se* drug offences do not require any proof that the accused drove erratically, exhibited signs of impairment or performed poorly on a battery of psychophysical tests. Rather, the *per se* drug offences are based solely on the accused having a blood-drug concentration equal to or above the prohibited limit.

The government has proposed three cannabis-related *per se* driving offences. First, having 2 but less than 5 nanograms (ngs) of THC per millilitre (ml) of blood would constitute a summary conviction offence punishable by a maximum fine of $1,000. Second, having 5 or more ngs of THC per ml would constitute a hybrid offence, which would be subject to the same penalties as the alcohol-impaired driving offences.

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66 See Part I(b) and the accompanying notes, above.

67 Statistics Canada, *CANSIM Table 35-10-0177-01: Incident-based crime statistics, by detailed violations* (Ottawa: Statistics Canada, 2018) [*CANSIM Table 35-10-0177-01*].

68 Beirness & Porath, *supra* note 27 at 2.

69 Statistics Canada, *CANSIM Table 35-10-0177-01: Incident-based crime statistics, by detailed violations* (Ottawa: Statistics Canada, 2018).

70 A 2008 survey, which estimated that 15.6 million trips were made per year after using cannabis, would yield a far lower charge rate per cannabis-related driving trip. CCSA, *Drugs and Driving* (Ottawa: CCSA, 2011).

While total impaired-driving convictions are reported on an annual basis, the number of drug versus alcohol-impaired driving convictions are not separately reported. Consequently, the number and percentage of drug-impaired driving charges that result in a conviction cannot be determined. Statistics Canada, *CANSIM Table 35-10-0027-01, Adult criminal courts, number of cases and charges by type of decision* (Ottawa: Statistics Canada, 2017); and Statistics Canada, *CANISM Table 35-10-0038-01, Youth courts, number of cases and charges by type of decision* (Ottawa: Statistics Canada, 2017).

71 Bill C-46, *supra* note 7.

72 *Ibid*, cl. 1.

Third, having 2.5 or more ngs of THC per ml and a BAC equal or above .05% would also be a hybrid offence carrying the same penalties as the alcohol-impaired driving offences.[73]

Police powers to collect evidence of drug-impaired driving would also be expanded. First, the police would be authorized to demand an oral fluid sample from drivers whom they reasonably suspect have any drugs in their body.[74] The Canadian Society of Forensic Science, Drugs and Driving Committee has recommended that the threshold for the oral fluid screening devices should be 25 ngs/ml of THC, 50 ngs/ml of cocaine and 50 ngs/ml of methamphetamines.[75] As with the ASD and SFST, the results of the oral fluid test would not be admissible in evidence, but rather could only be used to screen drivers and provide grounds for demanding a DRE or an evidentiary blood test. Second, the police would be authorized to demand a blood sample from drivers whom they have reasonable grounds to believe have committed a drug-impaired driving offence within the last three hours.[76]

While the new *per se* offences and police powers will strengthen drug-impaired driving enforcement, there are significant limits on their effectiveness, particularly in regard to THC. First, it may be difficult for officers to meet the threshold requirement for demanding an oral fluid sample, namely that they had reasonable grounds to suspect that the driver had drugs in his or her body. As noted earlier, this test proved to be a significant obstacle in drinking and driving cases.[77] A national survey indicated that defence counsel often successfully challenged the basis for the officer's belief that the driver had alcohol in his or her body and thus the legality of the ASD or SFST demand.[78] If the court finds that the officer lacked insufficient grounds for the initial demand, the results of any subsequent evidentiary breath tests are excluded from evidence,[79] which almost always results in the charges being dropped or withdrawn. Officers may have even more difficulty in establishing individualized suspicion of drug presence, because the signs and symptoms of drug use are not as widely recognized.

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73 Health Canada, News Release, "Backgrounder: Changes to Impaired Driving Laws" (13 April 2017), online: <https://www.canada.ca/en/health-canada/news/2017/04/backgrounder_changestoimpaireddrivinglaws.html >.

74 Bill C-46, *supra* note 7, cl. 3(3) and (4).

75 Canadian Society of Forensic Science, Drugs and Driving Committee, "Drug Screening Equipment – Oral Fluid Standards and Evaluation Procedures" (Ottawa: Canadian Society of Forensic Science, 2017) at 4.

76 Bill C-46, *supra* note 7, cl. 3(5). The police will also be authorized to demand that a person provide a blood sample or submit to a DRE, if they have reasonable grounds to believe that the person has driven while his or her ability to do so was impaired to any degree by a drug or a drug in combination with alcohol. This additional power to demand testing is not limited to individuals who were driving within a specified time period. *Ibid*, cl. 15.

77 R. Solomon & E. Chamberlain, "The Road to Traffic Safety: Mandatory Breath Screening and Bill C-46" (2018) 23 Canadian Criminal Law Review 1 at 12-16.

78 See generally R. Robertson, W. Vanlaar & H. Simpson, *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* (Ottawa: TIRF, 2009) at 68-70.

79 *Ibid.* As a result, challenges to the officer's demand for a preliminary breath test figured prominently in defence strategies and acquittals.

Second, based on the Canadian Society of Forensic Science's recommendation, the THC threshold for testing positive on the roadside oral fluid screening devices is set at 25 ngs per ml of oral fluid.[80] This threshold is under-inclusive, in that drivers with 2 to 24 ngs of THC per ml of oral fluid will evade detection and not be required to submit to a DRE or evidentiary blood test, even though many of them may have been above the *Criminal Code per se* limit at roadside. The 25 ngs threshold was adopted because THC levels in blood peak during or immediately after use[81] and fall an estimated 80% to 90% within 30 minutes.[82] The high THC threshold for oral fluid screening devices reduces the number of drivers who would otherwise be arrested at roadside, only to be subsequently cleared because their THC level fell below 2 ngs by the time they were subject to evidentiary blood testing 1½ to 2 hours later.[83]

Third, the cost of oral fluid drug testing is substantial. One source stated that the prices ranged from over $12 to $25 per test kit depending on the manufacturer, while another study indicated that the prices ranged from $14 to $45.[84] The time it takes to obtain the oral fluid test result also varied depending on the manufacturer, ranging from 3 to 12 minutes.[85] Moreover, the cost of an evidentiary blood-drug test appears to be in the range of several hundred dollars, and it can take months to obtain the results.[86] Drug-impaired driving cases already require more court appearances and take about twice as long as alcohol-impaired driving cases.[87] In contrast, a roadside or evidentiary alcohol breath test costs pennies and the results are available in a minute. Put simply, there is currently no inexpensive, quick, simple, and accurate means of screening large numbers of drivers for cannabis or other drugs at roadside.

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80 In conjunction with the federal government, the Society has set criteria for, and tested, various roadside oral fluid screening devices, and recommended *per se* thresholds for the various categories of drugs. Canadian Society of Forensic Science, Drugs and Driving Committee, *Drug Screening Equipment – Oral Fluid Standards and Evaluation Procedures* (Ottawa: Canadian Society of Forensic Science, 2017) at 4, online: <https://www.csfs.ca/wp-content/uploads/2017/11/Approval-Standards-for-Drug-Screening-Equipment.pdf>.

81 D. Schwope *et al.*, "Identification of recent cannabis use: whole-blood and plasma free and glucuronidated cannabinoid pharmacokinetics following controlled smoked cannabis administration" (2011) 57(10) Clinical Chemistry 1406 at 1410.

82 R. Compton, *Marijuana-Impaired Driving – A Report to Congress* (Washington, DC: NHTSA, 2017) at 5. The rapid dissipation of THC in blood appears to have been a factor in establishing the *Criminal Code*'s low *per se* limit.

83 Drivers who fail a roadside oral fluid screening test must be transported to the station, advised of their right to legal counsel and given an opportunity to consult with counsel before a blood sample may be demanded. A qualified individual must then be found to draw the sample.

84 See respectively, Hildebrand *et al*., *Oral Fluid Testing Devices – Validation of Selected Commercial Products for Future Roadside Screening for Drugs* (Ottawa: Canadian Police Research Centre, 2008) at 27 [Hildebrand]; and M. Asbridge & R. Ogilvie, *A Feasibility Study of Roadside Oral Fluid Drug Testing* (Oakville, ON: MADD Canada, 2015) at 13 [Asbridge].

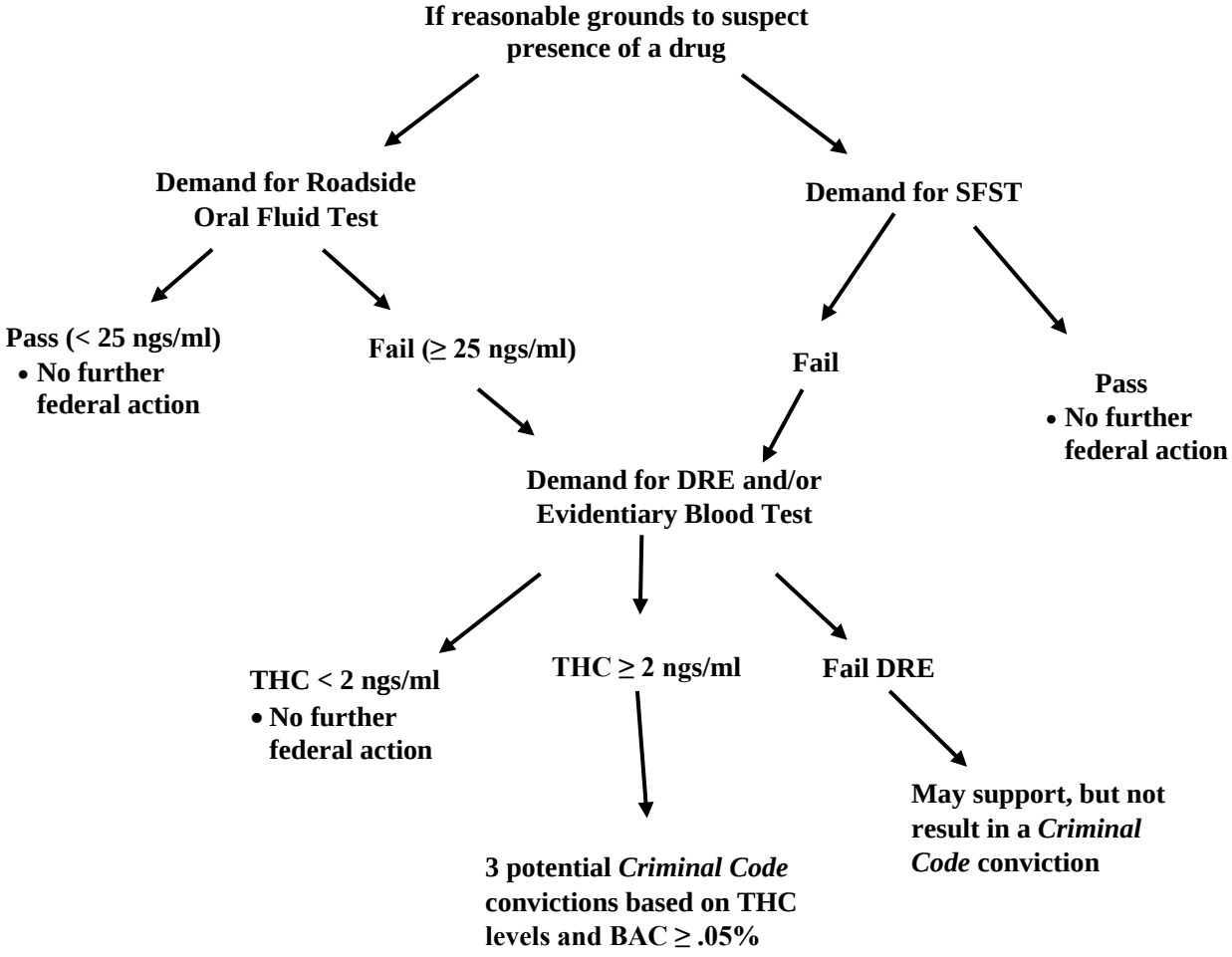
85 Hildebrand, *ibid* at 27; and Asbridge, *ibid* at 9.

86 Telephone communication with A. Murie, CEO, MADD Canada and R. Solomon, Distinguished University Professor, Faculty of Law, Western University (24 July 2018).

87 S. Perreault, *Impaired Driving in Canada, 2015* (Ottawa: Statistics Canada, 2016) at 15-16.

As illustrated below, the new federal *per se* driving offences and enforcement powers operate in conjunction with the pre-existing, drug-impaired driving offence, and the SFST and DRE provisions. The *per se* limits for cannabis are used to demonstrate the enforcement of the new *per se* drug-related driving offences.

Federal Drug-Related Driving Enforcement Process



Part III: Model Provincial and Territorial Drug-Impaired Driving Policies

(a) Introduction

As indicated, the number of Canadians who use cannabis has risen sharply in recent years, as has the percentage of weekly and daily users. The potency of cannabis products has increased and black market prices have fallen. Driving after drug use has also increased sharply, particularly among young cannabis users. The legalization of the recreational cannabis market will likely exacerbate these trends. While the 2008 and 2018 *Criminal Code* drug-impaired driving amendments modestly strengthen police enforcement, there are major limits on the effectiveness of this federal legislation. Given these factors, the provinces have a pivotal role to play in minimizing driving after drug use and related crashes, injuries and deaths.

The following subparts summarize two important areas in which the provinces have broad authority that can be used to deter driving after drug use, namely the licensing of young and beginning drivers and the imposition of administrative licence suspensions and vehicle impoundments.

(b) Licensing of Young and Beginning Drivers

(i) Graduated Licensing Programs (GLPs)[88]

New drivers, of any age, should be subject to a two-stage GLP. Those applying to Stage I should be required to be at least 16, pass a conventional traffic rules and road signs test, and establish their medical fitness to drive. During Stage I, the new driver must always be supervised by a sober driver who is at least 21 years of age and has been fully licensed for a minimum of two years. Because the purpose of this stage is to allow the new driver to gain experience in low-risk situations, several other conditions should apply, including: a restriction on late-night driving, teenage passengers, high-speed roads; a ban on using any electronic device; and a prohibition on being positive for any amount of alcohol and/or drugs while driving. This stage should be a minimum of 12 months long and require the driver to pass a road test before he or she can graduate. The successful completion of a driver education program should not result in shortening the length of Stage I, given the limited benefits of such programs[89] and the proven traffic safety benefits of supervised driving.

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[88] For a detailed summary of the features of the provincial GLPs, see Solomon *et al.*, *A Summary of Provincial and Territorial Traffic Legislation Related to Alcohol-Impaired Driving* (Oakville, ON: MADD Canada, 2018) at 7-9 [Solomon, 2018].

[89] Research has failed to establish that driver education programs have a long-term positive impact on crash rates. For example, a 1999 review of nine studies on high school driver education programs concluded that: "there is no convincing evidence that high school driver education reduces motor vehicle crash involvement rates for young drivers, either at the individual or community level." J. Vernick *et al.*, "Effects of High School Driver Education on Motor Vehicle Crashes, Violations and Licensure" (1999) 16(1S) Am. J. Prev. Med. 40 at 40. See also D. Mayhew *et al.*, "Specific and Long-Term Effects of Nova Scotia's Graduated Licensing Program" (2003) 4 Traffic Inj. Prev. 91 at 95.

Drivers in Stage II should be able to drive unsupervised in most situations. However, they should still be required to have a supervisor when driving late at night or on high-speed roads. Furthermore, the restriction on passengers and the use of electronic devices should continue as a responsible adult will not necessarily be present to discourage risky behaviour and maintain a low-risk driving atmosphere. During Stage II, drivers should be subject to lower demerit point thresholds or otherwise be more closely monitored by licensing authorities than experienced drivers. The prohibition on alcohol and drug consumption should also continue. Police should be given express powers to enforce the terms of the GLP, and any violation should be punishable with mandatory roadside ALSs, vehicle impoundments and an extension of the GLP program.

(ii) Zero Blood-Drug Limits (BDLs) for Drivers under 22 or with less than 5 Years of Driving Experience[90]

A key GLP component is abstaining from the use of cannabis and all non-medical drugs. Beginning drivers are already disadvantaged because of their inexperience and should not have their judgment further impaired by cannabis and non-medical drugs. There are significant traffic safety benefits of extending the zero-BDL beyond the GLP, which it should be noted young drivers may complete in half of the provinces before they reach the age of 18.[91]

Although driving under the influence of a drug is prohibited by the *Criminal Code*,[92] this prohibition warrants extra emphasis among young drivers, who have among the highest rate of driving after drug use.[93] Drivers supervising those in the GLP should also be subject to a zero-BDL. Much like alcohol consumption, drug use impairs the supervisor's ability to monitor the beginning driver and respond quickly to any urgent situation that develops. Moreover, permitting supervisors to have a positive-BDL sets a poor example for beginning drivers, and increases the likelihood that they will be used as "Designated Drivers" for their older friends.

Of particular concern for MADD Canada is that motor vehicle crashes are the leading cause of death among 15-24 year old Canadians.[94] Moreover, impairment-related crashes take a disproportionate toll among young people. For example in 2014, 16-25 year olds made up 13% of the population[95] but

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90 For a detailed summary of the provincial zero BAC and BDL limits, see Solomon, 2018, *supra* note 88 at 11-12.

91 R. Solomon, C. Ellis & C. Zheng, *A Summary of Provincial and Territorial Traffic Legislation Related to Impaired Driving* (Oakville, ON: MADD Canada, 2017) at 5-10.

92 *Supra* note 2, s. 253(a).

93 See D. Beirness & A. Porath-Waller, *Clearing the Smoke on Cannabis: Cannabis Use and Driving – An Update* (Ottawa: CCSA, 2017) at 2 and 3; D. Beirness & E. Beasley, *Alcohol and Drug Use by Drivers in Ontario: Findings from the 2017 Roadside Survey* (Ottawa: Beirness & Associates, Inc., 2018) at 9 and 29; and R. Robertson *et al., Road Safety Monitor 2017: Drugs & Driving In Canada* (Ottawa: TIRF, 20018) at 16-17.

94 Statistics Canada, *Deaths, by cause, Chapter XX: External causes of morbidity and mortality (V01 to Y89), age group and sex, Canada* (Ottawa: Statistics Canada, 2018).

95 Statistics Canada, *CANSIM Table 051-0001: Estimates of Population, by Age Group and Sex for July 1,*

accounted for almost 30% of alcohol-related traffic deaths.[96] Similarly, the percentage of 16-19 year old, fatally-injured drivers who tested positive for drugs rose from approximately 26% in 2000 to over 40% in 2012.[97] Sixteen to nineteen-year old, fatally-injured drivers also had the highest rates of testing positive for cannabis from 2011-2015.[98] In terms of public health, youth crash deaths represent a major preventable cause of years of life lost, as these victims die 50-60 years prematurely.

The zero-BDL requirement should apply beyond the GLP. Thus, there should be a prohibition on being positive for cannabis and any non-medical drugs for all drivers under 22 and all drivers with less than five years of driving experience. Young beginning drivers lack driving experience, tend to be risk takers and are less cautious than their older counterparts.[99] Thus, even in the absence of drugs, young drivers are at a greater relative risk of a crash than older, more experienced drivers.[100] While older, beginning drivers may be more mature and have more experience with drugs, they still lack driving experience and this is reflected in their crash rates. This extended zero-BDL requirement will discourage driving after drug use among this high-risk constituency and allow all beginning drivers to gain driving experience unencumbered by the impairing effects of drugs.

(iii) Enforcing the Graduated Licensing and Zero-Drug Limits

In order to effectively enforce the GLP and zero-BDL limits, the provincial legislation will need to specifically authorize the police to stop vehicles and require beginning drivers and their supervisors identify themselves and present their driver's licences. As the preceding survey, roadside screening and post-mortem studies indicate, a significant percentage of new drivers violate the current GLP zero-BAC limits at least occasionally, and many drive after using drugs.[101]

Canada, Provinces and Territories Annual (Persons Unless Otherwise Noted) (Ottawa: Statistics Canada, 2012), online: <https://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=0510001&paSer=&pattern=&stByVal=1&p1=1&p2=37&tabMode=dataTable&csid>.

96 R. Solomon, C. Ellis & C. Zheng, *Alcohol-Related Fatalities Occurring Within 30 Days of a Crash on a Public Road Involving a Highway Vehicle, by Jurisdiction and Age: Canada, 2014* (Oakville ON: MADD Canada, 2018) at 4.

97 TIRF, *Trends Among Fatally Injured Teen Drivers, 2000-2012* (Ottawa: TIRF, 2015) at 4.

98 TIRF, *Marijuana Use Among Drivers In Canada, 2000-2015* (Ottawa: TIRF, 2018) at 3.

99 See instance J. Hatfield & R. Fernandes, "The role of risk-propensity in the risky driving of younger drivers" (2009) 41(1) Accid Anal Prev 25.

100 A. McCartt *el al*., "Effects of Age and Experience on Young Driver Crashes: Review of Recent Literature" (2009) 10 Traffic Inj Prev 209 at 217-218.

101 While there does not appear to be any Canadian studies on the number of new drivers who violate the GDL program or the frequency of such violations, several American studies address this issue. See for example, N. Chaudhary, A. Williams & W. Nissen, *Evaluation and Compliance of Passenger Restrictions in a Graduated Licensing Program* (Washington, DC: NHTSA, 2007); S. Masten *et al.*, "Non-compliance with graduated driver licensing (GDL) requirements: Changes in GDL-related conviction rates over time among 16–17-year-old California drivers" (2014) 72 Accident Analysis & Prevention 230; and A. Curry, "Estimating Young Novice Drivers' Compliance with Graduated Driver Licensing Restrictions: A Novel Approach" (2017) 18(1)

In order to enforce the proposed zero-BDL restriction, police should also be authorized to demand oral fluid samples from any driver in the GLP, any supervising driver, or any driver under the age of 22 or with less than five years driving experience.[102] The ability to demand oral fluid samples should not be dependent on a suspicion that the driver has alcohol or drugs in his or her body. Although this may conflict with the general principle that searches should not be conducted in the absence of reasonable grounds,[103] this provision should withstand *Charter* scrutiny. Oral fluid testing is minimally intrusive, and the results would be used for the purpose of enforcing the zero-BDL provision and determining whether there were grounds to demand further testing. Thus, in terms of the criminal law, oral fluid testing would be used solely for screening purposes and the results would not be admissible in a criminal trial.[104]

If the supervising driver breaches the zero-BDL restriction, his or her licence should be suspended for 24 hours, and the beginner driver should not be allowed to continue driving unless someone else is able to take over as the qualified, sober supervisor.

The graduated licensing program should also have some means of identifying potential problem drivers and preventing them from obtaining full licensure before their problems can be addressed. Thus, drivers in Stages I and II who are involved in at-fault crashes, commit serious provincial traffic offences, or breach conditions of the GLP should be subject to extended periods of supervision and, depending on the driver's record, possible licence suspensions.[105] As described below, licence suspensions tend to be a meaningful deterrent for young people and should help to motivate them to drive safely.

(iv) Sanctions for Violating the Graduated Licencing and Zero Drug Limits[106]

A driver who violates the conditions of his or her graduated licence should be considered to be driving without a valid licence and should be subject to prosecution for unlicensed or unauthorized driving. This

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102 That is, a driver under 21 or who has been licensed for less than five years.

103 *Hunter v. Southam Inc*, [1984] 2 S.C.R. 145.

104 Further, the Canadian courts have found that there is a diminished expectation of privacy for certain "regulatory inspections" that are necessary to ensure compliance with a lawful condition imposed on the exercise of a right or privilege. *R v. Hufsky*, [1988] 1 S.C.R. 621. Presumably, because the use of mandatory oral fluid tests would be fulfilling the same role as our previous recommendation for the mandatory breath testing of young and new drivers, these tests would be found to be *Charter* compliant. For a *Charter* analysis of mandatory breath testing of new and young drivers, see R. Solomon & E. Chamberlain, *Youth and Impaired Driving in Canada: Opportunities for Progress* (Oakville ON: MADD Canada and Allstate Insurance, 2006) at 77-82. For a more recent and detailed review of mandatory breath testing and the *Charter*, see Solomon *et al.*, "The Case for Comprehensive Random Breath Testing Programs in Canada: A Review of the Evidence and Challenges" (2011) 41(1) Alberta Law Review 37 at 60-77.

105 It should be noted that these licence sanctions should not apply to drivers who commit minor traffic violations. Suspending the licences of such drivers would only detract from their ability to improve their skills and gain experience. Rather, the suspensions would apply to drivers who deliberately violate key conditions of their licence, or who show a pattern of disregarding licensing laws and traffic safety.

106 For a detailed summary of the provincial sanctions, see Solomon, 2018, *supra* note 88 at 13-22.

should result in ALSs of 30, 90 and 120 days for first, second and subsequent infractions, respectively, and the suspension period should not count toward completion of the minimum length of each stage. Likewise, the vehicle of a driver who violates the zero BDL should be impounded for 7, 30 and 60 days for a first, second and subsequent infraction.[107] In addition, drivers with a third violation should be required to re-start the GLP. It is important for these drivers to remain in the program so that they can gain the benefits of supervised and low-risk driving.

Drivers who violate the zero-BDL restriction should be prosecuted for unlicensed or unauthorized driving, even if they are otherwise fully licensed.

Several jurisdictions already impose significant sanctions on GLP drivers and supervisors who breach their BAC restrictions. Although drug consumption is more difficult to detect than alcohol consumption, these sanctions can be broadened to include drugs as well. For example, Ontario has amended its *Highway Traffic Act* to align the sanctions for breaching the zero BDL with those for breaching the zero BAC limit. These amendments include $250, $350 and $450 fines, as well as 3, 7 and 30-day ALSs for a first, second, and third or subsequent violations of the zero BDL.[108]

Research indicates that licence suspensions may be the most meaningful punishment for young people. For example, in regards to alcohol, at least 36 American states have "Use and Lose" laws, whereby youth who drink, possess or attempt to purchase alcohol while underage have their drivers' licences suspended or, if not yet licensed, have their ability to apply for a licence delayed.[109] The theory behind such laws is that young people greatly value the ability to drive, and will be deterred by a law that threatens to remove their ability.[110] Thus, GLPs that include suspensions as a penalty should have a considerable deterrent impact, and thereby enhance traffic safety.

(c) Provincial Administrative Licence Suspensions and Vehicle Impoundments

(i) Introduction

While the provinces and territories impose licence suspensions on drivers in a very broad range of circumstances,[111] our discussion is limited to ALSs that are imposed for drug-related driving. Two

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107 The rationale behind the use of vehicle impoundments will be discussed in detail in the following section.

108 *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 44.2(4) and (6), 48.0.2(2); and Ministry of Transportation, "Impaired Driving" (May 8, 2018), online: <http://www.mto.gov.on.ca/english/safety/impaired-driving.shtml#novice>.

109 R. Compton, R. Ulmer & V. Shabanova, "Effectiveness of the Use and Lose Law" in D. Mayhew and C. Dussault, eds, CD-ROM, *Proceedings of the 16th International Conference on Alcohol, Drugs and Traffic Safety* (Montreal: SAAQ, 2002).

110 *Ibid*. A licence suspension is seen as a more serious punishment than a fine, which has less direct impact on teenagers, or the threat of prison as very few teens are sent to prison for breaching highway traffic or alcohol possession legislation. It is likely that drug consumption legislation will follow the same trend and not be vigorously enforced in favour of warnings and other less onerous punishments.

111 Depending on the jurisdiction, the grounds for imposing suspensions may include: specified provincial traffic offences; too many demerit points; unfitness to drive; a poor driving record; failure to pay family support; and

additional issues warrant clarification before turning to a detailed discussion of provincial ALSs and vehicle impoundment programs. First, it is important to distinguish between provincial licence suspensions and federal driving prohibitions.[112] As indicated, only the provinces and territories have constitutional authority to enact legislation for issuing, suspending, revoking, or cancelling a driver's licence.[113] Nevertheless, Parliament has authority under its criminal law power to impose driving prohibitions on those convicted of a federal driving offence.[114] These federal driving prohibitions for the impaired driving offences apply independently from any action the provincial authorities take.

Second, in addition to short-term ALSs for various alcohol and drug-related infringements, the provinces typically impose lengthy ALSs on drivers convicted of a federal alcohol-related impaired driving offence. Thus, federal impaired driving offenders are subject to lengthy provincial suspensions in addition to any federal driving prohibition that is imposed by the court in their criminal trial. These provincial licence suspensions for second and subsequent federal impaired driving convictions are typically considerably longer than the federal driving prohibitions. Moreover, the provinces typically require federal impaired-driving offenders to attend an education program, undergo a drug and/or alcohol assessment, complete a treatment program, and/or put an alcohol interlock on their vehicle prior to applying for licence reinstatement.

(ii) Evidence in Favour of Roadside Administrative Licence Suspensions and Impoundments

There is currently a lack of research on the impact of ALSs and impoundments on drug-impaired driving. The research on alcohol-related ALSs and vehicle impoundments is the closest comparator and serves to explain how ALSs and impoundments would likely affect driving after drug use. In the context of alcohol, the combination of ALSs and impoundments have been shown to have significant traffic safety benefits. It is likely that ALSs for drugs will achieve somewhat similar benefits.

Research indicates that many suspended and prohibited drivers continue to drive, at least occasionally, during the period of their licence suspension or prohibition.[115] Licence suspensions and prohibitions alone,

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unpaid fees, fines and civil judgments.

112 Unfortunately, some of the provinces also use the term "prohibition" in reference to their 90-day ALSs. See for example *Motor Vehicle Act*, RSBC 1996, c 318, s 94.1(1)(a); and *Highway Traffic Act*, RSPEI 1988, c H-5, s 277.2(1). Consequently, one cannot assume that the term "driving prohibition" always refers to a federal driving prohibition under the *Criminal Code*. In our discussion, however, we have reserved the use of the term "prohibition" for the federal criminal provisions.

113 *Constitution Act, 1867, supra* note 1, s. 92(13).

114 *Ibid*, s. 91(27).

115 A Moncton area study of drivers stopped at four checkpoints indicated that licence suspensions only reduced the incidence of driving among suspended drivers by 43%. J. Malenfant, R. Van Houten & B. Jonah, "A Study to Measure the Incidence of Driving Under Suspension in the Greater Moncton Area" (2002) 24 Accident Analysis and Prevention 439 [Malenfant]. American studies have estimated that 65% to 75% of suspended drivers continue to drive. See for example, A. McCartt, L. Geary & A. Berning, "Observational study of the extent of driving while suspended for alcohol impaired driving" (2003) 9 Inj. Prev. 133.

have proven to be insufficient to keep certain offenders off the roads, and insufficient to keep them from driving while impaired.[116] Consequently, some sort of vehicle-based sanction may be essential to discourage and at least temporarily prevent some suspended and prohibited offenders from driving and, particularly, from driving while impaired. By impounding a suspended driver's vehicle, the police remove the driver's ability to drive, preventing them from continuing their unsafe behaviour.

Various Canadian ALS and vehicle impoundment or immobilization[117] programs have shown positive results in reducing recidivism and subsequent crashes among affected drivers. In 2010, British Columbia implemented a number of traffic safety measures, which in practice included mandatory ALSs and vehicle impoundments for drivers with a BAC of above .05%,[118] drivers with a BAC above .08%, or those who failed or refused to take a blood or breath test.

A roadside driver study conducted two years after the legislation was implemented reported a 59% decrease in the number of drivers with BACs above .08%, and a 21% decrease in drivers with a BAC between .05% and .08%.[119] Moreover, another study concluded that alcohol-related injury collisions fell by 23.4% and property-damage-only collisions fell by 19.5%.[120] The provincial Coroner's Office reported an approximately 38% reduction in alcohol-related fatalities between 2010 and 2014, saving an estimated 43 lives annually during this period

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116 American and Canadian research indicates that suspended and prohibited drivers are far more likely to be in crashes, be at fault in crashes, and be impaired in fatal crashes than licensed drivers. See for example, R. Scopatz *et al*., *Unlicensed to Kill: The Sequel* (Washington: AAA Foundation for Traffic Safety, 2003; J. Suggett, *Driving While Disqualified in Saskatchewan, Report to MADD Canada* (St. Catharines: Synectics Transportation Consultants Inc., 2006); and J. Suggett, *Fatal and Injury Crashes Among Unlicensed Drivers in Ontario: 1996-2003, Report to MADD Canada* (St. Catharines: Synectics Transportation Consultants Inc., 2007).

117 In Canada, "impounded" vehicles are generally secured in a locked storage facility. In the United States, some jurisdictions use a boot or club to "immobilize" vehicles to prevent them from being driven. Immobilization programs tend to be less costly than impoundment programs, because the vehicle can be kept on the owner's property and no storage costs are incurred. See R. Voas *et al*., "Controlling impaired Driving Through Vehicle Programs: An Overview" (2004) 5 Traffic Injury Prevention 292.

118 It should be noted that in the case of a first infraction, the police had only limited authority to impound the vehicle of a driver with a BAC above .05% but below .08%. The police had discretionary authority to impound the vehicle of these drivers, but only if the police believed that doing so was necessary to prevent a breach of the driving prohibition. *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, ss. 215.4(1) and 215.46.

However, this limit on impoundments was ignored, and the vehicle of these drivers were automatically impounded. The British Columbia legislation and the way it was enforced generated numerous legal challenges and the legislation had to be amended. However, the basic features of the program were upheld. See for example, *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2011 BCSC 1639; and *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46.

119 E. Beasley & D. Beirness, *Alcohol and Drug Use among Drivers Following the Introduction of Immediate Roadside Prohibitions in British Columbia: Findings from the 2012 Roadside Survey (Victoria: Office of the Superintendent of Motor Vehicles*, 2014) at 11.

120 S. Macdonald, *et al*., "The impact on alcohol-related collisions of the partial decriminalization of impaired driving in British Columbia, Canada" (2013) 59 Accident Analysis and Prevention 200 at 202-203.

As a result, several provinces have followed British Columbia's example and have introduced mandatory impoundments to their ALS regimes. In 2012, Alberta added mandatory 3-day vehicle impoundments to its 3-day ALS and 90-day ALS programs.[121] Alcohol-related fatalities fell 46% in the six months following the implementation of their combined ALS and impoundment program relative to the five-year average for the same period.[122] The alcohol-related traffic fatalities in Alberta decreased by approximately 22%, from 167 in 2010 to 130 in 2014.[123]

Saskatchewan enacted a new administrative sanctions in 2017 comprised of: 3-day ALSs and 3-day vehicle impoundments for drivers with a BAC equal to or above .04%; 90-day ALSs and 30-day vehicle impoundments for drivers with a BAC above .08% but below .16%; and 90-day ALSs and 60-day vehicle impoundments for drivers with a BAC equal to or above .16.[124] According to Saskatchewan Government Insurance (SGI), these provisions contributed to a 40% decrease in alcohol-related fatalities in 2017 relative to the previous five-year average.[125]

(iii) Provincial 24-Hour Licence Suspensions and Vehicle Impoundments[126]

If the police have reasonable grounds to believe that a driver's physical or mental ability is affected by drugs or a combination of drugs and alcohol, they should be authorized to suspend the driver's licence for 24-hours. The police should also be given the right to impound the driver's vehicle if the car cannot be secured. This suspension is not meant to be punitive, but rather to protect the public from drivers who are unfit to drive by temporarily removing them from the road. If police believe that the driver's condition is due to a long-term problem, they should be required to report the driver to the provincial licensing authority, which can investigate further and take any necessary licence action required.

(iv) Provincial 7-Day Administrative Licence Suspensions and Vehicle Impoundments

MADD Canada recommends that each province enact a 7-day ALS and 7-day vehicle impoundment

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121 *Traffic Safety Act*, R.S.A. 2000, c.T-6, s. 172.1(1)(a) & (b).

122 Alberta Transportation, *Fatalities in Alcohol-Involved Collisions July-December*, (Edmonton: Alberta Transportation, 2013), online: <http://www.transportation.alberta.ca/content/docType4789/Production/AlcoholFatalities2012.pdf>.

123 *Crash Problem*, *supra* note 115 at 60; and R. Solomon, C. Ellis & C. Zheng, Alcohol and/or Drugs Among Crash Victims Dying Within 12 Months of a Crash on a Public Road, By Jurisdiction: Canada, 2014 (Oakville ON, MADD Canada, 2018) at 6 (Solomon, 2018).

124 *Traffic Safety Act*, S.S. 2004, C. T-18.1, ss. 146(2), 146(4)(a)(i), 148(5)(a) & 148(b)(i)-(iii); and R. Solomon, *et al*, *A Summary of Provincial and Territorial Legislation Related to Alcohol-Impaired Driving* (Oakville ON: MADD Canada, 2018) at 41 & 49.

125 SGI, "Sharp decrease in impaired driving deaths and injuries in 2017", (May 24, 2018), online: <https://www.sgi.sk.ca/news?title=sharp-decrease-in-impaired-driving-deaths-and-injuries-in-2017>.

While Ontario's short-term ALS program does not include mandatory impoundments, the police must impound for 7 days the vehicle of drivers who receive a 90-day ALS. *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 48.4(1).

126 For a summary of the relevant provincial legislation, see Solomon, 2018 at 27-28

program for drivers who have failed an oral fluid test or a SFST. The provinces need to emphasize that this risky driving behaviour will be taken seriously. Police should have a duty to inform the driver of the right to challenge the results of the oral fluid test by submitting, without delay, to a second oral fluid test. If the second oral fluid test is passed,[127] the driver's licence should be returned. Likewise, drivers who fail an SFST should be informed of their right to challenge the result of the SFST by taking an oral fluid test.

Drivers should be able to apply in writing to have the 7-day ALS and vehicle impoundment reviewed by the provincial licensing authority. The grounds for review of the ALS should be limited to whether the driver's BDL reading was above the 25 ngs/ml threshold for the oral fluid test, or if the oral fluid test or SFST was conducted according to procedure. The grounds of review for the impoundment should be limited to whether the owner can prove that the car was taken without their explicit or implicit permission.

These short-term administrative impoundments are intended to deter driving while under the influence of drugs and to supplement the 7-day ALS provisions outlined previously. They serve to immediately remove impaired drivers and their vehicles from the road and reduce the risk that these individuals will drive during the administrative suspension period.

Drivers suspended under the provincial legislation should be required to pay a licence reinstatement fee of between $150 and $300 to help cover the administrative costs of the program. In addition, police should be required to report the suspension and send the driver's licence to the provincial licensing authority. If no other suspensions or conditions have been imposed, the driver should be permitted to obtain his or her licence from the licensing authority at the end of the suspension period. A recordkeeping fee should be implemented, with additional fees and countermeasures applicable for repeat occurrences within a three-year period. The licensing authority should note all short-term licence suspensions on a driver's record and include them on driver's abstracts for a period of ten years.

Both the driver and the owner should be liable for any towing, impoundment, storage or immobilization costs, which should constitute a lien on the vehicle. The towing and storage company

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[127] Because the drug level in the driver's oral fluid and blood may decline rapidly, these confirmatory tests should be conducted as soon as possible. Otherwise the driver may be able to delay the confirmatory oral fluid test long enough for the drug level in his or her oral fluid to fall below the level necessary to demand an evidentiary blood test. Similarly, the driver's BDL may fall below the *Criminal Code per se* limit during the time it takes to do the oral fluid testing, advice the driver of his or her right to counsel, transport the driver, and find a qualified individual to draw the evidentiary blood sample.

This is of particular concern in regard to cannabis, because THC levels in blood peak during or immediately after use and fall an estimated 80% to 90% within 30 minutes. R. Compton, *Marijuana-Impaired Driving – A Report to Congress* (Washington, DC: NHTSA, 2017) at 5. The rapid dissipation of THC in blood appears to have been a factor in establishing the *Criminal Code*'s low *per se* THC limit. It also explains why the THC threshold for testing positive on the roadside oral fluid screening devices was set at 25 ngs per ml of oral fluid.[127] This high THC threshold for oral fluid testing reduces the number of drivers who would otherwise be arrested at roadside, only to be subsequently cleared because their THC level fell below the *Criminal Code* 2 ngs limit by the time they were subject to evidentiary blood testing 1½ to 2 hours later.

would have the right to sell the vehicle to recover its costs if it has not been paid within 90 days of the end of the impoundment period. Owners should have the right to a review of the impoundment order if they can establish that the driver took the vehicle without the owner's explicit or implicit permission. Owners of impounded vehicles should have the right to recover any costs that they incurred from the culpable driver. Nevertheless, the vehicle should not be released before the end of the impoundment unless the owner can prove that the car was taken without explicit or implicit permission, or that he or she took reasonable steps in attempting to verify that the driver had a valid licence.

(v) Provincial 90-Day Administrative Licence Suspensions and 30-Day Vehicle Impoundments

As will become apparent, the processing of 90-day ALSs and 30-day impoundments is more complicated in drug cases than in alcohol cases.[128] The police should be required to issue a 90-day ALS and 30-day vehicle impoundment to any driver:

1. who fails or refuses to submit, without a reasonable excuse, to an oral fluid test, SFST, DRE, or any other required impairment test;
2. who fails a DRE once a positive confirmatory blood or urine test is received (these tests are used to determine if the drug the officer identified in the first 11 steps of the DRE are in the driver's system); and
3. who's evidentiary blood test establishes that his or her BDL exceeds the *Criminal Code per se* limits.

The ALS and vehicle impoundment sanctions should apply regardless of whether a criminal charge is laid. Typically, drivers in the last two situations would have failed an SFST and/or oral fluid test prior to being required to submit to the DRE or the evidentiary blood test. Consequently, as outlined above, these drivers would be subject to an immediate 7-day ALS and vehicle impoundment.

However, the 90-day ALS and 30-day vehicle impoundment cannot be imposed when these suspects are initially stopped, processed and tested. Rather, these administrative sanctions can only be imposed if and when the police obtain a confirmatory blood or urine test in the case of the DRE or evidentiary blood test results indicating that the driver's BDL exceeds the *Criminal Code* threshold in the case of the *per se* drug-impaired driving offences. Unfortunately, it may take weeks or months to obtain these laboratory results, and the driver will need to be found, notified or summoned to surrender his or her licence. These drivers should be issued a 7-day temporary licence to allow them to make arrangements for alternate transportation before the 90-day ALS and 30-day vehicle impoundment come into effect.

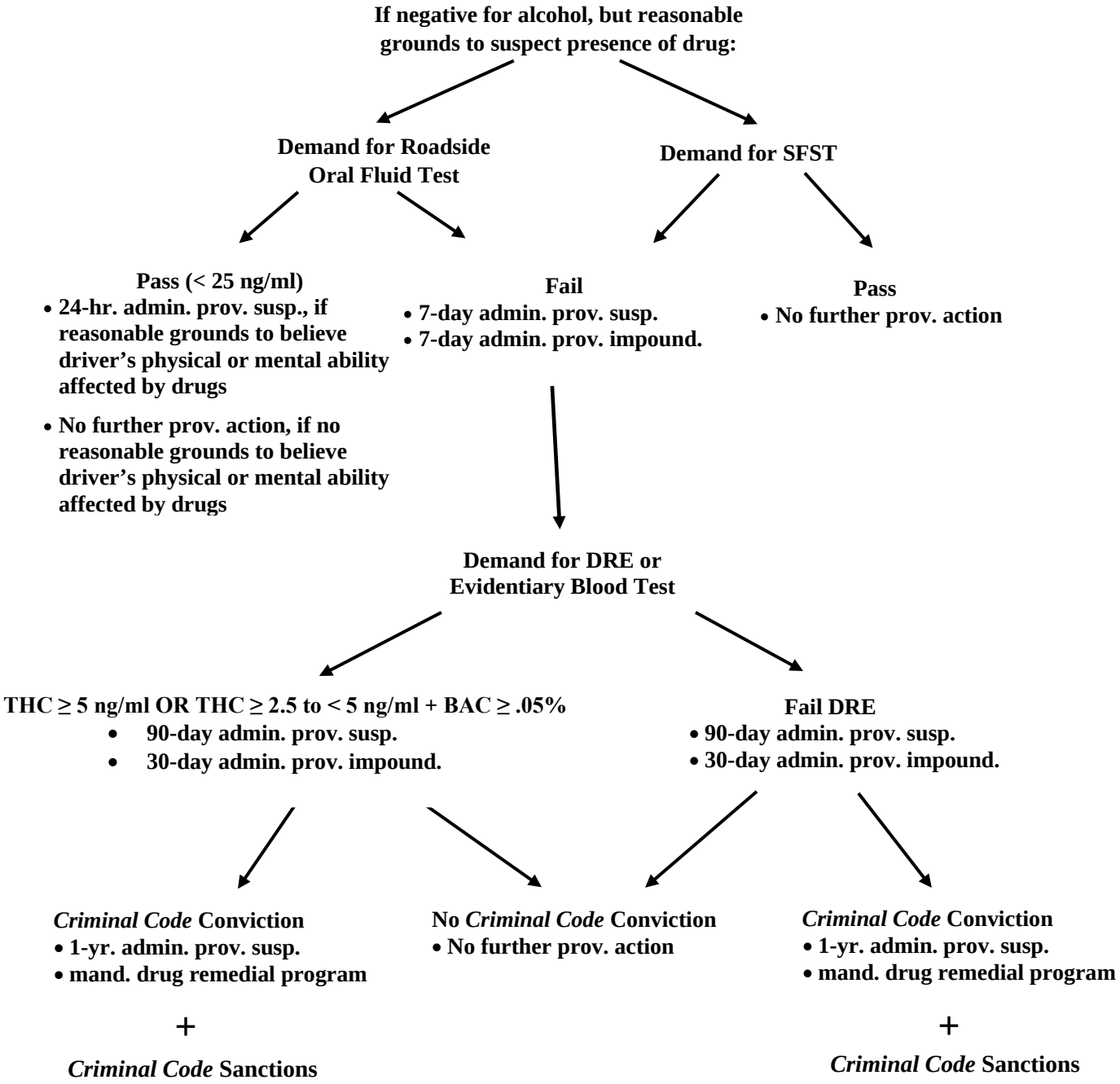
These administrative sanctions provide suspects who are likely to be convicted under the *Criminal Code* with an incentive to address the criminal charge as soon as possible. Drivers who delay the criminal proceedings risk having to serve the 90-day ALS separately from any subsequent federal driving prohibition and automatic provincial or territorial licence suspension.

The following chart illustrates the complex interplay between the federal impaired driving offences and enforcement powers, and the proposed provincial administrative sanctions. We have assumed that drivers will be subject to mandatory roadside breath screening at the outset of their interaction with the

[128] For a summary of the provincial 90-day ALS legislation, see Solomon, 2018 at 43-54.

police. The Chart reflects the federal offences and provincial administrative sanctions applicable to three specific cannabis-related driving behaviours, namely: driving with a BDL equal to or above 5 ngs/ml, driving with a BDL equal to or above 2.5 ngs/ml and a BAC equal to or above .05 and failing a DRE.

Federal Drug Impaired Driving Law and Proposed Provincial Administrative Sanctions



The police should be required to seize the driver's licence and submit it to the provincial licensing

authority. The driver should have a corresponding duty to surrender his or her licence when requested to do so and should be informed that it can be recovered from the licensing authority at the end of the 90-day period if no other suspension has been imposed. Finally, the accumulation of multiple 90-day suspensions and 30-day vehicle impoundments within a prescribed period should result in heavier sanctions, a mandatory review of the driver's record and the imposition of remedial measure. For example, drivers with two or more of these administrative sanctions within ten years should be required to undergo a drug assessment and complete any recommended treatment prior to licence re-instatement.

Although the driver should be entitled to a review of these 90-day ALSs, the legislation should limit the grounds for a review. The provincial licensing authority should be required to confirm the suspension if it is satisfied that the driver:

- underwent a DRE that was done according to procedure;
- had a BDL of 5 ngs of THC per ml or more;
- had a BDL of 2.5 ngs of THC per ml or more and a BAC of .05% or higher;
- was impaired by drugs, or drugs in combination with alcohol; or
- failed, without a reasonable excuse, to submit to the relevant test.

If the licensing authority is not satisfied that the criteria have been met, it should be required to revoke the suspension and impoundment. In any case, an application for review should not delay the 90-day suspension from coming into effect.

Drivers and vehicle owners should be subject to the previously outlined regime for towing, impoundment, storage, immobilization, cost recovery, and vehicle release. Further, drivers suspended under the provincial 90-day ALS legislation should be required to pay a licence reinstatement fee of between $150 and $300 to help cover the administrative costs of the program.

In addition, police should be required to report the suspension and send the driver's licence to the provincial licensing authority. If no other suspensions or conditions have been imposed, the driver should be permitted to obtain his or her licence from the licensing authority at the end of the suspension period. The licensing authority should note all 90-day ALSs and 3-day vehicle impoundments on a driver's record and include them on driver's abstracts for a period of ten years.

(vi) Provincial Suspensions Imposed on Federal Impaired Driving Offenders

All of the provinces impose lengthy licence suspensions on drivers convicted of the federal alcohol-related driving offences, failing or refusing to submit to a required test, or driving while prohibited or suspended for a federal impaired driving offence. It is important to ensure that these provincial licence suspensions are applied to those convicted of any federal drug-related driving offence with the exception of driving with a BDL of 2 ngs to less than 5 ngs of THC per ml of blood. This is the least serious federal impaired driving offence. These drivers will have already been subject to a 7-day provincial ALS and 7-day vehicle impoundment. While MADD Canada is not opposed to these drivers receiving additional sanctions, it is not advocating for such measures. Given the cost and delay associated with obtaining the evidentiary BDL and other traffic enforcement demands, using additional resources to notify the driver and administer the ALS and vehicle impoundment may not be warranted.

(vii) Summary

A single drug-impaired driving incident may trigger a range of provincial administrative sanctions, from a 24-hour ALS to remove a suspected unfit driver from the road to a mandatory a multi-year ALS, lengthy vehicle impoundment and comprehensive remedial treatment program for a driver with repeat drug-impaired driving convictions. These provincial administrative provisions have taken on increasing importance, given the backlog in the criminal courts, the highly contested nature of all federal impaired driving cases and the inherent limitations in the pre-existing and new federal drug-impaired driving legislation. The provinces that have enacted comprehensive alcohol-related ALSs and vehicle impoundments have achieved significant traffic safety benefits. Consequently, there is reason to believe that comparable provincial drug-related administrative sanctions would likely have a positive impact.

Part IV: Conclusion

This document outlines a number of key measures that the provinces should implement to reduce drug-impaired driving and improve traffic safety within their jurisdictions. Although the provinces could enact other positive measures, we have focused on four major areas: graduated licensing; extended zero-BDL for drivers under 22 years of age or with less than five years driving experience; administrative licence suspensions; and administrative vehicle impoundments.

MADD Canada has focused on measures that are well-supported by international research and have proven traffic safety benefits. Moreover, many of these measures have already been introduced in some form in one or more Canadian provinces and thus, are readily achievable within Canada's legal and social framework.

The *Provincial and Territorial Drug-Impaired Driving: Model Policies 2018* reflects the following principles:

- Obtaining and holding a driver's licence is a privilege and not a right.
- Traffic authorities must be empowered to take action to prevent tragedies, not just react after the event by sanctioning offenders.
- The police need broader investigatory authority to efficiently detect impaired drivers and obtain admissible evidence.
- Administrative proceedings are far more expedient, efficient and inexpensive than penal sanctions, and more appropriate for the regulatory issues relating to the licensing of drivers, vehicle sanctions and remedial programs.
- Public safety should be given the highest priority in framing provincial and territorial impaired driving legislation.

The provinces and territories should view this document as a proposed framework for legislative reform. MADD Canada is committed to working with each jurisdiction. As in the past, MADD Canada welcomes the opportunity to publicly support any government that demonstrates leadership. We hope to be able to report on continued progress both in terms of legislative activity and in terms of crash reductions in the near future.

2010 Winston Park Drive, Suite 500
Oakville, Ontario, L6H 5R7
1-800-665-6233
info@madd.ca
www.madd.ca