THE TOP TEN REPORT:
Federal Measures to Minimize Impaired Driving and Support Victims

March 2020

E. Dumschat, Legal Director, MADD Canada
R. Solomon, Distinguished University Professor, Faculty of Law, Western University
Steve Sullivan, Director of Victim Services, MADD Canada

madd
No alcohol. No drugs. No victims.
INTRODUCTION

Under the Canadian constitution, the federal government has legislative authority over criminal law and criminal procedure. In turn, the provinces and territories have legislative authority over driver licensing, highways, automobile insurance, and the enforcement and prosecution of the federal criminal law. Thus, both levels of government have sufficient constitutional power to enact legislation and introduce programs that would significantly reduce impaired driving and better safeguard victims and survivors. However, this paper focusses on the measures that the federal government can take in these regards.

In 2018, the federal government enacted sweeping legislation, repealing and re-enacting with significant amendments all the Criminal Code impaired driving and other transportation offences. Among other things, the legislation rationalized the sanctions for the impaired driving offences, created new per se drug-impaired driving offences, strengthened drug-impaired driving enforcement, and addressed many evidentiary, procedural and technical concerns. In terms of traffic safety, the most important measure was the mandatory alcohol screening provision which authorized the police to demand a roadside breath test from any driver whom they had lawfully stopped. If fully implemented, the 2018 legislation should have a significant deterrent effect on alcohol-related impaired driving.
Nevertheless, major challenges remain. Canada’s impaired driving record is still poor relative to comparable advanced democracies. The percentage of fatally-injured drivers testing positive for alcohol, which had generally been falling since 2000, increased in 2015 and 2016. The percentage of respondents who acknowledged driving when they thought they were over the legal limit rose sharply in 2019 to the highest level in the last 20 years. There have also been sharp increases in driving after drug use, particularly among young cannabis users. In 2019, the percentage of respondents who acknowledged driving within two hours of using cannabis alone and cannabis in combination with alcohol appears to have reached record levels.

The federal government commercialized the recreational cannabis market in 2018, despite the lack of effective means of enforcing the federal drug-impaired driving legislation. Finally, a great deal more can be done to support victims and ensure that they are adequately compensated.

The Top Ten Report is part of an ongoing MADD Canada project, commonly referred to as the Federal Legislative Reform Agenda. The purpose of the project is to encourage the federal government to implement reforms that will reduce impaired driving and assist victims. The first step in the project was undertaking a comprehensive review of the Canadian and international traffic safety research in order to identify effective measures that the federal government could enact that would be compatible with Canada’s constitution, including the Canadian Charter of Rights and Freedoms. In selecting its priorities, MADD Canada considered measures that would likely garner the greatest public support and most significantly reduce impaired driving.

MADD Canada published its first analysis of the federal law in 1998, followed by comprehensive reviews in 2001 and 2012. During the past 21 years, MADD Canada has met with, and presented written briefs to, almost all the federal Ministers of Justice and many other leading parliamentarians from all parties. MADD Canada has also repeatedly appeared as a witness before various House of Commons and Senate Committees, prepared draft legislation on specific impaired driving issues, and submitted numerous detailed briefs on needed reforms to the federal impaired driving law. Although many of MADD Canada’s proposals have been enacted, major problems remain.

The Top Ten Report is the next instalment in the Federal Legislative Reform Agenda. MADD Canada has adopted a comprehensive approach, recognizing that a combination of counter-measures is required to deter impaired driving among the general population, reduce recidivism among offenders and support victims. While MADD Canada recognizes that the federal government could enact other positive measures, it has limited this report to ten issues. By limiting the number of recommendations, MADD Canada hopes to highlight priority issues and focus its discussions with the federal government. The absence of a recommendation on an issue is not necessarily an endorsement of the underlying legislation or program, but rather reflects MADD Canada’s view that there other more pressing concerns. The Top Ten Report will be updated periodically to reflect the progress that the federal government has made.
(a) Alcohol-Impaired Driving

(i) Enact a federal summary conviction .05% blood-alcohol concentration (BAC) offence. The offence should be designed to maximize its deterrent impact, while minimizing the procedural burdens inherent in the existing .08% BAC offence. In order to achieve these goals, the proposed federal .05% BAC offence should be a summary conviction only offence, which is punishable by a fine and a federal driving prohibition that is considerably shorter than that imposed for driving with a BAC of .08% or more. The .05% BAC offence should be subject to streamlined ticketing procedures, an option to plead guilty without having to make a court appearance, and provisions that automatically protect first-time .05% BAC offenders from having a permanent federal criminal record.

(ii) Enact a mandatory alcohol screening (MAS) provision that is applicable to any driver or person suspected of being a driver in a crash.

The police are currently authorized to demand a MAS test from a driver whom they have lawfully stopped, but only if the demand for the breath sample is made immediately and the officer has an approved screening device (ASD) in his or her possession. Consequently, the current provision does not apply to drivers who abandon their vehicle, flee the scene of a crash or are taken to the hospital before the
police arrive. The proposed provision would allow the police to quickly and efficiently screen drivers involved in crashes and prevent those who are impaired from evading criminal responsibility for their conduct.

(iii) Authorize the police to require the taking of a blood sample from any driver or person suspected of being a driver in a crash, if that individual is unable to take an ASD test or is unable to respond to a demand for a breath or blood sample.

Very few impaired drivers who are hospitalized following a crash are charged with, let alone convicted of, any federal impaired driving offence. Although the Criminal Code blood-testing provisions were broadened in 2018, they are unlikely to significantly increase the detection, charge and conviction rates among hospitalized impaired drivers.

(b) Drug-Impaired Driving

(i) Authorize the police to demand an oral fluid drug screening test from: any driver they have lawfully stopped, if the demand is made immediately and the officer has an oral fluid test kit in his or her possession (i.e. mandatory drug screening); and from any driver or person suspected of being a driver in a crash.

Currently, the police require reasonable grounds to suspect that a driver has drugs in his or her body to demand that the driver submit to an oral fluid test. Research indicates that the police have far greater difficulty in identifying drug-positive drivers than in identifying alcohol-positive drivers, and this is reflected in the extremely low rates of drug-related impaired driving charges and convictions. For example, even though driving after drug use now appears to be far more common than driving after alcohol use, drug-impaired driving charges accounted for only 6% of total impaired driving charges in 2108.

The first half of the proposed amendment would greatly increase drug-impaired driving detection, charge and conviction rates. As explained above, the second half of the proposed amendment would allow the police to quickly and efficiently screen drivers involved in crashes and prevent those who are drug impaired from evading criminal responsibility.

(ii) Authorize the police to require the taking of a blood sample from any driver or person suspected of being a driver in a crash, if that individual is unable to take an oral fluid test or is unable to respond to a demand for an oral fluid test, drug recognition evaluation or blood test.

As explained above, this proposal is necessary to increase the charge and conviction rate among drug-impaired drivers who are hospitalized following a crash.

(iii) Work in conjunction with the provinces and territories, to develop mandatory remedial education, assessment, treatment, and relicensing programs for all federal drug-impaired driving offenders.
(c) Victims Supports and Programs

(i) The Criminal Code should be amended to require judges to ask Crown prosecutors in cases involving an impairment-related crash whether, prior to accepting a joint plea or sentencing submission, they took reasonable steps to inform crash victims and survivors of the proposed joint submission.

The Canadian Victims Bill of Rights should be amended to specify that victims and survivors of impaired driving crashes have a right to be informed of any plea or sentencing agreement before it is presented in court.

(ii) The Criminal Code should be amended to require judges to acknowledge in their sentencing remarks any victim impact statement that has been made.

(d) Additional Measures

(i) Establish a system for the timely, accurate and comprehensive collection and publishing of total, and alcohol and drug-related transportation deaths and injuries in Canada.

The latest national motor vehicle statistics are from 2015 and they do not include: deaths and injuries in British Columbia; deaths and injuries occurring in off-road collisions or on non-public roads (e.g. roads on First Nations land, military bases and industrial, mining and other worksites); and deaths and injuries involving only bicycles, e-bikes, ATVs, snowmobiles, and other non-principal vehicle types. The inclusion criteria have been narrowed over time and without very careful reading the impression is created that total alcohol-impaired crash deaths and injuries have fallen more sharply than is in fact the case.

As bad as the alcohol-related crash data are, the drug-related data are worse. Finally, there are no national data on total and alcohol and drug-related deaths and injuries involving vessels, railroad equipment and aircraft.

At best, the current data are five years out of date and so incomplete as to be largely useless in attempting to establish current trends and evaluate recent provincial and federal legislation.

(ii) Establish a system for the timely, accurate and comprehensive collection and publishing of the disposition data (including sentencing) in all federal alcohol and drug-related impaired driving cases.
Again, the current system for collecting and reporting is wholly inadequate. For example, while alcohol and drug-related charges are separately reported, the disposition data are lumped together. Thus, there is no way of determining the number of drug-related charges that result in a conviction. Although the charge data are reported by calendar year, the disposition data are reported by fiscal year and must be updated every year due to the late reporting by the courts.

Of additional concern to MADD Canada is the lack of publicly-available disposition data in cases involving impaired driving causing death and impaired driving causing bodily harm. MADD Canada has had to buy this information from Statistics Canada and it typically contained numerous, often technically-complex endnotes that qualify the data, or alert the reader to omissions or other similar problems. For example, the latest disposition reports that MADD Canada purchased contained 39 endnotes. Among other things, the endnotes indicated, without providing any explanation, that the Manitoba provincial courts did not report from 1994/95 to 2004/05, the British Columbia provincial and superior courts only began reporting in 2000/01, and the Prince Edward Island, Québec, Ontario, Manitoba, and Saskatchewan superior courts do not provide any case or disposition data.