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Tuesday, June 5, 2007

Chair

Mr. Art Hanger

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● (0900)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I'd like to call the Standing Committee on Justice and Human Rights to order. This being Tuesday, June 5, 2007, the orders of the day, as noted, bring about the discussion on Bill C-32, an act to amend the Criminal Code on impaired driving and to make consequential amendments to other acts.

We have a number of witnesses appearing before the committee. I will just go down the list. We will begin with the Barreau du Québec and Mr. Louis Belleau, who is the president of the committee on criminal law of the Barreau du Québec, and Nicole Dufour, a lawyer with research and legislation services. From the Canada Safety Council, we have Mr. Raynald Marchand, general manager of programs; Emile Therien, past president; Ethel Archard, consultant. As an individual, we have Line Beauchesne, associate professor, Department of Criminology, University of Ottawa. From the Criminal Lawyers' Association, we have Paul Burstein, director; and Jonathan Rosenthal, representative.

Welcome, all.

I will begin with the Barreau du Québec, please.

Is it Mr. Belleau?

Mr. Louis Belleau (President of the Committee on Criminal Law of the Barreau du Québec): Maître Dufour will present the Barreau's position, and I will be available to answer questions later.

The Chair: Okay.

Ms. Dufour.

[*Translation*]

Ms. Nicole Dufour (Lawyer, Research and Legislation Service, Barreau du Québec): Good morning. As you say, I am responsible for coordinating the work of the Criminal Law Committee of the Quebec Bar. That Committee is made up equally of members who are defence lawyers and Crown attorneys. Academia is also represented on the Committee. With me today is Mr. Belleau, who will answer questions, as appropriate.

To begin with, I would like to summarize the Quebec Bar's position on Bill C-32. What we can say, right from the start, is that we agree with the goal being pursued through this bill, which is to establish rules to ensure effective action against impaired driving under the influence of drugs. However, we do have some concerns that we would like to make you aware of.

This bill creates a new offence—that is, the operation or the fact of having the care or control of a motor vehicle while in possession of a controlled substance, within the meaning of the Controlled Drugs and Substances Act. The Quebec Bar believes that there is no rational link between the intent of the bill and the offence of possession. In the absence of a breach of the driver's obligation, there should be no such offence. The offence of possession is, in fact, already provided for under the Controlled Drugs and Substances Act.

Furthermore, the penalties that are suggested for a first conviction on the new offence, which is an order prohibiting the offender from operating a motor vehicle for a period of at least a year, with no access to mitigation measures, appears to us to be unduly harsh, considering the absence of a logical connection between the offence of possession of a controlled substance and the prohibition to operate a motor vehicle.

We agree with changes that would allow a peace officer to make a video recording of a performance of the physical coordination tests. However, we would like there to be an obligation, on the part of peace officers, to systematically make such video recordings, in order that the best possible evidence be available. This would probably limit the nature and scope of legal debate on these issues.

With respect to sentencing, the Quebec Bar advocates the free exercise of judicial discretion by the court in order to ensure that punishment is just, by balancing the relevant principles. In that respect, the Quebec Bar cannot support the changes proposed in the bill with respect to the minimum fine for a first offence and the minimum prison term for a subsequent offence.

The effects of imposing a minimum fine will vary based on the financial circumstances of the accused. The Quebec Bar is concerned about the negative repercussions of such a penalty on the offender's family. Indeed, imposing a prison term of no less than 90 days for a third offence would mean that the sentence could not be served intermittently. That could have unfortunate consequences, such as the loss of employment, for example, and would clearly affect other members of the accused's family.

The bill also provides that, in the absence of evidence tending to show both that the approved instrument malfunctioned or was used incorrectly, or that, when the analysis was performed, the concentration of alcohol in the accused's blood would not have exceeded 80 milligrams of alcohol per 100 millilitres of blood, evidence corresponding to the results of the analysis will constitute conclusive proof of the accused's blood alcohol level at the time the offence was alleged to have been committed.

The Quebec Bar is concerned about this double requirement of evidence and its consequences. We believe that conclusive proof as to the malfunction or improper use of the equipment should suffice to reject the test results. Otherwise, we believe this provision is likely to violate the presumption of innocence.

The bill also proposes to make it impossible to adduce direct evidence of a blood alcohol level of less than 0.08 with a view to challenging the instrument results. We are concerned that this could lead to wrongful convictions. As an illustration, we would cite the example of an accused who, after failing such a test, decided on his own to go to a health clinic for the purposes of determining, through a blood test, what his blood alcohol level was. If the results of that test showed the level to be under the limit, that person would not have an opportunity to adduce that direct evidence if he or she had been unable to prove that the instrument malfunctioned or was operated improperly.

The Quebec Bar is also concerned about the difficulties an accused could encounter when attempting to demonstrate that the instrument malfunctioned or was used incorrectly. What exactly would he or she have access to?

Those are our comments.

● (0905)

[*English*]

The Chair: Have you completed your presentation?

[*Translation*]

Ms. Nicole Dufour: Yes.

[*English*]

The Chair: Thank you very much.

From the Canada Safety Council, sir, the floor is yours.

Mr. Emile Therien (Past President, Canada Safety Council): Thank you very much, Mr. Chair.

I'd like to acknowledge Diane Diotte and her staff for facilitating our appearance here today. Thank you very much.

We have brief remarks, and I think all of you have received our submission.

Canadians are very concerned about young drivers impaired by alcohol or drugs and older drivers impaired by prescription medications. The Canada Safety Council considers the issue of drug-impaired driving to be a very high priority, and we agree that government action is needed. It is imperative.

The former and current governments proposed the amendments in Bill C-32 to strengthen the enforcement of drug-impaired driving offences in response to this high level of public concern. Criminal legislation must be airtight, because unlike provincial traffic regulations, the accused is innocent unless proven guilty. A very high level of proof is required because for the accused the stakes are very high. Anyone convicted of a criminal offence will carry that record for life. The chances are therefore very high that such legislation will be challenged and loopholes found.

Drug-impaired driving is a very complex issue. Until the enormous problems identified in the Canada Safety Council's submissions are resolved, criminal legislation is premature. That is why we urge the government to put Bill C-32 on hold, until it can meet the rigorous requirements of a criminal court. There are other ways to respond to this serious problem, and we have recommended that these be pursued. The council agrees that immediate precautionary measures are in order, but the priority must be to protect the public from drug-impaired drivers, rather than simply impose criminal sanctions after the fact.

This committee is no doubt aware of Canada's strategy to reduce impaired driving, which is known by the acronym STRID. That strategy started in 1991 and has the full support of all provinces and territories, as well as Transport Canada. Justice Canada must not take unilateral action on impaired driving.

Canada's impaired driving laws are among the strictest in the world. Combined with leadership from STRID, this has led to significant progress in the fight against impaired driving. Between 1995 and 2000, road fatalities involving a driver who had been drinking went down by one third. That said, impaired driving remains a safety problem of the highest priority in this country.

In 2004, the latest year for which comprehensive statistics are available, road crashes involving a driver who had been drinking killed 815 people. Consistently about half of all impaired driving fatalities are the impaired drivers themselves—very definitely not innocent victims.

The absence of national statistics on motor vehicle fatalities or crashes involving drug impairment should be of concern. Good laws are not driven by feelings and opinion polls, but are based on hard facts, credible statistics, and solid research.

l expect that you have all looked at our submission, so l would like to review some of our recommendations.

It should be obvious that we believe Bill C-32 is premature, and we strongly recommend that it be put on hold for the necessary groundwork to be completed. Indeed, the government's priority should be to provide resources, and these include adequate funding to ensure that future legislation has a solid scientific basis and technological support, to identify drugs that can impair driving ability, and to establish defensible impairment levels for each drug and specify the measurement methods.

We have pointed out that more and more impaired driving cases are being pleaded outside the Criminal Code. The government must consider the reasons behind this trend before proceeding with further criminal legislation.

Administrative licence suspensions have proven effective in the fight against impaired driving. Under traffic codes, most Canadian jurisdictions impose 12- to 24-hour suspensions on drivers whose blood alcohol concentration is below the criminal limit. These suspensions remove potentially dangerous drivers from the road. They provide a stern and effective warning, without the punitive lifetime consequences of a criminal record and a costly criminal court case.

The Canada Safety Council has encouraged provincial and territorial governments to impose administrative licence suspensions on drivers who show impairment by substances other than alcohol. That is why we recommend that federal resources should redirect moneys earmarked for the implementation of this bill to help provinces and territories deal with drug-impaired driving under their traffic codes.

One of our key recommendations is that Justice Canada should collaborate with STRID to coordinate any amendments to the Criminal Code with respect to drug-impaired driving. I stress that it could be counterproductive for Justice Canada to enact impaired driving legislation that interferes with the national strategy and counters measures now in place.

● (0910)

Proponents of Bill C-32 say a driver impaired by cannabis poses as much of a risk as a driver who is above the legal limit with alcohol. First of all, the bill is not restricted to cannabis. On top of that, there is no scientific basis to establish impairment by cannabis, or for that matter, any drug.

It should also be noted that the evidence clearly shows alcohol carries a higher risk than cannabis. The underlying problem with this illicit drug is that it is an illegal substance. The focus should be on the fact that so many Canadians are using it at all. Its negative health and safety effects extend far beyond impairment while driving. A national strategy is needed to reduce cannabis use, with an emphasis on youth and habitual users. In our opinion, this is far more urgent than criminal legislation on drug-impaired driving at this time.

It may be counter-intuitive, but there is little evidence that drivers who have used cannabis on its own are more likely to cause crashes than drug-free drivers. It does negatively impact driving ability, although in very different ways from alcohol. THC, the active component in cannabis, can be detected in the body for up to four weeks, but its impairing effects do not last. Relatively few road fatalities test positive for THC alone. Most often it is found in combination with alcohol, a combination that drastically increases crash risk.

Roadside breathalyzers allow police to detect and measure the presence of alcohol. At present there is, unfortunately, no reliable, non-intrusive roadside method to test for cannabis. Even if such a test were available, a defensible limit must be set at which a cannabis-using driver is criminally impaired. Before criminal legislation can be implemented, defensible criteria must be set for THC impairment, alone and also in combination with alcohol, and the government must approve detection tools for use by trained police officers. This process alone could take years, but without it the law will not be enforceable.

I'd like to move on to medications, which are also covered in Bill C-32.

Canadians over age 65 take an average of nine medications daily, including prescription, over-the-counter, and herbal. Medications can have a positive or negative effect on driving ability. Some people, such as epileptics, may not be able to drive at all without medication. Physicians prescribe benzodiazepines to combat anxiety and insomnia among seniors. They can have side effects such as drowsiness, impaired motor function, and confusion, and have been implicated in many collisions.

Seniors taking certain painkillers may experience sedation and mild impairment. Even over-the-counter drugs can reduce driving ability. Antihistamines can cause drowsiness and poor concentration. Tranquilizers or cold remedies such as cold tablets, cough syrup, and sleeping pills can reduce driving ability. Combinations of medications can also produce unexpected side effects and bad reactions. Combining alcohol with medications is very risky, especially for seniors. With age, tolerance for alcohol decreases steadily, and the body does process it less efficiently.

Currently about 22,000 human drugs are available in this country. To identify those that can impair driving—alone or in combination with other substances—and then set defensible criteria for each and approve measurement tools just poses a huge challenge.

With Canada's aging population, legal medications present a health and safety issue that extends beyond driving and must be addressed. The council views this as a very important health and safety issue, but not a criminal issue.

Other strategies, some of which are already in place, would be far more effective and appropriate than using the Criminal Code to prevent driving under the influence of potentially impairing medications. We have therefore recommended that the federal government develop and fund a strategy, including public education, to address concerns associated with impairment by medication. Justice Canada must assess the rationale for and potential consequences of using the Criminal Code as a legislative tool to address medication-related impairment. This issue, in our view, is a better fit with Health Canada's mandate.

To a lesser extent, illegal use of prescription medications such as those with psychotropic properties, as well as the use of illicit drugs such as cocaine, are factors in impaired driving. Targeting cannabis could turn users to other, even more harmful substances.

● (0915)

In summary, we know politicians are under pressure to do something about the perceived increase in drug-impaired driving. However, the proposed criminal legislation is likely to be ineffective, and even counterproductive. We urge you not to risk failure. Address the problem in collaboration with the appropriate agencies outside the Criminal Code at this time.

Thank you very much.

The Chair: Thank you very much, Mr. Therien.

Next, as an individual, is Ms. Beauchesne.

[*Translation*]

Prof. Line Beauchesne (Associate Professor, Department of Criminology, University of Ottawa, As an Individual): Good morning. Thank you for your invitation.

In any piece of legislation, before being able to say how relevant the measures being proposed actually are, one first needs to consider the goal being pursued and look at the problems to be resolved. In this case, the purported goal is to improve road safety by preventing people who are impaired from driving a vehicle, as they may pose a danger to themselves or to others. However, a bill hoping to attain that objective must successfully resolve the following issues.

The first major issue, which was raised during parliamentary debates, is that thus far, activity has, for all intents and purposes, focussed on alcohol, in terms of both prevention and our legal system, even though there are many other factors that can give rise to impaired driving, be they fatigue, medication or other reasons.

The second issue relates to repeat offenders, who seem to be relatively unaffected by prevention campaigns. Repeat offenders are few in number, but are responsible for the vast majority of accidents. According to the research, these repeat offenders are clearly dependent on drugs, the main drug being alcohol, for most of them. Alcohol is a drug, even though that seems to be somewhat forgotten in some of the debate.

This bill must make it possible to determine all the causes of impaired driving and to better target repeat offenders. However, it succeeds in neither case.

What are the issues clearly indicating that this bill misses the target, which is to improve road safety by preventing impaired driving?

The first issue is that the bill is practically unenforceable from a financial standpoint. In fact, a number of parliamentarians have pointed to that specific problem and the debate on Bill C-16 — the predecessor to Bill C-32 — clearly demonstrated that. The resources that will be needed to implement this bill across the country are in the millions of dollars. Even the addition of 1 000 police officers, as one parliamentarian has suggested, would in no way resolve the problem in rural areas. The process created here is cumbersome and practically unenforceable.

As well, enforcing this legislation will be costly. In a general sense, there is the cost of training DREs and police officers. However, the regular renewal of portable detection equipment, validation of laboratory drug tests and judicial procedures are also extremely costly. We are talking here about a middle class that will defend itself. There is a whole maze of possibilities. We already know what the alcohol-related side of this costs in terms of legal proceedings. This opens a whole new window of opportunity that will create very costly legal tangles.

The second issue, as was already mentioned, is that traces of drugs in the body are not clear proof that a person was impaired. They simply indicate that this individual used drugs. If, for example, a person used marijuana Friday evening and, on the following Friday, is given a drug test, the test will not be about determining whether that person was impaired because of marijuana. The test would only tell us that in the days or weeks prior to that, the individual in question had used marijuana.

The kind of equipment that authorities claim to be able to use is relatively discriminatory. It has been proven scientifically that it cannot be said that a person is impaired simply because traces of drugs have been detected in that individual's body.

The third issue is that enforcement of this legislation is likely to be extremely discriminatory. As Mr. Therien pointed out, there are 22,000 different types of medication and a whole range of drugs. It is quite clear that the portable equipment used nowadays focusses on certain types of drugs that are used by certain kinds of people.

In that respect, one may wonder whether the real objective is to catch people who use illegal drugs, or to include all the possible causes of impaired driving, whatever drug has been used. During the debate on Bill C-16, some pointed out that if medication were involved, that person would be referred to a physician or to someone other than the police.

● (0920)

The message of prevention that this bill sends is that there are good and bad reasons to drive while impaired. Let me give you an example.

Supposing an individual worked an unexpected shift and has not slept for 30 hours. That person is practically asleep, but still decides to his or her car and ends up killing someone. Are we going to say that it was okay for that individual to have killed someone, simply because he or she had worked too many hours? I don't think that's the kind of message we are trying to convey. We may also be talking about someone 79 years old, who is told by his daughter that his medication puts him to sleep and that he really should not drive a car, but who decides to drive his car anyway, and ends up killing someone. Are we going to tell such individuals that they have the right to kill someone, simply because they are elderly and they decided to drive their car?

The message of prevention that this bill sends is not clear at all. In fact, it seems to be more about the fight against illicit drugs than it does about preventing impaired driving. The millions of dollars that will be invested for no purpose in this bill are millions of dollars that could be invested in prevention.

So, what should be done to improve the current situation as regards impaired driving and move in a different direction in relation to the two issues that I have raised?

It is quite clear that prevention should focus on broadening advertising aimed at specific client groups, so as to include medications considered to impair the ability to drive. Indeed, France has done a great deal of work in that area. Be it on television or through other means, we have to stop saying that alcohol is the only thing that results in impairment, and encourage people to drive only when they are fit to drive.

We are not talking about reinventing the wheel here. I am not referring to sobriety tests, because the issue is not only about having used specific drugs; we are also talking about roadside reflex tests that are videotaped, tests which would now be mandatory. Those tests would make it possible to determine whether an individual is able to drive. Whatever the reason, if that person is not able to drive, he or she would be taken off the road.

We do not need to know whether such individuals use drugs, whether they were tired, whether they were going home or whether they were coming out of a bar. They were tested and filmed and proven not to have the necessary reflexes to drive properly. We are not only seeking people who use drugs through this exercise. The important thing is to remember that we need to take people off the road who are driving impaired.

One of the basic concepts in criminology is that an enforcement mechanism that is simpler and is used more often — and people have the sense that it is being enforced — is preferable to a complex and costly mechanism that is rarely enforced, and which gives people the feeling that they will not get caught because the authorities will hesitate to move in that direction. They have the feeling they will not be targeted because this is only aimed at people who use illegal drugs.

It is much easier to train police officers to carry out a basic reflex test — which involves asking people to walk in a straight line or lift their legs, while being filmed, than it is to train DREs, at a cost of many millions of dollars, whose job it will be to determine, using an extremely complex procedure, whether people seem to have used drugs.

France has done more in a year and a half to reduce speeds on the highway by installing cameras that regularly take pictures of drivers. Highway accidents have decreased by a quarter or a third. I will soon be receiving all the details with respect to the assessments that have been carried out. This particular program involves demerit points and fines, which have a much greater impact than if 300,000 additional police officers had been assigned to patrol the roads in France.

As a result, the more complex the procedures, the less likely it is that they will be enforced and that they will be highly discriminatory.

● (0925)

As regards the second issue—that is, repeat offenders—studies show that the vast majority of them have an alcohol dependency problem. People like them could have their licences taken away. However, what is needed is a much better organized national register to keep track of them, so that their licences can be taken away as long as there are not adequate guarantees that their problem has been resolved. The real issue here is treatment.

When you read the testimony of highway accident victims, you realize that they often lacked support following their accident. So, perhaps we should be spending more of these millions of dollars on support for highway traffic accident victims.

In closing, I would just like to say that it is time to give police officers the means they require to ensure more effective prevention of impaired driving, whatever the cause. Police action will be successful if the procedure is simpler and includes demerit points, higher insurance premiums and a proper offences registry. Such measures, which are far less costly than those presented here, would also allow for the introduction of a series of additional measures aimed at prevention and at assisting highway traffic accident victims.

Unfortunately, this bill does not move in that direction and even risks reducing police effectiveness in this area, at the expense of the many individuals who are victims of traffic accidents.

Thank you.

[*English*]

The Chair: Thank you, Ms. Beauchesne.

Now we will go to the Criminal Lawyers' Association.

Will you be presenting, Mr. Burstein?

Mr. Paul Burstein (Director, Criminal Lawyers' Association): We will both present, Mr. Chair.

The Chair: That's fine.

Mr. Paul Burstein: Once again the Criminal Lawyers' Association is honoured to have the opportunity of appearing before this committee to help with the very important work that it does.

With me today is Jonathan Rosenthal. He is a lawyer of almost 20 years' experience in defending drinking-and-driving cases. He's lectured to law students, lawyers, and judges on the topic, and I'll be asking him to address you on the bill's amendments relating specifically to the investigation and prosecution of drinking and driving.

I should say I sort of lured him here under false pretences. I promised him we'd see the Senators, and we haven't yet been to the Senate chamber to have a gander. So I promised him we'll go after we're finished here.

My name is Paul Burstein. I'm here to address you on the new drug-impaired driving provisions. I'm not only a criminal lawyer; I also am an adjunct professor at Osgoode Hall Law School and Queen's University. I've been a director of the CLA for ten years, and I've been called upon on a number of prior occasions to testify before this committee on issues relating to marijuana and cannabis. I should say I was also counsel on the trilogy of cases that wound their way up to the Supreme Court of Canada dealing with the decriminalization of marijuana, as well as many of the medical-marijuana cases. I only say that because while I don't purport to be a scientist, I certainly consider myself to be quite familiar with the social science concerning marijuana and its uses and abuses.

Let me begin by emphasizing, if I could, that when you decide what, if anything, to do about marijuana, you must be very careful in dealing with "studies". As many say about statistical analyses, "figures lie and liars figure". The report of the Senate Special Committee on Illegal Drugs identified the weaknesses of many of the studies that concerned the use of marijuana and its symptoms and manifestations. They noted that "there are divergent opinions about the interpretation of studies and their meaning in connection with the specific effects of marijuana on driving".

I only say that because when police groups or any other proponents of the bill who come before you cite numbers and statistics, I just urge you to be very cautious before you accept the data. The most objective and complete summary of the data, I believe, at least up until 2002, was found in the Senate report, and I urge you to go to that. Indeed, the Senate report concluded, after reviewing essentially all the studies current to that date, that findings show that cannabis alone does not increase the likelihood of responsibility in an accident. The findings definitely confirm the significant risk of alcohol, but generally fail to demonstrate that there is an effect of cannabis alone on the risk of being responsible for a fatal accident or an accident involving serious injury.

It's not to say that it's a good idea to drive after consuming marijuana. Of course it's not. But the question is whether there's enough there to warrant invocation of the blunt instrument of the criminal law. Also, I say to you that when proponents come here and try to tug at your heartstrings through reference to families of victims of fatal accidents, it's essential that you keep in mind two things. As you've already heard some of my colleagues here say, these provisions will do little or nothing to prevent the small percentage of the population who do drive after consuming marijuana from continuing to drive after smoking marijuana. You'd be fooling yourselves to think otherwise. Second, as you've also heard—and I certainly endorse the comments of Mr. Therien and Professor Beauchesne—there are other and much better non-criminal ways of preventing and reducing drug-impaired driving.

As I'm sure members of this committee already know, the Senate committee has already plowed much of the ground for you. Indeed, having considered the social science evidence, the Senate committee concluded that "it would appear that it would be highly desirable to adopt the DEC"—that's the drug enforcement classification—"and train police officers in drug recognition".

However, I would say there are two reasons why that recommendation does not justify this legislation, at least at this time. First of all, the Senate recommendation about DREs, or drug recognition evaluators, was part of a bigger package that recommended decriminalization of the personal use of marijuana, which of course was assumed to likely increase not only the use of marijuana but the likelihood that people might drive after consumption. That recommendation—to decriminalize the personal use of marijuana—was predicated on the Senate committee as well as the committee of this House recognizing that the criminal prohibition on marijuana caused disproportionate harm to people by virtue of the criminal prohibition compared to the potential harm that it might prevent. So this is only going to make it worse. It's going in the wrong direction.

● (0930)

On proposed subsection 253.1(1), the driving-while-in-possession offence, there's nothing about that offence that prevents harm. There's simply no scientific or logical basis to conclude that the mere possession of drugs increases the risks associated with impaired driving. If that were the case, why has no province in this country imposed licence suspension as a consequence of a drug conviction? No country in the world does that. Remember, according to the statistics that are presented to you as to why something needs to be done, this offence, proposed section 253.1, will have the most effect on young Canadians, because it would seem that mostly young Canadians are engaging in this behaviour. There's already, though, according to the Senate and the House committee reports, a disproportionate impact of the criminal prohibition of marijuana on young persons. This is going to make it ten times worse.

The second reason why we say the Senate recommendation does not support this legislation is because unfortunately the reality of the screening testing mechanisms does not yet meet the hopes and expectations. I don't believe the Senate committee heard evidence about what the current state of affairs is. There's some reference to studies there, but Dr. Beirness of the Traffic Injury Research Foundation testified before this committee on Bill C-16 and he recognized that the testing procedures were far less than perfect. In the States, even, they're at best reliable maybe 80% to 90% of the time. But what does that mean? It means one in five or one in ten most likely young Canadians, on the strength of an unreliable test, will wrongly be taken into police custody to the hospital and forced, under penalty of criminal prosecution, to give a blood sample for no good reason. That, in our view, is an undue cost.

Let me wrap up my section by just saying there are three significant costs to the criminal justice system you've already heard some allusion to. First is the cost of training the police. There are much better uses of scarce police resources than training them to do this. Bear in mind, it's not like an instrument where you can buy it once. Even though police officers may advance in their careers from front-line officer to detective to administration, you have to keep re-training those police officers. A machine, at least, stays in the police detachment as police progress through the system. It's very expensive. Second, even if the DRE provides grounds to take bodily samples, the bodily sample analysis is itself a big question mark. What level of drug in the blood or urine suggests impairment? There is no clear science on that, which means, the third problem, the cost of litigating these, as you've already heard, will be very expensive in every one of these cases because this is very soft science. The length of trial will double or triple, as my colleague Mr. Rosenthal is about to tell you.

I conclude by telling you that we strongly oppose certainly all the DRE amendments, especially the offence provision, proposed section 253.1. Deterrence doesn't work. In fact, if it did, why do you need it, because there's already a criminal offence to possess marijuana, so you know that doesn't work. It will significantly burden the criminal justice system. Right now there are probably no trials in the system—or very few—on defences to possession of marijuana because most of them are diverted or people plead guilty because of the somewhat benign consequences. No person will agree to plead guilty to possession of marijuana while driving a car because of the devastating consequences.

Finally, as for the other amendments, no one wants drivers on the road who are stoned, as Professor Beauchesne says, nor do we want them drowsy or unskilled or on their cell phones. These amendments will not have a net reduction on societal harm, but rather it will increase it. We would rather see you spend more money equipping police to get guns off the street than getting marijuana drivers off the street.

Mr. Rosenthal.

● (0935)

The Chair: Mr. Rosenthal, please.

Mr. Jonathan Rosenthal (Representative, Criminal Lawyers' Association): I will be addressing the amendments in paragraphs 258(1)(c), (d), (d.01), and (d.1) of the code. These are dealing with what is commonly known as evidence to the contrary.

The proposed amendment will require an accused person to show either machine malfunction or improper operation to avoid conviction for an over-80-milligram offence. If this amendment is passed and it survives charter scrutiny and charter litigation, it will have numerous, far-reaching implications, and in addition there will be significant cost, both in time and money, in regard to over-80 litigation.

This is a disturbing and unprecedented provision in criminal law. This is a provision that really creates an unrebuttable presumption. Since blood alcohol measures cannot be measured at the time of driving—you can't stick a needle into the arm of someone who's driving—there's a presumption that's been created known as the "relating back provision" that is really a shortcut for the crown to prove that someone is over-80 at the time.

However, this proposed amendment puts a significant and somewhat impossible burden on persons who may be factually innocent. When I'm talking about factual innocence, I'm not talking about legal innocence, not talking about raising a reasonable doubt, but talking about people whose actual blood alcohol levels at the time of the offence are under the legal limit, people who have done nothing wrong, and people who are not at risk to harm others or themselves.

Under this legislation, people will be convicted and will suffer the stigma of a criminal record and all the consequences of a criminal conviction—people who are as a matter of fact legally and factually innocent.

This amendment is premised on the supposition that the Intoxilyzer 5000C is an infallible machine. No machine is infallible. In fact, Intoxilyzers do not measure blood alcohol content. What they do is estimate blood alcohol content based on a blood-breath ratio. These are fast machines. They're machines that give an instantaneous reading. They're machines that are much quicker than machines used in hospitals to actually analyze blood. They're machines that are much cheaper than those used in hospitals to actually analyze blood.

I ask myself, and you may want to ask yourselves, if these machines are really that accurate and that infallible, why aren't all of the hospitals using these Intoxilyzers instead of expensive, much more time-consuming blood machines?

Just improving an instrument does not make it infallible. Just being approved by our alcohol test standards committee does not make an instrument infallible. We don't have to look any further than the experience that I know occurred in Ontario.

There was a machine known as the ALERT model J3A. It was an approved screening device, it went through all the tests, it was approved under the Criminal Code, it was designated. It was used for about 15 years, until someone realized that in fact it wasn't an approved instrument, and it was recalled.

This proposed amendment will entirely take away from the trier of fact, whether it be a judge or a jury, the ability to determine guilt or innocence. Criminal trials, if you bring them down to a simple level, are really simple: the crown and the police get up and say he did it; the accused gets up and gives the reasons why he did it. You have a judge decide. That's what judges do.

This amendment entirely takes away that possibility, unless you can show that the machine was either being improperly operated or was malfunctioning, and if you can't show that, quite frankly, you're guilty.

This is an extreme amendment. There is no other provision in the Criminal Code that has this sort of requirement, this sort of what I call an erosion of the presumption of innocence.

I just want to give you a few examples where you may see people who are legally innocent—their blood alcohol level as a matter of fact is below the legal limit—being convicted.

My friend earlier gave the example about someone going to a private health clinic for a blood test. Quite often, breath samples are taken at the hospital at the same time as blood samples are taken. If there is a difference between the two—in other words, the blood sample is below the legal limit but the breath sample is above the legal limit—in anyone's mind that would be a reasonable doubt, or even further, the person is probably innocent. Under this legislation, too bad. Unless the accused can show a problem with the machine or operation, he's guilty.

You may have a situation where a judge doesn't find that someone's evidence raises a reasonable doubt. They go farther and say, "I believe Mr. Jones' evidence. I believe all his witnesses." It doesn't matter. The judge, notwithstanding that, under this legislation is going to be compelled to find that person guilty.

● (0940)

Let me give you another example. Someone drives home, they park their car, they put it in the garage, they lock the door, and they have a few drinks. For some reason the police show up and breath samples are taken. There's no doubt that the person had nothing to drink beforehand. Under this legislation that person will be found guilty, unless they can show a number of things.

I suggest to you that if this legislation is passed, we're heading down a very dangerous, slippery, and sliding slope.

Let's apply the ideology of this legislation to other cases. Let's say we apply it to a DNA case. We all know DNA is infallible. Could you imagine if the Criminal Code were amended to say in a sexual assault case that if someone's DNA is found there, they can't raise the defence that they weren't there. They can't. They could show you a plane ticket. They could show you a video that they were in another country. No one would support that type of legislation.

It's the same thing with the fingerprint. We all know fingerprints are infallible. What happens if the legislation were amended so that if your fingerprint is found on a document you're deemed to have created that document? You have no right to defend that. That's what judges do. They take a look at the facts and they determine who they believe.

This is the recipe for a wrongful conviction. There will be wrongful convictions.

I can tell you, as a lawyer who specializes in defending drinking-and-driving cases—and there are a number of us—that if this legislation is passed, we're not going to lie down, wave the white flag, and say you've got us. It's just not going to happen. What will happen is that there will be significant litigation to attack both the operation and the functioning of those machines. Judges are going to be ordering—and I can tell you this will happen—production of maintenance logs, which they're not doing now. They're going to be ordering production of training manuals. There are going to be source code litigations on the manufacturers themselves, which are third-party applications. You're going to have lengthier trials.

There's an amendment here dealing with certificates so the breath technicians don't have to come to court. You can forget that. I can tell you that we're going to insist on it now. We're entitled to cross-examine the breath technician on every single case.

You're going to see subpoenas, which we see in the States, for the actual breath machines to be brought to court for independent analysis.

In closing, let me just leave you with this. If this amendment is passed, I'll grant you this: you're certainly going to convict a lot more people who are guilty, but you're going to erode presumption of innocence, and you're also going to convict a lot of innocent people. In due course someone is going to have to clean up the mess of these wrongful convictions.

You also had better prepare to allocate a greater number of resources. Anyone who practises criminal law in a jurisdiction where there's a backlog—whether it's a crown attorney, a defence lawyer, or a judge—will tell you that the source of the backlog is litigation over drinking-and-driving offences. The harder the penalties are, the more people will litigate.

If you want to pass these types of amendments that are going to lengthen trials, you'd better build a bunch more courthouses. You'd better hire yourself a bunch more judges to sit in these courtrooms, and while you're at it, throw in a bunch more crown attorneys.

More importantly, and lastly, I can tell you it will make CMI, the manufacturer of the Intoxilyzer 5000C, because you'll need to order a lot of those machines. A lot of those machines are going to be stuck in exhibit rooms and courtrooms, as opposed to police detachments.

Thank you.

● (0945)

The Chair: Was that your conclusion?

Mr. Jonathan Rosenthal: That was my conclusion.

The Chair: Okay.

Thank you for your very passionate intervention, Mr. Rosenthal. It brings to mind a lot of questions, but they're not for me to ask right now.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you.

We take note of the warning of robust engagement from the Criminal Lawyers' Association.

In a 30-second preamble, I want to note my fascination with the current government's apparent obsession with sex and drugs. There's another bill in front of the House of Commons that talks about restricting work permits. It's an amendment to the Immigration Act. The government's own press releases explicitly refer to strippers and exotic dancers. I'm curious about that, and we'll see how that works out.

In this case, we're dealing with drugs. I have two focuses, and I'd like to direct a question to any of the lawyers at the table—I think they're almost all lawyers. The first one is this. Section 253.1, which has been referred to here, only deals with the issue of possession; it doesn't deal with impairment. It covers the same territory as the Controlled Drugs and Substances Act.

It occurred to me that about five years ago I was taking a flight, Mr. Chairman, and my spouse said to take a sleeping pill in case I wanted to sleep on the flight. I still have it. I never used it. I never took it out, and it's buried in the bottom of my wallet. I think if I tried to get it out, it would rip my wallet. It's still here, it's right there. I think it's a schedule 4 drug, and it just occurred to me that if we pass this section, I would be committing a criminal offence as soon as I got into my car. So is it ill-considered in this bill to include schedule 4 drugs in the legislation? Should we just walk from that, fix it? It's a mistake the government didn't notice; they didn't think about it.

Schedule 4 drugs include steroids, and I can't see the connection between being in possession of a steroid, or having a steroid in your body, and being impaired. There's no connection, from a public policy point of view at least.

So let me just put that to the first one who puts up their hand, Mr. Chairman. I would appreciate the analysis of Ms. Beauchesne, or from the Criminal Lawyers' Association.

● (0950)

The Chair: Ms. Beauchesne, would you like to start, and we'll go to the Criminal Lawyers' Association after?

[*Translation*]

Prof. Line Beauchesne: You're right. This bill seems to focus more on the war against drugs than on combating impaired driving. There is more of an inclination here to go back to the approach used during prohibition than to reflect on what would actually bring down the number of impaired drivers.

As we mentioned, a lot of innocent people run the risk of being caught in this net without being impaired, and will, rightly, challenge the charges. The results have been fairly well laid out by the lawyers. Unless the government already decided it will spend the money on this whether it's helpful or not, because it has money to waste, I believe there is a need to sit back down and look at the whole issue of impaired driving.

[*English*]

The Chair: Mr. Belleau.

[*Translation*]

Mr. Louis Belleau: Your comments are extremely relevant. The risk that this bill is attempting to prevent, by regulating or prohibiting the possession of drugs while in a motor vehicle, is the danger caused by individuals who have used drugs and are not able to drive a vehicle responsibly. If that is the goal being pursued, then legislation has to be passed that will enable us to attain that goal. Here, an offence is being created that does not attain that goal.

There is no connection between the fact that you, Mr. Lee, for example, may have a sleeping pill in your wallet while driving a motor vehicle, and the safety of the public in terms of protecting the public from drivers who are under the influence of alcohol or drugs.

If we want to be logical about this and see this as a way of ensuring safety on the roads, we would have to create a corresponding offence for anyone driving a vehicle in which there is a bottle of wine, or for someone coming back from the corner store with a case of beer to watch a hockey game, the logic is exactly the same. It is no more difficult to uncap a bottle of beer or roll a marijuana joint while driving a vehicle.

So, it is quite obvious that there is no rational link between the prohibition and the goal being pursued. It is unconceivable that we would prohibit someone from having a bottle of beer or two in his car, supposedly to ensure safety on the roads.

Indeed, the Quebec Highway Traffic Code prohibits the consumption of alcohol in a vehicle. That applies not only to the driver, but to anyone travelling in the vehicle. However, that prohibition does not include penalties such as suspension of the driver's permit, demerit points or anything else of that nature. There is a fine associated with the commission of that offence, obviously, but there is nothing so radical as what is provided for in the new section 253.1.

There are other comments that should be made with respect to that clause, particularly as regards the sentence. This clause creates a harsher sentence than the one currently provided for under the Controlled Drugs and Substances Act, particularly with respect to cannabis. The penalty for simple possession of cannabis is the same as for the summary offence, reduced by no more than $1,000 and six months in prison, whereas in this case, there is an option to prosecute by indictment with a five-year prison term for an offence that is essentially the same as the one now covered by the Controlled Drugs and Substances Act.

And this clause contains a further absurdity: the penalty of a prohibition on driving. Proposed clause 253.1 provides no opportunity for an offender to use an alcohol-ignition interlock device. Thus, the following situation might arise. A person is stopped with a sleeping pill in his wallet and is sentenced, in theory, to a harsher penalty than someone liable to be charged with an offence under the Controlled Drugs and Substances Act. That person would be prohibited from driving for a year and would not have the option of using an alcohol-ignition interlock device, even though he was perfectly sober and fit to drive at the time he was intercepted. On the other side, you have an individual who could be stopped because he was dead drunk and, three months after the prohibition, could request the use of an alcohol-ignition interlock device with his vehicle.

So, as you can see, there is a complete imbalance between the treatment of these two types of offenders when, in actual fact, the problem we are trying to prevent is the same. In our opinion, this provision, primarily because of the lack of any logical connection between the prohibition and the goal being pursued, which is to ensure road safety, is beyond repair.

● (0955)

[*English*]

The Chair: Thank you, Mr. Belleau.

Mr. Lee, thank you.

Mr. Burstein, did you have a comment?

Mr. Paul Burstein: I just wanted to say one thing.

Mr. Lee's example demonstrates the illogic of it. You're in possession because you didn't use the drug, right? The point is that if the whole point of the section is to stop people from driving while drugged, possession is actually counter-intuitive. You want to charge the person who has the bar receipt in their pocket, not the 24 of beer in their car, because they're not the danger; it's the one who has the receipt for the 24 but doesn't have the 24 any more. So your example makes perfect sense for why it's illogical.

Thank you.

The Chair: Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Mr. Chairman, as you can see, the next action we should be taking is to withdraw this bill.

I will begin with a question for Ms. Beauchesne, and then I will have one for Mr. Burstein or Mr. Rosenthal.

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): She quotes your very words. As the member of the Bloc Québecois, Serge Ménard, so aptly pointed out during hearings on Bill C-16, bad laws make for very rich lawyers. And Bill C-32, like Bill C-16, is particularly bad.

Mr. Réal Ménard: She quoted Mr. Ménard.

But don't confuse the two of us! It was Serge she was quoting.

Mr. Daniel Petit: Did you invite him?

[*English*]

The Chair: Order, please.

Mr. Ménard, you have the floor.

[*Translation*]

Mr. Réal Ménard: It sounds as though some people are under the influence of alcohol here in Committee. The party is about to begin!

Ms. Beauchesne, when the minister appeared, he talked about two new tests—the standardized sobriety tests and the drug recognition tests. You seem to be saying that all of that will be very costly and that there is no evidence to suggest they will be easy to enforce, and could in fact be totally ineffective.

Two points that you raised in your testimony are of interest to me. You said that the most effective tests may be the simplest ones. You reminded us that roadside tests that measure reflex acuity, which are filmed and can serve as evidence, are probably the most effective ones of all. I would like you to say a little bit more about that. Perhaps we could table an amendment to the bill with respect to the national registry.

In your brief, which I read in bed last night, I noted there were a lot of references to removing people's driving licences as more of a disincentive than anything else. Representatives of the Canada Safety Council also talked about that. Again, perhaps you could talk about the merits of revoking people's driving licence and tell us how the national registry you referred to would work.

Those are my questions for you, but I have others for the fascinating lawyers seated next to you.

Prof. Line Beauchesne: Well, I won't go into it in detail, but I will address the issue associated with each of the points your raised.

I do agree that police officers have to be given the ability to force someone to take a reflex test. With respect to the first problem, as to whether the individual is fit to drive, I believe police officers have to be given that ability. Furthermore, the test has to be filmed, because if the individual decides to challenge the results, evidence will be available.

These tests already exist and studies show how they could be improved. They also show that there is a certain level of testing. Airline pilots take reflex tests and the same applies to them. I am not interested in knowing whether he was making love all night or whether he smoked marijuana; what I want to know is whether he is fit to fly a plane. So, the reflex test is intended to determine whether he is fit to fly a plane, whatever the reasons involved are. The same principle applies here.

As regards the national registry, the reason I mentioned it was in relation to the second problem—namely, repeat offenders. The fact is that the research shows that a great many accidents are connected to a small number of people driving impaired. An individual can be in one province, receive a penalty in another, and repeat the scenario over and over again. Where repetition is involved—and I'm not talking about repeated drug possession, but rather, of repeated impaired driving—I think there need to be rules or ways of ratcheting up the penalties.

● (1000)

Mr. Réal Ménard: There is the Canadian Police Information Centre, or CPIC.

We are told that the Firearms Registry is consulted 6,500 times a day. You are talking about a registry that every police force in Canada could consult with a view to ascertaining whether an individual has a record of impaired driving—for whatever reason—provided there is enough there for it to be a concern. I guess your intention is for a police officer to be able to access that information quickly, is that correct?

Mme Line Beauchesne: I haven't actually thought about how it would work. Furthermore, I do not know exactly how this system works in those countries that have this kind of registry. I always have one foot on the brake when it comes to the detailed procedure involved. I would have to take a closer look at that. What is important to me is access to the registry and what could be done with it. I am always afraid it could go the other way and be used for other purposes.

I would like it to specifically serve to identify individuals who repeatedly drive impaired. Thought has to be given to some way of ensuring that authorities will have the right to ask them to take a test to determine whether they have a problem related to a dependency or some other problem, and to require them to receive treatment or take some sort of action, until there is proof that the problem has been resolved. I stress, once again, that this would only affect a small proportion of drivers. So, that is the reason why I was proposing two solutions.

I would just like to come back, once again, to what was said initially: the studies are very clear in that regard. As was already pointed out, if I'm told that I will receive demerit points, that the cost of my insurance will go up, that my car may be taken away from me for 24 hours and that I will have to pay to get it back, because I am impaired…

Mr. Réal Ménard: The effectiveness of the punishment is more important than…

Prof. Line Beauchesne: Such individuals will be careful. On the other hand, if they are threatened with prosecution, they will hire a lawyer and so the process begins.

Mr. Réal Ménard: This is the positive aspect of this bill, about which we have reservations and are likely to have even more, having heard your testimony. Should what is known as the "two-drink defence" not concern us at a social level? We may have gone too far. As you say, this bill may erode the presumption of innocence in a way which is inconsistent with the freedom that we seek to defend. I would like you to talk a little more about that. Is there something that can be done in the medium term or is it irreversible, in its current form? From a social standpoint, it seems to me that there is something here we should be concerned about as lawmakers.

I am 100 per cent in agreement with Ms. Beauchesne's arguments. In terms of revoking drivers licences, I don't know whether, as lawmakers here in Ottawa, we could propose amendments to have an individual driver's licence revoked, while at the same time respecting the provinces' jurisdiction in that area. In terms of the "two-drink defence", I think that we should be concerned from a social perspective. I would like you to suggest potential amendments. I'm not asking you to do that in terms of the legislation *per se*, but rather to tell us what you think we should do.

[*English*]

Mr. Paul Burstein: I guess it begs the question of why we have a criminal offence of impaired driving or drinking and driving. It's to prevent the risk of harm that anyone who has consumed alcohol and then drives poses to other drivers. The whole idea of the "two-drink defence" or "last drink defence" is that it calls into question the reliability of the science. It says that even though this machine, which took a test some time after the offence, suggests that the person has a level of alcohol in their blood that may make them a risk, it's wrong to presume that whatever the result was an hour or an hour and a half later necessarily reflects what the person was at the time of driving. In other words, they really weren't a risk at the time they were stopped.

So it's not just some technical defence. Technical defences in the drinking-and-driving context are, for example—and it happened, and Mr. Rosenthal can tell you all about them—that an officer didn't identify the machine properly or there was something wrong with the paperwork. Admittedly that's the lifeblood of criminal law, and whether you want to do something about that is another issue, but taking away a defence that goes to whether the person really was a risk of harm and may have been factually innocent, as Mr. Rosenthal said, that we have problems with.

● (1005)

Mr. Jonathan Rosenthal: And if I could add one thing, remember that there are two drinking-and-driving offences. There are impaired driving and over 80 milligrams. If someone exhibits physical signs of impairment, and the test for that in Canada is whether their ability to operate a motor vehicle is even slightly impaired, the police lay the charge. Generally when you're dealing with an over-80 offence, you're dealing with an offence where the police do not see physical impairment, where people's ability to operate a motor vehicle for whatever reason is not impaired.

So the police are always left with that option. And I think it's one of the things the Supreme Court of Canada pointed out in a number of decisions dealing with over-80, saying it doesn't just give carte blanche for people to drive drunk. There's still the impaired driving charge.

The Chair: Thank you, Mr. Ménard.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you all for being here.

[*Translation*]

I want to thank Ms. Beauchesne and the representatives of the Bar who are with us today.

Have studies been conducted in the United States?

[*English*]

And I'm asking the same question of Mr. Burstein and Mr. Rosenthal. Are you aware of any legal studies in the United States—legal studies, not the statistical ones that you, Mr. Burstein, were so right in pointing out the error of following slavishly—from a constitutional standpoint, a Bill of Rights standpoint in the U.S., challenging these types of procedures and in particular the right of police to demand the invasive type of sample?

Let me just say to you that up to this point the information we have is that whatever challenges there have been in the U.S., they've been unsuccessful. So my second question to follow that up is that even if that is the case—and if there are studies that you're aware of, I'd like to know about them—do we have a different rights structure here under the charter that perhaps would imperil the latter part of those demands for invasive procedures?

Mr. Paul Burstein: Let me simply say that I don't think I can speak to that. Something like 34 jurisdictions in the U.S. have the DRE approach. They're 25 and zero, or something like that, in terms of the challenges, but my understanding is that you are quite right, that almost universally they have failed. I can tell you, more importantly, that having been a proponent of more than my fair share of constitutional challenges to legislation that this honourable House has passed, I wouldn't be optimistic about the chances of any constitutional challenge succeeding to this legislation, in terms of challenging the authority of the police to compel a driver to perform the sobriety test. It's a question of whether or not the results could be used as evidence in the trial.

I think there is some pretty strong case law—actually a case that I argued, one of the few successfully, where the Court of Appeal for Ontario said that compelled roadside sobriety tests can't be used as evidence in the trial. They can be used as evidence to give the police grounds to then make the next step in the process, but the real problem with these, I think, is that right now the reliability of the testing in Canada—that is, the training of the DRE officers—is perhaps a lot more questionable than it was in the U.S. when the challenges were brought. So assuming someone could sort of get together the evidence—and this is quite an undertaking financially for a litigant—and could demonstrate that the current status of the training of Canadian DRE officers is so unreliable that the tests as administered, in Canada anyway, don't really reliably establish anything, maybe the constitutional challenge would succeed. I still have doubts.

In other words, in the States they failed because they've had so many years of experience. The officers are reasonably reliable. The officers in Canada.... I commend to you an article in the *Edmonton Sun* of February 17, 2007, by Kerry Diotte, where he talked about the training program that's being used right now by the RCMP to train DRE officers. It's actually quite startling how unsophisticated and unstandardized it is. So maybe that would give rise to a successful challenge. I doubt it, though. I think you can pass this and not worry about that issue.

● (1010)

Mr. Joe Comartin: If I can go back to the issue of the admissibility of this, are we talking about a court saying this is irrelevant because it doesn't prove anything so we are not admitting it because of its prejudicial impact?

Mr. Paul Burstein: One of the things about DRE analysis is that it has to be administered almost perfectly by the officer. That's one of the reasons they talk about having to videotape the process. Forget about the response of the test subject, if the officer doesn't administer the test in the perfect standardized way he or she is trained, the results of the test are entirely fallible. The people who designed the test say so. This is not something a defence lawyer has conjured up.

That's why we're saying it's going to give rise to very lengthy and costly litigation. I will tell you right now, I wouldn't know of a self-respecting defence lawyer in the country where one of these cases came up who didn't challenge the reliability of the grounds used to make the subsequent blood or urine demand. That's the problem. It wouldn't be a constitutional challenge to the section. It would be a case-by-case challenge to the reliability of the officer.

If it were one constitutional challenge, you'd be okay, because it wouldn't be that expensive. You'd have one case work its way up and you're done. But you're talking about every case being a challenge.

Mr. Joe Comartin: My understanding is that in the U.S. in fact that's not what's happened.

Mr. Paul Burstein: No. In individual cases they still do challenge the reliability, very much so. In fact, they have full-blown jury trials on this stuff in the U.S., but on a case-by-case basis. That's where the American defence part takes a run at the reliability of this. It is not to say the law is unconstitutional, but the application in each case simply isn't sufficiently reliable.

I don't know if I'm making my point clear.

Mr. Joe Comartin: I have the same concern, Mr. Rosenthal, with your analysis of what is going to happen, because mine, quite frankly, is precisely the opposite, that we're going to see a substantial reduction in the number of hours spent in our courts on section 258. In terms of this, you were saying this type of approach of making it an absolute crime, an indefensible crime—is there no other experience we can look to any place else in the Commonwealth or in the U.S. or in any jurisdiction that has done what we're proposing to do?

Mr. Jonathan Rosenthal: I don't think any jurisdiction has passed a law, a criminal law, which puts such a burden upon an accused. But what I can tell you is every time they make the penalties harder for drinking and driving, people fight these things harder and harder. The most significant amendment in increasing penalties took place a couple of years before I was called to the bar in 1985, where they changed it from a three-year minimum suspension to one-year, not criminally, but through the Highway Traffic Act, and that created an industry of "impaired driving" lawyers in Ontario, which has steadily grown since then.

The harder the penalties, the greater the consequences of criminal convictions, the more people fight these things. So when you make the penalty harder, people don't say, "Okay, you've got me. I'll take my lumps. I'll get a criminal record. I'll make sure I can't be bonded. It may affect my travel to the U.S. When I get my car back after I don't drive for a year I'll have to install an interlock device, and my insurance is going to go up to $30,000 or $40,000." They're not going to say, "Okay, you got me." They're going to say, "Gear up. Do what you can."

The Chair: Thank you, Mr. Comartin.

Mr. Dykstra.

Mr. Rick Dykstra (St. Catharines, CPC): Thank you.

Mr. Rosenthal, you made an interesting point about the whole issue of whether someone drove home, went inside, had a few drinks, and then somewhere down the line was charged with impaired driving, and that you could actually convict for that. Out of curiosity, how often do police show up and knock on the door of someone's home and ask that person to take a breathalyzer for no reason?

Mr. Jonathan Rosenthal: Well, it may not be for no reason. Quite often the police get calls that there is some bad driving on the road, and with their obligation to investigate that, they show up and they do knock on the door. But on this post-drinking conduct, the example I gave was showing up at the door. Let me give you another example. Someone has an accident, and before the police show up or before the breath tests are administered, they consume alcohol.

Mr. Rick Dykstra: Why would they do that?

Mr. Jonathan Rosenthal: Why would they do that? People do a lot of stupid things, but just because they do something like that—

Mr. Rick Dykstra: Listen, you're talking about the extreme examples of situations versus the general rule of law, and I suppose you're much better at being able to do that than I am, I'll grant you that. My responsibilities, I feel, as an elected representative in the House of Commons, are to try to apply a general rule of law and not to get too carried away with extreme examples, because what ends up happening is we have no law at all, because every single law has its boundaries, whether it be very good on the one hand, or very bad on the other.

So the assumption of using extreme examples makes it difficult, at times, to be able to pass legislation, if that's all you're going to do. I appreciate the fact that Mr. Comartin did ask you a little about the increase in the severity of the penalties, and you did comment then as to what the impact would be. A substantial part of the legislation actually is that in fact there will be some new and tougher legislation that will be enacted if the bill were to pass.

Maybe I'll get your opinion on this. What is suggested here is an increase from $600 to $1,000 for a first offence, 14 days to 30 days for a second offence, and from 90 days to 120 days for a third offence. You tell me. I don't find those to be significant with respect to the increase in penalty. It's certainly an increase, but not significant.

● (1015)

Mr. Jonathan Rosenthal: Let me try to answer all of your questions.

The difficulty is that by making a general law or a general rule, as you say, you're going to convict innocent people. I invite you to find another provision in this Criminal Code where people who are factually innocent—someone who did not commit the offence.... They may have done something that you don't like or society doesn't like after the offence. We don't punish those people in the criminal context in a free and democratic society.

As far as the penalties—

Mr. Rick Dykstra: We have lots of examples, though, of innocent people who are convicted of other crimes, so—

Mr. Jonathan Rosenthal: That's right. And do we want to really create a piece of legislation that is forcing judges and taking away their job to analyse the facts—

Mr. Rick Dykstra: It's an interesting argument to get into. If we were to take the opposite approach that you're suggesting—that is, that it's not going to stop someone from drinking and driving, it's just going to make them fight it more—in that case we haven't seen a decrease. When you look at these numbers and you look at the example of 67,000 drivers charged with impaired driving, I would suspect that some of them were charged inappropriately, no question about that. But would you suggest that most of them were charged inappropriately?

Mr. Jonathan Rosenthal: No, I'm not saying whether they're charged inappropriately; I'm saying we have courts to determine whether or not they are guilty. Anything that forces a judge to convict someone who is factually innocent is a dangerous piece of legislation, sir.

Mr. Rick Dykstra: I don't disagree with you, but at the same time, it's theoretically impossible, I would suggest, to pass a piece of legislation where that isn't going to happen.

Mr. Jonathan Rosenthal: I guess it comes back to one of the basic premises of criminal law, which is that it's better that 10,000 guilty people get off than one innocent person ever get convicted.

Mr. Rick Dykstra: Well, would you suggest the opposite, that if 9,999 get off and one gets convicted, it therefore makes better legislation?

Mr. Jonathan Rosenthal: I think it's a very dangerous system where we're going to convict innocent people at the expense of not getting some people—

Mr. Rick Dykstra: I do think our dialogue shows—for me, anyway—that it's difficult to presuppose one extreme or presuppose another extreme, and that in fact what we're trying to do is find a balance.

Mr. Paul Burstein: Except for one thing: there's no evidence before you that the guilty people are being acquitted because of the current law you have. In other words, if there's a body of social science that says—

Mr. Rick Dykstra: Mr. Burstein, how do we ever know whether someone is guilty if they are found innocent?

Mr. Paul Burstein: Because you'd have reports by crowns or police. And I'm not talking about people who get off on a technicality. I'm talking about people to whom the judge has said, "I believe you are not guilty."

Where's the suggestion that people are coming before you and saying that we have 200 cases of factually guilty people who were allowed to walk away on the basis of the judge shouldn't have believed them? Unless you find that, you just shouldn't fix it.

As my grandfather used to say, don't fix it if ain't broke. This part isn't broke, so don't fix it.

Mr. Rick Dykstra: And as my grandfather said, don't let people innocent walk away if they're guilty.

Voices: Oh, oh!

Mr. Rick Dykstra: Thank you.

The Chair: Thank you, Mr. Dykstra.

Mr. Rosenthal was asked by Mr. Dykstra why people would want to drink after an accident. As a former police officer, I know why: they want to mess up the reading on the breathalyzer. If they're impaired, they want to mess up the reading on the breathalyzer. If they take that drink right after an accident, they know that their lung capacity and the amount of alcohol in their system right then will give a false reading.

So that's one way of, if you will, trying to beat the breathalyzer, even though they may be impaired. That situation is one that every police officer in the country faces today and did face 20 and 30 years ago.

Mr. Bagnell.

● (1020)

Hon. Larry Bagnell (Yukon, Lib.): Thank you.

Thank you for coming. It's been very helpful, actually.

My interest and my question will be directed toward driving with drugs, and catching those people.

Mr. Rosenthal, I think you actually convinced me on your point. I don't want to talk about the possession one, although I'm getting convinced on that too, actually.

Not to the bar—because you didn't comment on this—but to the others, I want to change the attitude. It seems as though your attitude is to find one little thing wrong, whereas I want to have the positive attitude. We want to try to save one or two children's lives by catching some impaired drivers.

I agree, of course, that we want to stop all impaired drivers, and for all reasons, but right now we're having an effect on alcohol-impaired drivers. The next step with drugs.... And I'm not sure why people keep mentioning marijuana. There are all sorts of more serious drugs that can impair people more seriously. So I'm talking about all drugs.

We have a huge problem with drugs and alcohol. Over half of crimes are committed under the influence, or to get substances, so we've had quite an effect. Every criminal expert that's come to us has said that the chance of getting caught is a major deterrent. So if we can do something at all on drugs that works technically, legally, I think we're going to stop some people, including children, from getting killed.

My understanding of the provisions would be that you would do some type of roadside test. It would be different from alcohol, because cocaine and all the other drugs are different from alcohol in their effects. But you would do some type of test that would then allow a blood test that would hopefully, scientifically at least, be accurate enough to get convictions and prove that someone was impaired.

Is that not how the system would work? Would that not save a number of lives, as does the similar system we have for alcohol? What I'm looking for is a way to try to catch these people and save lives. I'm not looking for the reasons why we can't do it but for how we should go about doing it.

[*Translation*]

Prof. Line Beauchesne: The first thing to be noted in terms of alcohol consumption is that prevention has played a huge role. There have been huge prevention campaigns. Health Canada has funded… One of my Master's level students prepared a list of all the programs funded by Health Canada in the schools. The department has conducted a huge campaign, which is absolutely fantastic, to explain to people how alcohol can impair one's ability to drive. If someone says to me that as a result of the police presence and the risk of receiving a penalty, the number of cases has gone down, I would answer that—and I have been teaching at the university for more than 25 years—when I present that part of the course and ask students whether they know which roads to take if they have been drinking, every single one of them is able to name one road the police do not patrol. If people are relying on the police to convince people not to drink and drive, they are making a mistake. People will simply find which road to take, because police officers cannot patrol every single road—unless we want to end up in a police state.

Prevention campaigns have really been the most effective way of reducing the number of cases and changing people's behaviour when it comes to drinking and driving. Similarly, it is clear that when it comes to preventing all causes of impairment… In terms of medications, as I was saying earlier, France has made tremendous progress by putting pictograms on product labels that people can refer to.

Certainly, if we want there to be fewer accident victims, people's behaviour has to change. It is not by bringing in tougher penalties that this will happen. People's behaviour changes primarily through prevention and through lighter, but more frequent, penalties, because people realize that there is a risk they will be caught and hit with the usual penalties: having their car seized or receiving demerit points. The objective is to target as many people as possible who drive impaired.

● (1025)

[*English*]

Mr. Paul Burstein: You made two points, sir, about surely we must be able to come up with a system where we can get to the blood test and that would provide reliable evidence of conviction and isn't that going to essentially help reduce the incidence of drug-driving through the deterrence.

I want to deal with both those points. First of all, even if you get to the blood test stage of the process, the science isn't there to make it simple enough to establish what level of drug in the blood or urine proves impairment. Read the Senate committee report. Some places use one level, other places use another; some scientists say it's ten nanograms, France says it's one nanogram. So the difficulty you're going to have, especially because in the legislation you don't even set a standard, is in each case you're going to have to litigate the issue of how much of a drug in the system establishes impairment.

The problem that creates for the "deterrent" value of this law.... I remember many years ago when Ontario brought in its administrative driving licence suspensions. I think my friends at the Safety Council will say that probably the most dominant reason for the reduction in impaired driving in Canada is the nationwide administrative non-criminal licence suspension. I remember cross-examining Dr. Beirness about this, and I remember the alliteration he had: that the most important thing about deterrence or the most important features of a law to promote deterrence are swiftness, certainty, and severity. In other words, swiftness of the process concluding or the punishment being imposed after the "commission of the offence"; the certainty, meaning that it's always imposed; and, of course, the severity.

All you have in this legislation is severity. You don't have swiftness and you don't have certainty. Why not? Because of all the reasons we said before. Every one of these cases will go to trial because the science is so vague.

In other words, as an example, you have the young person who arguably may have committed the offence, and the sanction they might receive is going to be 15 months later—and they might receive it. That doesn't promote deterrence. You want to go with the administrative penalties, the non-criminal ones.

Sorry, Mr. Chair.

The Chair: Thank you, Mr. Burstein.

I'd like to hear from Mr. Marchand.

Mr. Raynald Marchand (General Manager of Programs, Canada Safety Council): Thank you, Mr. Chair, members of the committee, and others.

At the Canada Safety Council, of course, we have seen that prevention works over the years. Perhaps our greatest gain is indeed by prevention, because if we look at the general public, today they have more or less disappeared from the statistics. The average social drinker understands the penalities and behaves accordingly. Our greatest challenge has really been in dealing with those folks who are alcohol-dependent, people who are perhaps alcoholics or who drink to excess on a regular basis. How do we reach these people? Many of them are more afraid of being apprehended than of the actual punishment. After all, if we look at impaired-driver fatalities, in close to half of them, it's them—it's the drivers themselves who receive the greatest punishment, which is death. That doesn't deter them.

Mr. Rick Dykstra: I think it does, actually.

Mr. Raynald Marchand: Well, yes; there's no repeat offender there.

That penalty doesn't deter them, so how do we reach these people who continue to drive without a licence or without insurance? They have an alcohol problem. We need new ways to reach these people. It isn't the penalty as much as it is that they're going to get caught and they're going to be prosecuted.

In Ontario and Quebec and other provinces we have moved into other ways to prevent them from buying vehicles. For example, you have to have a driver's licence today to register a vehicle in your name, so if they get caught, they can't just go and buy a $1,000 vehicle and get back on the road without a licence or insurance. They can't do that quite as easily as they once could.

We need to look at ways to keep these people off the road until they have beaten the problem they have, which is alcoholism or impaired driving.

Thank you.

● (1030)

The Chair: Thank you, Mr. Marchand.

Go ahead, Mr. Therien.

Mr. Emile Therien: Am I allowed to speak?

The Chair: You are.

Mr. Emile Therien: Paul alluded to administrative licence suspensions. In terms of a tool, I think police forces across the country love them. I think that's a good sign. We have called on all the provinces and territories to standardize the sanctions under these. It doesn't make sense that in Ontario it's a 12-hour suspension, and nothing happens to you; there's no report to the insurance company. We want these standardized across the country. I think it makes a lot of sense. Some provinces are rather more punitive; I think Saskatchewan is. I think maybe they're the model in terms of the sanctions they're giving.

Another important point we alluded to in our presentation is that a lot of impaired driving cases have been plea-bargained outside the criminal code. The province on the far west, I think, gives you an example. I wonder if Paul and Jonathan might be able to tell us if this is happening to a great extent in Ontario, and what the numbers are in terms of the criminal charge.

They may not want to tell us.

The Chair: I'm not going to allow them to answer right at the moment; I'm going to get back to the witnesses here. That question will come back—I know it will.

[*Translation*]

Mr. Daniel Petit: Thank you.

My question is addressed either to Ms. Beauchesne or to Mr. Rosenthal, who is a lawyer. In the province of Quebec, when an automobile accident is caused by a criminal driving under the effect of alcohol—because drugs are not yet included in the legislation—who kills someone and injures himself, even though he is responsible and has pleaded guilty, the Automobile Insurance Board, which is a provincial Crown corporation, pays him an allowance throughout his prison term for the lasting effects of his injuries.

Second of all, I am talking about drugs that are much more powerful than marijuana—such as cocaine, and so on—although you seem to be obsessed with marijuana. I would like to present a possible scenario in Quebec and Ontario. At the present time, if someone smokes a cigarette in a public place and is found guilty, he receives a fine of at least $50. However, you are telling us that if someone smokes marijuana in a public place, then gets into his car and drives down the highway, he should not be prosecuted or convicted. You seem to have some reluctance where marijuana is concerned, but does that reluctance extend to all drugs? That is my first question for you, Mr. Rosenthal.

[*English*]

Mr. Paul Burstein: I think that question is actually aimed at me.

Sir, it's not that we're suggesting that people should smoke and drive. The concern about section 253.1 isn't about using drugs while driving, it's just while having them in your pocket. As far as driving while you're impaired by a drug is concerned, if you can reliably prove that a person is impaired by a drug, it is an offence under the Criminal Code right now. We don't have a problem with that. We're just saying that the legislative package you're proposing here doesn't do anything to really help establish, or help the police establish, anything. It's just going to be a very expensive boondoggle along the lines of, dare I say, the firearms registry kind of boondoggle. Or is that a verboten term here?

[*Translation*]

Mr. Daniel Petit: Do I have any time left, Mr. Chairman?

[*English*]

The Chair: Yes.

[*Translation*]

Mr. Daniel Petit: My question is again addressed to Mr. Rosenthal, since this gentleman answered for him. This question is addressed to you. You know as well as I do that when we represent clients in a prosecution case involving blood alcohol levels, whether it's in Quebec or Ontario—as a matter of fact, in Ontario, you are in an even better position than we are in Quebec—almost all of our clients ask for legal aid because, very often, they have lost their jobs; they are people who are experiencing problems. In my case, it's the Government of Quebec that pays the lawyer's fee. In your case, you are paid $85.19 an hour to represent the same type of client. I understand that this allows you to make money, and I hasten to add that I, too, have made money from this, because I worked in that area for quite a long time.

But my question for you is important because, based on your advice, we will have to make some decisions. I hear the comments made by Ms. Beauchesne, just as I have heard those made by other witnesses, and have heard yours as well. The problem is that you always draw our attention to marijuana. Is it marijuana that poses the problem or is it drugs in general? As far as I am concerned, drugs include things other than marijuana. You seem to focus our attention solely on marijuana. Is that your intent? Is it that particular aspect of things that concerns you about the bill, or is it with respect to drugs in general that you would like to remove any possibility—and I stress the word "possibility"—of their being detected?

I would like to make a second point. From the very outset, we have been talking about extreme cases. I just want to point out that in both Quebec and Ontario, we use… In Quebec, section 215 of the Highway Safety Code allows us to arrest somebody if the car's tail lamp has burnt out. The police officer approaches the vehicle, asks the driver to lower his window, smells alcohol on his breath and proceed to administer a test, and so on. However, it is possible that the officer doesn't suspect anything. What about a driver who hasn't smoked marijuana for over a month and whose tail lights are all working; in that case, there is no problem. What is your concern about that? What are you afraid could happen after one or four months? As a lawyer, that's a point I would like you to explore. First of all, he can't be arrested because police officers will have no indication or no suspicion on which to arrest him. So, what are you afraid of? That's what I want to know.

● (1035)

[*English*]

The Chair: Thank you, Mr. Petit.

Mr. Rosenthal and Madame Beauchesne, I know that you both will reply, but if you can, make it quick.

Mr. Jonathan Rosenthal: I can say that the vast majority of defences of these cases are not legal aid funded at all. I can tell you, and Mr. Burstein can probably confirm, I'm a wonderful specific deterrent against my client committing these types of offences ever again. I make sure they pay for it in some way or another.

Mr. Joe Comartin: Maybe you can tell us why we can go ahead with this legislation.

Mr. Jonathan Rosenthal: I've said it before. The greater you make the penalties the more litigation you create. Certainly I can't complain from that standpoint. That's not why I'm here.

I can comment on the drugs. Paul obviously addressed it more than I did. If the police pull someone over—and let's make no mistake about it—and they are exhibiting signs of impairment, the police do not have to prove whether they're impaired by cocaine, or the type of sleeping pill that Mr. Lee has in his pocket, or by alcohol. Impairment is impairment. If they are exhibiting signs of impairment, the offence, as it is now drafted in paragraph 253(a) of the code, says "impaired by drugs or alcohol", so which drug it is is irrelevant.

The Chair: Thank you, Mr. Rosenthal.

Madame Beauchesne.

[*Translation*]

Prof. Line Beauchesne: It was actually in proceedings here in Committee that there was mainly a focus on marijuana; as far as I'm concerned, my expertise is in impairment. If you want to talk about the people who probably use more drugs than any other group and could be impaired, I'd say they are probably the elderly. At the present time, that is the group most at risk, as consumers of drugs, of being impaired. It was along those lines that I asked the question earlier: is this bill concerned with impairment, whatever the cause, or with users of illicit drugs?

[*English*]

The Chair: Thank you, Ms. Beauchesne.

Thank you, Mr. Petit.

Mr. Thompson, I think you have some questions.

Mr. Myron Thompson (Wild Rose, CPC): Thank you.

I find the discussion very interesting. A lot of the things that were said are troubling to me.

I'll start with the Canada Safety Council. They mentioned that most of these problems we're dealing with are with people who are dependent on alcohol, probably alcoholics more than the social drinker. Yet in my riding—I keep tabs on all the courts and I have three different courts in a rural jurisdiction—over the last while I can't tell you how many young offenders, 16-, 17-, 18-year-olds, were drunk and mostly driving while intoxicated. It's a phenomenal number, and this is a small rural area. I can only imagine what it must be in other jurisdictions. But these young people aren't necessarily drug-dependent or drink-dependent. They're just starting out. They haven't got enough brains to know how to do it, maybe.

Then we talk about education. Well, I've been in the education system for 30 years, and I've seen all kinds of programs. And yes, they will have a positive effect on a good number of the students, but they won't reach everybody. There's no doubt about that. And of course in our wisdom as a wise society, we lowered the drinking age from 21 to 18, and trust me, that didn't do us any favours in the secondary schools with younger people. Where we used to have a problem with 18- and 19-year-olds consuming, it suddenly became a problem with 14- and 15-year-olds, or even worse.

We're our own worst enemy in some of the other decisions that we make, the influences. I've heard comments like, "Well, marijuana's really nothing all that big". Yet I've seen it have a drastic effect on young people in the school where I taught, a horrendous effect.

I'm really tired of the legal system. It seems as if the legal system overpowers the justice system on undue harsh penalties. I heard that comment—undue harsh penalty. Well, what's an undue harsh penalty for the victims at the hands of these people? How bad does it have to get before that becomes undue harsh penalty? And deterrence doesn't work. Well, unfortunately, he's probably right in most cases. I can't remember who said that, but he's probably right in most cases.

I can name one particular case back in the sixties in a county, and I think it was Saguache County—I'm trying to remember—where they had the right to impose the law. What they did is if they caught you impaired or drinking while driving or whatever, they took your vehicle, period. No questions asked, you lost your vehicle. If it belonged to your dad, it was gone. If it belonged to a company, it was gone. Boy, did that deter drinking in that county. You didn't do it. It was very effective, but unduly harsh, I will admit.

So where is the balance that Mr. Dykstra was trying to seek? We go to the extremes at one end or the other and we never seem to arrive anywhere. And always, to me, it's the legal system that interferes. We talked about cameras. My God, if you used a whole bunch of cameras, how long would it be before there'd be some people out there saying "You have no right. You're invading my privacy." We're overdoing this whole thing. It's overkill. Why don't we stick with the brass tacks?

Was it 815 dead during 2004? My God, people, 815. We are very saddened, we're broken up that we've lost 56 soldiers since 2002 in the war in Afghanistan. That breaks us up. And here we've got 815 in one year from drunk drivers? If this happens every year, how many thousands is that? I think it's time to stop all the nonsense of talking. What do we have to do to get down to hit that balance and get it fixed? What do we have to do? I'm still waiting to hear good solutions. I'm sorry, I can't buy a lot of them. I can't buy it.

● (1040)

The Chair: Thank you, Mr. Thompson.

It invites some response, undoubtedly. I'm going to ask you to keep your comments short, but I will go around the table.

Mr. Belleau, you indicated....

[*Translation*]

Mr. Louis Belleau: Those are very relevant questions. Whether we are talking about Canada or other industrialized countries, no one can boast of having achieved absolutely fantastic results in terms of controlling the crime of impaired driving or drinking and driving.

We talked about education. When the Code was amended in Quebec in 1985, the amendment simply involved raising the minimum fines from $50 to $300. There was a highly visible television advertising campaign about this. The slogan was: "Drinking and driving is a crime". Several years later, people agree—and there is a consensus on this—that this type of action, which includes visible barriers and highway spot-checks at strategic points, has contributed to a considerable drop in the number of people being arrested for impaired driving.

We can see this not only because police officers have less work, but also because it has been observed that there are fewer people driving drunk on the roads. That tells us that in terms of education, one of the solutions is to make people aware of the idea that they are committing a criminal offence, and that they will be arrested and punished for it. The certainty of being subject to punishment is 100 times more effective than increasing the fine from $600 to $1,000. That type of action changes nothing. When you're dealing with people who get in their car and drive after having a few drinks, the fact that the penalty will be $400 more will not change his behaviour.

The expression "unduly harsh penalty" has been used in this context. In the bill, we raise a problem related to that. The fact is that the minimum penalty is increased to 120 days for a third offence. At first glance, that seems perfectly reasonable. However, the result of it is that a judge would be prevented from exercising any discretion in terms of modulating that penalty. In some cases, for example, the accused would lose his job as he would be prevented from serving his prison term intermittently. The difference between 90 and 120 days is not very great, in terms of the actual punishment, but the effect, needless to say, is that the judge loses part of his ability to modulate the penalty. Nothing prevents a judge from imposing a 120, 160 or 200 day prison term on an offender, where it is warranted.

As you were saying, Mr. Thompson, it's really a matter of striking a balance between extreme penalties, which yield no result whatsoever because they do not act as a deterrent, and the complete absence of such measures. As regards drug-related measures, the Quebec Bar's primary concern is the lack of statistical information that would establish whether or not this is a real issue, as well as the lack of scientific data with respect to the validity of the methods being proposed to resolve the problem.

● (1045)

[*English*]

The Chair: Ms. Beauchesne.

[*Translation*]

Prof. Line Beauchesne: Your questions with respect to what could change the behaviour of people who drive impaired are relevant. I referred earlier to alcohol prevention campaigns. I asked my students how they view that. Those who said they don't drive impaired did not say that it was because they are afraid of being caught by police. They said they wanted to avoid killing someone. Prevention campaigns were what had encouraged them to change their behaviour. On the other hand, those who said they do drive while impaired said that they know a road that is not patrolled by the police. In any case, prevention is what had the effect of changing people's behaviour.

Furthermore, you are perfectly right: there is a need to raise everyone's awareness, including seniors and young people, with respect to the myriad of causes. In that regard, there are some new ads that I really like. I don't know whether they are being shown in all the provinces. You must be familiar with them. The message is that driving a vehicle and opting for a specific type of behaviour is, first and foremost, a matter of choice.

It has already been stated that there is no magic bullet. So, we have to ask ourselves what will result in the greatest improvement, in terms of our ability to manage the problem from a legal standpoint. There are measures which are immediate, and certain. In terms of behavioural change, having the police arrest someone, seize their vehicle for 24 hours, and give them demerits points, is more effective than a lengthy process the result of which remains unknown.

As regards repeat offenders, you're absolutely right: there are some. To my knowledge—and Mr. Therien can certainly provide you with more accurate information than I—national registries are not consistent across the board at the present time, which makes it impossible to properly identify these individuals and do something about them.

● (1050)

[*English*]

The Chair: Thank you, Ms. Beauchesne.

Go ahead, Mr. Marchand.

Mr. Raynald Marchand: Thank you, Mr. Chair.

To answer your question about what we should do, first, I think we need to continue what we have been doing in terms of the visibility of enforcement as a general deterrence for the population as a whole so they don't go back to the bad habits they once had.

What do we do for those more narrow areas, such as youth, for example? We know that youth may not yet be dependent on alcohol but will drink occasionally to excess on weekends and so on. In rural areas, the problem we have is one of apprehension. People do not believe they're going to be apprehended. We often say that in rural areas, it's not drinking and driving, it's drinking while driving. As a result, these people either know where to go or do not believe they're going to get caught. We need to increase there. We need to continue our work, in terms of prevention, for these folks.

We also need to work with the provinces, and I think we said that in our brief. For example, Ontario has announced that they are going to increase suspensions from 12 or 24 hours to three days a week and then have more severe sanctions as we go through under the highway safety code. We think this is going to be effective. We would like all provinces to standardize so that for national prevention, we can advertise, we can promote, to all Canadians.

If we can get there, that will have an impact. I believe, like the professor, that the certainty of being apprehended is far more effective for many of those folks than the penalty down the road, whether it be a driver's licence suspension or death, in some cases.

Thank you.

The Chair: Thank you, Mr. Marchand.

I have one question. The Canada Safety Council made a very clear point that most cases pleaded are pleaded outside of court. That's in the present situation. I believe that to be true, as well. Since you made the statement, and I believe it was made also by Ms. Beauchesne—something similar at least—what is the percentage of charges laid and what is the percentage of charges that are tossed or pleaded out?

Mr. Emile Therien: I don't know, and that's why I asked these fellows. It's probably a lot.

The Chair: I think it's an important issue.

Ms. Ethel Archard (Consultant, Canada Safety Council): There is a figure in our brief of 20% based on a study in British Columbia, but that is only one province.

The Chair: It's 20% of what?

Mr. Emile Therien: Of impaired driving charges, 20% were plea-bargained down to something less under the Criminal Code.

Ms. Ethel Archard: But that's not nationally.

The Chair: I think the number might even be higher than that.

Mr. Rosenthal, you seem anxious to speak to this point.

Mr. Jonathan Rosenthal: I can't tell you what the exact percentage is in Ontario. It does happen. There's certainly a crown policy manual that discourages it. It can only be done in certain situations with the approval of either the acting crown attorney for the jurisdiction or the deputy crown attorney.

It's primarily done in situations where there is a great risk that charges are going to be thrown out because of a backlog in courthouses. Those are the jurisdictions in Ontario where you're seeing it most. It is occurring in situations where there are significant difficulties with the crown's case, and it's better to get something than nothing.

This law or any law that's going to increase litigation will put more and more pressure on those dwindling resources.

The Chair: Again, procedure here is becoming more the issue than guilt or innocence.

What about the situation—and this is happening all too frequently—where an impaired driver is picked up and brought before the court. He obtains a lawyer and the lawyer says, “For another $5,000 we can bring in an expert to testify in reference to the charter issue. Since there are some rulings already in the court system in reference to the charter, breathalyzers, and all that other technology that has been brought into question now, we'll get you off.”

Are these legitimate arguments on impaired driving cases?

● (1055)

Mr. Jonathan Rosenthal: They're legitimate arguments that happen all the time, because cost is not the issue. For example, someone was talking about the increase of the penalty from $600 to $1,000, but $400 is not going to do a thing.

I don't want to get into the exact particulars, but the legal fees to properly defend one of these cases dramatically exceed the maximum financial penalty for an impaired driving charge—not the minimum penalty.

The Chair: I fully agree.

Maybe the committee should be looking at those issues, as opposed to some of the ones that were brought up here.

Ms. Beauchesne, I think you also mentioned something about that.

Prof. Line Beauchesne: Yes.

[*Translation*]

Studies show that if someone decides to drive impaired or to commit another offence, what that person is measuring is the risk of being arrested. He is not wondering what the punishment will be. So, changing the punishment has absolutely no effect whatsoever on a number of people committing offences. The most important factor is the certainty of being arrested or not arrested.

[*English*]

The Chair: Mr. Bagnell.

Hon. Larry Bagnell: I'm going to let Derek Lee ask a short question first.

Mr. Derek Lee: I have one quick question for the Barreau du Québec.

Proposed subsections 254(2) to 254(6) of the act say that if a peace officer has reason to believe that a person has a drug or alcohol in his or her body—it could be a drug alone—the person must do the physical tests based on the judgment of the police officer and, if necessary, accompany the police officer somewhere. It doesn't say where, how far, or for how much time.

Controlled substances are in schedules 1 through 5, and schedule 4 drugs include steroids. If you had a corticosteroid on your skin for a skin condition, you would technically come within the reach of this provision. The police officer would be fully entitled to ask you to do the test and accompany him or her for whatever the other tests might be.

Should we consider amending the bill to either shrink the reach of this section in terms of accompanying the police officer, or should we remove schedule 4 or modify it in some other way?

[*Translation*]

Mr. Louis Belleau: If steroids are present or if there is an indication that it could be a drug listed in Schedule 4, certainly a police officer could, theoretically, ask the suspect to accompany him. However, I think it's important to keep in mind that there has to be a correlation between the drug and the person's fitness to drive. Obviously, a police officer cannot simply go on the fact that there is a drug in the vehicle or on the individual.

What is of most concern to us—and we have already mentioned this—is the completely uncertain method of assessing the presence of drugs in the individual's body. The intrusive side of searches is another aspect of the problem that was raised during the Committee's discussions. That sometimes involves physical manipulation. We have all tried to imagine an Aboriginal person out West being arrested by the RCMP. He would be locked in a dark room with all the lights off, and officers would check to see whether his pupils were dilated too much or too little. The officer would obviously try to get him to do certain things; there would be physical manipulations, and so on.

In light of available scientific data, we were of the opinion that such situations could lead to quite extensive abuse and violations of privacy.

[*English*]

The Chair: Thank you.

I have to cut you short, Mr. Belleau and Mr. Bagnell. The time is now concluded.

I would like to thank the witnesses who have come forward here today. I think we've had a very in-depth discussion. It should continue a little longer, but our time is short. Again, thank you so much for your appearance here. It's appreciated.

The meeting is adjourned.

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