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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 on Thursday, June 7, 2007. Our agenda deals with Bill C-32, An Act to amend the Criminal Code (impaired driving) and to make consequential amendments to other Acts.

We have a good list of witnesses before us this morning.

We have Mothers Against Drunk Driving, Ms. Margaret Miller, the national president. Welcome. We have Mr. Robert Solomon, director, legal policy. Welcome to the committee, sir.

We have the Canadian Council of Criminal Defence Lawyers, Mr. Mark Brayford, vice-chair. Welcome, sir.

Finally, we have the B.C. Civil Liberties Association, Mr. Kirk Tousaw, chair of the drug policy committee.

Welcome all to the committee.

I understand, Mr. Solomon, you will be presenting for Mothers Against Drunk Driving. Sir, you have the floor.

Mr. Robert Solomon (Director, Legal Policy, Mothers Against Drunk Driving): Thank you.

I am appearing before you on behalf of Mothers Against Drunk Driving in my capacity as its national director of legal policy. I have been a professor in the faculty of law at the University of Western Ontario since 1972, and I am so old I even taught my learned friend here in his first year of law school. I have authored or co-authored numerous articles, studies, and government reports on alcohol and drug law. My research in recent years has focused on impaired driving and the reform of federal and provincial legislation.

I would like to introduce Mrs. Margaret Miller, the incoming president of MADD Canada. Her son, Bruce Miller, a 26-year-old police officer in Nova Scotia, was killed by a young drunk driver whose blood alcohol level was three times the legal limit for driving. Officer Miller had made a point of speaking out in his community to young people about the dangers of impaired driving. We are fortunate that Margaret has chosen to continue her son's important work and has agreed to represent our organization throughout Canada.

First, I want to briefly address the need for Bill C-32. Despite the progress we've made in terms of impaired driving between 1980 and the mid-1990s, impaired driving in Canada remains by far the largest single criminal cause of death in this country. Impaired driving claims almost twice as many lives per year as all types of homicide combined, and tragically, impaired driving takes a disproportionate toll among young Canadians. Those between the ages of 16 and 25 represent 13.7% of the population but 32% of the traffic fatalities in this country.

When you look at Canada's record in terms of impaired driving relative to the rest of the world, we lag far behind other comparable democracies. A 2001 Transport Canada study indicated that Canada had the highest rate of impairment among fatally injured drivers of eight OECD countries. Similarly, a 2000 international study indicated that Canada ranked second worst of 15 nations. The simple fact is that our federal impaired driving law is not effective and efficient relative to those in other jurisdictions around the world.

MADD Canada regards Bill C-32 as a major step forward in addressing many of the weaknesses in Canada's existing federal impaired driving law.

Given the time available, I am going to limit my oral presentation to the drug-impaired driving provisions and the narrowing of the Carter, or two-drink, defence and the last drink, or bolus drinking, defence.

I will be submitting a written brief at a later date to address some of Bill C-32's other important reform provisions.

I'm going to turn now to drug-impaired driving and the magnitude of the drug-impaired driving problem. There is ample reason to believe that drug-impaired driving is a matter of considerable concern and a growing problem. A series of national surveys indicate that driving after drug use is commonplace and that the rate of driving after cannabis use is increasing, particularly among the young.

Numerous provincial and regional studies report equally troubling patterns of drug use and driving, particularly in regard to cannabis. For example, a Quebec study of fatally injured drivers between 1999 and 2001 indicated that 22.6% were positive for only alcohol, 17% were positive for only drugs, and 12.4% were positive for both. The most common drugs, other than alcohol, were cannabis, benzodiazepines, cocaine, and then opiates.

Similarly, a 2005 study in Nova Scotia found that 15% of grade 10 to 12 students in Atlantic Canada reported driving under the influence of cannabis, whereas only 11% reported driving under the influence of alcohol. Thus, in this study, the number of young people driving under the influence of cannabis and drugs exceeded the number driving under the influence of alcohol. Students who drove under the influence of cannabis were twice as likely as cannabis-free students to report being in a collision.

● (0905)

The adverse effects of cannabis and other drugs on driving performance have been well documented. While the exact causal role of various drugs in crashes requires more research, it is clear that drug use constitutes a major traffic safety problem.

For example, a Canada-wide study in 2004 estimated that drug use alone or in combination with alcohol contributed to approximately 368 traffic fatalities, 21,702 traffic injuries, and 71,000 property damage only collisions.

These statistics are particularly important for young people. Why? It is because this constituency has the highest rates of illicit drug use and fatal crashes per kilometre driven. These facts underscore the importance of moving on Bill C-32.

I'm going to turn to the proposed impaired driving provisions.

Given that Canada's first prohibition against driving under the influence of drugs was in 1925, it is an understatement to suggest that giving the police powers to enforce this law are long overdue. It's been an offence for 82 years, and we have yet to give the police the powers they need to enforce this law in an efficient and effective manner.

Although there are some provisions of the existing Criminal Code that can, in very limited circumstances, be used to enforce drug-impaired driving, they apply in rare circumstances. As a result, currently those who drive under the influence of drugs are largely immune to criminal charges.

Bill C-32 provides a strong framework for drug-impaired driving enforcement by laying out the basis for the drug recognition expert testing, DRE. The DRE evaluation is a twelve-part process that involves physical observations to check for the presence of seven classes of drugs, an interview with the suspect, physical sobriety testing to determine impairment—and it's important to understand that it is those components of the DRE that establish impairment—a summary report, and a confirmatory test of urine, saliva, or blood to confirm the presence of the class of drugs identified in the report.

The bodily sample test isn't a test of impairment. It confirms the presence of the drug. The other aspects of the DRE—the divided attention test, the physical coordination testing—establish the impairment. There has been a lot of confusion in the media.

The DRE program has been used throughout the United States since the early 1980s. Today it is also widely used in Australia, New Zealand, Germany, Norway, and Sweden.

The constitutionality of DRE testing and the admissibility of DRE-related testimony have withstood numerous challenges in the American courts. Early studies carried out in the United States by the National Highway Traffic Safety Administration, or NHTSA, which is probably the world's leading traffic safety organization, showed that when DRE officers concluded that a subject had a drug in his or her possession, the toxicology results revealed that the suspicion was correct 94% of the time. Recent studies have confirmed these results, concluding that the overall accuracy rate in recognizing drug presence was nearly identical to that of the early studies.

Justice Canada is to be commended on the proposed drug-impaired driving provisions, because they provide a far simpler, stronger, and more constitutionally sound enforcement framework than that set out in its 2003 “Drug-Impaired Driving: Consultation Document”.

I now want to turn to alcohol-impaired driving and the Carter and last drink defences. The Canadian courts have interpreted the Criminal Code in a manner that results in the evidentiary breath and blood test results being thrown out based solely on the accused's unsubstantiated denial of impairment. In the absence of the test results, the charge of driving with a blood alcohol level above 0.08 is invariably dropped or the accused is acquitted.

I'm going to briefly outline the defences.

The Carter, or two-drink, defence is based on the accused's testimony or claim that he or she consumed only a small amount of alcohol prior to the alleged offence. A defence toxicologist is then called to confirm that if the accused had in fact consumed such a small quantity of alcohol, his or her BAC would not have exceeded 0.08.

● (0910)

Since the toxicologist's testimony is based solely on the accused's self-reported consumption, it adds nothing to the credibility of the accused's consumption testimony. If the court accepts the accused's consumption evidence, then the breath or blood evidence is completely disregarded, even if the evidentiary tests were administered properly by a trained and certified officer and were consistent with the results of the roadside screening tests and were supported by the arresting officer's observations and other evidence that the accused was visibly intoxicated.

It is simply assumed, based on the accused's self-serving and often unsubstantiated claim or testimony, that the evidentiary test results were somehow wrong and must be rejected without any direct proof that a testing error occurred.

The last drink defence is based on the accused's testimony that he or she consumed a very large quantity of alcohol—a practice known as bolus drinking—immediately before driving. It is then contended that very little of this alcohol had been absorbed into the driver's bloodstream by the time he or she was stopped by the police. Thus, the accused argues that his or her BAC was below the legal limit when driving but only rose above the limit in the interval between being stopped and the evidentiary breath or blood testing.

The last drink defence is rarely compatible with accepted principles of toxicology or typical patterns of alcohol consumption. I doubt that very many people sit in a bar for seven hours, have milk and cookies, and then 20 minutes before the bar closes drink a large quantity of alcohol and get immediately stopped by the police. But that's the only basis upon which this defence is plausible.

While the defence is theoretically plausible in rare cases, it begins to lack an air of reality at BACs much above 0.1%. Again, if the last drink defence is accepted, then the evidentiary breath or blood tests are thrown out and the accused is acquitted.

The current federal legislation and the courts' interpretations of it have created insurmountable barriers to efficient and effective prosecution. National and provincial surveys have documented police officers' growing frustration with these loopholes and their increased reluctance to lay impaired driving charges. Officers, when surveyed, indicate that they will frequently or sometimes not lay criminal charges even if they are convinced that the individual is impaired.

In British Columbia, 50% of the police refuse to lay criminal charges even if they are convinced that the accused is impaired. Why? Because the process is so frustrating and these loopholes render their efforts of no force.

This sense of frustration that the police have helps explain the falling rates of impaired driving charges in Canada. For example, in 2003, the statistics indicated that Canada's charge rate for impaired offences per 100,000 licensed drivers was 39% of what it is in the United States.

These defences help to bring about the de facto decriminalization of impaired driving in this country because the law is so inefficient and so ineffective. These defences do not exist in any other jurisdiction, and they bring the administration of justice in Canada into deserved disrepute.

Indeed, some Canadian defence counsel boast openly about their ability to get virtually any impaired driver acquitted. For example, in a newspaper article entitled, “How Big Bucks Can Beat .08”, one Saskatoon lawyer bragged about having never lost more than one of his 50 impaired driving trials per year, while another claimed to have achieved a string of 28 consecutive acquittals.

I had my students check some of the websites of defence counsel, and they have testimonials on their websites from impaired drivers who said, “My blood alcohol was way over the limit; I thought I was done like dinner, but I spoke to my lawyer and he told me he could get me acquitted on a technicality, and he did”. Do you think anyone, any lawyer, would allow testimonials for any other offence, testimonials such as, “I committed seven sexual assaults; I thought I was done like dinner, but my lawyer told me I could get off on a technicality, and I did”?

● (0915)

We would not allow this defence to operate in this way for any other offence. Surely the victims of impaired driving are no less deserving of protection and respect than victims of other violent crimes.

Bill C-32 will significantly narrow the Carter and last drink defence and help ensure that the 0.08 offence is enforced and prosecuted as Parliament intended. The proposed amendments would also bring Canada's 0.08 offence into line with the law in other comparable democracies. MADD Canada strenuously supports these changes.

In conclusion, MADD Canada strongly supports Bill C-32. We hope the committee will move quickly to endorse the legislation.

Although we addressed only drug-impaired driving and the Carter and last drink defences in our presentation, we will be submitting a written brief endorsing the other important amendments in Bill C-32.

In closing, I would like to thank you on behalf of my colleague, Mrs. Margaret Miller, for this opportunity to appear before you on this important issue.

Thank you.

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

Mr. Brayford, could you tell us about your web page, please?

Mr. Mark Brayford (Vice-Chair, Canadian Council of Criminal Defence Lawyers): Thank you.

I appear on behalf of the Canadian Council of Criminal Defence Lawyers. We're a national organization, an umbrella organization of all the defence lawyers' organizations throughout Canada.

I am personally one of the vice-presidents from western Canada, from Saskatoon. I am not one of the two lawyers he was referring to in the article.

I was in that article; I'm disappointed you didn't refer to me.

I would like to start by saying that there's perhaps a suggestion that defence lawyers aren't concerned about drunk drivers. We're very concerned about drunk driving. Certainly it is a very serious problem, and we do not wish to diminish in any way the seriousness of the problem.

However, we would disagree with my colleague's suggestions that the acquittal of some accused drunk drivers is a major problem. Statistics can say anything one wants, but if we look at the statistics, the actuality is that most people plead guilty to drunk driving when they're charged with drunk driving.

These anecdotal suggestions that 50% of police officers in certain jurisdictions won't lay the charges are simply anecdotes. There's no effective way of really knowing that. Quite frankly, it's my perception that this is one of the most common charges laid, particularly in rural areas, by police officers. If you look at the jurisdiction I'm from, in the rural areas it's the number one charge that police officers lay.

Once again this is an anecdotal statistic, but it would my belief that 90% of people plead guilty to impaired driving. That obviously says something. It says that people do not believe you automatically get off simply because you pay a lot of money and hire a lawyer. Contrary to what my colleague says, the two-beer defence isn't some magic bullet. What happens in actuality—

And I must say I do a lot of this kind of work myself. In fact, that's what I'll be doing tomorrow—in Alberta, actually. The person in that case had a very similar defence to what's being described. But if one looks at it, one will see that out of the hundreds of calls that I get in a year, there are perhaps only 50 cases I might run a criminal driving defence on. And it can be for a wide variety of reasons, not necessarily how much they drank, such as some constitutional aspect of the way they were dealt with; whether or not they could be proven to be the driver; whether or not they could be proven to have been in care and control. There are many issues on drunk driving, not just how much the person drank.

This idea of the two-beer defence—that you simply tell the court you had two beers and you win—overlooks the fact that essentially 100% of the people who are charged with criminal driving offences are double-charged. They're not simply charged with driving while over 80 milligrams; they're also charged with impaired driving. If you're charged with impaired driving and a police officer has observed you to be driving badly, when they approach the car they smell an alcoholic beverage on your breath, when you're asked to exit from the car you use the door as a lever to get yourself out, and you stumble, you stagger, and you slur—that person in all probability will be convicted of impaired driving based on their physical symptoms, irrespective of whether or not they might be able to win the case if the charge were only driving while over 80 milligrams, because even if the judge has some doubt as to whether or not they might be slightly under the legal limit, the judge will believe, based on the symptoms observed by the officer, that the person was impaired.

The only person who has a reasonable prospect of winning a two-beer defence is someone who essentially appears sober. If they essentially appear sober, just maybe they're innocent. Is it such a bad thing that someone who might be innocent be found not guilty?

● (0920)

We do not have a problem with people being found not guilty. It's a very small number of the overall people who are charged who are actually found not guilty. Obviously, it is some higher percentage of the people who have trials. The 90% who plead guilty will all be found guilty. But the people who are contesting their charges are the people who obviously feel they're not guilty. It's difficult to know in any one case why the judge may or may not have found the person not guilty, because often the cases involve multiple problems with the evidence.

So in attempting to address a problem that we suggest doesn't exist with the changes that make, essentially, the accused person's testimony as to how much alcohol they did or did not drink of no evidentiary value, we have serious concerns about what may happen to the system over the next couple of years before this matter makes its way to the Supreme Court of Canada. Because it would be my respectful view that saying that you cannot testify that you did not have alcohol to drink as a basis for winning the case will violate both section 7 and paragraph 11(d) of the charter. I would respectfully submit that these provisions dealing with the two-beer defence will be found to be unconstitutional, and accordingly, the approximately 100,000 cases per year that we get in the system where these people couldn't use this defence because it was prohibited by statute—given that the Supreme Court then were to find it was unconstitutional—would cause significant chaos. It would be a very unsatisfactory situation. Is there any other comparable provision where you can say that the accused can't testify that they're innocent? I don't know of anything.

The example given of the rape-shield provisions is not a comparable example whatsoever. The rape-shield provision example, as to the restriction on the ability to cross-examine, has to do with evidence that is potentially not relevant in almost all cases. It's not an absolute prohibition, but it's close to it on the basis of lack of relevance to the case. Here, we're talking about a situation where hypothetically someone blows 200, but they also say they drank no alcohol whatsoever. This legislation would prevent the person from being acquitted even though they came to court, gave sworn testimony that they drank no alcohol, and the judge believed they drank no alcohol. Yet they still would be required to be found guilty unless you could prove what was wrong with the instrument, which of course you cannot do.

This idea that you should somehow be able to address the problem of the instrument is impossible. We've all had the situation where we tried to start our car, it wouldn't start, and the tow truck comes, takes it to the garage, and then the car starts. Well, you know that the car didn't start. But the garage can't tell you why it didn't start and they can't diagnose the problem, and they have the car to look at. What's an accused person supposed to do?

I expressed the reservation that on the one hand perhaps the courts won't let us look at the instruments. On the other hand, what if they do? How helpful is that to the system if every Intoxilyzer is busy being taken apart by experts for the defence to try to diagnose why it didn't give the result that was expected?

There is also, I believe, the false perception that we're using cutting-edge technology that's somehow super reliable. I personally own a Breathalyzer Model 900A. I own an alert device. I own other testers. I'm very familiar with the Intoxilyzer 5000. Quite frankly, about the Intoxilyzer 5000, to say that the instrument that's being used in Canada is not cutting-edge technology is the understatement. This is not some infallible instrument. It is a good instrument, but it is anything but infallible. In fact, the technology is almost as old as when I was taught by my colleague beside me. We're not talking about something that is new or foolproof.

The Intoxilyzer 5000 comes out in many variations. The variation that's being used in Canada is bordering on being obsolete as far as getting parts for it. That's how out of date it is. That's not to say that it's necessarily wrong in every case. I don't want in any way to be suggesting that. What I am suggesting is that it is not foolproof in every case, and to abdicate someone's liberty, if I could put it that way, to an instrument rather than to allow a judge to judge their testimony would be, in our respectful view, unfortunate.

● (0925)

With respect to scientific evidence, certainly we have some concerns about the reliability of drug evaluation testing, but quite frankly that's a matter that the courts will be able to evaluate. I would urge the committee not to necessarily accept that the accuracy of the ability to judge whether or not someone is impaired by drugs is as high as some statistics say, because there is certainly a lot of controversy about that. Having said that, I don't have anything further on that.

Moving on to the question of someone having a small amount of drug in a car and someone might get a one-year loss of licence, I would simply point out that when one looks at the magnitude of the problem for someone who loses their licence for one year in a rural part of Canada—because knowing that one of your passengers has in their possession a small amount of narcotic might cause you to lose your licence for one year and get a criminal record—it can have a devastating effect that may or may not, in your view, be disproportionate. I just urge you to consider that.

In closing, with respect to the licence suspensions that are presently handed out and just dealing with one aspect of fairness, at the present time a large number of provinces have administrative suspensions that occur automatically at the roadside, typically for three months, but it varies from province to province. It's a fundamental principle that you should not be punished for having a trial. The way the Criminal Code presently is, the judge doesn't have the statutory authority to take into account the administrative suspension that someone serves while waiting for their trial. I would suggest that out of fairness, if you have a trial and you lose, and some people do lose, the judge should be able to consider the time you have served on your administrative suspension when fixing the suspension that is mandatory under the code, which starts at one year. It needs an amendment for that to take place, and I would urge the committee to consider that as well.

Thank you.

● (0930)

The Chair: Thank you, Mr. Brayford.

Mr. Tousaw.

Mr. Kirk Tousaw (Chair, Drug Policy Committee, B.C. Civil Liberties Association): Thank you, Mr. Chair, members of committee. My name is Kirk Tousaw, and I'm from the British Columbia Civil Liberties Association. The association is the oldest and most active defender of civil liberties in the country, and we thank you for the opportunity to make some remarks on Bill C-32.

Like my colleague Mr. Brayford, I feel compelled to begin my presentation by saying that the association—as I think is the case for all persons who will testify before this committee—opposes impaired driving for any reason. All too often, persons who speak out against pieces of legislation like Bill C-32 are unfairly characterized as not caring about impaired driving, but that's not the case. We oppose impaired driving. But what the association also opposes is the imposition of new and intrusive laws that will diminish civil liberties, particularly when those laws are not necessary to and will not achieve legislative goals. We believe Bill C-32 is such a piece of legislation.

There are roughly five components to this bill: the increased penalties for impaired driving, including fairly significant increases in mandatory minimum sentences and fines; a new mandatory and highly invasive drug testing process; the creation of the new offence of driving while in possession of a drug; the creation of new offences related to causing injuries while impaired and refusing to provide breath or bodily samples to police after being involved in an accident, whether or not there's an issue of impairment; and restrictions on the right of the accused person to call evidence in his or her defence.

I'm going to focus my remarks on the new offences and the drug testing procedures. I will briefly speak about the evidentiary restrictions related to blood alcohol concentration tests, and there are really three points I'd like to make.

My first point is similar to what Mr. Brayford indicated. These restrictions are based on what I believe to be the faulty assumption that the blood alcohol test is infallible. Two, the evidentiary restrictions are undue restrictions on the charter right to full answer in defence. They will certainly be challenged. They will, in my view, almost certainly be found to violate the charter. And three, I'll just comment on what Mr. Solomon said particularly about British Columbia, where I'm from, and police being reluctant to lay impaired driving charges. He characterized that as a case of police response being frustrated with the process. I don't know if that's true or not, but police are often frustrated by the fact that defendants mount defences and sometimes are acquitted, although I should say they're rarely acquitted.

But another potential reason for why impaired charges are not laid in this country is that impaired driving charges are one of the very few offences in our Criminal Code that carry the imposition of mandatory minimum sentences, and the police are sensitive to and cognizant of this fact.

With respect to the “driving while in possession” offence, the first and primary concern is that, frankly, this offence has nothing whatsoever to do with impaired driving. It appears to be an end-run around the provisions of the Controlled Drugs and Substances Act that already make it illegal to possess drugs.

As the members of this committee I'm sure are aware, the burden of the drug laws in this country fall disproportionately on persons with lower incomes. This law might be the first step in the other direction, in that it will disproportionately impact people who have the means to have a car. But I don't think that's the direction we want to go with respect to creating new offences when the activity in question—possession of a drug—is already illegal.

On the idea that because you possess a drug in your car you ought to be punishable both by a maximum penalty of five years' imprisonment and the imposition of mandatory driving prohibitions, there's simply no connection. There's no connection between taking away somebody's ability to drive—and quite likely their ability to earn a living and be a productive member of society—and the fact that they may have had a small amount of marijuana in their car or their friend may have had a small amount of marijuana in their pocket and the driver knew it. It's just not related to impaired driving.

The purpose of this bill is purportedly to address the situation involving impaired driving, not the fact that people often use automobiles to go and purchase drugs. When you have a situation in this country in which almost half the population has used cannabis, marijuana, and some 15% to 20% of the country uses marijuana on a regular basis, I think it can be clearly demonstrated that the impact of this law is going to be disproportionate in terms of the seriousness of the activity targeted.

● (0935)

I should also say that this came up when this committee was discussing Bill C-16, the prior incarnation of the “drug-impaired” legislation put forward by the previous government. That legislation did not include this new offence of driving while in possession, although it was added in committee by member Vic Toews. At the time, Ms. Kane, senior counsel from the justice department, essentially said there's going to be a charter problem with this because the ends of the legislation are not connected to the new offence at all.

The fact that you have some drugs in your car does not mean you're driving while impaired. I will also suggest that of the number of people in this country who use marijuana, for instance, the vast majority of them are responsible citizens who are not driving while impaired, although they may use their vehicles to obtain the drug. It's just like how you will drive to the liquor store to buy beer. That doesn't mean you're going to drink the beer in the parking lot of the liquor store and then drive home while impaired. So this shouldn't be in the bill at all.

With respect to the proposed drug testing procedure, there are a significant number of concerns that the Civil Liberties Association has and that I urge this committee to consider. First, the proposed legislation is quite fuzzy on the concept of reasonable grounds. What are the reasonable grounds that are going to be utilized by police officers to perform the standardized field sobriety tests on the side of the road? What are the reasonable grounds that are going to be used to demand that the driver come to the station for the interview and for testing by a drug recognition expert? What then are the grounds that are going to be used to demand, under threat of criminal punishment, that citizens of this country provide blood, saliva, and urine samples? These are highly intrusive procedures.

This is a country that cares very deeply about privacy, and there is a significant privacy concern with respect to those things that are within your body. The process for getting these samples is, in itself, quite invasive. It's humiliating and can be quite degrading. For instance, if you're asked to provide a urine sample, in order to ensure that the sample is true and accurate you'll have to be observed giving the sample. That's a degrading experience. Some people are afraid of needles. To get a blood sample, you have to stick a needle into somebody's body and withdraw the blood. This is going to be a very humiliating experience for people who are subjected to it.

Another problem is that the process set out in the legislation is cumbersome and time-consuming. You have to remember that from the moment you're stopped by the police, you've been detained by the police. Your liberty has been restricted. And we now are talking about a three- or four-step process that will take a significant period of time to complete. Throughout that entire period of time, the individual has been detained.

Worse, the results of both the DRE evaluation and the bodily sample testing are, frankly, of little evidentiary value to the ultimate question of impairment. The DRE process has a veneer of scientific credibility behind it, but at the end of the day, it's observational on the part of police.

One study, a study done in Oregon by Smith, suggests that the average error rate for DRE testing is about 21%. The legislative summary attached to this bill suggests that error rates are anywhere from 10% to 25%. To put it another way, we have a situation in which, of every hundred people who are forced to come to the police station to be subjected to DRE testing, twenty will end up falsely accused and will then be forced into either committing a criminal offence by refusing to give a urine or blood sample or being put through the invasive procedure of giving that urine or blood sample. That's twenty out of a hundred persons who have to go through this experience but who may well not be under the influence of any drug at all. There's an error rate, and there's an error rate because DRE testing is simply not foolproof.

● (0940)

Worse yet, the invasive process, the forced taking of blood, urine, and of saliva, yields information of very little value to the ultimate question. The legislative summary is clear. As Mr. Solomon pointed out, there's simply no way in the science to link the presence of drugs in one's system to impairment. In legal terms, the information gleaned from the blood or urine test is irrelevant to the ultimate issue of impairment.

Frankly, I'm not sure the judges are going to be permitting this evidence to come in, because it's not relevant evidence. Absent reliable scientific links between drug use and actual impairment, it is inappropriate to conduct invasive searches of one's bodily fluids and to impose the accompanying detention that is necessary to effectuate the tests. It's simply inappropriate.

There is no doubt that impaired driving is unacceptable. The legislative summary suggests that 97% of all motor vehicle fatalities and 98% of all motor vehicle injuries are not related to drugs. The Senate report on marijuana, also cited in the legislative summary, concluded that for cannabis, which has been said to be the most widely used illegal drug and the most widely used drug second to alcohol, “The visual recognition method used by police officers has yielded satisfactory results”. In other words, we already train the police to observe people's levels of impairment and to make decisions at the side of the road on whether to charge the person with impaired driving or to take some other action such as imposing a 24-hour driving suspension.

This law has been characterized as a tool in the toolbox for police, but I think it's akin to using a hammer to pound in thumbtacks. We have a procedure in this country for charging people who are driving while impaired by drugs. As Mr. Solomon pointed out, we've had that for a number of years. It exists, it is used, and it can continue to be used. Police do that regularly. The invasive testing contemplated by Bill C-32 simply adds a false veneer of scientific credibility to the individual officer's subjective determinations.

I can certainly say more about each of these points, but the final objection to Bill C-32 is more philosophical than practical. Laws should be promulgated in this country in order to achieve results, not, frankly, so that government can be seen to be achieving results. First, the money that's required to implement this new law has been cut by the present government, with $4.2 million taken away from drug recognition training for police officers.

It appears that the provinces are being expected to bear the financial burden of implementing this new procedure, a process that will undoubtedly take several years and cost several millions of dollars. I would suggest to this committee that this money is better spent on activities that have been shown in the past to make a significant dent in the problem. We have achieved some great successes in this country in reducing both drunk driving and other dangerous behaviours through the use of education.

The assumption that increased penalties in the criminal law or the new criminal scheme is going to deter the behaviour is an assumption that bears some scrutiny, because I think it's one without merit. The way to stop this activity—and it is reducing—is through educational programs. It's through teaching people that this is a dangerous activity. Mothers Against Drunk Driving has been instrumental in doing just that, both in this country and in the United States. The television commercials have had an enormous impact.

● (0945)

Having defended these cases both here and in the United States for a number of years, I can tell you that people are doing this less. And they're not doing it less because of the law; they're doing it less because it's wrong. They know it's wrong because people can be hurt, and they've been taught that. But they're not doing it less because we're increasing penalties or because we're going to take blood or urine samples from them at the side of the road or in the station.

I would urge this committee to think long and hard about going forward with a law that dramatically restricts civil liberties, that's highly invasive of privacy, and that frankly isn't going to achieve the legislative goals that I think everyone in this room would like to see achieved.

Thank you.

The Chair: Thank you.

Mr. Lee, questions.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you, Mr. Chairman. We've had excellent submissions this morning, in my view.

I should state at the opening that even though I may pick at some parts of this bill, I realize there's massive support for new legislation and a policy that would reduce the incidence of impaired driving in Canadian society. I'm concerned, though, that components of this statute may, intentionally or unintentionally, go too far within our current legal system.

I want to direct a question to Mr. Solomon. It's a double-barrelled question.

Firstly, subclause 8(6) of the bill essentially removes a defence, or tries to remove a defence, as you've described. But I'm going to read a quote from a particular case, the Seaboyer case:

> A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial.

I'm suggesting that subclause 8(6) falls into that category. It's going to obstruct the trier of fact from getting all the truth. I'd like your response to that.

Secondly, this bill will, in practice, implicate an individual—and I'll refer to schedule 4 of the Controlled Drugs and Substances Act. A weightlifter who's taking steroids, who happens to have the steroids in his or her body, gets stopped by a police officer for a broken tail light and admits that he or she is a weightlifter and has been taking steroids. That weightlifter would fall within the ambit of this new statute now, and the police officer would be allowed to stop, detain, and apply a test even in the absence of any evidence of impairment. It has nothing to do with drunk driving or drugged driving. The statute, in my view, may just go too darn far.

Could I ask you to comment on both of those, please?

● (0950)

Mr. Robert Solomon: It would be my pleasure.

The first issue is whether or not the bill, as constituted, would limit the defensibility to testify that I only had two drinks. I think it's perfectly permissible for Parliament to decide to prefer the evidence of a scientifically established machine after the fellow has already failed a roadside screening test, after the officer has reason to suspect the fellow has alcohol in his body, and to prefer the results of the machine over the unsubstantiated denial of guilt of the accused. It's my view that Parliament is perfectly entitled to make those choices as to the weight that evidence is to be given.

If in fact the Supreme Court of Canada ultimately decides, in its infinite wisdom, that the legislation goes too far, it no doubt can narrow the scope of the limitations on the evidence. I'm not particularly troubled by this limit on the defensibility to testify. If the Supreme Court ultimately says it has gone too far, then I'm sure the Supreme Court will suggest that this evidence may come in. In other words, it may modify the legislation as passed, by use of the charter.

There are a number of other jurisdictions that use other means of narrowing this kind of defence, such as the U.K. and other jurisdictions.

The second question you raise relates to what happens to the individual who is in possession of a steroid under this legislation. Unless the individual admits that he has drugs in his body, it's very unlikely the officer is going to have a suspicion that he has drugs in his body. Once the individual says he has taken a steroid and has a drug in his body, the police officer is then going to have to.... I don't think most police officers have had the experience of saying to people, when they're pulled over, "How are you?" and then immediately having those people confessing that they have drugs in their body, but theoretically it could happen. If he says, "Yes, I'm a bodybuilder and I take a steroid", the officer may simply reach the reasonable conclusion that there are no signs of impairment, that the drug doesn't impair, and simply say, "Thank you very much, you're on your way".

I go to Starbucks. When I come out of Starbucks, I'm drinking caffeine. I think the bold coffee has sufficient caffeine in it. I have a drug in my body. Am I concerned about officers pulling over people —

Mr. Derek Lee: The law as written doesn't require any impairment. You've built that into the rationale for—

Mr. Robert Solomon: But why would a—

Mr. Derek Lee: We're trying to write a law here, and it doesn't require impairment.

Mr. Robert Solomon: If there is no reason to believe that you are impaired, that your driving is flawed, why would the officer take on giving you a standard field sobriety test at the side of the road?

Mr. Derek Lee: It is a breach of this new law if you do have drugs in your body. If you have possession of any drug like that in your car, in the trunk, even though it has nothing to do with impairment, it is a possession offence. It's a new kind of an offence. It has something to do with drugs.

I've often commented on this apparent obsession of this government with drugs and sex. If there's a drug out there, they say they're going to get it, even though it has nothing to do with any apparent social ill, although you can say steroids might.

Anyway, I'm sorry to have interrupted.

● (0955)

Mr. Robert Solomon: Perhaps what I can do is separate out the two issues. The first issue is the drug testing. If I'm pulled over and I acknowledge that I have a drug in my body, whether it's a beta blocker or I took cold medication, I don't see the police demanding from people who acknowledge having taken cough syrup that they do a field sobriety test. The law as written is broad and would allow that, but I see no reason why the officers would.

If they do give you a standard field sobriety test, then guess what? You're going to pass and they're not going to go on to the DRE. So I'm not concerned about that aspect of it.

The second issue you asked me about is this new offence of being in possession of a drug while driving. My own view is that we have to get the message out there to young people that drugs and driving don't mix. Driving after drug use has increased among youths. They are the most vulnerable segment of the population. Impaired driving collisions are the number one killer of young people, and it is a matter of concern. To the extent that this legislation gets the message out that drugs and driving don't mix, I think it plays some role.

Do I view this legislation of the offence as being vital or the most important part of the legislation? I do not. We are not as wedded to that particular provision as we are to some of the others. I still think it's the right messaging.

The Chair: Thank you, Mr. Lee.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Thank you.

Mr. Chairman, our witnesses have given us three good presentations. We favour the principle and the goals of the bill. However, I rather agree with the Canadian Council of Criminal Defence Lawyers and the B.C. Civil Liberties Association that we could, in fact, remove some provisions of the bill without prejudicing its basic goal.

I wonder about the link between possession of drugs in a car and the capacity of driving without being impaired. I believe that this Committee should consider removing that part of the bill. I was a member of the Sub-Committee which has been sitting for several months following the introduction of a motion on the non-medical use of drugs by Randy White, one of the Chair's colleague.

It seems to me that in regards to driving, there have been rather some serious expert views that cannabis use might interfere with driving as it could reduce the capacity to follow a straight line. I am not ready to accept that it is acceptable to drive after using marijuana. Does it justify the offence regime proposed in this bill? Maybe we should provide for reduction measures. I think that this is a social issue that should concern us.

My question is for the B.C. Civil Liberties Association and the Canadian Council of Criminal Defence Lawyers. You gave the example of people who might lose their driver's licence in rural areas of Canada. This is really not what we are looking for. If the possession of drug-in-a-car provision was removed from the bill and if there was a better definition of "reasonable grounds", would you find the bill more acceptable? I do not wish for the student to go against the teacher. I am perfectly aware of the respect you both have for academic authority.

[*English*]

Mr. Mark Brayford: I certainly agree with the suggestion that possession in an automobile is not a major component of this bill. Quite frankly, it doesn't add a lot to the bill. As far as the potential unfairness stemming from a charge for it, I can colloquially say it's one of the most unfair parts.

I would still be particularly concerned about the ramifications of the part dealing the two-beer defence and having some unconstitutional provisions passed that later get struck down. It might be very beneficial to defence lawyers—we would get thousands of new clients who normally might have pled guilty—but it could cause chaos for the justice system.

● (1000)

[*Translation*]

Mr. Réal Ménard: I just want to make sure that I understand. Your colleague will have his turn after.

Strangely enough, the reason we liked that bill was that, in the name of social order, it was eliminating the two beers defence, which is a rather irresponsible defence. You said earlier that in Canada, there are several types of breathalyzers and that the types in use are obsolete in many cases. Maybe we should consider using new technologies.

Do you agree with those who have concerns about an abuse of the two beers defence? You are saying that technologies are obsolete. What do you mean by that?

[*English*]

Mr. Mark Brayford: I definitely do not believe we should ever remove the two-beer defence whatsoever. Under no circumstances, in my view, should we ever say to an accused person that because of the fact that they might come and lie, we're going to deem their evidence to be inadmissible. Trials are quite inconvenient, so we could do that with any crime.

We could simply say that for the person who pleads not guilty when they're charged with murder and says they killed in self-defence. The person they killed is often the only witness. If the accused person says they acted in self-defence, often it's very hard to refute the lie that this person might be telling in terms of it being self-defence, but obviously we can see how unfair it would be to deem that evidence that you're acting in self-defence inadmissible.

It's the same thing to say the fact that you say you had nothing to drink or very little to drink should be inadmissible. That is not where we should be going.

Certainly, I concur that we should be constantly updating our breath technology. the Intoxilyzer 5000 has gone through many series and modifications and improvements. But it's not for me to suggest how much money we spend on updating the technology. Whether we're dealing with helicopters or Tudor jets or icebreakers, all kinds of technology are advancing.

But the Intoxilyzer 5000C is twenty-some years old. It's quarter-of-a-century-old technology. That doesn't mean it's necessarily bad technology, but even in the latest technology there are about 115 breath testing devices that are presently on the market. Some of them are much better, but they're still not foolproof. Even new cars don't always start.

Mr. Kirk Tousaw: Thank you for your question.

The short answer to your question is no. Removing the possession provision doesn't make the bill acceptable, for a few reasons.

As Mr. Brayford has pointed out with respect to the evidentiary restrictions, people have the right to defend criminal charges in this country. That's a right enshrined in the charter, and it's one that should not be taken away from them.

The assumption that the breath test machines are infallible is simply a faulty assumption. I think Mr. Solomon said there are no other jurisdictions in the world where people put on these kinds of two-beer defences. In reality, that's simply not the case.

I practised criminal defence law in the United States for about five years, and I can tell you that people regularly take the witness stand and say that despite what the breathalyzer machine said, they only had one or two beers. All the people who were with them at dinner for the past four or five hours will get up on the stand and testify that the person only had one or two beers, and here's their receipt from dinner showing that they only had one or two beers.

You can't take that right away from an accused person or else what you're doing essentially is saying that the breathalyzer spits out a result, you're guilty, and you go to jail, you lose your driver's licence, or both. It's simply not acceptable.

It's interesting to hear that one of the frustrations the police have is that there are a lot of abilities for defence counsel to gum up the system, to spend a lot of time defending these charges, and that's why they don't lay charges. This bill doesn't solve that problem. I can tell you that I like running charter arguments, and this evidentiary restriction is a charter argument in every single case. You have to run it in every single case. That's not going to make the process more efficient. If anything, it will do quite the opposite.

The other problem is the drug testing provisions themselves. I understand there's a great deal of support for them, but we have to realize that police have the ability to charge people with driving while impaired by drugs. We train police to detect impairment at the side of the road. The fact that we're now contemplating forcing people to give blood or urine samples at a police station on the basis of a procedure used by a DRE officer, a procedure that is not infallible and will yield toxicology results that themselves are not infallible and are simply not proof of impairment, is a real problem with this bill.

Let me give you this example. There are about—

● (1005)

The Chair: Sorry for interrupting, but could you wrap it up quickly? We have other witnesses.

Mr. Kirk Tousaw: I have one quick example.

We have about 1,700 people in this country who are authorized to use marijuana for medical purposes. There are about 200,000 or 300,000 more who haven't been able to navigate the federal government's system. These people will test positive for the presence of marijuana in their system days, weeks, or potentially a month after their last use of cannabis. What's going to happen is if they're pulled over and they end up doing the drug test, they can be convicted while never having been impaired. They didn't drive while impaired. That's a very serious problem when you have critically and chronically ill people who might be subject to deprivation of their liberty on the basis of quasi-scientific evidence—and I say “quasi-scientific” because it's not infallible.

The Chair: Thank you, Mr. Tousaw.

I think Mr. Solomon might have some point of rebuttal, and then we'll go to Mr. Comartin immediately after him.

Mr. Robert Solomon: I have a couple of points.

First of all, the statistics I gave about police officers not laying charges are not based on anecdote. One is based on a national study published by the director of Transport Canada. The other is a study by the B.C. ministry of justice. The existence of these offences discourages police from laying charges in the first place, discourages the Crown from proceeding. We have large numbers of jurisdictions where, because of these defences, the Crown will simply take a plea to careless driving rather than go to trial, so it has a major deleterious impact.

In a survey done by the ministry, 40% of police officers indicated that one of the reasons why they don't lay charges is these kinds of technicalities in the law. It is having a major deterrent impact. Last week I spoke to Chief Superintendent Grodzinski, who is the director of traffic safety for the OPP, and I asked him about this issue. He confirmed that these defences have a demoralizing, discouraging, and deterrent impact.

The worst-case scenarios that are being trotted out by my friends do in fact lack a certain air of reality. If I am a regular marijuana user for medicinal purposes and I'm stopped by a police officer and acknowledge that I have drugs in my body, the officer then has the power to demand a standard field sobriety test.

The validity of the standard field sobriety test has been confirmed in study after study by the National Highway Traffic Safety Administration in the United States, in terms of its ability to predict impairment. If I'm not impaired, I'm not going to fail the standard field sobriety test. The officer is not then going to have reasonable grounds to take me to the station. If I somehow fail the standard field sobriety test, I'm taken to the station. At the end of that twelve-part process, if the officer concludes that I'm not impaired by a drug, then no blood sample is going to be demanded.

People want to ignore the fact that it's not automatic that when you're stopped, you automatically have to provide a urine or blood sample. That comes at the end of the process, when you have failed each and every part in order. At the end of that process, a bodily fluid sample is demanded.

It is a mischaracterization. I stick to my original statement—

● (1010)

The Chair: Mr. Solomon, I know this is an interesting discussion that we're having here. It's certainly essential to the committee in terms of our accumulation of information, but I do have other questioners. Unless the committee indicates otherwise, we can allow this debate to continue on with them.

Other than that, I'll just go over to Mr. Comartin.

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

I thank you all for being here.

Mr. Tousaw, on the study that you referred to in Oregon, my understanding of that and some of the other ones in which we're seeing a failure rate in the 20-percentile range is that the 20% includes not a failure of an assessment of impairment but a failure of accurately describing which of the drugs the person used that led to the impairment. Is that correct?

What I'm trying to say to you is that it's a bit disingenuous to say there is an absolute 20% to 25% failure rate. It's not a 20% to 25% failure rate of testing for impairment. It's the type of drug that underlies the impairment.

Mr. Kirk Tousaw: The Oregon study actually allowed officers to choose two categories of drugs, so the failure rate is only reflected if they were wrong on both.

Mr. Joe Comartin: They were wrong about the drug, not wrong about impairment.

Mr. Kirk Tousaw: But the question of impairment isn't contemplated in the study at all. It's a question about whether the test was able to tell whether or not the drug was in the system. The question of impairment is a wholly different question from the question of whether or not you have the presence of drugs or drug metabolites in your system. That's really one of the biggest problems with the bill. The bill seeks to determine the presence of drugs in the system. The impairment piece comes well before that.

There's a question of why on earth we are putting people through this invasive procedure when it is in fact not indicative of the question, which is whether or not the person is impaired.

Mr. Joe Comartin: Mr. Brayford, I want to make a statement first and then I want to challenge you.

What I see and what I strongly believe has happened in Ontario—I haven't studied the rest of the provinces, so I can't comment on them—is that our courts, in effect, our judges, have been forced to accept the two-beer defence. I hear that from some of the judges. When you study not only Carter but the cases that have flowed out of Carter and have occurred subsequent to Carter, when judges have rejected this defence, they've been appealed. The Court of Appeal for Ontario has been very strong on this and has effectively said the judges can't reject it. That's what the provincial court judges right across the province believe at this point. Based on the Carter decision and subsequent ones from the Court of Appeal, that's the reality in the province.

It's not like we're precluding evidence. It's evidence that absolutely has to come in, has to be accepted, even when the trial judges don't believe it themselves, based on the decisions flowing from Carter. That's the reality in Ontario.

I want to challenge you, and I have to say to you that you blew some of your credibility when you made this point. You have a person who has gotten on the stand and said—and the judge has been forced to accept this evidence—that the breathalyzer is wrong because they only had two beers. How are you going to expect the judge to then convict him of impaired driving? If you have to accept that the person only had two beers, how can you then convict him of impaired driving? That just doesn't happen. That's never been my experience. If you can't get him on the breathalyzer in those circumstances, then you're not going to get him on impaired.

I really had some difficulty with your description of the fallback, and I know the Court of Appeal for Ontario has said the same thing. The court has said to forget about the breathalyzer charge but to convict him of impaired, after saying that you have to accept the evidence of the two-beer defence. It's impractical. That's not what happens in the courtroom. If you beat 0.08, you're going to beat impaired too.

● (1015)

Mr. Mark Brayford: Perhaps I didn't express myself very well, because what I'm saying is this. If we go back to when Dr. Borkenstein introduced the breathalyzer, his view was that the test should be confirmatory of physical observations and that it should take both to convict someone.

What I'm saying is that if you have someone who is displaying symptoms of impairment that are marked at all, they will probably be convicted of impaired driving. The judge can use those symptoms of impaired driving, if the judge so chooses, as a basis for disbelieving the accused's testimony that they only had a small amount to drink.

If you deal with—

Mr. Joe Comartin: Let me interrupt you. I want to know your experience in the western provinces. In Ontario, the provincial court judges are telling me they have lost the ability to reject that evidence. It's contrary evidence, as interpreted by the Court of Appeal, and they have to accept it.

Mr. Mark Brayford: I only agree with that to this extent: where there is no basis on which the physical observations by the police officer would permit him to say, "I disbelieve the accused". All a judge needs to have before the court in order to reject the two-beer defence is a basis on which to say, "I do not accept that testimony". If the judge can say, "I do not accept that this person only had this amount to drink, and I have no doubt they drank much more than tha —". If they have a basis to say that, then there will be a conviction that will stand. That basis can come as a result of a contradiction between people testifying as to how much they drank. Or it may well be simply that the physical description is consistent with only one conclusion, and that is that they were falling down drunk.

What I think may have caught some judges by surprise—and we're speculating here—is those cases in which there is really nothing but a low reading, not much for observations at all, and very plain, matter-of-fact sworn evidence, under oath, where someone says, "This is all I drank. I'm under oath, I'm telling the truth, and this is what I drank." Yes, in those cases there should be an acquittal, according to the Court of Appeal, and I agree. If the judge doesn't have a basis for saying why they're finding the accused to be a liar, they would be reversed. They need to be able to explain why they're convinced the accused is a liar.

We're talking about something where the person has to go on the witness stand and commit perjury. These people aren't all committing perjury. Maybe some are, but a lot may well not be.

One of the things that I think we do overlook—and I'll be very brief—is that this new bill makes a comment about videotape testimony at proposed subsection 254(2.1). Quite frankly, a lot of our concerns could be beneficially addressed if, rather than saying, "For greater certainty, a peace officer may make a video recording of a performance of the physical coordination tests referred to in paragraph (2)(*a*)", in drunk driving law there should be an adverse influence if everything isn't videotaped

Videotapes cost nothing now. They can be e-mailed to defence counsel at no cost after they've been collected. It would cost us nothing. It would be a very effective enforcement tool. I often now do get them in some cases. Quite frankly, I'm waiting for one right now. If my client has bad symptoms on the videotape, I'll be pleading him guilty. If not, he has a very obvious defence.

Thank you.

The Chair: Thank you, Mr. Brayford.

Mr. Dykstra.

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

Mr. Brayford, this is the second session that this committee has had, and one of the issues that continues to come out is the fallibility or infallibility of the machines that obviously are used to test. You made a comment that there may be an individual who drank nothing yet tested at 200. Could you tell me, in a case, how that happened?

● (1020)

Mr. Mark Brayford: That's using an extreme example. To use a better example, if you have some degree of alcohol consumed, there's a multiplicity of other reasons why you may get a falsely high reading for a small amount. For hyperbole, I used an extreme example, but without some actual alcohol, you're unlikely to get some reading.

Just by way of example, if you were to simply swish alcohol in your mouth—you're not swallowing it, just swishing it around in your mouth—and then spit it out, you would show a blood alcohol level that would be fatal if you were then tested by a breath device. The Intoxilyzer had a slope detector put into it that was to try to help deal with this type of contamination.

Mr. Rick Dykstra: Let me tell you what I'm trying to get at. It would seem to me that if I were to be charged after having taken a test and I actually am—Let's say it's a one-beer defence. I had one beer and I actually tested higher than 0.08, and I was therefore charged. I know I'm not guilty. What are my options? Obviously the device is incorrect. I would call my lawyer immediately, have that device picked up, and have that device tested. I don't see the point. If you're actually right and the test is wrong, then obviously you're going to get the device, have the device proven incorrect, and be found innocent.

Mr. Mark Brayford: I have defended hundreds and hundreds of alleged drunk drivers over the last quarter century, and I know of no case in which someone has successfully been able to grab a breath testing device or get their hands on it. But more to the point, the Intoxilyzer doesn't use a wet system, if I can call it that.

Mr. Rick Dykstra: Let me ask you this. I come from a really nice city in Ontario called St. Catharines, and I don't ever recall a night when they were using a device and found fifty people in a row that evening, which would have easily proven that the device wasn't working.

Anyway, I'm going to move on, because there's a whole issue around the device. It would seem to me that if it wasn't working and you were actually being truthful and hadn't had anything to drink that evening, you'd be able to prove the device was not correct.

Mr. Mark Brayford: There are many times when there are potential problems with devices, and you can appreciate how you can't prove it after the fact.

Mr. Rick Dykstra: Kirk, you made the comment that we've cut $4.2 million out of police funding. In fact, while we may have certainly, from a budget perspective, rearranged how finances work within different departments, some programs that were actually affected are not affected in terms of how you relate them. Actually, $161 million was set out in 2006, specifically for more RCMP officers to focus on priorities such as drugs, corruption, and border security. Another $16.1 million was provided for community programs to help young people get back to school, rather than having them join a gang and learn how to do drugs or get involved in alcohol. Likewise, in this year's Budget 2007, $64 million was spent on a new anti-drug strategy for across the country. So I just want to make sure you're clear that we have a pretty clear focus on where we want—

Mr. Kirk Tousaw: I'm well aware of this government's concern with the issue of drugs and its attempts to combat them, but my numbers came from the legislative summary.

Mr. Rick Dykstra: Just so you're clear on it, this government is investing a lot of money in terms of fighting drug use in this country.

I got the impression from you—and perhaps you can correct this—that there is absolutely no relationship between drugs in one's system and impairment. Is that true?

● (1025)

Mr. Kirk Tousaw: There is no scientific way to make a causal link between the presence of, for instance, marijuana or other drugs in one's system and the issue of impairment.

Mr. Rick Dykstra: So you think that no matter how much of a drug you use, you can still drive and not be considered impaired.

Mr. Kirk Tousaw: No, that's a totally different question. You asked me about linkages, causal linkages, and scientific testing.

Mr. Rick Dykstra: I'm sure Mr. Solomon will comment on that.

Mr. Kirk Tousaw: You certainly can take drugs and be impaired by those drugs. The problem is that drug testing only tells you if you have the drugs in your system. It doesn't tell you if you're impaired. If you smoked marijuana yesterday, you will test positive for the presence of marijuana in your system today. It won't have anything to do with impairment.

Mr. Rick Dykstra: You won't be pulled over if you're not impaired. At least where I come from, you don't get pulled over and tested unless the police officer has a notice of impairment. It isn't just to pull someone over to test them to see if they actually have drugs in their system.

Mr. Kirk Tousaw: Certainly, but the problem is—and I think it's one of the major problems we've been dealing with all morning—is that there's this assumption of infallibility. It was said, I think by Mr. Solomon, that if you fail the standardized field sobriety test, you're impaired. Well that's simply not the case. Police officers do sometimes get it wrong. That's why, for instance, when we talk about removing the ability to call the two-beer defence—

Mr. Rick Dykstra: Kirk, that's fine. That's true. Aside from any new legislation that we're introducing, that's the case.

Mr. Kirk Tousaw: That's right.

Mr. Rick Dykstra: If you're talking about infallibility, whether it's right or whether it's wrong, it's a completely different philosophical argument from whether or not the legislation actually makes sense, whether the legislation should be enacted.

Mr. Kirk Tousaw: No, I don't think it is. What happens is that we now have the idea that we're going to subject people to highly invasive, privacy-intrusive drug tests on the basis of an assumption, first, that there's some level of at least certainty that the person might have drugs in their system; and second, that if we find the drugs in their system, that provides evidence of impairment. Those are two faulty assumptions. That's simply not the case.

With respect to the idea that we should not allow, for instance, someone to take the stand and say, “I only had one beer”, that has been referred to as getting people off on a technicality. I don't think the right of an accused person to testify under oath that they're not guilty is a technicality. In fact, that's the cornerstone of our judicial system.

Mr. Rick Dykstra: I want Mr. Solomon to respond, but the other point you made at the beginning was about the whole issue of the percentage of people who actually use marijuana and whether someone in a vehicle has it in his pocket, and therefore the driver is....

Whether you think marijuana should or shouldn't be an illegal drug is entirely another argument. The fact is, it is an illegal drug in this country for those who don't have a medical exception to be able to use it. When you use a vehicle, when you actually purchase the drug, or when you actually use the drug, those are three things that are still illegal in this country. You may wash over it from a civil liberties perspective, but those acts are certainly still illegal from a legal perspective, at least the last time I checked. That's why they've been incorporated into the bill.

Mr. Kirk Tousaw: No, I think—

The Chair: I would like you to respond, Mr. Tousaw, but there is limited time here.

I'm going to go to Mr. Solomon, and then the next questioner.

Mr. Robert Solomon: I think we have to get this clarified.

I agree with you that the testing of bodily fluids is at the end of the process. This is after the person was stopped. The officer has reason to suspect you have drugs in your body. You fail the standard field sobriety test. They have reasonable grounds to believe you are impaired by drugs. They take you to the station. They do the eleven-part test of DRE. They conclude you have a particular drug.

At the end of that, you're right, they get to demand and do an invasive test. It's just like how, if I'm charged with an indictable offence, the police can fingerprint me. I may find that to be invasive. If the police charge me with particular offences, they can demand hair, saliva, DNA. So you're right, it is, but it's at the end of a long process in which there are a number of safeguards and barriers built in. I think we have to recognize that. If, at any one of those stages, the officer concludes that there are no drugs and you're not impaired, you don't pass go and you don't go to the next step.

The other thing that I think it's important to emphasize is the other aspects of the DRE that establish the impairment. I would take issue with the view that DRE testing can't establish that you're impaired. That's absolutely not so, because it can establish that you are impaired. As a matter of fact, the science on divided attention, past testing—horizontal gaze and various test elements are clearly linked to impairment.

So I think you're right, it is invasive, but it's at the end of a long number of barriers that you have to jump over, all of which you have to answer yes to. Every other element of the DRE goes to impairment. The other elements go to the impairment by drug, including some of the physical examination stuff, but you're right, the bodily fluid test only confirms presence of drug.

● (1030)

The Chair: Thank you, Mr. Solomon, Mr. Dykstra.

Madam Jennings.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you.

My colleagues here have covered some of the issues I had some concerns about, including the lack of connection between impairment and possession of an illegal substance in the vehicle. But I do have one issue, and it is under clause 3 of Bill C-32, in proposed subsection 254(2), which says:

> If a peace officer has reasonable grounds to suspect that a person has in the preceding three hours had alcohol or a drug in their body while they were operating—the peace officer may, by demand, require the person to comply with

When we look at the actual Criminal Code and the section that is being amended by Bill C-32, there's a clear link between the officer having to have

> reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed—an offence under section 253

The reasonable ground that the officer has to have is that the individual actually may be impaired.

Under Bill C-32, the peace officer no longer has to have reasonable grounds to believe the driver has committed an offence under section 253, which is the offence of impairment. The officer merely has to have reasonable grounds to believe that the person, in the preceding three hours, had alcohol or drugs in their body. That's a real problem. Do you not see that as being a problem, Mr. Solomon?

I would prefer to see that, under clause 3 of Bill C-32, in proposed subsection 254(3), we add in the reasonable ground that an offence was committed under section 253. That would then allow the officer to conduct the breathalyzer test, the breath test, the road sobriety test, whatever. That would then trigger all of the other mechanisms the officer has to confirm or inform his reasonable grounds that the driver was impaired. Right now, nowhere in that subsection do we talk about having committed an offence under section 253. We find that in the Criminal Code, but we don't find it here.

The Chair: Mr. Solomon.

Mr. Robert Solomon: I'll apologize. I'm somewhat at a loss, because I don't have that right in front of me.

It was my understanding that to do the tests at roadside for either drugs or alcohol, you need a reasonable suspicion that they have the alcohol or drug in their body.

Hon. Marlene Jennings: Period. But under the Criminal Code, it says very clearly—let me read it:

> Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding three hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

—and then it goes on about breath samples, etc.

Bill C-32 is amending that section, and it's amending it by saying:

> If a peace officer has reasonable grounds to suspect that a person has in the preceding three hours had alcohol or a drug in their body while they were operating a motor vehicle...the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol

The reasonable and probable grounds in the Criminal Code were linked to the fact that the person had committed, was committing, is committing, or at any time in the previous three hours committed an offence under section 253. In Bill C-32 we've removed the connection between the reasonable grounds—

Our courts have clearly defined all of the criteria for “reasonable grounds”, depending on the circumstances that meet the test of reasonable grounds. We've removed the connection with committing an offence under section 253. That's a glaring problem.

● (1035)

The Chair: Mr. Solomon.

Mr. Robert Solomon: Again, the question catches me a little off guard, because I haven't memorized those sections. My understanding, though, is that you need the reasonable suspicion for the roadside, and you need reasonable and probable grounds to then make the demand to take them down to the station for the DRE. I'd be happy to take a look at it, and perhaps I can address it later.

The Chair: I'm going to move on now, Madam Jennings.

Madame Freeman.

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): We are all aware of the impaired driving problem. We realize that this bill provides for many rather important mechanisms, including the training of drug recognition experts. I personally believe that it will not be easy to enforce that legislation. I would like to hear your comments on that.

It is one thing to pass legislation, but to enforce it, a procedure has to be put in place. How shall we be able to enforce it in remote areas? In a previous hearing, we learned that the training of drug recognition experts is very costly, that it includes several stages and that it is quite long. The cost of that training will be paid by provinces. The training budgets of the RCMP have been reduced. I wonder how we will be able to train the number of experts required to enforce that legislation.

Do you think that it would be possible in practice to implement this bill satisfactorily given the training required for the Drug Recognition Expert Program? That training includes eight examinations and two practical tests. Twelve evaluations have been mentioned. It is rather difficult to find drug recognition experts. All those people have to be trained. Do you really believe that the implementation of this bill will be possible considering that it must cover the whole country?

[*English*]

Mr. Robert Solomon: As I understand it, the RCMP are continuing to train DRE officers at this current time. I'm pleased to see the rigorous standards of training because they ensure that those conducting the tests have the skills necessary to do so at a high level of accuracy. I think that's a positive thing.

Will there be some problems in some remote areas where there's no DRE officer? Yes, just as there are major problems in enforcement now where you have rural areas and relatively scarce police enforcement resources.

I accept that it's costly to train, but this legislation will provide a framework, and the training will ensure the accuracy and reliability of the results. So the legislation is a very positive step.

● (1040)

[*Translation*]

Mrs. Carole Freeman: Do you have any comments on this subject?

[*English*]

Mr. Kirk Tousaw: I'd identify a serious concern. Notwithstanding the accuracy of DRE testing, there has to be a procedure in place to do it. What we heard from Mr. Solomon earlier is that police are reluctant to lay impaired charges because the defences take so long and they have to spend so much time in court.

This system isn't going to change that at all. In fact, it's going to increase the amount of time required to defend each case, because as a defence counsel you're going to have to challenge the standardized field sobriety test results and the officer's ability to do that. You're going to have to challenge the DRE test results and the officer's ability to do that, along with the training and the procedures they've gone through. And you're then going to have to challenge the toxicology screening results.

I think what you're going to see happen is what Mr. Solomon suggests is happening now, in that police are going to be reluctant to go down this road and lay these charges. They're going to do what they do, which is issue administrative roadside suspensions for 24 hours—at least in British Columbia—and not lay the charges.

So there are two pieces. One is that we don't have the people to implement the program. The provinces certainly don't have the money to implement the program currently. And the program itself is going to cause a further backlog in the criminal justice system, which is going to lead to more and more problems with the courts.

The Chair: Thank you, Mr. Tousaw. Madame Freeman, thank you.

We'll go to Mr. Moore. This will be the last line of questions.

Mr. Rob Moore (Fundy Royal, CPC): I'll split my time with Mr. Petit, if that's okay with you.

Regarding Ms. Jennings' questioning, I just want to confirm, Mr. Solomon, that your understanding—even though you haven't had quite a chance to review it—is correct on the safeguards that are in place. I did want to state that up front. I am referring to your understanding on the suspicion that leads to the standard field sobriety tests, as well as the reasonable and probable grounds that lead to the work with the drug recognizance experts. I did want to put that out there.

I wanted to give an opportunity to Ms. Miller. Is there anything you wanted to say? You've been here for a couple of hours. Is there something brief you wanted to put on the record? We do appreciate all the witnesses' presence here. This is an important bill.

I don't have a major concern with some of the concerns that were raised, because I think people recognize that we have to do more, that we have to tighten up some of these defences. I went through an airport screener the other day, and of course the buzzer went off; I had to subject myself to some things that I wasn't entirely comfortable with. I would argue that you only reach the point you get to with the final blood test—as, Mr. Solomon, you have appropriately characterized—after you've failed at every level. If at some point you do not fail, then you do not go past that stage—you never reach it. But we have to have safeguards in place, and that is in fact a check on all the other preceding testing that has been done to ensure that this person is in fact impaired. I think it's important to have those checks and balances in place.

I did want to comment first, Mr. Solomon, that your characterization of the process is in fact correct.

Ms. Miller, is there something wanted to say?

Ms. Margaret Miller (National President, Mothers Against Drunk Driving): I do have a few things I'd like to bring up.

My role in MADD Canada is to work with the volunteers, listen to the volunteers' stories, and help them try to find their way through the process. Sometimes it has been when the judicial system hasn't been doing what they needed.

Last weekend I was in P.E.I. for a white cross placement. They have a really bad situation there. A mother and a daughter had gone for a walk at six o'clock in the morning. Their neighbour had been out drinking the night before. He had slept for a few hours, got back in his truck, headed home, hit them both, and killed them both. This was on a very beautiful rural road, so it was really hard to go there, see it, and put up these white crosses.

What has now made it even worse for the family is that the impaired driving charge was dropped because the test hadn't been administered within two hours and fifteen minutes. The young man has now only been found guilty of dangerous driving causing death, and he was to be sentenced yesterday. I haven't heard what it was going to be.

During his trial, eighty people from the community wrote letters of support for the impaired driver, saying what a nice guy he was. That just shows the depth of frustration the families must be feeling that there's that much support for impaired driving. It's a fact. He was driving impaired, yet he has the total support of the community.

This was a really bad issue in this community, and it's too bad that the justice system hasn't been able to do more to get that conviction for impaired driving.

As another story, I was in Vancouver. A woman there lost her daughter to an impaired driver who was acquitted. He was drug-impaired. The family has been doubly victimized. That young man was acquitted too, so the family is being victimized again by the justice system because they're seeing that person drive about daily, knowing that he killed their loved one.

Every day, four people in Canada are killed by impaired driving, and 187 have often life-changing injuries. It's not just the numbers. We're talking about numbers. We're talking about lawyers. We're talking about loopholes, getting away with it, and other things, but we're dealing with people's families having their lives blown apart. Delays in this legislation will cost lives.

To put this in perspective, we lose more sons, daughters, mothers, fathers, and kids in two weeks in Canada than we have lost in all wars since 2002. Our greatest battle is here on our own ground, on our soil in Canada.

I was thinking a little bit about the self-serving two-drink offence. I have a new little grandson. He's two years old. I caught him at the wall with a red crayon, and I saw the red crayon marks. He said, “Not me”. It just brought to order that this is not a little self-serving. Was I going to believe him? I'm also a mother, but I'm also realistic. You have to be realistic when you're making these defences too.

We were fortunate that Bruce's killer was judged by a higher power than our justice system. He was killed at the scene of this crash. I can't imagine dealing with what I'm hearing so many of the victims are dealing with on a daily basis: that the people who have killed their loved ones, when we know they were impaired, when we know they were way over, have gotten through the justice system, have gotten off on technicalities, and are still living their lives while these families are not living theirs at all, not able to go forward.

Thank you.

● (1045)

The Chair: Thank you, Mrs. Miller.

We appreciate that.

I'm going to bring this session to a conclusion now as far as the witnesses are concerned. We do have some business that the committee will have to deal with.

I want to thank everyone for appearing. Your testimony has been invaluable for the committee members to deliberate on, and we really appreciate your appearance.

Thank you very much.

[*Proceedings continue in camera*]

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