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# Standing Committee on Justice and Human Rights

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EVIDENCE

**Monday, February 23, 2009**

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**Chair**

**Mr. Ed Fast**

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## Standing Committee on Justice and Human Rights

Monday, February 23, 2009

•(1530)

[English]

**The Chair (Mr. Ed Fast (Abbotsford, CPC)):** I'd like to call to order the fourth meeting of the Standing Committee on Justice and Human Rights.

Members, you have before you the agenda for today. Please note that we have scheduled a meeting of the steering committee for tomorrow and will at that time have a chance to review our work plan and also define a list of witnesses for this impaired driving study.

I understand there are still a number of motions on the table, including the ones that were tabled by Mr. Martin, Monsieur Ménard, and Mr. Storseth. You will notice that today's witnesses have actually been allocated the full two hours in aggregate, so I was hoping that at our steering committee tomorrow we could determine how much time each of the remaining motions will take and then schedule those for Wednesday.

I've discussed this with Monsieur Ménard. I've noticed that Mr. Storseth isn't here, and Mr. Comartin is here but has just left briefly. So I'm in the hands of the committee. Are you okay with that process?

[Translation]

**Mr. Réal Ménard (Hochelaga, BQ):** Yes, I'm fine with it.

[English]

**The Chair:** All right.

You also have before you the proposed budget for this study. If you review that you'll notice that the amount requested is a total of \$10,000 for the witnesses we've requested to appear. If it's contentious, we'll put it off to the end of this meeting, but if it's not, we could actually approve it right here.

**Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.):** I move that we approve the operational budget request for the study on impaired driving.

**The Chair:** Mr. Comartin, the total budget request for the study is \$10,000.

Do we have consensus here at the table?

(Motion agreed to)

**The Chair:** In accordance with our agenda, we have scheduled for the first hour today officials from the Department of Justice. We have with us Greg Yost, as well as Hal Pruden, who are both counsel with the criminal law policy section.

Gentlemen, you will have approximately 10 to 15 minutes in aggregate to make your presentation, and then we'll open it up to questions.

Mr. Yost, the floor is yours.

**Mr. Greg Yost (Counsel, Criminal Law Policy Section, Department of Justice):** Mr. Chairman and members of the standing committee, Mr. Pruden and I are pleased to be invited again to discuss impaired driving issues with you. I believe the clerk has distributed a Department of Justice paper entitled "Impaired Driving Issues", which was prepared by Mr. Pruden and me. It's essentially the same document as we presented last year, updated to reflect the coming into force on July 2, 2008, of the impaired driving provisions of the Tackling Violent Crime Act.

We understand from the officer in charge of the RCMP's drug recognition expert, or DRE, program that the number of drug-impaired driving charges has quadrupled since the legislation came into force, which compels the suspected drug-impaired driver to perform standard field sobriety tests, and upon failure to participate in the DRE test.

The issues paper does not address the recent drug-impaired driving legislation and is restricted to alcohol-impaired driving. We are well aware that legislation is only one of the measures needed to reduce impaired driving. A coordinated approach, including enforcement, education, and treatment of those who are alcohol and drug dependent, is also important.

•(1535)

[Translation]

It has been an offence since 1969 to drive with a Blood Alcohol Concentration (BAC) greater than 80 mg per 100 ml of blood, commonly called over 80. That level was based on the scientific consensus at that time. Indeed, it was lower than the BAC limit in the United States which in many states was 120, before being lowered to 100, and, only recently, all states adopted over 80.

With respect to lowering Criminal Code BAC, experts agree that, at the 50 BAC level, there is a degradation of skills used in driving compared to the driver's sober state. Also, over 50 is correlated with increased risk of collision, death and injury particularly for young drivers. For this reason, many jurisdictions, for example Australia and most European states, have established a legal limit of 50 and sometimes lower. However, those states do not apply the minimum fines and terms of imprisonment for repeat offenders that Canada applies to those who are over 80.

Generally, being over 50 except in the case of recidivism is punishable by a fine. Canadian traffic safety experts, however, disagree whether the most effective way to deal with this elevated risk in the 50 to 80 range for drivers is by provincial legislation alone or if in addition the Criminal Code should make it an offence to drive with a BAC in the 50 to 80 range.

Enacting an over 50 Criminal Code offence would not override provincial over 50 laws. Currently, when a person is charged under the Criminal Code with being over 80, the provinces impose an immediate administrative license suspension that is completely independent of the results of the criminal charge. Also, all provinces except Quebec issue a short administrative license suspension for drivers in the 50 to 80 range. If Parliament enacts an over 50 offence, the provinces could continue to issue administrative suspensions for those drivers.

There would be two possible options to establish an over 50 offence. Lowering BAC from 80 to 50 is simplest as police and prosecutors would not need to change any of the procedures with which they are familiar. However, the impact of such an offence on the criminal justice system cannot be ignored. Persons who accept a short provincial suspension for being over 50 will likely contest vigorously a criminal charge where the minimum fine is \$1,000 and there is a one year's prohibition from driving. Alternatively, a separate offence could be created with a lower range of penalties while maintaining the existing over 80 offence.

[English]

With respect to random breath testing, or RBT, there is research indicating that many impaired drivers are able to avoid a demand for a breath test when stopped by the police because the officer does not detect the smell of alcohol or symptoms of impairment, which are necessary before the officer can form the suspicion that there is alcohol in the driver's body and demand a screening test. These drivers would be more likely to be deterred if they knew the officer could simply demand that they provide a screening test. Nevertheless, it is probable that RBT would ultimately have to be justified under section 1 of the charter, as RBT requires detention of the driver.

The Oakes test requires that there be proportionality between the objective and the limitation. In that regard, the results of the introduction of RBT, which I've set out in the annex to the paper, are noteworthy: in Ireland, a 23% decrease in fatalities; in New Zealand, a 30% decrease; in Queensland, Australia, a 35% decrease. It must be noted, however, that RBT has generally been introduced as part of a series of measures that have included lowering BAC to 50 and increasing enforcement, making it difficult to isolate the effect of RBT.

The success of RBT is such that it's been recommended by the European Commission as part of its strategy to reduce fatal car accidents by 50%. RBT is now in force in 22 member states of the European Union.

With respect to innovative practices in use in other countries, we are most familiar with American practice. Some American states have been having some success with DWI—driving while impaired or intoxicated—courts, modelled on drug courts, and with using electronic monitoring to ensure that those who are prohibited from driving will be detected. However, these programs are expensive and require an elaborate infrastructure.

In the United States, persons who fail a breath test on a screening device or perform poorly on standard field sobriety tests are required to provide a breath sample on an approved instrument for use in court. The American courts have held that assistance of counsel is not needed for either test because the police are gathering physical evidence that already exists. Indeed, a BAC under 80 will exonerate a person, while a BAC over 80 does not in and of itself result in a conviction, as the prosecution must still prove that the person was driving and that the equipment was working properly and had been operated properly.

As you know, our Supreme Court has held that it is constitutional to require a driver to provide a roadside screening test without the person being given the right to counsel. Although the driver is being detained, the detention is justified as a reasonable limit because it is relatively brief and the results of the screening test cannot be used in court. Very careful consideration would have to be given to whether requiring a test on an approved instrument without the right to consult counsel would be consistent with charter rights. The necessary charter analysis would need to consider the objectives to be achieved and how to minimally impair the rights of the accused persons who would be providing evidence that could be used against them without the benefit of legal counsel.

This question is likely to become important in the near future. There are now very compact instruments that can act as both an approved screening device and as an approved instrument: some are in use in California, and the alcohol test committee is evaluating whether this new generation of equipment can meet Canadian standards. What works in California's climate may not work so well at roadside on the prairies in January. If these instruments can meet the ATC's strict standards, it would be possible to have the screening and the approved instrument test done at roadside. However, there would be little if any benefit if the officer at roadside may have to wait for hours while the driver tries to consult counsel.

I will not say much about sanctions because the Tackling Violent Crime Act included increases in penalties. The Province of Manitoba has raised a concern that it is an aggravating factor for a person to have a BAC over 160, so there is an incentive for a person with a high BAC to refuse to provide a breath sample. In the United States and Australia it is usual to have penalties tied to BAC and to have the maximum penalty apply to a person who refuses to provide a breath sample.

Finally, I would point out that much of our work as officials has consisted of responding to decisions made by the courts and advances in technology. The "breath testing on an approved instrument" provisions of the Criminal Code are almost 40 years old, with amendments authorizing the use of screening devices added in 1979.

• (1540)

There has been a series of amendments over the years. As a result of this series of amendments and the complex jurisprudence on virtually every section, the law is very difficult to understand. In 1991 the Law Reform Commission report on recodifying criminal procedure stated:

The law governing the procedure for the investigation and proof of alcohol- and drug-related driving offences is unnecessarily complex. It is the product of fragmentary responses to scientific advances in the area as well as hardening public attitudes demanding more effective detection and prosecution of offenders. Some provisions, we believe, have become virtually unreadable.

The issues paper suggests that consideration of the legislation as a whole with a view to making it simpler could be advantageous. If legislative reform is recommended as a result of this review, it may be appropriate for Parliament to assist the courts in understanding Parliament's intent in making any changes that may flow from this review by a preamble or the inclusion of principles. Parliament has done so, for example, in the sentencing provisions of the Criminal Code and the DNA Identification Act.

Thank you.

• (1545)

**The Chair:** Thank you, Mr. Yost.

I'll now open the floor to questions from the various members.

Mr. Murphy, I believe you're starting. You have seven minutes.

**Mr. Brian Murphy:** What would that preamble say?

**Mr. Greg Yost:** That preamble would perhaps underline the seriousness of impaired driving and the necessity to establish a simple and effective way of determining a person's BAC.

Back in my office I have a stack this high of legislation from around the world, many of which have preambles outlining why the legislation is being passed and so on.

I wouldn't be able to say at this stage. It would be an issue to think about in terms of the drafting, but those are certainly some of the possibilities.

**Mr. Brian Murphy:** I'm intrigued, and I think this has to be a non-partisan issue. As parliamentarians, we want our roads to be safer. For some of us, it's not the first kick we've had at it. We've heard from you and other groups before, and it seems there are some common tools that need to be tweaked or used. I don't know if it's unanimous, but it seems to me that they've experimented with RBT, which is a good one and could be morphed into the Canadian experience in a broader way; that lowering the limit, although MADD would like it, is not practicable in and of itself; and that the penalty aspect has been dealt with. What we probably need is a simplification of the code and its interweaving with provincial statutes in order to be effective.

The minister is always talking about his good rapport with attorneys general, but when I think of RBTs, roadside breath tests, and perhaps lowering the limit for some purposes, it all leads to one term: download. It all leads to provincial responsibility and money and resources for putting it into effect. Am I not correct about that?

**Mr. Hal Pruden (Counsel, Criminal Law Policy Section, Department of Justice):** If I may, I'll speak to the breath tests. Greg may wish to speak to other points.

Currently the police services throughout the country have the option to use tools that are within the Criminal Code. In respect of alcohol breath testing, they have the tool of the approved screening device and the tool of the approved instrument.

My colleague, Mr. Yost, has spoken about the possibility that we may see instruments in the future that will actually be able to do both the approved screening device test and the approved instrument test. However, one of the difficulties in Canada that you may hear from scientists, if you're going to be hearing from scientists from the alcohol test committee of the Canadian Society of Forensic Science, is that their standards and also current Criminal Code provisions require that a qualified technician do the approved instrument test. So even if you have one of these simplified pieces of equipment at the roadside, only the officer who is a qualified technician may use it in the approved instrument—

**Mr. Brian Murphy:** In the EU experience, and Australia's, and so on, is the legislation different? Must the ASD be approved by a qualified technician?

**Mr. Hal Pruden:** I'm not certain if they require their evidential equipment to be operated by what we would call a qualified technician. Again, I think you should be hearing from scientists from the alcohol test committee of the Canadian Society of Forensic Science, who can address that point straight on.

**Mr. Brian Murphy:** To the central part of the question, increase in RBT programming and any move towards a lower limit would put a strain on provincial resources, would it not?

• (1550)

**Mr. Hal Pruden:** With respect to random breath testing, as indicated in—

**Mr. Brian Murphy:** Is the R “random” or “roadside”?

**Mr. Hal Pruden:** It's randomized breath testing.

**Mr. Brian Murphy:** What does RBT stand for?

**Mr. Hal Pruden:** Randomized breath testing. So what is being spoken of is roving random breath tests. The police may have at the present time organized check stops, but they can only test when they have suspicion of alcohol in the body and they can use an approved screening device. The idea of these randomized roving breath tests is that they may stop any driver, any time, anywhere. This is a detention. The question is, can it be justified under section 1 of the charter if it is a criminal law investigative tool?

On the other hand, if a province chose to enact provincial legislation, it would be justified not as a criminal law investigative tool but perhaps as a driver licensing and traffic safety tool. So the question might arise, as it does in the issue of lowering the legal limit to 0.05, is this something the federal Criminal Code should do, is it something provincial legislation might do, or is it something for which both should be invoked?

**Mr. Brian Murphy:** Either way, the engagement of the attorneys general is absolutely essential?

**Mr. Greg Yost:** I would like to speak to that. Definitely the engagement of the provincial attorneys general is essential. I don't think it's any secret in this committee that Mr. Pruden and I are members of a CCSO working group on impaired driving, which has representatives from all the provinces. We deal with these issues and how they fit together. Yes, there is no question that changes would require the provinces to do things. We do not provide them with the equipment they might need. Certainly to make randomized breath testing really effective you'd want to have virtually all your squad cars with one of these devices in it.

Just as an anecdote, my nephew was in Australia for a year or so, and he phoned me because he knows the work I do. He was pulled over at 10 o'clock in the morning because he had a rather liberal attitude towards the speed limit.

**Mr. Brian Murphy:** Liberal—could you use another synonym, not as pejorative perhaps?

**Mr. Greg Yost:** Should we say that he considered the speed limit more a guideline than a fixed amount? The first thing the police officer did was pull out the ASD and make him blow into it. He blew zero at that stage, but he was pulled over and that's the way they handle it. We are not the experts on what kind of effect that would have. There's certainly a deterrent effect for people who are afraid they might get caught. But presumably you're going to catch more people and that would result in more trials.

On the other side, we have, particularly through the restrictions on evidence to the contrary, taken some steps to simplify trials and reduce the amount of time that might be involved in the courts in proving the case. If we're talking simplification, then that would be

the kind of thing we would be hoping as a package would make things a lot easier for the police to enforce the law and for the prosecution of the law.

**The Chair:** Thank you.

Mr. Ménard.

[*Translation*]

**Mr. Réal Ménard:** You have summarized quite well in your submission the question that this committee must answer, namely whether the Criminal Code BAC should be lowered from 80 to 50,

I came in to the office Sunday to reread all of the evidence heard by the committee. I recalled that the majority of witnesses had argued that the most effective measure was the administrative license suspension. As you noted, all provinces, with the exception of Quebec, issue suspensions under these circumstances. I'm wondering if perhaps this is the recommendation that the committee should pursue.

We heard how enacting a new Criminal Code offence would likely tie up the criminal justice system which is already quite overrun. We were even quoted statistics on the number of cases that a Crown prosecutor had on his plate, compared to the number of cases pending for a defence counsel.

So then, I have two or three questions that I hope you can answer for me. Firstly, what are the repercussions of an administrative license suspension? Are there any repercussions, for example, from the standpoint of the Criminal Code?

Also, could you brief me on the status of the different highway safety codes in effect? Do these provincial codes merely have the status of provincial laws? Are provinces limited to issuing fines or do they have other options under the Criminal Code? I would appreciate some clarification of that issue.

Finally, has your department done any studies on the deterrent effect of license suspension? Witnesses have told us that license suspension is a far more effective measure because the imposition of the suspension is immediate and the repercussions are not deferred until a trial, which may not be held until a year or 18 months after the incident in question.

• (1555)

**Mr. Greg Yost:** I will try to answer your questions.

I can't say exactly what the repercussions of administrative license suspension are, since the nine provinces that do issue suspensions follow somewhat different rules. British Columbia has just announced a series of tougher measures. If memory serves me well, a person who has his license suspended will be required to see a therapist if charged with an offence more than twice in five years. Other provinces, such as Newfoundland and Labrador, are charging drivers \$50 to get their license back.

The Canadian Council of Motor Transport Administrators can provide you with all of the information to bring you up to date on where the provinces now stand.

**Mr. Réal Ménard:** To your knowledge, no province imposes Criminal Code charges.

**Mr. Greg Yost:** Not to my knowledge. You were asking if anyone had done any studies on the effects of license suspension. I do not believe that our department has done a study like this. Several studies have been conducted over the years. Virtually all of them show that the majority of drivers want to keep their licenses at all costs. License suspension is therefore a very strong deterrent.

**Mr. Réal Ménard:** I see. Without advocating any one policy in particular—I understand that this is the role of lawmakers—I maintain that administrative license suspension is a sound, effective measure.

A second measure that has been suggested is the mandatory introduction of breathalyzer ignition lock systems. If the committee were ever to recommend such a move, would it have to proceed by way of an amendment to the Criminal Code? Instead of having his license suspended, a person could agree to have his vehicle outfitted with a breathalyzer ignition locking device. In agreeing to this, the license suspension period would be shortened. Would such a measure be compatible with the Highway Safety Code or would some provision for this absolutely have to be made in the Criminal Code?

[English]

**Mr. Hal Pruden:** At present the provincial governments can run programs of ignition interlock, so that where a person has committed a Criminal Code impaired driving offence, the province can tell them that as a condition of getting their provincial driving licence back they must have an ignition interlock device. Parliament has amended the Criminal Code to say that in a province where there is an ignition interlock device program, if that provincial program allows you to enter, you might have a reduction in your federal Criminal Code driving prohibition, which currently, on first offence, is a minimum of one year. That could be reduced to three months if the person uses an interlock device. Some witnesses in 2008 suggested that this minimum three months could be reduced even further, so people would be encouraged right away to get on to the provincial program, rather than waiting three months in the case of a first offence, waiting six months in the case of a second-time offender, or waiting one year in the case of a third-time offender.

[Translation]

**Mr. Réal Ménard:** Even though certain highway safety codes do provide for the use of ignition locking devices, the fact remains that this would still impact the sentencing under the Criminal Code charges. I understand that when ignition locking devices are ordered installed, judges and sentencing administrators will reduce the length of the sentence provided for in the Criminal Code. This is one area in which, to use Mr. Murphy's words, provincial legislation and the Criminal Code have been harmonized to some degree.

I do have a question, though. If all of these measures are effective, why enact a new Criminal Code offence? I would much prefer to work with the existing provisions of the highway safety codes. Here, you have given us an example of harmonization.

• (1600)

**Mr. Greg Yost:** As I said, some witnesses argued that the Criminal Code should immediately allow for this, if that is what the province wanted.

Furthermore, in keeping with what the provinces wanted, Bill C-2 aimed to bring in a certain degree of harmonization. In the past, the order had to come from the judge. Today, if the judge does not expressly prohibit this, the provinces are entirely free to decide if the person can enrol.

We are working with the provinces to come up with a formula that works.

[English]

**The Chair:** Mr. Comartin, you have seven minutes.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Thank you, Mr. Chair, and thank you, witnesses, for being here.

Let me pursue this line. When we went through this last year, there were criticisms of the provincial-level governments—that it was a patchwork, that it wasn't being systematically enforced even in the provinces that had the right to suspend and whatever other quasi-penalties they had. Has there been any improvement in that? There was some fairly harsh criticism that a number of the provinces had started down this road a number of years ago and were making very little progress.

**Mr. Greg Yost:** Are you referring to the 0.05?

**Mr. Joe Comartin:** Yes.

**Mr. Greg Yost:** Okay. Again, it's CCMTA that keeps track of what's happening in all the provinces. To my knowledge, no province has yet adopted the CCMTA's model program, which has a seven-day, if I recall correctly, suspension for the first time. But I do know that British Columbia, Ontario, and Nova Scotia have, over the past year, announced changes. In each case, the changes are making it closer to the CCMTA model, but no province has yet adopted that model. So there is definitely a patchwork across the country, and of course Quebec is the one province that doesn't have such a thing yet.

**Mr. Joe Comartin:** Is there any reason for optimism that we'll get some fairly standardized approaches across the country, and specifically in regard to Quebec, that they're going to move?

**Mr. Greg Yost:** If you're asking whether there is reason for optimism, well, with respect to Quebec's not being in it, it was proposed by the government that was re-elected with a majority, so perhaps it's back on their agenda. I don't know.

Over the years, with respect to young drivers and the zero tolerance, if I can put it that way, for young drivers with alcohol, that took a few years, but I do believe it's now universal. Every province has that. That was recommended by CCMTA. It's taking longer on the 0.05 standardization, but there has been a standardization on the zero tolerance for young people, so there may be some reason for optimism.

**Mr. Joe Comartin:** In the meetings you have with the provinces, I assume the territories are there as well.

**Mr. Greg Yost:** Yes and no. The territories are always invited. We certainly try to accommodate them by teleconference, but travelling expenses do keep their personal participation in a number of these meetings down.

**Mr. Joe Comartin:** Going back to the slow progress from the provinces—and I think Mr. Murphy was raising this, but I'm not clear—is it a question of resources, that they just don't have the resources to enforce the 0.05%?

**Mr. Greg Yost:** I don't know whether the resources are a problem or not. I mentioned in our remarks that to have an effect on impaired driving, the laws are one part. The level of enforcement is clearly a significant part. There is some concern that has been expressed in the past that some of the provinces are using the short 0.05 suspension even when the person is well over 0.08. So that's the other side of it.

Definitely there is severe pressure on the provincial courts to handle all the cases. So in regard to the 0.05, I think you'll have to ask the CCMTA what's slowing it up.

•(1605)

**Mr. Joe Comartin:** Okay.

Are there any studies of where it is being enforced—looking at other jurisdictions, whether it's Australia or one of the others? Has that had an effect on the number of cases that end up in court?

**Mr. Greg Yost:** My understanding is no, that when Australia brought in the 0.05, the number of charges remained approximately the same. The general BAC levels of people they were pulling over dropped. It seemed as though everybody had one drink or so less. So the people who might have been 170 were now 120, but they were still well above the limit.

One of the things is that there is really a limit as to how many charges an officer can lay on a patrol. It does take time—the two breath tests and so on—so you're off the road for quite some time doing that. Some concern has been expressed that they may be off the road handling a lower BAC driver instead of giving that person a short suspension and looking for a higher BAC driver.

**Mr. Joe Comartin:** In terms of your opening or earlier comments about reform of this part of the Criminal Code, I'm a big supporter of that, as I think you know, and not only of this part of the code but almost all of the code, because that quote could be applied to a number of other sections of the code that are incomprehensible when one tries to read them in conjunction with other sections.

In terms of activating the provinces to do more, would a simplified, clearer version of these sections help in the role we expect the provinces to play?

**Mr. Greg Yost:** I would think, yes. We work in our committee with the provinces on the Criminal Code provisions and what's causing difficulties, and it seems that every few months something new pops up in the courts. If we were able to eliminate some of the technical defences that do not address the central issues—were you driving, were you over 80—I would imagine that would have an effect upon the enthusiasm of the police to lay charges. We did know that the evidence to the contrary problem was definitely giving them difficulties, doing all that work and then having it thrown out. And if they aren't going to be tripped up over extraneous issues, then I imagine that would have an effect upon the willingness of the police

to lay charges and on the prosecution's belief in their chances of getting a conviction. So I think both of those would certainly be helpful.

We do have probably the most complex code in the world on this issue anyhow.

**The Chair:** We'll move on to Monsieur Petit.

You have seven minutes.

[*Translation*]

**Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC):** Thank you for meeting with us this afternoon.

My comments will be directed to Mr. Greg Yost.

This is not your first appearance before the committee. We have had some discussions before. I want to be sure I understand your opening remarks clearly. I'm talking about the proposal to lower the BAC from .08% to .05%. Let me explain my question to you this way.

In Quebec, when a driver is sentenced, he loses his license for a period of up to 12 months, faces new fines, gets a criminal record and in some cases, because of that, cannot even travel to the United States. In some cases, if the judge so orders, he must install at his own expense an ignition locking device in his vehicle for a period of 12 months. For three years, he must pay the government extra for additional insurance—because the government is the insurer in Quebec. Lastly, if the government believes the person is an alcoholic, it orders new medical tests, which also means additional expenses must be incurred. So then, if you add up all of the Quebec government requirements following sentencing, even without counsel or without measures to speed up the process, almost everything that is needed is in place.

My question to you is one that is regularly put to Members of Parliament, particularly by members of the media. Imagine for a moment that you have been charged and that you plead guilty. You have injured someone, you have sustained an injury in a car accident and while you are incarcerated, you receive some compensation from the Société de l'assurance automobile du Québec, further to their no-fault insurance scheme. When I mention the Criminal Code to these individuals, they are quite confused. We need to try and sort this all out. A person charged with a criminal offence who has sustained an injury would receive some compensation while in jail in Quebec. As you know, this is a serious problem for us because it is a provincial matter.

Mr. Ménard asked you a very pertinent question. Whether the BAC is 50 or 80, people are still going to be just as upset. I have to wonder why you are proposing a BAC of 50 to us. Not that we do not need the BAC to be 50, but in light of what I have just told you about the system works at the provincial level, I would like to know what advantage you see in lowering the BAC limit to .05%?

•(1610)

**Mr. Greg Yost:** For starters, the consequences you spoke of would be more or less the same for all provinces. For example, an Ontario driver would pay higher private insurance premiums after a conviction for impaired driving. Everything you talked about would apply if the BAC limit was lowered from 80 to 50. The consequences would be the same.

I mentioned in my opening statement the possibility of establishing the legal limit somewhere between 50 and 80. Perhaps we could consider a summary procedure, a somewhat harsh penalty given that the individual in question does not pose the same threat as others. I do not know how the Société de l'assurance automobile du Québec would feel about a conviction based on a BAC of between 50 and 80. If Quebec opted to impose an administrative suspension, these officials would be fully within their rights to tack on additional sanctions, from an insurance standpoint. This has nothing to do with the Criminal Code.

You talk about injuries and terms of imprisonment. This is very serious business. Person will be charged under the Criminal Code and could have their license suspended for several years. The consequences in Canada are very serious. More than likely, in cases where the BAC is 80, we will see some of the toughest penalties ever imposed. Neither Australia nor the United States impose minimum \$1,000 fines or one-year license suspensions. Again, I don't think we're going to be very successful if we impose tougher Criminal Code sanctions. There are no provisions in the Criminal Code covering cases where the BAC is between 50 and 80. It is up to this committee to decide if individuals who register in this range, who are more dangerous than persons who are sober, should also face criminal charges and if so, what sanctions would be appropriate.

**Mr. Daniel Petit:** Do I have any time remaining, Mr. Chair?

[English]

**The Chair:** You have one and a half minutes.

[Translation]

**Mr. Daniel Petit:** I understand your answer, which was worded quite skilfully.

As far as lowering the limit from .08% to .05% goes, I told you how things work in my province. Despite all of the possible sanctions, a record number of alcohol-related accidents are being reported. It is often said that when criminals are stopped early, they can be rehabilitated and set on the right path. Would a BAC limit of 50 not have a deterrent effect? After all, a limit of .05% is very close to zero tolerance. As far as people would be concerned, an allowable limit of 50 would be close to zero tolerance.

•(1615)

**Mr. Greg Yost:** Obviously, the committee could hear from persons who have more experience in this area than either myself or Mr. Pruden. All I can say is that in countries where the BAC limit has been lowered, this move has had a deterrent effect. The number of accidents and deaths have decreased.

In Annex 1, we discuss the international experience with RBT. In virtually all countries that have introduced RBT, lowered BAC limits and brought in programs with increased police visibility to enforce the new legislation, positive effects have been noted. Obviously, the

possibility of being charged under the Criminal Code might have a greater deterrent effect than the possibility of being charged with a provincial highway safety code violation and having one's license suspended.

[English]

**The Chair:** Monsieur LeBlanc, for five minutes.

**Hon. Dominic LeBlanc (Beauséjour, Lib.):** Thank you, Mr. Chairman.

Thank you, gentlemen, for your presentation. I'd like to ask you to expand on two particular issues. One is what I think Monsieur Petit and others referred to, or the terrain onto which they brought you, and that is the issue of deterrence. The other one is the simplification of the various measures in the code.

With respect to deterrence, Mr. Yost, I think it may have been in answer to Mr. Murphy's question, but I think I heard you say that a provincial suspension was in fact a very effective deterrent, that the immediate revocation of the driving privilege could be a very effective deterrent. I would have thought that the whole criminal conviction, the public trial, and someone having to show up in a provincial court...and even if they were to plead guilty, the chances are that if they're unlucky, there will be a local journalist there watching. I would have thought that the Criminal Code sanction, with someone getting a criminal record and all that that entails, would in fact be a greater deterrent than simply, let's say, lowering it to 50 milligrams and being able to have a quick licence suspension for three months under provincial legislation, and not having, as Monsieur Ménard was discussing, a criminal sanction. So I'd be curious to have you expand on the deterrence aspect.

Secondly, if we have time, perhaps you could finish your thoughts from when you were answering Mr. Comartin. My sense is that a great deal of the pressure in provincial courts from prosecutors is around the complicated terms of the code, the different decisions, which have in fact provided interpretations to various aspects of the criminal legislation with respect to impaired driving. Can you expand for us in a layman's version how this committee could assist in simplifying the code to increase the prosecutions and the laying of charges in cases?

**Mr. Greg Yost:** I'll start with respect to deterrence. Certainly, I am amazed that with the level of the penalties under the Criminal Code, people still drive after drinking. You'd think these penalties would be enough to deter them, but apparently they aren't.

We talked about the loss of a licence. It's when you're talking about a person who is facing the minimum \$1,000 fine out of their pocket, but being prohibited from driving for one year.... In that balance, for most people, it's not being allowed to drive for one year that it is the bigger deterrent. The advantage of the provincial administrative suspensions, however, is that they are now immediate in all provinces, I believe. Certainly I know that's the case in Manitoba, where they pioneered this, because I worked on it when I was there. If you're over 80 milligrams, they pull your licence and you're off the road for 90 days, or perhaps longer. You have an administrative appeal of that, which is usually fruitless, because it doesn't have the complicated parts of the Criminal Code. What they seem to focus on is: were you behind the wheel and did you blow over 80 milligrams in the breath test? Those are fairly easy questions to answer.

With respect to the simplification, our federal-provincial committee has for many years recognized that this is a problem. However, we've been developing the drug-impaired driving provisions, and those things that went into Bill C-2. We are now meeting fairly regularly and going through the code virtually line for line with the provincial prosecutors who deal with these things every day, and who say, "We were tripped up over this, and we were tripped up over that."

I'll give you a simple example. If you don't get your breath test within two hours, you lose your presumptions of identity. It then becomes necessary for the crown to call a toxicologist, who will say, "Well, he blew 150 milligrams two and a half hours afterward." And then that toxicologist does a back calculation, etc. In some Australian states, within two hours, that's what it is, and then they simply start adding. It's just part of the law: 15 milligrams will be added every hour beyond two hours, because we know you're in the phase of elimination, so why should we have to call a toxicologist and go through all that? That kind of simplification in the Criminal Code could be there.

We have a case that just came across my desk last week, dealing again with this issue of someone being over 80 milligrams after three hours. This case headed to the Ontario Court of Appeal because the affidavit of the toxicologist on behalf of the crown said, "I assume there has been no bolus drinking"—that is, a pile of drinking before he got behind the wheel—"and I'm assuming he didn't drink after he was arrested", and then there's the scientific stuff. The judge has said, "Well, you established that he didn't drink in between." That's true, because the police had him under observation. "But you didn't establish that he didn't have anything, or a pile of drinks, just before he got behind the wheel." So the judge threw out the affidavit and the calculation that this person was at, I think it was, 130 milligrams; I'd have to look at it again. It was at 190 milligrams at the time they were driving, but the judge threw it out because they hadn't established that he wasn't....

How are the police supposed to keep somebody under observation for 15 minutes before they stop him? They stop him at the side of the road.

• (1620)

**The Chair:** Unfortunately, we're out of time.

Thank you.

Monsieur Lemay.

[*Translation*]

**Mr. Marc Lemay (Abitibi—Témiscamingue, BQ):** Your comments are very interesting, Mr. Yost. I have extensive experience as a defence lawyer—I practised criminal law—and I have argued a number of impaired driving cases.

One thing bothers me. As I see it, what drivers really fear are random spot checks. These are more costly, because they require the presence of more police officers and so forth.

In Quebec, the number of impaired driving cases has declined dramatically. Contrary to what Mr. Petit was saying, pursuant to the Quebec highway safety code, in the case of youths under 16 years of age, or youths between the ages of 16 and 18 with a learner's permit, the zero tolerance policy applies. If the young driver is caught with even a whiff of alcohol on his breath, he loses his temporary license. Already this is a form of education.

I am concerned about two Supreme Court rulings that I read and that I am now re-reading. In *Orbanski and Elias*, the Supreme Court held in 2005 that if random breath testing was done...I'll read paragraph 55 to you. The Supreme Court stated the following, and I quote: "There is no question that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective. " Therefore, this measure could block the application of section 1 of the Charter.

I understood clearly what you were saying. You seem quite torn between lowering the BAC limit from 80 to 50, because of the cost involved and the implications, particularly from a criminal law standpoint. Do you feel that it would be better to have more random breath tests, more roadside spot checks and more preventive measures, so that it would be the provinces' responsibility to decide on a BAC of between 50 and 80 and they would have the discretion to act? Above a BAC limit of 80, then it becomes a Criminal Code offence. Have I understood your position correctly?

• (1625)

**Mr. Greg Yost:** I'll let Mr. Pruden take a crack at that first.

[*English*]

**Mr. Hal Pruden:** Mr. Yost will finish.

The random breath testing and roadblocks are very important tools. Whether the random breath testing would be done at a provincial level or under the Criminal Code, it could be a very helpful tool for police, because then drivers would think that at any time, anywhere, they could be pulled over and possibly asked for a breath test. Currently, with respect to deterrence, if I'm an individual who is a drunk driver and I repeatedly drive drunk...the statistics from the Traffic Injury Research Foundation tell us that something in the order of 3% to 5% of drinking drivers commit 84% of the drinking and driving offences. So a small percentage of drinking drivers repeatedly behave this way and account for the vast majority of drinking and driving offences situations. Why do these people continue to do that? Because they are aware that out of 200 impaired driving trips, they will be detected on an average of one occasion in Canada. That's an optimistic estimate.

So if I know that last Friday night I was driving home drunk from the bar and I wasn't caught and I didn't get into an accident, am I going to drive home tonight on a Friday after I've been drinking and I feel less impaired than I did last Friday, when I made it home and the police didn't stop me? The behaviour of individuals who are drinking and driving repeatedly is reinforced, because they are not necessarily stopped or detected by the police officers who might not even smell alcohol and give them a test, or they just make it home without being stopped. That's a beginning to an answer. I'm sure Mr. Yost will have something further for you.

**The Chair:** We're actually out of time. I'm going to leave a little bit of room for the last question from Mr. Norlock. If he wants to follow along the same line of questioning, that's fine, but that is his prerogative.

**Mr. Rick Norlock (Northumberland—Quinte West, CPC):** Please go ahead and finish what you were going to say.

**Mr. Greg Yost:** With respect to the roadblocks and so on, they are very effective. The random breath testing serves two purposes. One is that these roadblocks—setting them up and all of that sort of thing—are very police-resources intensive. When you do set them up, they're more effective when you have the random testing because you don't have to interview people and try to decide whether you smell alcohol. You just present the thing and they blow in it. That's how they do it in Europe. That's how they do it in Australia. Wave them in and they blow. If they blow under 50 in Australia, they send them out. Presumably in Canada, if they get the warning, they get the provincial...so that does that.

The other thing it does is this. Canada is a rather large country. In rural areas, etc., and on roads that are not heavily travelled, you're not going to be able to set up these roadblocks and have them there so that you can stop 10 cars in three hours or something, but if you do see somebody doing something and you have that in your car, you can immediately demand that they provide a breath sample, and you can either clear the person right away—if it isn't alcohol, that's their problem—or perhaps you have them now and you can continue on with the approved instrument test.

We are not advocates here. I'd love to be one, but Winnipeg South didn't elect me, so that's the way it goes.

The 0.05 and RBT are not mutually exclusive or anything. We could do them both if you want us to. We'll find a way to do it.

• (1630)

**The Chair:** Thank you very much for your contribution to our study.

I'm going to suspend now for two minutes, and then we'll have the other two witnesses here.

• (1630)

\_\_\_\_\_ (Pause) \_\_\_\_\_

• (1635)

**The Chair:** We'll reconvene the meeting.

I want to welcome Mr. Phil Downes, representing the Canadian Council of Criminal Defence Lawyers.

Jan Westcott is not here, so, Mr. Downes, you may have some extra time with us, which is probably to your advantage. There's no client to bill, Mr. LeBlanc says.

The other thing I wanted to confirm is that Mr. Comartin is going to be leaving, so he has asked that Ms. Leslie be given an opportunity to ask questions. Do we have consent to do that?

**Some hon. members:** Agreed.

**The Chair:** Hearing no opposition, we'll allow Ms. Leslie to ask questions.

Mr. Downes, you have 10 minutes, and then we'll open the floor to questions.

**Mr. Phil Downes (Representative, Canadian Council of Criminal Defence Lawyers):** Thank you.

Good afternoon. My name is Phil Downes. I bring greetings to you on behalf of my colleague Bill Trudell, who is the chair of the Canadian Council of Criminal Defence Lawyers and who is known I think to many of you. We are once again extremely honoured to have the opportunity of appearing before this committee to help with the very important work you are doing.

I am a criminal defence lawyer in Toronto, but you should know that I was a crown prosecutor for eight years. I trust that I bring a perspective to you that is informed, balanced, and helpful as you consider these challenging issues.

As I expect you all know, our council was formed in November of 1992 with the encouragement of the then justice minister, the Honourable Kim Campbell. With the purpose of offering a national voice and perspective on criminal justice issues, we have representation throughout the country. We are concerned first and foremost with ensuring that the criminal law develops in a manner that is consistent with the principles of fundamental justice and that is practical and workable across the country. We are very grateful to have been given the opportunity to address you today. I hope we can offer some constructive comments on the pressing issues you are addressing in this committee.

I have a handout concerning the Canadian Council of Criminal Defence Lawyers. If anybody wants some further information about it, please feel free to take one.

We believe passionately that real progress in the reform of criminal justice has been and can only be made through the cooperation of all parties. The national steering committee on access to justice is just such an initiative. I am sure that those who are involved, whether they are police, crowns, defence counsel, the judiciary, victims groups, politicians, or bureaucrats will tell you when they get together in a room they have far more in common than they have differences. The goals are fundamentally the same: safe communities, fair trials, efficient use of resources, and a recognition of the constitutional values that underpin our criminal justice system.

With that said, let me turn to some of the specific issues you are examining. Let me first comment on the proposal with respect to the criminal level of blood alcohol. In one sense we really don't care what the limit is. Whether it's 0.08, 0.05, 0.01, or zero, we appreciate the business, I suppose. As an absolute number, it's largely irrelevant to us, and in and of itself, this doesn't implicate issues of fairness; it's a choice to be made.

In our respectful submission, any decision to reduce the prohibited blood alcohol content level must take into account the serious implications for the administration of justice in Canada. The burden of cases in our provincial courts today is in many jurisdictions at the breaking point. That burden, we submit, should not be increased unless it is clear that the net results will be worth the increased costs that will inevitably result. We say that the added financial logistical and practical costs placed on provinces and cities across Canada that operate the front lines of our courts and our police services will be enormous.

Think of the practical problems before you even get to a courtroom. I believe in your hearings a year ago there was evidence as to how long it took police officers to complete an impaired driving investigation, and it was something along the average of four hours. If we want a lower blood alcohol content we should expect more investigations, and we should expect the chiefs of police of every police service in the country to rightly ask for more officers and more resources. A lower limit would surely give the police more cases in which they would have reasonable grounds to arrest someone. That person needs to be taken to a police station and a breathalyzer has to be administered, so you should expect a need for more qualified breath technicians and breathalyzer instruments. If you're arrested you're entitled to free legal aid advice, so expect the various legal aid plans across the country to want more resources.

Don't be surprised if the number of charges that are stayed for an unreasonable delay are increased substantially. Our representative in Nova Scotia tells me that one can reasonably expect to wait up to a year to schedule a simple two-day trial; many parts of Ontario are the same. I speak from practical experience when I say that prosecutors in many jurisdictions really have no choice but to resolve these charges by way of a plea to a provincial offence because they know they don't have the resources to take the number of cases they already have to trial.

• (1640)

I say to you that you must be very sure that the benefits of reducing the blood alcohol content level will outweigh the enormous costs that such a move would incur. Can we be sure that such a change would not mean that police resources are being taken away from the detection and investigation of serious repeat drunk drivers who are at a greater risk to kill somebody on the road? In our view, the fact that impaired driving has displayed an almost uninterrupted trend downwards since 1981, and without a reduction in blood alcohol content level, is indicative that societal factors are really far more relevant to changing behaviours than the reduction of any particular blood alcohol standard. I'll come back to that in my closing comments.

I haven't talked about technology—there isn't time—but you must bear in mind that the machines that are used, the breathalyzers, in

some cases are 25 years old, and their reliability is highly questionable still. The extent to which you lower a blood alcohol content level raises the spectrum in which there will be factually innocent people convicted because the reliability, we say, decreases to the extent that the prohibitive blood alcohol level is lower.

Let me turn to the issue of random breath testing. It's important to understand what we really mean by this. I think we can do that by talking about—in Ontario, at least—the RIDE programs that you've already heard about today. There the police have the right to systematically stop and question every driver about their alcohol consumption without articulable grounds to do so. The police are trained to do that and to make those assessments based on those very simple questions. One question we would ask is, what are you saying about the skills of police officers in conducting those investigations if we think they need a completely unfettered basis to demand a breath sample? We think they're capable, through their experience and training, of drawing a conclusion as to whether the person has consumed any alcohol, or indeed whether they are lying when they say they haven't. The threshold is extremely low.

Are we saying we want police to simply be able to administer a roadside screening device to every driver stopped in a RIDE program? What will that do to the amount of time it takes to administer that program? So be prepared, I say, for the courts to say to them that this kind of arbitrary detention without access to counsel is no longer a reasonable and justifiable breach of the charter. Don't forget the Supreme Court of Canada said that these kinds of programs were a violation of the charter but were justified under section 1.

I should also add that our representatives in the Yukon whom I spoke to about this issue also have concerns about the criminalization of people who are already marginalized by poverty and by criminal charges and whose public life may be subject to greater policing if random testing were in place. We think the public would rightly be concerned about increasing the already significant interventions on privacy with random testing.

Let me turn to the question of ignition interlock. Virtually everybody thinks this is a great idea. Why? Because it works, and it's effective, we think, in reducing recidivist drunk drivers. As you know, the code provides for relief from the period of prohibition upon conviction if the driver installs the ignition interlock device. The problem is that too many provinces have not implemented that program. In our view, the federal government should consider taking steps to ensure that provinces do operationalize this section. Nova Scotia, I understand, has relatively recently enacted these regulations. Our report from there is that the first effect that criminal defence lawyers noticed is the significant increase in the number of guilty pleas because people realize that the single biggest inconvenience they will face—i.e., the inability to drive—can be mitigated by an ignition interlock, which is effective in stopping them from drinking and driving, particularly recidivist drinking drivers, but allows them not to lose their livelihood.

•(1645)

We say it's crucial also to recognize the regional differences and the differences in impact that this program or that the suspension of a driving licence can have. The situation for a farmer in rural Alberta whose licence is suspended for a year is very different from that of somebody living in a condo in downtown Montreal or Vancouver. In Yukon, where public transportation outside of the major centres is virtually non-existent, a prohibition on driving means that people essentially lose their livelihood. So it's very important to keep in mind the regional disparities in that program.

**The Chair:** Mr. Downes, I'm going to have to ask you to wrap up.

**Mr. Phil Downes:** Thank you very much.

Let me just say that targeting repeat offenders and changing behaviours go well beyond the criminal justice system. We think that creative education has been shown to be the way to go and will do far more to solve the problems you're looking at than will some of the measures you're considering.

I'm very grateful for your time.

**The Chair:** We welcome Mr. Jan Westcott, representing the Association of Canadian Distillers.

You have ten minutes to make a presentation.

**Mr. Jan Westcott (President and Chief Executive Officer, Association of Canadian Distillers):** Thank you very much, Mr. Chair.

I'm Jan Westcott. I am the president and CEO of Spirits Canada. We're also known as the Association of Canadian Distillers.

I appreciate the opportunity to appear before you today to talk about our industry's views on reducing the incidence of impaired driving.

We're a national trade association that represents the distilled spirits manufacturers and marketers in Canada. We use Canadian agricultural materials, mostly grains in central Canada and the west, to produce distilled spirits, which we both sell here in Canada and export to some 162 countries around the world.

We are in fact Canada's leading exporters of beverage alcohol and are proud that our signature product, Canadian whisky—which we hope some of you will be familiar with—remains the most popular selling whisky in the United States, the largest market in the world.

We also import and sell a broad range of spirits produced in other countries, and together our member companies account for over 80% of all spirits sold in this country.

One of the fundamental goals of the association and its members is the fostering of responsible use of all beverage alcohol products. In pursuing this goal, the industry participates in a wide range of activities, including sponsoring public service campaigns, providing targeted education programs, and advertising in the media. All of these are aimed at heightening awareness of the importance of responsible consumption. In fact, many of our initiatives focus on the prevention of drinking and driving.

We also collaborate with recognized safety, addictions, and academic organizations to conduct research and to bring forward

new ideas for combatting alcohol misuse. We work with governments at all levels to develop policies to eradicate drinking and driving.

In this vein, we were amongst the original group that pressed for updating Canada's approach to reducing the harms associated with the misuse of alcohol and were pleased to serve on the various steering committees and working groups over three years culminating in the creation of Canada's new national alcohol strategy. This strategy was formally launched in 2007 by Health Canada, the Canadian Centre on Substance Abuse, and the Alberta Alcohol and Drug Abuse Commission.

Recognizing that the strategy is simply a plan for achieving progress in addressing issues surrounding the misuse of alcohol, we continue to be active participants in working to make the strategy come to life through the realization of new initiatives and programs.

Within this context, I want to share with you our thoughts on some of the matters you are exploring.

**The Chair:** Mr. Westcott, may I ask you to go a little more slowly? Our interpreters are having a little bit of difficulty.

**Mr. Jan Westcott:** For a whole host of reasons, we do not support lowering the Criminal Code threshold of impairment from 0.08 to 0.05 BAC. The fact is that all Canadian provinces and territories, with the exception of Quebec, whose legislature did consider and reject adopting such administrative measures about 14 months ago.... They had quite a deliberative process, looked at it and said, "not at this time". All of the rest of the provinces and territories maintain and enforce roadside administrative sanctions that immediately take drivers off the road if they have been drinking but their BAC is below 0.08. These administrative procedures are already effectively dealing with persons who register at 0.05 BAC, and in some provinces at lower BACs, and they are doing so in a way that gets potentially at-risk drivers off the road quickly and with minimum fuss. Moreover, led by the Canadian Council of Motor Transport Administrators, improvements are being made to these locally administered programs to make them even more useful in deterring people from drinking and driving.

It's also significant that the diverse group of people who undertook the creation of Canada's new national alcohol strategy purposefully declined, amongst their 41 recommendations, to include any proposal for lowering the current criminal threshold. This group of people, comprised of addictions organizations and experts; the medical community; academia; interest groups; federal, provincial, and municipal governments; native community representatives; police, road safety, and research authorities; and industry, chose not to include changing the threshold, believing that there were much more robust opportunities to reduce and eliminate drinking and driving than amending the legislation in this form. And lest anyone assume that drinking and driving wasn't considered by the group, I want to draw your attention to five separate national alcohol strategy recommendations that deal specifically with the issue of drinking and driving.

Recommendation 37 endorses and supports the "Strategy to Reduce Impaired Driving 2010", or STRID. You may have heard about that; I'll come back to it in a minute.

Number 38 supports CCMTA's short-term suspension model and other actions to address drinking drivers with lower BACs.

Recommendation 39 calls for reinvigorating law enforcement around drinking and driving, in part to deal with the persistent suggestions that police are not pressing criminal charges unless drivers are at or over 0.10.

Recommendation 40 calls on government to focus on high-risk and alcohol-dependent drivers as well as repeat offenders—those with BACs often well above the legal threshold—and to actively pursue more widespread use of technology to help mitigate these well-identified subsets from getting behind the wheel.

Recommendation 41 calls for graduated licensing, including zero tolerance—that's zero BAC—for all drivers below the age of 21 years.

●(1650)

The national alcohol strategy members felt strongly that these actions—rather than lowering the criminal threshold—were the ones that could deliver the most progress over the shortest time in combatting drinking and driving.

I won't take the time now to detail the various actions embodied in these five recommendations, but I would be pleased to answer any questions you might have about them.

I want to turn to a notion that you will hear repeated by those promoting a reduction in Canada's legal threshold. You will be told that countries around the world are moving to lower their policies to embrace the 0.05 threshold and that Canada is falling behind by not taking such action. Now, given Canadians' deep-rooted desire not to be out of step, this is a popular notion, and while part of it is accurate, it really presents a distorted picture of what's occurring. The true part is that many countries are moving to 0.05 BAC and to even lower BAC thresholds in some cases. The false assertion is that these countries are making 0.05 BAC their criminal threshold.

In a study conducted at the University of Ottawa for the Canada Safety Council in 2002—which was then updated in 2006—it was established that the vast majority of countries that have adopted 0.05

BAC have done so administratively and not through their criminal law. I understand that the Safety Council is again updating that study to reflect more current realities. Indeed, what the study found is that many countries are doing exactly what Canadian provinces and territories have been doing for a long time, which is using roadside administrative sanctions to get people who have been drinking off the road. They are not using their criminal law to criminalize driving at 0.05 BAC, as some are proposing we do here.

I'd like to come back just for a moment to what is being done in this country to deal with drinking and driving, and the result it is producing. About a year ago, the Canada Safety Council appeared before this committee. I want to reiterate a few facts they shared when they were here. They reported that road crashes involving drivers who had been drinking took 851 lives in 2005. Of these, 459 were drivers whose blood alcohol concentration was above the legal threshold of 0.08. They went on to state that the 2005 fatalities were down by 34% from 1995, when 1,296 driving deaths involved drinking drivers. In part, they attributed the decline to the fact that provincial governments and Transport Canada, along with many non-governmental organizations, had been making concerted efforts to deal with this issue. CCMTA has been coordinating efforts across all of these jurisdictions and levels of government to design and improve measures to reduce the incidence of drinking and driving. One of the most significant activities that occurs right across Canada is the aforementioned police intervention with drivers with BACs at or above 0.05.

My colleague just mentioned technological advances, and I want to lend our support to them. Numerous safety and expert organizations have cited the availability of new developments such as ignition interlock, and they recommend them for chronic repeat offenders who pose public safety concerns. The federal government should be doing more to facilitate the use of these devices and should work with the provinces and territories to find out why we're not seeing more uptake of them. These instruments save lives by keeping those with known problems with alcohol away from cars. Their use should be expanded. When you consider that an overwhelming majority of drunk driver deaths are caused by drivers well above the 0.08 criminal threshold, we think it is a cause for concern that these devices are not more commonly available.

In a January 2008 research study for Transport Canada, the Traffic Injury Research Foundation reported that 55% of fatally injured drinking drivers had a BAC level of over 0.16. So more than half were impaired at more than twice the legal limit. Thirty percent were between 0.08 and 0.16. Ten percent of fatally injured drivers who had been drinking had less than 0.05, while only 5% of those drivers had BACs between 0.05 and 0.08.

•(1655)

**The Chair:** Mr. Westcott, you'll have to wrap up.

**Mr. Jan Westcott:** All of these warrant our attention. But at a time when public resources are already stretched to the breaking point, we think it would be a serious misapplication of resources to lower the existing 0.08 criminal threshold to target the 5% who had BACs between 0.05 and 0.08, instead of taking more aggressive action to attack the 85% who are seriously beyond the current 0.08 threshold.

I'll stop there. Thank you.

**The Chair:** Thank you so much.

We'll move on to our first questioner for seven minutes. Mr. Murphy, go ahead, please.

**Mr. Brian Murphy:** Is it five, six, or seven?

**The Chair:** We're doing it again. It's seven and seven.

Mr. Moore.

**Mr. Rob Moore (Fundy Royal, CPC):** Are you saying that we start the whole rotation over again? This is all one meeting, is it not?

**The Chair:** It is one meeting.

**Mr. Rob Moore:** I just want to be clear on this. We're starting over from...?

**The Chair:** I'm going from my experience in the last committee when in fact we typically would start over when we had new witnesses.

**Mr. Brian Murphy:** I'm quite happy, Mr. Chair, to take five minutes because we have only thirty.

**The Chair:** Okay, we'll go with five.

**Mr. Brian Murphy:** Thank you both for your presentation.

Most of my questions will be for Mr. Downes.

I'm a lawyer but not a criminal lawyer. In the first part of your presentation—you might have been joking, and that's fine, since I like a good joke as well as anyone does—you said, and you were speaking for an organization, that you really don't care what the limit is. I'd ask you to revisit that, because whether it's 0.05, 0.06, 0.07, or 0.08, it's a serious offence and it has serious consequences for clients that your group represents. There's a serious public interest in trying to make it work to prevent accidents. Unlike stealing a chicken or breaking and entering, where there is physical evidence of a wrongdoing, this is an offence that prevents a wrongdoing, in a sense. If you're over the limit and driving a car, but you haven't done anything yet, the proof is in the actual potential for doing harm. Therefore, the potential for doing harm as evidenced by a BAC is very much the crux of the matter.

Would you like to revisit that and tell me seriously what criminal defence lawyers think is an appropriate blood alcohol content limit?

•(1700)

**Mr. Phil Downes:** I didn't mean at all to give the impression that we don't think there's significance to that choice. All I'm saying is that for the purposes of my submission to this committee.... There are many people who can tell you about the research on blood alcohol levels, the effects in other countries, whether it's good, whether it changes behaviour, whether it's a deterrent, and what impact it has on people. I'm not saying that's not an important public policy issue at all. Clearly it is, but for the purposes of my comments to you, what we think is significant is a decision or an issue that we, as criminal defence lawyers, don't have any particular monopoly or insight into. We do, however, have insight into how these issues affect the practice of criminal law and the efficiencies of the criminal justice system.

I take your point, but I wasn't trying to be at all humorous about it. I just think we want to recognize our appropriate place here in terms of the interests we represent.

**Mr. Brian Murphy:** I get that, but time is short, so I'll move on to the next point about alcohol ignition interlock devices.

I know this is somewhat unrelated to what you do, but in this time when we're asking auto companies for concessions toward greener cars and so on, is it a good time for us to all pitch in and say that the auto makers should move more strenuously toward making these available, affordable, etc.?

**Mr. Phil Downes:** Again, I don't want to stray outside of our particular expertise, but I think you're absolutely right. They work. They have the deterrent effect, and they prevent people, especially repeat offenders, from drinking and driving.

**Mr. Brian Murphy:** It's precisely the thing we all might be able to use in suggesting that auto makers step up to the plate.

Mr. Westcott, would you care to comment on trying to get auto makers more attuned to alcohol ignition interlock device needs?

**Mr. Jan Westcott:** I think it's an interesting idea, just as they've built mechanisms in cars to accept cell phones, MP3 players, and those sorts of things, but if we're going to be asking auto makers to install these devices in their cars, are we also going to ask them to put in devices that will report when you're too tired or when you've been working too long when you're driving home? There is as much data coming out of the road safety people that talks about inattention and fatigue causing accidents and causing death on the highways as there is about alcohol. I'm not defending alcohol. It's a terrible problem we have to fix. I think it may be appropriate to ask auto makers to start looking at how they can design their cars so that these devices can be incorporated into them, but is it appropriate for General Motors to put these in their cars for everybody? I don't believe so.

**The Chair:** Thank you.

Before we move on to the next question, I'm going to seek your guidance.

I think we have agreement that questions will be five minutes in length, but if we were to follow the normal rotation, as if we hadn't started a new one, the next three questions would be from the Conservative side of the table. Does everyone understand that?

**Some hon. members:** No.

**The Chair:** In the normal rotation, nobody speaks a second time until everyone has spoken once. In order to achieve that goal, which I understand has been articulated at this committee a number of times, we would require three more Conservatives.

[Translation]

**Mr. Réal Ménard:** We're starting all over again with a new witness. In such instances, we follow the agreed upon rotation. I am ready to take three minutes. I have only one question. But, to be courteous, we could go directly to Mr. Norlock, because he hasn't yet spoken. However, we cannot give the floor to three Conservative members in a row. That would not be in keeping with the rules adopted by the committee.

[English]

**The Chair:** Mr. Moore.

**Mr. Rob Moore:** Just so we don't waste the limited time we have on this, why don't we try to speed things up? Mr. Ménard had mentioned three minutes, but it is something we're going to have to revisit in the future when we have split witnesses.

**The Chair:** I agree. So if we can do it in three minutes, I'll try to be as fair as possible. We'll do one question from the Bloc, one from the NDP, and then, if we could, we can fill the rest of the time with the Conservative ones. Is that reasonable?

[Translation]

**Mr. Réal Ménard:** That's charitable, but unreasonable.

[English]

**The Chair:** Okay. Let's try that. Thank you.

Mr. Ménard, three minutes.

• (1705)

[Translation]

**Mr. Réal Ménard:** I have only one question. It won't take but a minute. You have stated your views clearly and I truly believe that committee must lean toward administrative suspension, rather than toward criminal law reform. This is the recommendation that I plan to make to my caucus. However, I would like to understand your analysis of this situation. What factors have contributed the most to lowering the number of alcohol-related car accidents? We've seen the statistics. The numbers are down in all provinces, including Quebec. In your opinion, what is the leading contributing factor to this decline? Has your association done any kind of study?

[English]

**Mr. Jan Westcott:** Yes, we have. There are a couple of things I would say. One is that in the last 15 years there has been a much more concerted effort by all governments, and I stress the words "all governments". I'll give you an example.

Over that period of time, more and more provinces have introduced administrative roadside sanctions; it seems to be something that's there. It differs from province to province, and the rates differ from province to province. In some provinces, if you get stopped, you get suspended for 12 hours: you park your car and come back and pick it up the next day. In other provinces it's 24 hours. What we're all trying to do is make these more common so that the public understands the risks of getting caught.

There's another thing that I think has been happening, and some recommendations are coming out of the CCMTA. It's important for province A to know what has happened in province B. People move across this country a great deal. If they have a record in one province, even if it's only two or three of these roadside administrative suspensions, in the next province that person is going to live in you want to know what that history has been. So the administration of these mechanisms is being improved and tightened up. One of the next biggest things that has to happen is that we have to convey this to the public so that the driving and the drinking public understand their chances.

One of the other things is that there were no records if you were stopped two or three times. No records of that were kept.

One of the recommendations now being taken up by a number of provinces is that if you get stopped, let's say, three times in two years for over 0.05 but below 0.08, that says something about you as an individual and you as a driver. It says that maybe that's the wrong kind of trend and maybe there needs to be some intervention there.

I think there's a whole series of these things that have happened, largely below the public radar. It's good governance, in a sense, and it's efficiency within the programs themselves that I think are bringing about some better success.

**The Chair:** Thank you.

Ms. Leslie, three minutes.

**Ms. Megan Leslie (Halifax, NDP):** Thank you, Mr. Chair.

First, I have a very quick question. Do either of you know how much it actually costs to install one of these interlock devices?

**Mr. Phil Downes:** Our representative in the Yukon, whom I spoke with just this morning, tells me that it's \$500 to install and then you have to pay a \$100 monthly fee. The \$500 may be a little on the low side; I've heard it's as much as \$1,500.

**Ms. Megan Leslie:** Thank you.

Mr. Downes, I, myself, don't know this case very well, but do you have an update on the two-beer defence case? Can you tell us where that stands?

**Mr. Phil Downes:** You're referring to the legislation that to a certain extent effectively removed what was called the Carter defence.

**Ms. Megan Leslie:** Right. It's been appealed.

**Mr. Phil Downes:** It's in a variety of stages. Essentially it's being challenged at the trial level. For example, in Ontario we now have dozens of different trial decisions speaking to whether or not that legislation should be applied retrospectively or on a forward basis. It's a patchwork quilt.

No superior court or court of appeal that I'm aware of has ruled on that issue yet. And in terms of its constitutionality, again, I'm not aware that there's been any authoritative decision on that either. So it's going to work its way up slowly, and it's taking time.

**Ms. Megan Leslie:** Thank you.

This is my last question. You stated earlier that it wouldn't matter so much where we set the limit, at 50 or at 80. But wouldn't your counselling of your client change if it were a Criminal Code offence versus an administrative law or a regulatory offence? If regulatory was 50 and Criminal Code was 80, wouldn't you say that your counselling would change?

• (1710)

**Mr. Phil Downes:** Yes, I would.... I don't mean to say it doesn't matter, because it does matter. I'm just saying that for our purposes we wanted to talk about what the implications would be. So yes, clearly, depending on whether it's a provincial scheme or Criminal Code consequences, we're giving our clients different advice.

**Ms. Megan Leslie:** What I'm getting at is it's a big deal to have a criminal charge against you.

**Mr. Phil Downes:** Interestingly, the big deal for the clients, though, is when can they not drive. In many ways, they don't care too much about the cost, even the legal fees or the fines. The big issues are for how long are they not going to be able to drive and the stigma of it. We find that those are the two things clients are most concerned about, which is why we think there should be a coordination between the provincial and the federal.

If you get a 90-day suspension from blowing over 80, if you plead guilty to that, those three months do not come off your 12-month suspension. We think they should. Even if you plead guilty at the very earliest opportunity—and in some rural jurisdictions it may be once a month that court comes around—you get no credit for having already been suspended for that three-month period. And we think that's fundamentally unfair.

**Ms. Megan Leslie:** Thank you.

Those are all my questions.

**The Chair:** Next is Mr. Norlock.

**Mr. Rick Norlock:** Thank you very much.

My questions will be mostly for Mr. Downes.

I'm not a lawyer, and I'll try not to play a Philadelphia lawyer with you, but because I only have a few minutes, I need short and succinct comments or answers from you.

As far as you saying the principles of justice.... You went on to say that it really doesn't mean much, that it's more business. And that was questioned. Some of us might think it would be a Freudian slip, but I think you answered that question.

One of the other questions that keeps coming up is about your clients and the tremendous burden some of these things would be on potential clients, that they would be concerned about having an impaired driving charge or a criminal charge, which was brought up by my NDP friend. Then you mentioned challenges.

But when we're dealing with impaired driving, we're talking about the victims of impaired driving, and they don't have a court of appeal

because they're dead and they don't have challenges before the Supreme Court because they're dead. The whole idea behind looking at this impaired driving has more to do with the victims rather than the people committing the offence. That's why the public, not the people who are charged and convicted but the average citizens out there, the people who elect us to come here, want us to keep looking at this issue. They drive the political agenda.

I wonder if you could comment on the fact that, yes, it's serious to have criminal offences against you, but at the same time the whole idea is to protect the public from a crime that might occur and that usually causes grave consequences.

**Mr. Phil Downes:** I was a crown prosecutor for eight years and I saw and spoke to those victims. So I know exactly what you're saying, sir. I would hope my submissions to you today reflect our genuine concern to stop repeat drinking and driving while at the same time not abandoning our charter and constitutional principles.

As a criminal defence lawyer, if the limit was 0.02, I would get more business. I hope it enhances the credibility of my submissions to you to say that we're not saying to do that, because we don't think it would be effective. So when I talk about ignition interlock, none of this is to minimize the impact these cases have on families.

**Mr. Rick Norlock:** If I might, though, I would say that if you go along with that argument, then by raising it from 80 to 100, you'd feel better about it, because then it's higher, and it's more, so I think we have to be careful. I think the other witnesses mentioned that we're going to be told that some of the studies—we had two previous witnesses who are lawyers—indicated that in jurisdictions where there was a 0.05 there were significant reductions in motor vehicle accidents and fatalities, but then we're told, well, no, one's not criminal and the other is.

From a personal perspective, I guess, the argument is that it would be challenged more, so if it's going to be challenged more at 0.05, then as a lawmaker I'm asking, is it going to be challenged less if we raise the offence? Succinctly put—a short answer—would I be right?

**Mr. Phil Downes:** I think we sort of have it right now, and I think that 0.05 is dealt with provincially so there are consequences for it.

• (1715)

**Mr. Rick Norlock:** But not in every province. Quebec has lagged behind. I was a police officer for 30 years. Quebec has always been soft on impaired driving, as far as convictions and enforcement go.

**Mr. Phil Downes:** I think we've sort of—

**An hon. member:** [*Inaudible—Editor*]

**The Chair:** Thank you.

We'll move on.

Is there another questioner from the government side?

Mr. Rathgeber.

**Mr. Brent Rathgeber (Edmonton—St. Albert, CPC):** Thank you, Mr. Chair.

Thank you for your presentation here today.

Following up on Mr. Norlock's questioning, I actually agree with you, Mr. Downes, that from a legal perspective it probably is irrelevant what the number is; it's going to be arbitrary. There are always going to be people who fall on one side of the line or the other.

What is of concern to me is consistent application across Canada, so I want your comments. Following up on the previous question, in provinces such as mine, Alberta, I believe that if one fails the roadside screening device, one is subject to a 24-hour suspension. I don't know if that translates to 0.05 or not. In other jurisdictions, it's a 12-hour suspension. In Quebec, I understand, there's no administrative suspension.

As a national trial lawyers' association, are you not concerned about unequal application of the law, and wouldn't that become equal if it were done by the Criminal Code?

**Mr. Phil Downes:** Yes, in terms of your last assertion. Yes, it would be if it were applied nationally through the Criminal Code.

We don't really have a position on whether the provinces should have identical legislation in highway traffic act legislation, so in that sense we don't see it as an equal application issue because each province has decided what to do when they apply it in that way.

We're more concerned in terms of consistency: that provinces have programs to implement, for example, the ignition interlock. Alberta does, as I understand it, and I understand it's been very successful. Ontario doesn't. So in that sense, we only care about consistency to the extent that those things will have a meaningful impact on repeat drunk drivers.

**Mr. Brent Rathgeber:** Mr. Westcott, you referred to a national alcohol strategy.

**Mr. Jan Westcott:** Yes.

**Mr. Brent Rathgeber:** I'm not familiar with that. Perhaps you can reference it for me after the meeting.

Do you know of any studies in that strategy or elsewhere, from a toxicology or a biomechanical aspect, as to what are the exact hand-eye or other coordination issues at 0.05 versus 0.08 versus 1.0?

**Mr. Jan Westcott:** There are a lot of them, but they're different for you than they are for Mr. Storseth, and they're different for everybody else in this room.

**Mr. Brent Rathgeber:** Are you commenting on my weight?

**Some hon. members:** Oh, oh!

**Mr. Jan Westcott:** No, no. They're just different. There are different factors. That's the problem. They can take an individual and be very specific, but it varies from individual to individual. That's where that subjective judgment comes in: with police officers and other people trying to apply it.

I'm sorry. Did that answer your question?

**Mr. Brent Rathgeber:** Yes, it has. After the meeting, could you refer me to those studies if you have them?

**Mr. Jan Westcott:** I would be happy to.

**The Chair:** Thank you.

We have one more question on this side.

Mr. Moore.

**Mr. Rob Moore:** Thank you both for being here today and providing your testimony.

We're talking quite a bit about the interplay between provincial administrative sanctions and the Criminal Code. Do you both agree, though, that it is appropriate at some level to have a Criminal Code sanction for impaired driving? In a perfect world, would this be taken completely out of the Criminal Code and put entirely in administrative hands?

**Mr. Phil Downes:** I wouldn't take that position. I don't think our organization would take that position. Clearly, impaired operation, particularly when it causes bodily harm or death, particularly when it's a repeat offender or somebody who's been put on notice or somebody who has refused treatment—those people—is clearly criminal conduct.

**Mr. Rob Moore:** There's pretty broad agreement that there should be a Criminal Code sanction. As a government and as a society, the Criminal Code is our strongest sanction against behaviour that could harm others. I'm wondering about that sanction. You spoke about your client's desire to get back behind the wheel. That's a major concern. How soon can I get driving again? Do you think that most Canadians would prefer to be hit with a roadside administrative penalty, or would they prefer to have a criminal conviction? Which is higher?

• (1720)

**Mr. Phil Downes:** If the consequences, practically, were the same, then clearly, the criminal conviction is more of a problem, because it carries with it an extra burden with respect to employment and travel and those kinds of issues. So a criminal conviction, if it's on your record, carries those extra things. I don't think there is clearly a preference, if you want to call it that.

**Mr. Rob Moore:** That's what we are weighing now: at what level does that criminal sanction kick in? I can tell you that impaired driving, as the number one criminal cause of death.... We probably all hear from concerned constituents about impaired driving. They would like us to take steps to address it. And they want all governments—provincial, federal, or even municipal—to work together to reduce the harms caused by impaired driving.

I did want one comment from you, Mr. Downes. You mentioned 25-year-old breathalyzers. We heard quite a bit of testimony for our impaired driving legislation, which was referenced, which was included in our Tackling Violent Crime Act. We had some impaired driving provisions. I didn't hear that there was widespread use of 25-year-old breathalyzers. Is that a bit of an anomaly? I would think that most of them are considerably more up to date. I would appreciate your input on that.

**Mr. Phil Downes:** I'm telling you something that was reflected to us by people across the country. It may be that the particular machines are not that old, but some of the technology behind them, in terms of the ability to accurately describe blood alcohol content, is still that old. Far more sophisticated and more accurate machines are used, for example, in hospital settings than what might be used in police stations. I'm just making the point that we shouldn't think that these machines are infallible and incapable of giving erroneous readings.

**Mr. Rob Moore:** I would just say that we've heard quite a bit of testimony that there have been great advances and that in fact the technology that's being used today, and the breathalyzers that are being used today, have proven to be extremely accurate. That was some of the testimony that led us to do some of the work we did on impaired driving legislation in the past.

Thank you both.

**The Chair:** We still have a couple of minutes left. I have a question for Mr. Downes.

When we were talking about the randomized breathalyzer testing, I believe you implied that it could violate the Charter of Rights and Freedoms. I think you would agree with me, though, that reasonable people, reasonable counsel, reasonable legal experts, can differ on whether the saving provisions of the charter would apply to any particular legislation, including RBT. Ultimately, it's the courts and the Supreme Court of Canada that would make that determination. Correct?

**Mr. Phil Downes:** I agree with you.

**The Chair:** We will not know whether any particular legislation that might permit randomized breathalyzer testing actually will be saved by section 1 of the charter. Would you agree?

**Mr. Phil Downes:** I agree.

**The Chair:** Does anybody else have a quick question?

Seeing none, I want to thank both of you. Your information has been very informative and helpful. You're free to go.

The meeting is adjourned.

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