

## **Failing to Heed Blackstone: A 50 Year Review of Tougher Sentences for Impaired Driving in Canada and How the Judiciary Strives to Avoid their Imposition**

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### **I. Introduction**

More than 200 years ago, Sir William Blackstone recognized that:

We may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity.<sup>3</sup>

Despite this, over the last 50 years, the sentences and consequences of a conviction for impaired driving imposed under the Canadian *Criminal Code* or under provincial *Highway Traffic Acts* have become more severe and more punitive. Politicians have been unable to resist the political attractiveness of being perceived as “getting tough on crime” through the simplistic and unquestioned assumption that the increased use of mandatory minimum sentences will serve as a deterrent to impaired driving.<sup>4</sup>

Harsh mandatory minimum penalties, combined with police and Crown policies of mandatory charging and mandatory prosecution leave a person charged with impaired driving no alternative means available to “resolve” the charge apart from contesting the charges. The combined effects of a policy of mandatory prosecution, coupled with harsh mandatory minimum sentences for impaired driving offences has led to a significantly increased likelihood that a

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<sup>3</sup> WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND, (University of Chicago Press 1979) (1765-1769). Blackstone then cites with approval CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764): “Crimes are more effectively prevented by the certainty, than by the severity of punishment”.

<sup>4</sup> See Anthony Doob and Carla Cesaroni, *The Political Attractiveness of Mandatory Minimum Sentences*, 39(2) OSGOODE HALL LAW JOURNAL 288 (2001).

person charged with impaired driving will plead not guilty and take their case to trial. The judiciary, faced with mandatory minimum penalties which are unduly harsh, have accepted numerous technical defences we argue, to avoid their imposition. As a result, the harsh mandatory minimum sentences have led to a decrease in the certainty of punishment for someone charged with impaired driving, and undermined the desired deterrent effect that the mandatory minimum sentences were intended to accomplish.

## II. Increasing Impaired Driving Sentences in Canada

### A. Canadian Criminal Code<sup>5</sup>

In Canada, the federal Government has jurisdiction over the criminal law, enacted primarily through the *Criminal Code*.<sup>6</sup> Impaired driving has been recognized as a socially unacceptable behaviour that has been a criminal offence in Canada for over 80 years.<sup>7</sup> The crime of driving while intoxicated was first introduced in Canada as a summary conviction offence in 1921, and was punishable by mandatory minimum penalties of seven, 30 and 90 days jail, respectively, for first, second and subsequent offences.<sup>8</sup> In 1930, an amendment allowed the Crown the option of prosecuting the offence as an indictable offence, in which case the

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<sup>5</sup> Two sources of particular assistance in tracking the history of the federal legislative amendments were: Standing Committee on Justice and Human Rights, *Towards Eliminating Impaired Driving*, Report No. 21 (1999) and Nicole Crutcher, *The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada* 39(2) OSGOODE HALL LAW JOURNAL 273.

<sup>6</sup> See the *Constitution Act, 1867*, s. 91 (27).

<sup>7</sup> Statistics Canada, *Impaired Driving in Canada - 1999*, 19(11) JURISTAT, Catalogue no. 85-002-XIE, (Nov. 1999) (hereafter "Statistics Canada, 1999") at 11.

<sup>8</sup> *An Act to Amend the Criminal Code*, S.C. 1921, c 25.

offence was punishable by mandatory minimum sentences of 30 days for a first offence and 90 days for each subsequent offence.<sup>9</sup>

The precursor to the modern offence of impaired driving was passed in 1951 as a hybrid offence. The offence carried mandatory minimum penalties of a \$ 50 fine, 14 days, and 90 days for first, second, and subsequent offences, respectively.<sup>10</sup>

Extensive revisions were made to the *Criminal Code* in 1969. In the context of impaired driving, the law was amended to permit the use of roadside screening devices. The new offences “driving with more than 80 mg of alcohol per 100 ml. of blood” and “refusal to provide a breath sample” were also introduced and were also punishable on summary conviction by a mandatory minimum fine or \$ 50.00.<sup>11</sup> In 1976, these offences became hybrid offences, and became punishable by the same penalties for impaired driving of 14 days, and 90 days for first, second, and subsequent offences, respectively.<sup>12</sup>

In 1985, the mandatory minimum sentence for a first offence for any of the impaired driving-related offences was increased to \$ 300.00, and mandatory federal driving prohibitions of three months, six month and one years were introduced, respectively, for first, second and subsequent offences. The new offences of impaired driving causing bodily harm and impaired driving causing death were also introduced, and were punishable by up to ten and fourteen years’ imprisonment respectively.<sup>13</sup>

In 1999, the mandatory minimum penalty for a first impaired driving-related offence was increased to the current penalty of \$ 600.00. The mandatory minimum driving prohibitions for

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<sup>9</sup> *An Act to Amend the Criminal Code*, S.C. 1930, c. 11.

<sup>10</sup> *An Act to Amend the Criminal Code*, S.C. 1951, c. 47.

<sup>11</sup> *Criminal Law Amendment Act*, S.C. 1968-69, c. 38.

<sup>12</sup> *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93.

<sup>13</sup> *Criminal Law Amendment Act, 1985*, S.C. 1985, c. 19.

first, second and subsequent convictions were increased, respectively, to one, two and three years.<sup>14</sup>

**B. Ontario *Highway Traffic Act***

While the federal government has jurisdiction over the criminal law, the constitutional division of powers in Canada provides that authority over transportation within a province, and therefore over the licensing of vehicles and drivers, is a matter of provincial responsibility.<sup>15</sup> Therefore, Canadian provinces have been free to introduce their own penalties or licence restrictions for individuals charged with impaired driving. Interestingly, it is through measures adopted by the provinces that some of the most severe effects of the penalties for impaired driving result. Changes in the Ontario *Highway Traffic Act* provide an example of the trend towards harsher consequences within provincial licensing regimes.

At the outset of the study period in 1950, s. 54 of the Ontario *Highway Traffic Act* provided that the driver's licence of a person who was convicted of impaired driving would be suspended for three months, for a first offence, and six months upon conviction for each subsequent offence. Where the impaired driver also caused damage to property, personal injury or death or due to the offence, these periods were increased to six months and one year, respectively, for first and subsequent offences.

By 1960, both sections were consolidated into s. 21 of the *Highway Traffic Act*, and the automatic suspensions were increased to six months for a first offence, and one year for each subsequent offence. These periods were also doubled to one year and two years for first and subsequent offences, respectively, in the event of damage to property, personal injury or death or due to the offence.

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<sup>14</sup> *An Act to Amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32.

<sup>15</sup> See the *Constitution Act, 1867*, s. 92 (10).

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In 1980, the legislation was amended to provide for minimum suspensions of one, two and three years, respectively, for first, second and subsequent offences.

In 1998, as a part of the so-called “Common Sense Revolution” introduced by the Conservative Harris government, the legislation was again amended to provide for mandatory driver’s licence suspensions of one year upon a first conviction, three years for a second conviction, and an indefinite suspension of one’s license for any subsequent conviction.<sup>16</sup> Pursuant to section 41.1 of the *Highway Traffic Act*, as amended, a person whose driver’s license is suspended for an indefinite period may apply to have his or her licence reinstated after ten years, subject to having met a number of conditions. A person who is convicted for a further subsequent offence will have his or her licence suspended for life, without the possibility of reinstatement.

In addition to the automatic licence suspensions, the Ontario *Highway Traffic Act* has also been amended recently to:

- provide for immediate administrative driver’s licence suspensions (“ADLS”) of 90 days for any person that is charge with an impaired driving offence, even if they are subsequently acquitted of the offence;<sup>17</sup>
- require any person whose driver’s licence has been suspended for an impaired driving offence to install an “interlock ignition device” on their vehicle, at their own expense, for a period of one year after the suspension;<sup>18</sup>

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<sup>16</sup> *Comprehensive Road Safety Act, 1997*, S.O. 1997 ch. 12, amending the *Highway Traffic Act*, R.S.O. 1990, c. H.8. In particular, see section 41(1) of the *Highway Traffic Act*. The decision to reinstate a driver’s licence after the 10 year suspension is entirely within the discretion of the Ministry of Transportation, and reinstatement may be illusive for many individuals.

<sup>17</sup> *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 48.3, as amended by S.O. 1997, ch. 12, s. 3.

<sup>18</sup> *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 41.2, as amended by S.O. 2000, ch. 35, s. 1.

- require any person whose driver's licence has been suspended for an impaired driving offence to attend an alcohol abuse assessment and the remedial "*Back On Track*" program before their licence is reinstated.<sup>19</sup>

### C. The "Real Cost" of a Conviction

In light of the above, it is clear that a conviction for even a first offence for an impaired driving related offence carries mandatory minimum penalties that can be devastating for an average individual. While the mandatory minimum fine of \$ 600 is not, by itself, unduly harsh, it has been estimated that, when one considers the licence reinstatement fee, the fee for the *Back On Track* program, the costs of renting and installing an interlock ignition device, and the increase in insurance premiums, the actual total costs resulting from a conviction are approximately \$20,000.<sup>20</sup> This figure does not account for the potential loss of livelihood for salespeople, contractors, real estate agents, and anyone else who is required to drive for a living faces from even a one year's suspension, or the total devastation and disruption of life that results for people who live in isolated or rural locations.<sup>21</sup>

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<sup>19</sup> See Ont. Reg. 340/94, s. 32.3-32.4, as amended by Ont. Reg. 490/98, s. 2.

<sup>20</sup> R. Conway, *Coming Out Against Minimum Penalties*, LAW TIMES, January 30, 2006. The authors observe, however, that many clients convicted of impaired driving report increases in insurance premiums by as much as \$5,000 per year, for up to six years. As such, we estimate that the actual cost of a conviction for some individuals may be as high as \$ 30,000 - \$ 40,000.

<sup>21</sup> Although economic rights are not enshrined in the *Canadian Charter of Rights and Freedoms*, it is interesting to note that Section 20 of Magna Carta itself notes:

*For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood.*

It would appear that this limitation on the degree of punishment has been lost in a modern era where people depend on their ability to drive in order earn a living.

### III. The Response to Mandatory Minimums

There are three ways that “certainty of punishment” for impaired driving, or any other crime for that matter can be enhanced: through the certainty of detection, the certainty of prosecution, and the certainty of conviction. Where a person who is driving while impaired is detected, prosecuted and convicted, then the certainty of punishment inevitably follows. If a person escapes any *one* of detection, prosecution or conviction, then “the chain” of certainty of punishment is broken.

When analyzed in this light, it becomes evident that increasing mandatory minimum penalties can only *decrease* the certainty of punishment. The “certainty of detection” involves the allocation of policing resources to ensure that those who commit a given crime are caught in the first place: an increase in mandatory minimum penalties has no impact on what the police choose to investigate and when. Similarly, the “certainty of prosecution” is ensured by the mandatory charging/mandatory prosecution policies maintained by police forces and Crown Attorney’s offices. Such policies are designed to ensure the individual police officers or Crown attorneys do not minimize the seriousness of certain crimes by removing discretion to lay a charge in the first place, to withdraw a charge that has been laid, or to agree to the use of alternative measures to “divert” a charge from the system. Once again, the certainty of prosecution is not affected by the severity of punishment.

It is only the certainty of conviction that can be enhanced or diminished by the use of mandatory minimum penalties. The more severe the mandatory minimum penalty associated with a crime, the greater the likelihood that a person will choose to contest a charge. Assuming that more contested charges will lead to more acquittals, then, an *increase* in a mandatory

minimum penalty leads to a *decrease* in the certainty of conviction, and therefore the certainty of punishment.

In the context of impaired driving charges, our experience indicates that, more than any other sanction, it is the use of mandatory minimum licence suspensions, which usurps judicial discretion not to impose the suspension or to allow exceptions from the suspension such as permitting driving for work purposes only, that has led to an almost universal desire to contest impaired driving charges.

To consider a hypothetical situation, suppose that judges had the discretion to allow a person charged for a first impaired driving offence to drive only for work purposes, but only if the person pleads guilty to the charge. It is highly likely that a much greater number of individuals would plead guilty.<sup>22</sup> By allowing a discretion to depart from the mandatory minimum penalty, the certainty of punishment would be enhanced. As it is, persons charged with impaired driving face no hope of a “resolution” negotiated with the prosecution, and no possibility of relief from the harsh minimum penalties. The only remaining option is to contest the charge.

There has been a significant trend towards more persons charged with impaired driving pleading not guilty. One Statistics Canada report has speculated that this increase is “possibly in response to increased penalties for conviction”.<sup>23</sup> Although fewer than five per cent of all criminal cases in Ottawa from October 2004 to September 2005 were impaired driving related charges, the Trial Co-ordinator’s Office has confirmed that, between August and December of 2005, 40 % of the provincial court time allocated for trials was spent on impaired driving cases.

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<sup>22</sup> Anecdotally, many senior defence counsel have indicated that guilty pleas were more common when there was a judicial discretion to allow convicted individuals to drive for work purposes. Statistics from this era are not readily available.

<sup>23</sup> Statistics Canada 1999, *supra* note 7 at 11.

For October 2005, this figure was 51%.<sup>24</sup> Anecdotal evidence confirms this trend as well. Some Ottawa criminal lawyers report that over half of their criminal matters that actually proceed to trial are impaired driving cases.

Not only are more people charged with impaired driving choosing to take the matter to trial, but the cases are taking longer and becoming more complex. Since Canada began compiling the Adult Criminal Court Statistics (“ACCS”) series, which tracks criminal matters in selected Canadian jurisdictions, the number of impaired driving court cases requiring six or more appearances has increased. While in 1994-95 19 % of cases required six or more appearances, that proportion rose to 23 % of cases in 1997-98.<sup>25</sup> In 2001-02, that figure rose to 38 %.<sup>26</sup> From 2000-01 to 2001-02, the average length of time that it took to resolve an impaired driving case, from first appearance to final verdict, rose from 92 days to 99 days.<sup>27</sup>

Interestingly, during this period, not only did the rate of impaired driving show steady decline, but so too did the actual number of impaired cases before the courts. The ACCS reports that, in 1997/98, there were 59,982 impaired cases before Canadian courts.<sup>28</sup> For 2001-02, this figure was 52,662 cases,<sup>29</sup> and by 2003-04, the most recent period for which data is available, this figure was 49,282 cases.<sup>30</sup> These figures represent 15 %, 12 % and 11 % of all criminal cases in Canada, respectively, for each period. In other words, a *decreasing* number of cases is taking up an *increasing* amount of court time.

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<sup>24</sup> Conway, *supra* note 20.

<sup>25</sup> Statistics Canada 1999, *supra* note 7 at 11.

<sup>26</sup> Statistics Canada, “*Impaired Driving and Other Traffic Offences - 2002*”, 23(9) JURISTAT, Catalogue no. 85-002-XIE (Nov. 2003) (hereafter “Statistics Canada, 2003”).

<sup>27</sup> *Id.*

<sup>28</sup> As reported in Statistics Canada, 1999, *supra* note 7 at 11.

<sup>29</sup> Statistics Canada, 2003, *supra* note 26 at 9.

<sup>30</sup> Statistics Canada, “*Adult Criminal Court Statistics*”, 24(2) JURISTAT, Catalogue no. 85-002-XIE (Dec. 2004) (hereafter “ACCS”) at 13.

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As might be expected, the evidence also suggests that, as an increasing number of people have contested impaired driving charges, the acquittal rate has also increased. Charged individuals have been more inclined to hire lawyers who are experts in impaired driving law, and these lawyers are utilizing increasingly technical and complex defence strategies. Faced with the choice of accepting a technical defence or convicting an accused that will face harsh minimum penalties, judges are tempted to accept the defence and acquit the accused. Statistics Canada confirms that there has been a gradual decline in the number of guilty verdicts in impaired driving cases. Acquittals in impaired driving cases rose 16 % between 1994-95 and 1997-98.<sup>31</sup> In 1997-98, 77 % of all impaired cases resulted in convictions.<sup>32</sup> For 2001/02, this figure was 73 %.<sup>33</sup> For 2003/04, of the 49,282 impaired cases reported in the ACCS, there were convictions reported in 34,265, or 70 %, of these cases.<sup>34</sup>

These figures certainly conflict with the common perception that conviction rates are higher for impaired driving charges than for other offences. While it is true that the conviction rate for impaired driving offences is higher than the overall conviction rate for all criminal charges in Canada of 58 %, <sup>35</sup> these figures do not account for the fact that 36 % of all criminal charges are either stayed, withdrawn, discharged or dismissed.<sup>36</sup> Since impaired driving charges are typically not amenable to any form of resolution other than a guilty plea or trial, it is likely that many of the 30 % of cases in which a conviction is not registered for an impaired charge were as a result of an acquittal at trial. Given that there are acquittals in only 3 % of all criminal

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<sup>31</sup> Statistics Canada, 1999, *supra* note 7 at 11.

<sup>32</sup> *Id.*

<sup>33</sup> Statistics Canada, 2003, *supra* note 26 at 9

<sup>34</sup> ACCS, *supra* note 30 at 17.

<sup>35</sup> *Id.* at 4.

<sup>36</sup> *Id.*

cases,<sup>37</sup> this suggests that the acquittal rate for impaired driving offences may actually be ten times higher than it is for virtually any other charge.

As an interesting note, the fact that judges are tempted to accept a technical defence to an impaired driving charge rather than convict the charged individual and impose penalties that can rob that individual or his or her livelihood would not come as a surprise to Blackstone himself. Blackstone observed that early common law judges:

Wisely avoided soliciting any great legislative revolution in the old established forms, which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they were, to languish in obscurity and oblivion, and endeavoured by a series of minute contrivances to accommodate such personal actions, as were then in use, to all the most useful purposes of remedial justice.<sup>38</sup>

As David Brown has pointed out in a paper presented before the Oxford Round Table on August 7, 2006, Blackstone thus saw common law judges as employing “minute contrivances” to achieve the ends of “remedial justice”.<sup>39</sup> As will be outlined in the next section of this paper, some of the defences to impaired driving charges in Canada do indeed resemble Blackstone’s “minute contrivances”.

#### **IV. The Development of Defences to Impaired Driving**

Having examined the notion that increasing mandatory minimum penalties for impaired driving has actually produced a decrease in the certainty of punishment, because of an increased likelihood of an acquittal, this next section of the paper provides a brief overview, of three of the most common defences utilized to defend impaired driving charges.

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<sup>37</sup> *Id.*

<sup>38</sup> BLACKSTONE, *supra* note 3.

<sup>39</sup> David Brown, *The Common Law, Change and Constitutional Rights: Blackstone in an Age of Rights-Based Jurisprudence*, paper presented before the Oxford Round Table August 7, 2006, at 7.

**A. Evidence to the Contrary - The “Carter” Defence**

The “*Carter* defence” is one of the most commonly relied upon defences used in trials for “driving over 80”.<sup>40</sup> In most “driving over 80” prosecutions, the Crown attorney adduces evidence of a qualified technician that states the result of an analysis of the accused’s breath, and relies on the “presumption of accuracy” found in s. 258 (1)(g) of the *Criminal Code*. By virtue of s. 25 of the *Interpretation Act*, the presumption that such documentary evidence is reliable can be rebutted by leading “evidence to the contrary”. Commonly, the defence attempts to rebut the presumption that the breathalyser results are accurate by calling the accused, who testifies as to what he or she had to drink, any other available credible witness to corroborate the drinking pattern, and then calling an expert toxicologist to testify as to the what the blood/alcohol concentration would have been given the accused’s gender, weight, alcohol elimination rate and drinking pattern.

The leading case in this area is *R. v. Carter*, decided by Court of Appeal for Ontario in 1995.<sup>41</sup> Interestingly, *Carter* itself did not involve an analysis of breath samples, but a sample of the accused’s blood that was obtained while Carter was in the hospital following a motor vehicle accident. The analyst employed by the police testified that Carter’s blood alcohol level was .226 and was consistent with someone who had consumed seven bottles of beer. Carter testified that he had consumed only three bottles of beer prior to the time of drinking. According to the Crown’s own expert, if Carter had consumed only three bottles of beer, “all the beer would have disappeared” from Carter’s system by the time of the test. The trial judge found Carter to be a credible witness, accepted his version of the amount of alcohol he had consumed, and acquitted him.

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<sup>40</sup> The defences discussed here are relevant to the charge of “driving over 80”. In many cases, where the accused is acquitted of this charge, the Crown will also fail to have sufficient evidence to prove the charge of impaired driving.

<sup>41</sup> *R. v. Carter* (1985), 19 C.C.C. (3d) 174.

When the accused utilizes the *Carter* defence, if the trial judge believes the accused's evidence about how much he or she had to drink, and this amount of consumption is consistent with a level under the legal limit, then the accused must be acquitted.<sup>42</sup> However, in order for the *Carter* defence to succeed, the trial judge need not make a finding he or she actually believes the accused, but need only be left with a reasonable doubt by the accused evidence.<sup>43</sup> Similarly, *Carter* also emphasized that it is not for the defence to show or speculate why the breathalyser readings were allegedly erroneous.<sup>44</sup>

In considering the evidence of the defendant who leads a *Carter* defence, a judge must not assume that a breathalyser machine is infallible. Subsequent cases have confirmed that neither the results of a roadside screening device test, nor the results of the breathalyser test itself, can be used to discredit the testimony of the accused.<sup>45</sup> The Supreme Court of Canada has recently affirmed that "it would be circular to rely on the test results to determine whether there is evidence that could raise a doubt about those very results".<sup>46</sup> In other words, a trial judge can not rely on the breathalyser results as a reason for rejecting the accused's testimony about how much they had to drink in putting forward evidence to the contrary.

## **B. "As soon as practicable" - The "Shouten" Defence**

The *Carter* defence challenges the Crown's ability to rely on the *Criminal Code* presumption that the readings obtained from a breathalyser are accurate. Section 258(1)(c) of the *Criminal Code* also provides the prosecutor with another powerful presumption, the

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<sup>42</sup> *Carter*, *supra* note 41. See also *R. v. W.(D.)*, [1991] 1S.C.R. 742.

<sup>43</sup> *R. v. W.(D.)*, [1991] 1S.C.R. 742.

<sup>44</sup> *Carter*, *supra* note 41. See also the comments on this issue in ALAN D. GOLD, DEFENDING DRINKING AND DRIVING CASES 120 (Thompson-Carswell 2005).

<sup>45</sup> *R. v. Coutts* (1999), 136 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Suttie* (2004), 72 O.R. (3d) 388, [2004] O.J. No. 3345.

<sup>46</sup> *R. v. Boucher*, [2005] 3 S.C.R. 499; 2005 SCC 72 at para 64.

“presumption of identity”, which provides that the accused’s blood alcohol level at the time of driving can be presumed to be the same as the lower of two readings obtained by a breathalyser analysis. In truth, this presumption is a legal fiction because, assuming that the accused has not consumed any alcohol after being arrested, the accused’s blood alcohol level at the time the breath analysis is performed will almost always be somewhat lower than it was at the time the accused was driving, due to the body’s processes that eliminate alcohol.

In order to rely on the presumption of identity, the Crown must show that the breathalyser samples were taken in strict compliance with the requirements of s. 258 (1)(c), including a requirement that both samples be taken “as soon as practicable after the time the offence was alleged to have been committed”.<sup>47</sup> Where the accused is able to show that there is an unexplained delay in the time taken to conduct the breathalyser tests, the Crown prosecutor will not be able to rely on the presumption, and will only be able to gain a conviction if an expert toxicologist is called to provide a “read back extrapolation” of the results to the time of driving. In the vast majority of cases, a loss of the presumption results in an acquittal.

In construing the words “as soon as practicable”, the courts have held that “as soon as practicable” does not mean “as soon as possible”.<sup>48</sup> It does mean “within a reasonably prompt time under the circumstances”.<sup>49</sup> Since the test is one of reasonableness, a court must be satisfied that the conduct of the police in the interval between the arrest and the breathalyser tests was reasonable, although this does not mean that the police need to account for every minute that elapsed before the samples were taken.<sup>50</sup>

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<sup>47</sup> See *Criminal Code*, R.S.C. 1985, Ch. C-46, s. 258(1)(c)(ii).

<sup>48</sup> *R. v. Phillips* (1988), 42 C.C.C. (3d) 150 (Ont. C.A.).

<sup>49</sup> *R. v. Dzaaja*, [2003] O.J. No. 2341 (Ont. C.A.).

<sup>50</sup> Jeffrey Milligan, *As Soon as Practicable*, 26 (6) FOR THE DEFENCE at 17.

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The “high-water mark” for the defence in this jurisprudence is widely regarded as having been provided in *R v. Schouten*.<sup>51</sup> Schouten was arrested for impaired driving after having been stopped for speeding and after having subsequently failed a roadside screening test. Schouten was transported back to the police station, where he arrived at 12:17 p.m. Although he was uncertain about whether or not he wished to call a lawyer, the police contacted legal aid duty counsel and allowed Schouten to speak with this lawyer. The evidence established that Schouten had finished speaking with duty counsel and that the breath technician was prepared to receive Schouten at 12:34 a.m. Despite this, the first breath analysis was not performed until 12:52 a.m.

At trial, Schouten argued that this 18 minute delay was completely unexplained and, as such, the tests had not been administered “as soon as practicable”. At trial, the judge relied on the fact that the police had generally processed Schouten in an expedient manner and on the fact that Schouten himself had delayed the earlier roadside screening procedure to conclude that the test were preformed “as soon as practicable”. However, on appeal, the court held that, since it was incumbent on the Crown to establish beyond a reasonable doubt that the test complied with the statutory provisions, an unexplained delay of 18 minutes was sufficiently long that the Crown had failed to establish that the tests were performed “as soon as practicable” and were therefore inadmissible.<sup>52</sup>

Subsequent cases have also confirmed that, in assessing whether or not the breathalyser tests were administered as soon as practicable, the court should consider the entire unexplained

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<sup>51</sup> [2002] O.J. No. 477 (Sup. Ct. Jus).

<sup>52</sup> While *Schouten* may be regarded as the “high water mark” for this defence, it is worth noting that, since the federal mandatory driving prohibitions were introduced, there has been a steady decrease in the length of time that courts appear to be accepting as being “as soon as practicable”. For example, in *R v. Cander* (1981), 59 C.C.C. (2d) 490, the British Columbia Court of Appeal accepted a 36 minute delay, 20 minutes of which was caused by nothing other than a police policy to allow a 20 minute “observation period”. Similarly, in *R. v. Phillips* (1988) 42 C.C.C. (3d) 150 and *R. v. Van Der Veen* (1988), 44 C.C.C. (3d) 38 the Courts of Appeal for Ontario and Alberta, respectively, accepted delays of 51 and 40 minutes, respectively, as being “as soon as practicable”.

delay, and that the unexplained gaps of as little as five to seven minutes could be added together to calculate the total delay. It is the total delay, taken together, that should be considered.<sup>53</sup>

### C. Roadside Right to Counsel - The “George” Defence

A third common defence to a charge of “driving over 80” that has led to much litigation resulted from the decision of the Court of Appeal for Ontario in *R. v. George*.<sup>54</sup> In *George*, the central issue was whether the accused should have been afforded the opportunity to consult counsel prior to providing a breath sample for a roadside screening device.

Under section 254(2) of the *Criminal Code*, a police officer that reasonably suspects that a person who is found operating a motor vehicle has alcohol in their body may require that person to provide “forthwith” a sample of their breath into a screening device.<sup>55</sup> Where a person registers a “fail” on a screening device, the police will have reasonable and probable grounds to arrest the suspect and to require them to provide breath samples for the more precise breathalyser device, back at a police station.

George was stopped while driving after a police officer saw a cloud of dark smoke and witnessed George’s vehicle leaving a shopping mall at a high rate of speed. The police constable noticed that George had bloodshot eyes and that he would turn his head away from the officer whenever he spoke. When asked if he had consumed any alcohol, George responded that he had consumed two beers about an hour earlier. Accordingly, the police officer was justified in

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<sup>53</sup> See, for example, *R. v. Beninato*, [2005] O.J. No. 2193 (Sup. Ct. Jus.) and *R. v. Monahan*, [2006] O.J. No. 3397 (Ont. Ct. Jus.). Although the overall delays were found to be reasonable, the courts in *R. v. Daley*, [2005] O.J. No. 1176 (Ont. Ct. Jus.) and *R. v. Blair* 56 W.C.B. (2d) 446 (Alta Q.B.) also affirm that it is the overall delay that is significant.

<sup>54</sup> [2004] O.J. No. 3287 (Ont. C.A.).

<sup>55</sup> See *Criminal Code*, R.S.C. 1985, Ch. C-46, s. 254 (2).

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having a reasonable suspicion that George had alcohol in his body, and he made the demand that George provide a sample of his breath into a roadside screening device.

Unfortunately for the prosecution, the police officer did not have a screening device with him at the time the demand was made. The police officer radioed for another police cruiser with a screening device to attend the scene. The officer was advised that it would take 15 - 20 minutes for the screening device to arrive, and it did arrive some 16 minutes later. Although he did not ask to call a lawyer, George had a cell phone with him at the time, and the trial judge accepted that, had George requested to call a lawyer, the arresting officer would have allowed George to have done so. The right to consult a lawyer upon detention is a constitutionally protected right in Canada,<sup>56</sup> and because the police officer was unable to require George to provide a breath sample “forthwith”, as required by the statute, the trial judge determined that George’s right to counsel was violated, and excluded the results obtained from the roadside screening device and the subsequent breathalyser tests, and acquitted George.

On the Crown’s appeal to the Court of Appeal for Ontario, the central issue was the legitimacy of a demand for a breath sample where the roadside breath test cannot be administered immediately. The Court confirmed that since the police constable was not in a position to require George to provide a breath sample “forthwith”, the demand did not comply with the statute, and did not justify a failure to provide George with an opportunity to consult counsel. The court held that, had the screening device been readily available, the police officer would have been under no obligation to allow George to consult a lawyer. However, where, as here, there would be a delay before the screening device arrived, the availability of ready means to consult a lawyer was a relevant consideration that militated in favour of the accused being

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<sup>56</sup> *Canadian Charter of Rights and Freedoms*, s. 10(b).

allowed to consult counsel before the roadside test was administered. Accordingly, George's acquittal was upheld.

*George* can be seen as a dramatic strengthening of the rights of the accused and an increase in the corresponding duties of the police. Prior to this decision, the traditional wisdom was that there was no right to consult a lawyer prior to providing a breath sample for a roadside screening device.<sup>57</sup> Now, the police need to be alert to the possibility that they may be required to afford the accused an opportunity to consult counsel prior to administering a roadside test in any situation in which a screening device is not immediately ready for use.<sup>58</sup> In addition to a delay because there is no screening device readily available, decisions subsequent to *George* have also found delays for any other reason also to be similarly unacceptable, including delays:

- to allow the screening device to warm up;<sup>59</sup>
- to wait for the device to be free because it is in use by another officer;<sup>60</sup>
- to allow sufficient time to pass to ensure there is no residual mouth alcohol;<sup>61</sup> or,
- to wait until a French speaking officer could attend to read the demand in French, which was the only language understood by the accused.<sup>62</sup>

## V. The Effectiveness of Mandatory Minimums

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<sup>57</sup> This issue was squarely addressed by the Supreme Court of Canada in *R. v. Thomsen*, [1988] 1 S.C.R. 640.

<sup>58</sup> Cases subsequent to *George* have confirmed that delays as short as five to seven minutes are sufficiently long to trigger the police duty to allow the suspect to consult a lawyer, particularly where there is a cell phone present. See for example *R. v. Fuchs*, [2004] O.J. No. 5683 (Ont. Ct. Jus.) and *R. c. Veillette-Thouin*, [2005] J.Q. no 20114 (Ct. Que. Cr. P.D.).

<sup>59</sup> *R. v. Fuchs*, [2004] O.J. No. 5683 (Ont. Ct. Jus.).

<sup>60</sup> *R. v. Styra*, [2006] O.J. No. 1580 (Ont. Ct. Jus.).

<sup>61</sup> *R. v. McKernan*, [2005] O.J. No. 5807 (Ont. Ct. Jus.).

<sup>62</sup> *R. v. Laird*, [2006] O.J. No. 827 (Ont. Ct. Jus.).

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Faced with mandatory minimum penalties that have devastating personal consequences, individuals charged with impaired driving have increasingly opted to contest impaired driving charges. Increasingly, specialized lawyers have developed technical defences, such as those just discussed, which are being accepted by the courts. All of this would suggest that mandatory minimum penalties have led to a decrease in the certainty of punishment for any given individual who is charged for impaired driving.

Proponents of mandatory minimums would suggest, however, that the dramatic decrease in the incidence of impaired driving in Canada is evidence that the mandatory minimum penalties have been an effective deterrent. However, a growing body of literature is suggesting that mandatory minimums simply do not work.

Professor Thomas Marvell and Professor Carlisle Moody of the College of William and Mary have extensively studied the effects of mandatory minimums on a number of different kinds of crime. For example, in 1995, they published a study on the impact of the introduction of mandatory minimums sentences for gun crimes across the United States.<sup>63</sup> The study concluded that it was “difficult to claim that” mandatory minimum penalties had “significant impacts on crime or gun use”.<sup>64</sup>

A 2002 study for the Research and Statistic Division of the Department of Justice Canada provides an extensive examination of mandatory minimum penalties and their effects on crime, including a review of the literature that is available specifically dealing with mandatory

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<sup>63</sup> Thomas B. Marvell and Carlisle E. Moody, *The Impact of Enhanced Prison Terms for Felonies Committed with Guns*, 33 CRIMINOLOGY 247 (1995).

<sup>64</sup> *Id.* at 274.

minimum sentences for impaired driving.<sup>65</sup> The study notes that Nienstedt's 1990 study of the impact of mandatory minimum sentences in two Arizona cities concluded that accidents resulting from impaired driving decreased at a much greater rate as a result of a publicity campaign than they did when mandatory minimum sentences were introduced.<sup>66</sup> Another study cited concluded that, while the threat of legal sanction was found to be an important deterrent, changing societal attitudes and the anticipated shame of an impaired driving charge was the primary deterrent for such crimes.<sup>67</sup> Gabor and Crutcher ultimately conclude that

overall, the evidence in this is holding out more hope for vigorous law enforcement and the certainty of punishment than for tough sentences. Studies indicate that mandatory minimum sentences and sanctions of increasing severity do not reduce recidivism rates or alcohol-related accidents.<sup>68</sup>

More recently, Professor David Paciocco and Professor Julian Roberts conducted a study in 2005 for the Canada Safety Counsel that examined sentencing in cases of impaired driving causing death or bodily harm, with a particular emphasis on the use of conditional sentences.<sup>69</sup> The study specifically looked at the concept of general deterrence and noted that "a growing body of research demonstrates that harsher penalties do not necessarily offer a greater deterrent

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<sup>65</sup> Thomas Gabor and Nicole Crutcher, *Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities and Justice System Expenditures*, Department of Justice Canada, Research and Statistics Division (2002).

<sup>66</sup> B. Nienstedt, *The Policy Effects of a DWI Law and a Publicity Campaign* in R. Surette (ed.) *THE MEDIA AND CRIMINAL JUSTICE POLICY* (Charles Thomas, 1990), as cited in Gabor and Crutcher, *supra* note 65 at 15.

<sup>67</sup> H.G Grasmic and R. J. Bursik, *Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment and Legal Sanctions*, 31 *CRIMINOLOGY* 41 (1993).

<sup>68</sup> Thomas Gabor and Nicole Crutcher, *supra* note 65 at 17.

<sup>69</sup> David M. Paciocco and Julian Roberts, *Sentencing in Cases of Impaired Driving Causing Bodily Harm or Impaired Driving Causing Death With a Particular Emphasis on Conditional Sentencing*, Report prepared for the Canadian Safety Counsel (Feb. 2005).

benefit”.<sup>70</sup> The study notes, for example, a study of two Canadian criminologists from the Centre of Criminology at the University of Toronto that concluded that “the time has come to conditionally accept the hypothesis [that the] severity of sentences does not affect crime levels”.<sup>71</sup>

Paciocco and Roberts observed that the extreme variance in incarceration rates for impaired driving offences in Canada provides an opportunity to test the hypothesis that harsh penalties deter impaired driving. For example, the most recent statistics available indicate that the incarceration rates for impaired driving offences in Canada range from a low of 4 % in Nova Scotia, to a high of 91 % in neighbouring Prince Edward Island.<sup>72</sup> One would predict that the rate of impaired driving would be higher in jurisdictions with lower incarceration rates. Despite this, the study found that there was no significant relationship between the incarceration rates and the rates of impaired driving, and ultimately concluded that

When a correlation analysis is performed on crime rate and average sentence length the same result emerges: no significant relationship between sentence severity (in this case average sentence length) and crime (impaired driving) rates.<sup>73</sup>

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<sup>70</sup> *Id.* at 46. The authors drew this conclusion from an examination of cited sources including H. Kury et. Al, *Does Severe Punishment Mean Less Criminality*, 13 INTERNATIONAL CRIMINAL JUSTICE REVIEW 110 (2003); A. vonHirsch et. Al, *CRIMINAL DETERRENCE AND SENTENCE SEVERITY* (Oxford University Press 2003); A. Doob and C. Webster, *Sentencing Severity and Crime: Accepting the Null Hypothesis* in M. Tonry (ed.) *CRIME AND JUSTICE, A REVIEW OF RESEARCH* (University of Chicago Press 2003) and S. Bricsoe, *The Impact of Increased Drink-Driving Penalties on Recidivism Rates in NSW*, 5 ALCOHOL STUDIES BULLETIN, (New South Wales Bureau of Crime Statistics and Research 2004).

<sup>71</sup> A. Doob and C. Webster, *Sentencing Severity and Crime: Accepting the Null Hypothesis* in M. TONRY (ed.) (2004) *CRIME AND JUSTICE, A REVIEW OF RESEARCH* (University of Chicago Press 2004) as cited in Paciocco and Roberts, *supra* note 62 at 47.

<sup>72</sup> Paciocco and Roberts, *supra* note 69 at 49.

<sup>73</sup> *Id.*

In summary, studies that have examined the impact of mandatory minimum sentences in impaired driving cases confirm that mandatory minimums are ineffective as a means to deter impaired driving. Any drop in the incidence of impaired driving appears better attributed to other reasons, such as public education campaigns or changing societal attitudes. As shown above, not only are mandatory minimum penalties an ineffective deterrent to impaired driving, but the imposition of mandatory minimum penalties may have actually had the opposite effect. Since the introduction of mandatory minimum penalties, the number of cases that end in an acquittal, has increased, and has decreased the certainty of an offender receiving any punishment at all, other than the sting of his lawyer's bills.

## **VI. Conclusion**

The ongoing lobby efforts of public interest advocacy groups have succeeded in convincing federal and provincial politicians to continue to raise the impaired driving sentencing bar. However, the judiciary refuses to go quietly into the darkness of mandatory minimums preferring to bravely and selectively exercise judicial discretion in the only remaining way open to them... acquittals. This result appears to be lost on those who continue to blindly push their agenda for increasingly harsh penalties, apparently without realizing that they are undermining their own goals. Blackstone concluded that:

The enacting of penalties to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons, who know what provisions the law has already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil.<sup>74</sup>

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<sup>74</sup> BLACKSTONE, *supra* note 3 at 4.

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The evidence certainly suggests that the true consequences of mandatory minimum penalties for impaired driving offences have been unforeseen and poorly understood by those who pushed for their introduction.

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