

Canadian Sentencing Law and Impaired Driving

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Introduction

Impaired driving victims and their families frequently express frustration with the Canadian criminal justice system, which appears to discount the seriousness of the offenders' conduct. Victims and their families point to Canada's low charge and conviction rates for impaired driving, the failure to ensure that repeat offenders are sentenced as such, the lenient sentences imposed in some cases, the generous credit that had been given for pre-conviction imprisonment, and the fact that offenders are eligible for full parole after serving one-third of their sentences.

In this paper, we review the current sentencing principles and practices as they relate to the federal impaired driving offences. It is often difficult to rationalize the sentence imposed in a given case or the discrepancies among the sentences received by offenders who have committed the same offence. The *Criminal Code*¹ gives judges broad discretion in both the type of sentence imposed and the length of any prison term, particularly in regard to the most serious offences. Impaired driving causing death and impaired driving causing bodily harm² have no minimum sentence and are subject to a maximum of life and ten years' imprisonment respectively. Although trial judges are subject to the general sentencing guidelines established by their provincial or territorial appeal courts, they retain considerable discretion.

Sentencing Principles

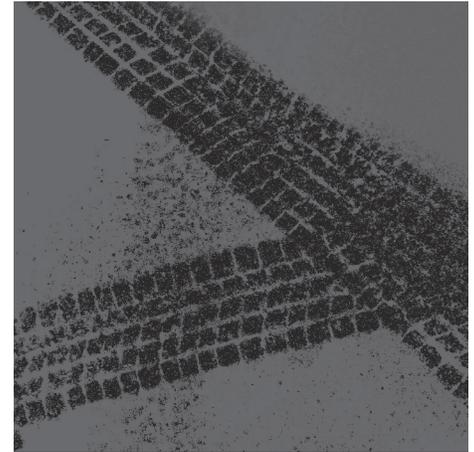
(a) The Fundamental Purpose and Fundamental Principle of Sentencing

The overarching rule in Canada is that sentences must be consistent with the *Criminal Code*'s "fundamental purpose" and "fundamental principle" of sentencing, and "other sentencing principles." According to the *Criminal Code*, the "fundamental purpose" of sentencing is to (s 718):

contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

While the "fundamental purpose" of sentencing sounds noble, it lacks an air of reality. It is doubtful that victims, the general public and offenders would share this aspirational view of the purpose of current sentencing law.



Section 718.1 of the *Criminal Code* states that the "fundamental principle" of sentencing is that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Although the *Criminal Code* does not list retribution as an accepted sentencing objective, the Supreme Court of Canada has acknowledged that it may be a legitimate sentencing consideration.³ However, in that case, the offender committed repeated acts of sexual assault, physical abuse and incest involving young children. Few impaired driving cases will likely engender the same sense of moral outrage.

(b) Aggravating and Mitigating Factors

Judges must also consider any aggravating and mitigating factors relating to the offence or the offender, and should increase or decrease the sentence accordingly. However, the weight given to these factors is a matter of judicial discretion. The *Criminal Code* deems certain considerations to be aggravating factors, but the only one directly relevant to impaired driving is having a blood-alcohol concentration (BAC) above .16% (i.e. twice the *Criminal Code* limit) at the time of the offence.⁴ (s 255.1) In addition, the courts have recognized several other aggravating factors, including: the severity of the victim's injuries;⁵ a prior criminal record or history of violence;⁶ a failure to seek or accept assistance for an underlying addiction, behavioural or other problem;⁷

and, in limited circumstances, a lack of remorse or failure to take responsibility.⁸ A failure to plead guilty is not an accepted aggravating factor.⁹

The accepted mitigating factors include: previous good character;¹⁰ “genuine” remorse;¹¹ aboriginal status (s 718.2(e)); youth or old age;¹² physical or mental disability;¹³ acceptance of responsibility;¹⁴ commitment to address an addiction or other underlying problem;¹⁵ and ongoing financial or other responsibilities for dependent family members.¹⁶ Considerable weight is routinely given to an accused’s guilty plea, based on the view that it indicates remorse and/or an acceptance of responsibility.¹⁷ In reality, many accused plead guilty for strategic reasons unrelated to either of these factors. Some judges have also justified more lenient sentences for offenders who plead guilty on the grounds that guilty pleas reduce demands on prosecutorial and judicial resources.¹⁸ In our view, expediency ought not to be treated as a mitigating factor in sentencing.

(c) Other Sentencing Principles

The *Criminal Code* and the courts have established several other relevant sentencing principles. The sentence imposed in a given case should be comparable to those imposed on similar offenders for like offences in similar circumstances. (s 718.2(b)) In determining the sentence, judges may consider the time that the offender spent in custody prior to conviction. (s 719(3)) Until recently, offenders were often given two days’ credit per day of pre-conviction incarceration.¹⁹ In 2009, the federal government enacted legislation that generally limits such credit to one day for every day imprisoned prior to conviction. However, judges may grant up to 1½ days’ credit if they can establish appropriate circumstances justifying it. (s 719(3.1))

Traditionally, maximum sentences were reserved for the worst offenders in the worst cases. However, consistent with section 718.1 of the *Criminal Code*, the Supreme Court rejected this principle in a 2008 case, stating that a maximum sentence is appropriate if it is “proportionate to the gravity of the offence.”²⁰ This policy change will likely encourage the courts to impose the maximum or other sentences in the upper range somewhat more frequently, but largely in cases involving violence, sexual assaults and similarly reprehensible conduct.

Sentencing should occur “as soon as practicable after an offender has been found guilty,” either in a proceeding following trial or at a separate time. (s 720(1)) The Crown may introduce the offender’s criminal record, but may be required to prove it if the accused refuses to acknowledge the record. A judge may order a probation officer to prepare a pre-sentence report outlining, among other things, the offender’s character, attitude, and family, education and employment history. (s 721) Pre-sentence reports are often sought for young or first offenders. Before sentencing, the judge must ask the offender if he or she has anything to say. (s 726)

In determining the sentence, the judge must consider all relevant information, including any victim impact statements, and the submissions of the prosecutor and defence counsel. (s 726.1) While the prosecutor and defence may make a joint sentence submission as part of a plea bargain, the judge is not bound by it.²¹ Nevertheless, judges typically accept a joint submission unless it is obviously inappropriate.²² Judges must state the specific terms of the sentence and their reasons for it. (s 726.2) In theory, appeal courts will not alter a sentence unless the trial judge applied the wrong legal principle, misapplied a principle or imposed a sentence that was wholly inappropriate.²³

Victim Impact Statements

In 1999, victims and their families were given the right to present a “victim impact statement” prior to sentencing (s 722(2.1)) and at any subsequent Parole Board hearings.²⁴ The statement must comply with the applicable provincial program (s 722(2) (a)), and its content is limited to the physical, emotional and financial impact that the crime had on the victims and their families.²⁵ The statement must be submitted to the court prior to sentencing, and a copy is provided to the Crown and defence counsel. (ss 722(2)(b) and 722.1) There is no limit on the number of victim impact statements that can be submitted,²⁶ and the author is generally permitted to read the statement or

present it “in any other manner that the court considers appropriate.” (s 722(2.1)) In recent years, the courts have allowed victim impact statements to be presented in a video format.²⁷ Victim impact statements permit the victim and his or her family to explain to the court and the offender, in their own words, how they have been affected by the crime. While judges must consider victim impact statements, they may impose whatever sentence they believe is appropriate. (s 722(1))

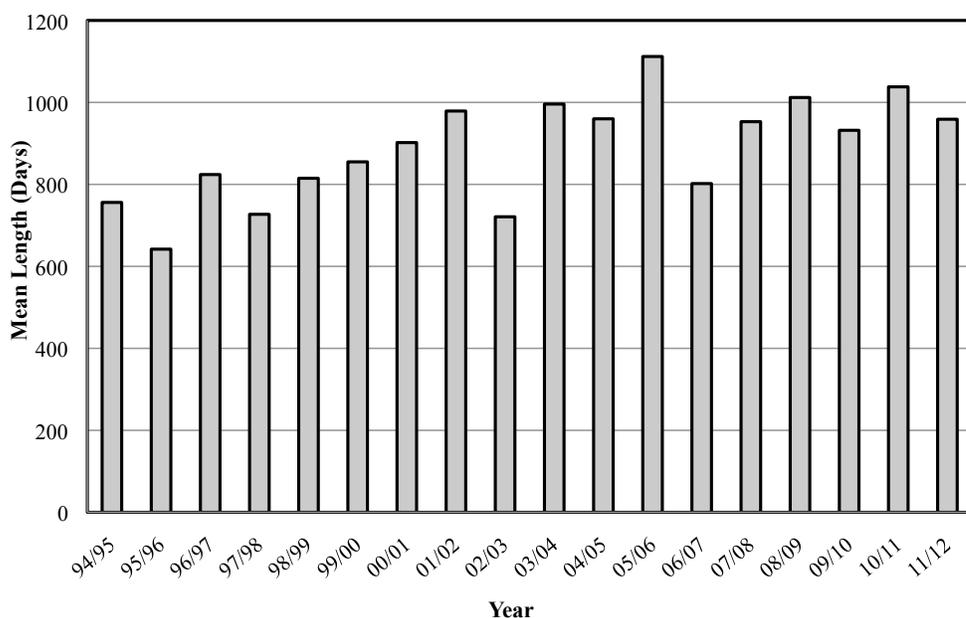
Maximum and Minimum Sentences

(a) Maximum Sentences

The maximum penalties for the impaired driving offences were increased in 1985, 1999, 2000, and 2008.²⁸ These measures have considerable political appeal in that they allow the government to claim that it is taking a tough stand on impaired driving. For present purposes, the 2000 amendments are the most significant because they increased the maximum

sentences for impaired driving causing death and bodily harm to life and 10 years' imprisonment, respectively. (s 255(2)-(3.2)) As Chart I illustrates, the 2000 amendments appear to have encouraged some judges to impose slightly longer prison terms for impaired driving causing death.

Chart I: The Mean Length of Custodial Sentences for Impaired Driving Causing Death: Canada, 1994/95-2011/12²⁹



Nevertheless, sentences at or near the maximum are likely to remain rare. In fact, there appears to be only one case in which the maximum sentence of life imprisonment was imposed for impaired driving causing death. In *R c Walsh*, the offender fled the scene after striking and killing a wheelchair-bound woman. His BAC was more than double the *Criminal Code* limit, and he had 18 previous impaired driving and 96 other prior criminal convictions.³⁰ Although the judge described Walsh as being incorrigible and likely to re-offend, the prosecutor's application to designate Walsh as a dangerous offender was denied.

(b) Minimum Sentences

While the least serious impaired driving offences (*i.e.* driving while one's ability to do so is impaired by alcohol and/or a drug, driving with a BAC above .08%, and failing to take a required test) are subject to a mandatory minimum sentence, the most serious offences (*i.e.* impaired driving causing death and bodily harm) are not. (s 255) Impaired driving victims, their families and the public have called for the enactment of a mandatory minimum prison term for these latter offences. However, the enactment of minimum sentences for impaired driving causing death and bodily harm would likely have both positive and negative consequences.

One benefit of minimum sentences is that they would remove discretion at the lowest end of the sentencing range, eliminating what are perceived to be the most unduly lenient sentences. Minimum sentences would also reduce sentencing discrepancies, ensuring greater consistency and fairness. This accords with the accepted principle that the sentence imposed in a given case should be comparable to those imposed on similar offenders for like offences, in similar circumstances. (s 718.2(b))

However, there are several potential concerns with mandatory minimum sentences. First, there is a risk that the minimum sentence will become the default sentence in almost all but

the worst cases, whether or not the offence warrants it. In other words, the minimum sentence would become the norm, rather than a sentence that is reserved for the least serious offenders. Second, the enactment of a minimum prison sentence for impaired driving causing death and bodily harm may discourage the police from laying these charges, encourage accused to plead not guilty, increase pressures on prosecutors to plea bargain for lesser charges, and result in more trials. These factors would likely further reduce the already low charge and conviction rates for impaired driving causing death and bodily harm.

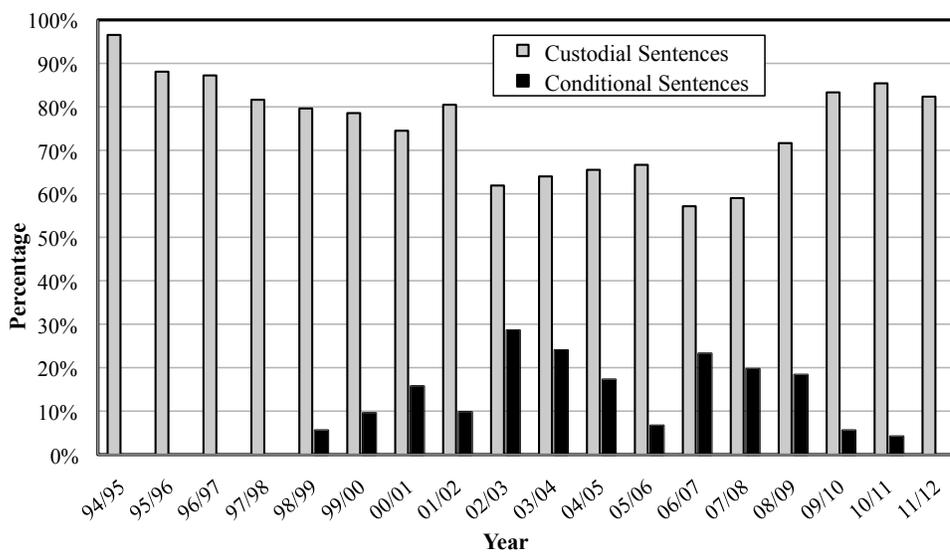
Third, minimum sentence legislation would invariably be challenged as constituting cruel and unusual punishment contrary to section 12 of the *Canadian Charter of Rights and Freedoms*.³¹ The longer the mandatory minimum sentence, the greater the number and likely success of the section 12 challenges. These challenges would more likely be successful in cases involving one or more mitigating factors, such as a case in which the driver was a young first offender of previous good character who had a relatively low BAC (*e.g.* .10-.14%) and showed genuine remorse. Fourth, given the preceding concerns and the widespread opposition among civil liberties groups, lawyers and judges,³² establishing a mandatory minimum prison term for impaired driving causing death and bodily harm would not necessarily increase the length of sentences for these offences.

Finally, the need for mandatory minimum prison terms may have been somewhat reduced. Prompted by Mothers Against Drunk Driving (MADD) Canada and other victims' groups, Parliament eliminated conditional sentences of imprisonment as of 2008 for specified categories of crimes, including impaired driving causing death and bodily harm.³³ As Chart II illustrates, the decline in conditional sentences for impaired driving causing death was accompanied by an increase in the percentage of prison sentences.

(c) Maximum and Minimum Sentences in the Context of Impaired Driving

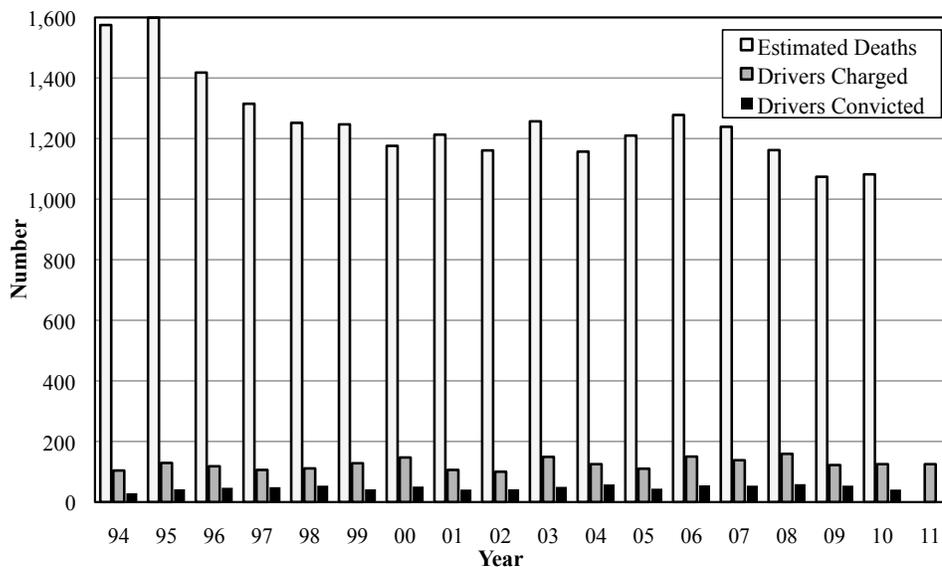
Sentencing issues are important, but the focus on having “tough laws” has detracted from other critical issues. For example, in contrast to most comparable developed democracies, Canada has failed to enact preventive measures, such as comprehensive random breath testing legislation and a criminal BAC limit of .05%.³⁵ Similarly, as Chart III illustrates, Canada’s low charge and conviction rates for impaired driving causing death and bodily harm warrant far greater attention. In 2010, the latest year for which national data are available, there were an estimated 1,082 impairment-related traffic fatalities, but only 125 charges and 48 convictions for impaired driving causing death.³⁶ Even accounting for multi-fatality

Chart II: The Percentage of Impaired Driving Causing Death Convictions Resulting in Custodial and Conditional Sentences: 1994-2012*³⁴



* Conviction and sentencing data are reported by fiscal year.

Chart III: Impairment-Related Traffic Deaths, and Charges and Convictions for Impaired Driving Causing Death: 1994-2010*³⁸



*Death and charge data are reported by calendar year, and conviction data are reported by fiscal year.

crashes and crashes in which the impaired driver was killed, only a small fraction of impaired drivers who cause a fatal crash are charged with, let alone convicted of, impaired driving causing death.³⁷

The Kienapple Principle and Multiple Counts

In *R v Kienapple*,³⁹ the Supreme Court held that a person cannot be convicted of more than one criminal offence arising from a single criminal act. Consequently, although impaired drivers are typically charged with both having a BAC above .08% and driving while their ability to do so is impaired by alcohol, they can only be convicted of one of these offences. The essential element of these two offences is the same: namely, drinking to excess and getting behind the wheel of a car. Similarly, an accused charged with dangerous driving causing death and criminal negligence causing death can only be convicted of one of these offences.

The *Kienapple* principle does not apply if a single act kills or injures more than one person. For example, an impaired driver who kills three people may be charged with, and convicted of, three counts of impaired driving causing death. A sentence will be imposed for each conviction, but the sentences will be served concurrently. The fact that the offender killed three people goes to the gravity of the conduct, and the sentence imposed for each offence will reflect this fact. The judge will increase the offender’s prison term moderately, rather than simply tripling the sentence that he or she would have given if one person had been killed.⁴⁰

The *Kienapple* principle does not preclude convicting a person of multiple criminal offences if each offence arose from a separate act. For example, *Kienapple* would not apply to a person charged with: impaired driving and fleeing the scene of the crash; driving while impaired and refusing to provide a breath sample; or impaired driving and driving while prohibited. These situations involve two discrete criminal acts for which the offender may be separately convicted and sentenced.

Concurrent and Consecutive Sentences

Concurrent sentences are sentences for two or more criminal offences that are served at the same time. Consecutive sentences are sentences for two or more criminal offences that are served one after another. (s 718.3(4)(c)) The *Criminal Code* provides that if consecutive sentences are imposed, “the combined sentence should not be unduly long or harsh.” (s 718.2(c)) While judges may order sentences to be served consecutively if more than one discrete offence arose from a single act, they rarely do so.⁴¹ Nor do judges generally order sentences to be served consecutively when the offences arose from a sequence of related events, such as a case in which an impaired driver causes a crash and then flees the scene.

Victim Surcharges

Prior to recent amendments, the *Criminal Code* imposed a victim surcharge of 15% on any fine that was imposed. If no fine was imposed, the set surcharges were \$50 for a summary conviction offence and \$100 for an indictable offence. Judges had discretion to increase the surcharge or, as was more commonly the case, to waive it in cases of undue hardship.⁴² As one commentator stated, judges often waived the surcharge “without an application from the offender, without any showing of undue hardship and without [providing] any reasons.”⁴³

As of October 2013, the fines were doubled from 15% to 30%, as were the set surcharges for summary conviction and indictable offences. (s 737(2)). Judges retained discretion to increase the surcharge, but could no longer reduce or waive it. (s 737(1) and (3)) Proceeds from the surcharge can only be used to assist victims, as directed by the provincial and territorial government. (s 737(7))

Types of Sentences

(a) Imprisonment

All available sanctions that are reasonable, other than imprisonment, should be considered for all offenders, particularly those who are aboriginal. (s 718.2(e)) Prison terms of two years or more are served in federal penitentiaries, and sentences of less than two years are served in provincial prisons. (s 743.1(1) and (3)) Judges may permit sentences of 90 days or less to be served intermittently. (s 732(1)(a)) Offenders serving intermittent sentences are subject to a probation order when not confined. (s 732(1)(b)) Typically, intermittent sentences are served on weekends and are used to allow offenders to maintain employment and schooling, or meet their family obligations. Intermittent sentences are often used for repeat impaired driving offenders serving 90 days or less.⁴⁴

The Impaired Driving Offences and Sanctions

The impaired driving offences carry potentially severe sanctions, particularly for a second or subsequent offence. Charts IV-VI divide the impaired driving offences into

three categories: the common impaired driving offences; impaired driving causing death and bodily harm; and driving while subject to a federal driving prohibition, or a provincial or territorial licence suspension for a federal impaired driving offence.

Chart IV: Penalties for the Common Impaired Driving Offences

OFFENCES	MINIMUM PENALTY	MAXIMUM PENALTY	
<ul style="list-style-type: none"> — Driving while one’s ability to do so is impaired by alcohol and/or drugs — Driving with a BAC above .08% — Failing or refusing to take a required test without a reasonable excuse 	<p>First offence: *</p> <ul style="list-style-type: none"> • \$1,000 fine; and • 1-year driving prohibition <p>Second offence: *</p> <ul style="list-style-type: none"> • 30-day sentence; and • 2-year driving prohibition <p>Subsequent offence: *</p> <ul style="list-style-type: none"> • 120-day sentence; and • 3-year driving prohibition 	<p>SUMMARY CONVICTION</p> <p>First offence:</p> <ul style="list-style-type: none"> • \$2,000 fine; • 18-month sentence; and • 3-year driving prohibition <p>Second offence:</p> <ul style="list-style-type: none"> • \$2,000 fine; • 18-month sentence; and • 5-year driving prohibition 	<p>INDICTMENT</p> <p>First offence:</p> <ul style="list-style-type: none"> • 5-year sentence; • 3-year driving prohibition; and • any fine the judge deems appropriate <p>Second offence:</p> <ul style="list-style-type: none"> • 5-year sentence; • 5-year driving prohibition; and • any fine the judge deems appropriate

* The minimum federal driving prohibitions of 1, 2 and 3 years for first, second and subsequent offences are reduced to 3, 6 and 12 months if the driver participates in a provincial or territorial alcohol interlock program.

(b) Conditional Sentences of Imprisonment

A conditional sentence of imprisonment is a prison sentence of less than two years that the judge allows the offender to serve in the community, while subject to certain conditions. Conditional sentences of imprisonment cannot be imposed for offences that carry a minimum term of imprisonment. Moreover, a judge may only impose a conditional sentence if he or she is satisfied that it “would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing.” (s 742.1(a)) Individuals convicted of impaired driving causing death had often received conditional sentences, which resulted in them serving no time in jail. (Chart II, above) As indicated, after 2007, the offences of impaired driving causing death and bodily harm no longer qualified for a conditional sentence. (ss 742.1, and 752, “serious personal injury offence”)

(c) Probation Orders and Suspended Sentences

A court may suspend the passing of sentence and place an offender on probation if the offence carries no minimum penalty. In making this decision, the court is directed to consider the offender’s age and character, and the nature and circumstances of the offence. (s 731(1)(a)) Probation orders may also be imposed in addition to a fine and/or in addition to a term of imprisonment of less than two years. (s 731(1)(b)) Offenders who receive a conditional discharge or an intermittent sentence must be put on probation. Probation orders cannot exceed three years in length (s 732.2(2)(b)) and must contain three conditions: keeping the peace and being of good behaviour; appearing before a court when required; and notifying the court or a probation officer of any change in name, address or employment. (s 732.1(2)) Judges may impose additional conditions including: curfews; community service orders; prohibitions on alcohol and drug use, or possessing a weapon; and participation in treatment. (s 732.1(3))

Failing or refusing to comply with a probation order, without a reasonable excuse, constitutes a federal offence that is subject to a maximum sentence of two years’ imprisonment. (s 733.1(1)) In addition to being sentenced for the new offence, an offender who received a suspended sentence may have his or her probation revoked and be sentenced for the original offence. (s 732.2(5)(d))

(d) Fines

Many criminal offences, including driving with a BAC above .08%, driving while one’s ability to do so is impaired by alcohol or drugs, and failing to take a required test, are subject to mandatory minimum fines. (s 255(1)(a)(i)) Judges may also impose a fine in addition to any other sanction, or in lieu of any other sanction except a mandatory minimum prison term. (s 734(1)) In setting the amount of a fine, judges must consider the offender’s ability to pay. (s 734(2)) Offenders who do not pay within the time set by the judge are in default of payment and may be imprisoned. (s 734(4)) Although practices vary, impaired drivers and other offenders are rarely imprisoned for failing to pay,⁴⁵ and fines are often not collected.

Chart V: Penalties for Impaired Driving Causing Death and Bodily Harm

OFFENCES	MINIMUM PENALTY	MAXIMUM PENALTY
<ul style="list-style-type: none"> — Impaired driving causing death — Driving with a BAC above .08% and causing death — Failing or refusing to take a required test without a reasonable excuse and causing death 	No minimum penalty	<ul style="list-style-type: none"> • Life sentence; • Any driving prohibition the judge deems appropriate; and • Any fine the judge deems appropriate
<ul style="list-style-type: none"> — Impaired driving causing bodily harm — Driving with a BAC above .08% and causing bodily harm — Failing or refusing to take a required test without a reasonable excuse and causing bodily harm 	No minimum penalty	<ul style="list-style-type: none"> • 10-year sentence; • 10-year driving prohibition; and • Any fine the judge deems appropriate

Chart VI: Penalties for Driving While Prohibited or Suspended

OFFENCES	MINIMUM PENALTY	MAXIMUM PENALTY
— Driving while subject to a federal prohibition, or to a provincial or territorial suspension for a federal impaired driving offence	No minimum penalty	Summary Conviction <ul style="list-style-type: none"> • \$2,000 fine; • 18-month sentence; and • 3-year driving prohibition
		Indictment <ul style="list-style-type: none"> • 5-year sentence; • 3-year driving prohibition; and • Any fine the judge deems appropriate

Repeat Offenders

Offenders with one or more prior impaired driving convictions are often sentenced as first offenders. In order to seek the heavier sanctions that the *Criminal Code* provides for repeat impaired driving offences (s 255(1)(a)(ii) and (iii)), the prosecutor must notify the offender before he or she enters a plea. (s 727(1)) However, as *R v Anderson* illustrates, even then the application may fail.⁴⁶ In *Anderson*, the prosecutor's decision to seek a heavier sanction for an offender with four prior impaired driving convictions was struck down under section 7 of the *Charter*. The Court of Appeal held that the prosecutor's exercise of discretion in seeking the heavier sentence was arbitrary because the prosecutor failed to consider the offender's aboriginal status.

Moreover, it can be difficult and time-consuming to prove that an offender has a prior impaired driving conviction. Prosecutors may choose not to introduce a suspect's prior impaired driving conviction if it occurred five or more years earlier.⁴⁷ As part of a plea or sentence negotiation, a prosecutor may agree not to introduce the offender's record.⁴⁸ If an accused pleads guilty at his or her first court appearance, the prosecutor may not be aware of the offender's record.

The failure to identify repeat offenders frustrates Parliament's goal in enacting heavier sanctions for second and subsequent offences. More importantly from a public safety perspective, many provincial and territorial assessment, treatment and alcohol interlock programs are tied to whether the individual is a first or repeat offender. Consequently, sentencing repeat offenders as first offenders may delay efforts to address the offender's underlying alcohol and/or drug problems.

Dangerous and Long-Term Offenders

Individuals can be classified as "dangerous offenders" if they have committed a "serious personal injury offence" and have a history of violent, aggressive or other behaviour indicating that they will continue to be "a threat to the life, safety or physical or mental well-being of other persons."⁴⁹ (s 753(1)(a)) The term "serious personal injury offence" is limited to offences that are subject to a maximum penalty of at least 10 years' imprisonment (s 752, "serious personal injury offence" (a)), which include impaired driving causing death and bodily harm. In most cases,⁵⁰ dangerous offenders must be sentenced to incarceration for an indeterminate period (s 753(4)(a)) and are subject to restrictive parole eligibility provisions.⁵¹

Individuals who have been convicted of a serious personal injury offence may also be classified as "long-term offenders" if: the Crown establishes that a prison sentence of two years or more is appropriate; there is a substantial risk that the offender will re-offend; and there is a reasonable possibility of eventual control of the risk in the community. (s 753.1(1)) After serving the sentence imposed for the offence, long-term offenders may be subject to a long-term supervision order of up to 10 years. (s 753.1(3)(b))

Individuals convicted of impaired driving causing death or bodily harm who have a long history of impaired driving offences will often meet the statutory requirements for dangerous or long-term offender status. Nevertheless, judges appear to be extremely reluctant to invoke these provisions, even in the most egregious cases. As noted above, in *R c Walsh*⁵² the judge refused to designate Walsh as a dangerous offender despite his reprehensible conduct, and his 18 previous impaired driving and 96 other prior criminal convictions.⁵³

Parole

Most offenders who have received penitentiary sentences may apply for day parole after serving the greater of six months or six months prior to their first full parole eligibility date. They may apply for full parole after serving one-third of their sentence. (*Corrections and Conditional Release Act*, ss 119(1)(c) and 120(1)) Victims who apply to the Parole Board of Canada have a right to be informed of the offender's parole hearings, and the right to present a statement. (*Ibid*, s 140(10)-(12)) Victims may also apply for more specific information about the offender, including where the offender is imprisoned, the offender's parole conditions, and destination upon release. (*Ibid*, s 26(1)(b)) The Parole Board will provide this information if it believes that the victim's interests in this regard outweigh the offender's privacy interests. (*Ibid*) In making decisions, the Board must consider any victim impact statements (*Ibid*, s 23(1)(e)) and a

broad range of other information. (*Ibid*, s 101(a)) However, the *Act* states that "[t]he protection of society is the paramount consideration ... in the determination of all cases." (*Ibid*, s 100.1)

Conclusion

The principles governing Canadian sentencing law are numerous, convoluted and appear to operate at cross-purposes. Judges can pick and choose among the principles to justify the sentence that they wish to impose. A judge wanting to impose an onerous sentence need only emphasize denunciation and deterrence.⁵⁴ Conversely, a judge wishing to impose a lenient sentence will focus on an offender's youth, prior good conduct and remorse.⁵⁵ In contrast to their own broad discretion in sentencing, the Canadian courts have imposed exacting standards on the exercise of discretion by prosecutors,⁵⁶ cabinet ministers⁵⁷ and other government officials.

While the impaired driving offences carry severe maximum penalties, the emphasis is on non-custodial sentences. Repeat offenders are often sentenced as first offenders, avoiding the heavier penalties that the *Criminal Code* provides and the mandatory remedial programs that are designed to address the offenders' underlying alcohol or drug problems. Without question, current Canadian sentencing law and practices are troubling and warrant review. Nevertheless, these issues should not delay consideration of other substantive legislative reforms that have been shown to significantly reduce impaired driving deaths and injuries in comparable countries.

References

- 1 RSC 1985, c C-46.
- 2 In 2008, two new impaired driving offences involving death and bodily harm were enacted. *Criminal Code, ibid*, s 255(2.1), (2.2), (3.1), and (3.2). For ease of reference, we have not distinguished between the offences of impaired driving causing death and bodily harm, and the new offences of impaired driving involving death and bodily harm.
- 3 *R v CAM*, [1996] 1 SCR 500 at para 79.
- 4 *R v Frank*, [2005] SJ No 244 (CA).
- 5 *R v Harrington*, [2012] OJ No 4545 at para 58 (Sup Ct).
- 6 *R v Andrade* (2010), 260 CCC (3d) 353 (NBCA).
- 7 *R v Yellowknee*, 2008 ABPC 168 (CanLII) at paras 278-80 [*Yellowknee*].
- 8 *R v Hawkins*, [2011] NSJ No 33 (CA) at para 33; and *R v Valentini*, [1999] OJ No 251 (CA).
- 9 *R v Blair*, [2002] BCJ No 656 (CA).
- 10 See for example, *R v McCormick*, [1979] MJ No 21 (CA). McCormick, a 20-year-old first offender and member of the United States Air Force, committed an armed robbery with a knife while under the influence of alcohol and valium. The trial judge sentenced McCormick to only three months in prison, accepting defence submissions that McCormick had unwittingly taken the valium and that the robbery was totally out of character. The Manitoba Court of Appeal upheld the trial judge's reasons and lenient sentence.
- 11 See for example, *R v Campbell*, [1977] NSJ No 443 (SC App Div).
- 12 For an example of youth and old age as mitigating factors, see *R v Foley*, [1983] NJ No 41 (CA); and *R v McNamara et al (No 2)*, [1981] OJ No 3260 (CA), respectively.
- 13 *R c Valiquette*, [1990] JQ No 1070 (CA).
- 14 *R v Magas*, [2012] AJ No 182 (CA).
- 15 *R v Fletcher-Jarvis*, [2005] OJ No 271 (CA) at para 1.
- 16 *Geraldes c The Queen*, [1965] JQ No 22 (CA).
- 17 *R v Gaya*, [2010] OJ No 185 (SC) at paras 53-60, rev'd on other grounds [2010] OJ No 5476 (CA).
- 18 *R v Hoang*, [2003] AJ No 1555 (CA) at para 25.
- 19 *R v Wust*, [2000] 1 SCR 455.
- 20 *R v LM*, [2008] 2 SCR 163 at para 22. The Court's position was understandable, given that the offender had a prior record for sexually assaulting young children and was convicted of sexually assaulting his four-year-old daughter, making and distributing child pornography, and possessing thousands of pornographic videos and photographs, many of which involved his daughter and/or her friend. See also *R v Chedeshingh*, [2004] SCJ No 15.
- 21 *R v Macheck*, [1994] NSJ No 541 (CA); and *R v Randhile*, [1997] AJ No 1238 (CA) at 212.
- 22 C Ruby, *Sentencing*, 8th ed (Markham, ON: LexisNexis Canada Inc, 2012) at 76 [Ruby].
- 23 *R v CAM*, *supra* note 3; and *R v Stone*, [1999] SCJ No 27 at para 230.
- 24 *Corrections and Conditional Release Act*, SC 1992, c 20, s 140(10) and (11).
- 25 *R v Gabriel*, [1999] OJ No 2579 (SC) at paras 29-33.
- 26 *R v Roberts*, [2001] AJ No 772 (QB) at para 51, aff'd [2006] AJ No 407 (CA), leave to appeal to SCC ref'd [2006] SCCA No 223.
- 27 See for example, *R v Laglace*, [2013] BCJ No 1252 (SC) at para 20.
- 28 See respectively, *Criminal Law Amendment Act* 1985, SC 1985, c 19; *An Act to amend the Criminal Code (impaired driving and related matters)*, SC 1999, c 32; *An Act to amend the Criminal Code (impaired driving causing death and other matters)*, SC 2000, c 25; and *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, SC 2008, c 6.
- 29 R Solomon & A Berger, *Impairment-Related Traffic Deaths and Injuries, and Associated Charges, Dispositions and Sentences: Canada, 1994-2012* (Oakville, ON: MADD Canada, 2013) at 6 [Solomon]. There was a somewhat similar increase in the mean length of custodial sentences for impaired driving causing bodily harm. *Ibid* at 14.
- 30 [2009] JQ No 9144 (Qc Prov Ct) [*Walsh*].

- 31 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For a recent review of minimum sentences and section 12 of the *Charter*, see *R v Charles*, 2013 ONCA 681 and *R v Nur*, 2013 ONCA 667, in which the courts struck down the five and three-year mandatory minimum prison terms for a repeat and first offence of unlawful possession of a loaded firearm.
- 32 *R v Wust*, [2000] SCJ No 19 at paras 18-21.
- 33 *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, SC 2007, c 12, s 1.
- 34 Solomon, *supra* note 29 at 5. There was a similar increase in the percentage of prison sentences for impaired driving causing bodily harm once conditional sentences could no longer be imposed. *Ibid* at 12.
- 35 For a review of the effectiveness of these measures see R Solomon, E Chamberlain & C Lynch, "Canada's New Impaired Driving Legislation: Modest Gains and Missed Opportunities" (2010) 56 *Crim LQ* 51 at 72-80; and T Babor et al, *Alcohol: No Ordinary Commodity*, 2d ed (Oxford, UK: Oxford University Press, 2003) at 159-62.
- 36 R Solomon & A Berger, *Impairment-Related Driving Deaths and Injuries, and Associated Charges and Convictions: Canada, 1986-2012* (Oakville, ON: MADD Canada, 2013) at 3.
- 37 The charge and conviction rates for impaired driving causing bodily harm are even more disappointing. In 2010, there were an estimated 63,821 impairment-related traffic injuries, but only 747 charges and 321 convictions. *Ibid* at 8.
- 38 *Ibid* at 3.
- 39 [1975] 1 SCR 729.
- 40 *R v Kummer*, [2011] OJ No 234 (CA).
- 41 For example, an impaired driver who was driving well in excess of the speed limit would likely receive concurrent sentences if convicted of the offences of driving with a BAC above .08% and dangerous driving. *R v Mascarenhas* (2002), 60 OR (3d) 465 (CA).
- 42 These provisions were repealed and replaced when the *Increasing Offenders' Accountability for Victims Act*, SC 2013, c 11, s 3(3) came into force.
- 43 Ruby, *supra* note 22 at 145.
- 44 *R v Howard*, [1991] AJ No 1025 (CA); *R v Dhaliwal*, [2009] OJ No 4125 (Sup Ct); and *R v Rawluk*, [2005] AJ No 1596 (Prov Ct).
- 45 In *R v Wu*, [2003] SCJ No 78 at para 3, the Supreme Court stated that "[g]enuine inability to pay a fine is not a proper basis for imprisonment."
- 46 2013 NLCA 2.
- 47 B Carroll and R Solomon, "Understanding drinking and driving reforms: a profile of Ontario statistics" (2000) 6 *Inj Prev* 96 at 99.
- 48 *Ibid*.
- 49 Individuals may also be classified as dangerous offenders if they have committed a single serious personal injury offence that, because of its brutal or sexual nature, indicates that they pose an ongoing threat to the public. *Criminal Code*, s 753(1)(a)(iii) and (1)(b).
- 50 Judges have a limited discretion to impose a lesser sentence, but only if there is a "reasonable expectation" that it would adequately protect the public against the risk of "murder or a serious personal injury offence." (s 753(4.1))
- 51 *Criminal Code*, s 761(1); and *Corrections and Conditional Release Act*, *supra* note 24, ss 115(1)(b), 119(1)(b) and 121(2)(b).
- 52 *Supra* note 30.
- 53 Apparently, no impaired driver has ever been designated as a dangerous offender, and few have been classified as long-term offenders. The offender in *Yellowknife*, *supra* note 7, was found to be a long-term, but not a dangerous, offender. Yellowknife stole a vehicle and, while fleeing from the police at 150 km/hour, crashed and killed four people. His BAC was .22%, he had two impairing medications in his system, and he had repeatedly failed to address his long-standing addictions and behavioural problems. Yellowknife had 61 prior criminal convictions for violent and non-violent offences, including two driving convictions. Similarly, the offender in *R v Allen*, [2003] OJ No 5543 (Ct J), was found to be a long-term offender, following his convictions for driving while disqualified, impaired driving causing bodily harm, and failing to stop at the scene of an accident. Allen had 10 prior impaired driving and 8 prior driving while disqualified convictions.
- 54 *R v Veitch*, [2008] AJ No 51 (Prov Ct).
- 55 *R v Priest*, [1996] OJ No 3369 (CA).
- 56 *Anderson*, *supra* note 46.
- 57 *Canada (Attorney General) v PHS Community Services Society*, [2011] 3 SCR 134. See also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 49-56.

Postscript

There are three very recent legal developments that warrant comment. First, as indicated, Parliament had limited credit for time served to one day for every day imprisoned prior to conviction. However, judges were authorized to grant up to 1.5 days credit if they could establish that "the circumstances justif[ied] it." (s. 719(3.1)) Nevertheless, the courts continued to routinely award 1.5 days credit, based on the harshness of pre-sentence detention and the fact that it did not count towards earned remission or parole eligibility. In April 2014, the Supreme Court of Canada unanimously held that the loss of earned remission and parole eligibility alone would almost always constitute circumstances requiring enhanced credit, even if the conditions in the remand centre were not particularly harsh. (*R v Carvery*, 2014 SCC 27; and *R v Summers*, 2014 SCC 26)

Second, as indicated, Parliament doubled the amount of the victim surcharges and made their imposition mandatory in October 2013. Trial courts have subsequently held that these provisions breach the offender's *Charter* rights under s. 7 (the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice) and s. 12 (the prohibition against cruel or unusual punishment or treatment). Moreover, these courts have held that these violations cannot be justified under s. 1 of the *Charter*. (See for example, *R v Tinker*, 2014 ONCJ 208; and *R v Flaro*, 2014 ONCJ 2)

Third, on April 2013 the federal government introduced *The Canadian Victims Bill of Rights*. The Bill expands the ability of victims to obtain case specific information and will help ensure that their views are sought at various stages in the criminal proceedings, including during plea bargaining. Offenders will be held more financially accountable in terms of victim surcharges and restitution orders. The security and privacy interests of victims will be given greater protection. While an infringement of the Bill will allow victims to register a complaint, it will not invalidate the related criminal proceedings or create a cause of action against the responsible official. The real world impact of the Bill will depend in large measure on the provinces' commitment to strengthening victims rights. (Bill C-32, *An Act to establish the Canadian Victims Bill of Rights and to Amend Certain Acts*, 2nd Sess, 41st Parl, 2014, (first reading 03 April 2014)).