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LEGISLATIVE SUMMARY



Bill C-46: An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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Legislative Summary of Bill C-46
(Legislative Summary)

Publication No. 42-1-C46-E

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CONTENTS

| | | |
|-------------|--|----|
| 1 | BACKGROUND..... | 1 |
| 1.1 | Purposes of the Bill and Principal Amendments..... | 1 |
| 1.2 | Impaired Driving in Canada | 3 |
| 1.2.1 | Statistics | 3 |
| 1.2.2 | History of Criminal Law Respecting Impaired Driving | 3 |
| 1.2.2.1 | The First Breath Tests (1969)..... | 4 |
| 1.3 | Recent Legislative Initiatives..... | 4 |
| 1.3.1 | Bill C-73, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts | 4 |
| 1.3.2 | Bill C-226, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts | 4 |
| 1.3.3 | Bill C-247, An Act to amend the Criminal Code (passive detection device)..... | 5 |
| 1.3.4 | Bill S-230, An Act to amend the Criminal Code (drug-impaired driving) | 5 |
| 2 | DESCRIPTION AND ANALYSIS | 6 |
| 2.1 | Part 1: Offences Relating to Transportation – Drugs..... | 6 |
| 2.1.1 | Amendments to the <i>Criminal Code</i> (Clauses 1 to 9)..... | 6 |
| 2.1.1.1 | New Offences (Drug-Impaired Operation) and New Punishments..... | 6 |
| 2.1.1.2 | New Investigative Methods..... | 7 |
| 2.1.1.2.1 | Drug Recognition Expert (or Evaluating Officer) | 7 |
| 2.1.1.2.2 | New Presumption (Type of Drug That Caused Impairment)..... | 7 |
| 2.1.2 | Transitional Provision (Clause 10) | 8 |
| 2.2 | Part 2: Offences Relating to Conveyances – Alcohol and Drugs | 8 |
| 2.2.1 | Amendments to the <i>Criminal Code</i> (Clauses 12 to 31)..... | 8 |
| 2.2.1.1 | Offences and Sentencing (New Sections 320.13 to 320.26 of the <i>Criminal Code</i>) | 8 |
| 2.2.1.1.1 | Offences and Punishment | 8 |
| 2.2.1.1.1.1 | Dangerous Operation..... | 9 |
| 2.2.1.1.1.2 | Operation While Impaired | 10 |
| 2.2.1.1.1.3 | Failure or Refusal to Comply with a Demand | 11 |
| 2.2.1.1.1.4 | Failure to Stop After an Accident | 11 |
| 2.2.1.1.1.5 | Flight from a Peace Officer | 12 |
| 2.2.1.1.1.6 | Operation While Prohibited | 12 |

| | | |
|-------------|--|----|
| 2.2.1.1.2 | Sentencing..... | 12 |
| 2.2.1.1.2.1 | Aggravating Circumstances | 12 |
| 2.2.1.1.2.2 | Delay of Sentencing | 13 |
| 2.2.1.1.2.3 | Prohibition Orders | 13 |
| 2.2.1.1.2.4 | Stay of Order Pending Appeal | 14 |
| 2.2.1.1.2.5 | Earlier and Subsequent Offences | 14 |
| 2.2.1.2 | Investigative Matters | |
| | (New Sections 320.27 to 320.3 of the <i>Criminal Code</i>) | 15 |
| 2.2.1.2.1 | (Roadside) Testing for the Presence of Alcohol or a Drug..... | 15 |
| 2.2.1.2.1.1 | Mandatory Alcohol Screening | 15 |
| 2.2.1.2.2 | Taking and Evaluating Samples (at the Police Station) | 16 |
| 2.2.1.2.3 | Warrants to Obtain Blood Samples | 17 |
| 2.2.1.3 | Evidentiary Matters | |
| | (New Sections 320.31 to 320.35 of the <i>Criminal Code</i>) | 17 |
| 2.2.1.3.1 | Presumption of Accuracy of Results..... | 18 |
| 2.2.1.3.2 | Presumption of Identity | 20 |
| 2.2.1.3.3 | Presumption of Operation..... | 20 |
| 2.2.1.4 | General Provisions | |
| | (New Sections 320.36 to 320.4 of the <i>Criminal Code</i>) | 21 |
| 2.2.1.5 | Review and report (Clause 31.1)..... | 21 |
| 2.2.2 | Transitional Provisions (Clauses 32 to 38)..... | 22 |
| 2.2.3 | Consequential Amendments (Clauses 39 to 50)..... | 22 |
| 2.3 | Part 3: Coordinating Amendments and Coming into Force | 22 |
| 2.3.1 | Coordinating Amendments (Clause 51) | 22 |
| 2.3.2 | Coming into Force (Clause 52)..... | 23 |

LEGISLATIVE SUMMARY OF BILL C-46: AN ACT TO AMEND THE CRIMINAL CODE (OFFENCES RELATING TO CONVEYANCES) AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill C-46, An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, was introduced in the House of Commons by the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, on 13 April 2017.¹

On 31 May 2017, at second reading, the bill was sent to the House of Commons Standing Committee on Justice and Human Rights for study. Several amendments to the bill were adopted by the committee on 16 October 2017.² **In the Senate, the Standing Senate Committee on Legal and Constitutional Affairs studied the bill between 31 January and 23 May 2018. Several amendments were adopted by the Committee on 23 May 2018.³ The bill was also amended at third reading in the Senate. Lastly, after an exchange of messages between the Senate and the House of Commons, some amendments passed by the Senate were rejected by the House of Commons. The bill received Royal Assent on 21 June 2018.**

Bill C-46 includes some of the amendments set out in Bill C-73, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts (short title: Dangerous and Impaired Driving Act), a bill from the 2nd Session of the 41st Parliament.⁴ Bill C-73 died on the *Order Paper* when Parliament was dissolved after the general election was called in August 2015.

In early 2016, the content of Bill C-73 was also reprised (with some changes) in Bill C-226, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts, which was sponsored by Steven Blaney, MP.⁵

1.1 PURPOSES OF THE BILL AND PRINCIPAL AMENDMENTS

Part 1 of the bill amends the *Criminal Code* (the Code)⁶ to strengthen the legislative provisions relating to driving while impaired by drugs, including cannabis.⁷ These amendments stem from the government's plan to allow regulated access to cannabis, as set out in Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, which was introduced the same day as Bill C-46.⁸

The primary measure in Part 1 consists of the introduction of new offences relating to driving while impaired by drugs, and of new tools for police to screen for the presence of drugs in a driver's body. More precisely, the bill provides for the roadside use of oral fluid drug screening devices (or approved drug screening equipment) by police

officers when they have reasonable grounds to suspect that a driver has a drug in his or her body.

The new offences vary with the level of drugs (or a combination of drugs and alcohol) in the blood. These levels will be established by regulation. However, the government has stated that, in the case of cannabis, the proposed levels would be as follows:

- 2 nanograms (ng) but less than 5 ng of tetrahydrocannabinol (THC)⁹ per millilitre (mL) of blood: an offence punishable on summary conviction with a maximum fine of \$1,000;
- 5 ng or more of THC per mL of blood: a hybrid offence liable to the punishments currently set out in section 255(1) of the Code; and
- more than 2.5 ng of THC per mL of blood combined with a blood alcohol concentration (BAC) of 50 milligrams (mg) of alcohol per 100 mL of blood (0.05): a hybrid offence liable to the punishments currently set out in section 255(1) of the Code.¹⁰

In response to the Supreme Court of Canada's decision in *R. v. Bingley*,¹¹ Part 1 of the bill also makes the opinion of the evaluating officer (or drug recognition expert) admissible as evidence without qualifying that person as an expert.

Part 2 of the bill enacts a complete overhaul of the Code provisions for offences related to conveyances in order to “create a new, modern, simplified, and more coherent system to better deter drug and alcohol-impaired driving.”¹² Although the types of offences remain generally the same, the bill increases some maximum penalties. For the offence of driving while impaired by alcohol, the bill restricts the defences available to the accused – for example, the “intervening drinking defence”¹³ – and addresses the Supreme Court ruling in *R. v. St-Onge Lamoureux*¹⁴ regarding the “two-beer defence.”¹⁵

More specifically, Part 2 of the bill:

- repeals the offence of street racing;
- harmonizes penalties for offences related to conveyances; for example:
 - the maximum penalties for offences not causing bodily harm or death (*simpliciter* offences) are doubled (on conviction on indictment), and
 - the maximum penalty for all offences causing bodily harm is set at 14 years' imprisonment (on conviction on indictment);
- removes the “bolus drinking defence”;¹⁶
- restricts the “intervening drink defence”;
- institutes random breath testing in Canada for the first time;¹⁷ and
- governs the disclosure of evidence in response to the Supreme Court ruling in *R. v. St-Onge Lamoureux*.

While the bill reforms most of the offences related to conveyances, it does not amend the offences of criminal negligence (sections 219 to 221 of the Code) or manslaughter (section 236 of the Code).¹⁸

Part 1 of the bill came into force when it received Royal Assent on 21 June 2018, and Part 2 will come into force on the 180th day after that date (see clause 52).

1.2 IMPAIRED DRIVING IN CANADA

1.2.1 STATISTICS

According to Statistics Canada, impaired driving is one of the most common criminal offences and continues to be among the leading criminal causes of death in Canada, even though the number of such cases has decreased since the 1980s.¹⁹ Alcohol is responsible for the vast majority (96%) of impaired driving cases, but the proportion of such cases involving drugs doubled between 2009 and 2015 (from 2% to 4%).²⁰

In 2014–2015, impaired driving offences accounted for 10% of all completed criminal court cases.²¹ This was the first time in 10 years that impaired driving was not the most common offence (the number of such completed cases in 2014–2015 decreased by 11,355 compared with the previous year).²² That same year, 79% of impaired driving cases resulted in a finding of guilt, which is higher than the average across all cases (63%).²³

The time required to resolve an impaired driving case declined considerably in 2014–2015, from a median duration of 155 days in 2013–2014 to 105 days.²⁴

Finally, in about nine out of 10 cases, the penalty was a fine²⁵ or a driving prohibition order,²⁶ while imprisonment was imposed in about 10% of cases.²⁷

1.2.2 HISTORY OF CRIMINAL LAW RESPECTING IMPAIRED DRIVING

The provinces are responsible for the rules surrounding road safety, vehicle registration and driver licensing. Most provinces enforce administrative sanctions, particularly roadside licence suspensions, for a BAC over 0.05.

At the federal level, Parliament decided in 1921 to use its authority to create criminal offences across Canada to criminalize impaired driving. Four years later, the Code was amended to include drug-impaired driving.

Several legislative amendments have been made over the years to the impaired driving provisions of the Code, resulting in a particularly complex regime. As early as 1991, the Law Reform Commission of Canada stated that certain provisions had “become virtually unreadable.”²⁸

One of the goals of Bill C-46 is to simplify the legal rules governing evidence of blood alcohol concentration. The following sections of this Legislative Summary provide context for some of the bill’s amendments regarding impaired driving.

1.2.2.1 THE FIRST BREATH TESTS (1969)

With the appearance of breath-testing instruments (now known as “breathalyzers”), the offence of driving with a BAC of over 0.08 was established in 1969. At the same time, Parliament provided for the requirements for a stopped individual to provide breath samples and for a standard of proof facilitated by the establishment of presumptions, such as the presumptions of accuracy and of identity.²⁹

In 1979, to assist the police in obtaining the necessary grounds to require a driver to submit to a breath test at the police station, Parliament provided for the roadside use of approved screening devices (ASDs).³⁰

For close to 50 years, the Alcohol Test Committee³¹ has been responsible for ensuring that breath-testing equipment used in Canada (approved instruments and ASDs) meets strict specifications. It also publishes standards and procedures for using and maintaining this equipment. Today the reliability of these devices is recognized by the scientific and legal communities.³²

1.3 RECENT LEGISLATIVE INITIATIVES

1.3.1 BILL C-73, AN ACT TO AMEND THE CRIMINAL CODE (OFFENCES IN RELATION TO CONVEYANCES) AND THE CRIMINAL RECORDS ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

Bill C-73, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts (short title: Dangerous and Impaired Driving Act), was introduced in the House of Commons by the then Minister of Justice and Attorney General of Canada, the Honourable Peter MacKay, on 16 June 2015. The bill died on the *Order Paper* when the general election was called on 2 August 2015.

Bill C-46 contains some of the amendments set out in Bill C-73 (except for Part 1 of Bill C-46). Unlike Bill C-46, Bill C-73 provided for new mandatory minimum sentences for most driving offences.³³

1.3.2 BILL C-226, AN ACT TO AMEND THE CRIMINAL CODE (OFFENCES IN RELATION TO CONVEYANCES) AND THE CRIMINAL RECORDS ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

Bill C-226, An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts (short title: Impaired Driving Act), was introduced in the House of Commons by Steven Blaney, MP, on 23 February 2016. The bill contained much of the content of Bill C-73, with some changes:

- The minimum penalty for the offence of impaired operation causing death and failure or refusal to comply with a demand after an accident resulting in death decreased from six years (in Bill C-73) to five years’ imprisonment.

- The penalty for the offence of impaired operation causing death became a consecutive sentence.
- A provision authorizing police officers to conduct random blood alcohol testing was added.

The House of Commons Standing Committee on Public Safety and National Security studied the bill in September 2016 and February 2017. In its report published in March 2017, the Committee recommended that the House of Commons not proceed further with the bill, owing to concerns about the constitutionality of the legislation, among other things.³⁴

1.3.3 BILL C-247, AN ACT TO AMEND THE CRIMINAL CODE (PASSIVE DETECTION DEVICE)

Bill C-247, An Act to amend the Criminal Code (passive detection device), was introduced in the House of Commons by Gagan Sikand, MP, on 26 February 2016.³⁵ The bill was considered by the House of Commons Standing Committee on Justice and Human Rights in October 2016 and February 2017.

Bill C-247 amended section 254 of the Code to allow police officers to use an “approved passive detection device” to sample the ambient air in the immediate vicinity of a person they have reasonable grounds to believe operated or had the care or control of a motor vehicle in the last three hours. No suspicion that the person is impaired would be required prior to taking a sample. If the device indicates the presence of alcohol, the police officer would have reasonable grounds to suspect that the person has alcohol in their body, which would justify further testing.³⁶

The bill also amended sections 255(3) and 255(3.1) of the Code, which currently refer to the offence of impaired driving causing death, changing the title of the offence to “vehicular homicide as a result of impairment.” The sentence provided for this offence (which is a maximum of imprisonment for life) would not have changed with the introduction of this bill.

In its report published in February 2017, the Standing Committee on Justice and Human Rights recommended that the House of Commons not proceed further with the bill because of the significant resources required to introduce such devices, whose reliability has not been demonstrated.³⁷ Nevertheless, recognizing that a comprehensive solution to the problem of detecting impairment – either by drugs or alcohol – while driving needs to be found, the Committee also requested that the government consider introducing legislation on this topic. However, Bill C-46 does not provide for the use of passive detection devices.

1.3.4 BILL S-230, AN ACT TO AMEND THE CRIMINAL CODE (DRUG-IMPAIRED DRIVING)

Bill S-230, An Act to amend the Criminal Code (drug-impaired driving) (short title: Drug-Impaired Driving Detection Act), was introduced in the Senate by Senator Claude Carignan on 4 October 2016.³⁸ This bill was considered by the Standing Senate Committee on Legal and Constitutional Affairs in November and

December 2016 and was amended once at third reading in the Senate. The bill is currently at the second reading stage in the House of Commons.

A number of the amendments set out in Bill S-230 are consistent with the purposes and intent of Bill C-46, i.e., to strengthen efforts to reduce drug-impaired driving. For example, Bill S-230 provides for the use of an ASD (on the road) to screen for the presence of drugs in a person's body (clause 2). Through this bill, peace officers will be authorized (when they have reasonable grounds to suspect that a person has alcohol or a drug in their body and that they operated a vehicle within the preceding three hours) to require the person to provide a sample of oral fluid using an ASD.

The bill amends section 254(3.4) of the Code regarding the taking of samples of bodily fluids (at the police station) to determine the presence of drugs in the blood. The amended section allows the peace officer or the evaluating officer (who has reasonable grounds to believe that the person is impaired by a drug or by a combination of alcohol and a drug) to require the person to provide a sample of oral fluid, urine or blood to determine the presence of drugs in their body. The peace officer's reasonable grounds for requiring these samples must be based on the results of physical coordination tests (section 254(2)(a)), the analysis of a sample of oral fluid (section 254(2)(b)), or both. The evaluating officer's reasonable grounds for requiring these samples must be founded on the evaluation conducted by a drug recognition expert (section 254(3.1)).

2 DESCRIPTION AND ANALYSIS

2.1 PART 1: OFFENCES RELATING TO TRANSPORTATION – DRUGS

2.1.1 AMENDMENTS TO THE *CRIMINAL CODE* (CLAUSES 1 TO 9)

2.1.1.1 NEW OFFENCES (DRUG-IMPAIRED OPERATION) AND NEW PUNISHMENTS

Part 1 of Bill C-46 introduces three new offences for operation of a conveyance while impaired by drugs, including cannabis (new section 253(3)). The bill criminalizes operation by a person with a concentration of drugs (or a combination of drugs and alcohol) in the blood equal to or above certain levels. The section specifies that this concentration must be present in the operator's blood within two hours after ceasing to operate a conveyance. However, the offence can still be prosecuted pursuant to section 253(1)(a) of the Code by demonstrating that an operator is impaired by drugs.

The new offences vary with the level of drugs (or a combination of drugs and alcohol) in the blood. These levels will be established by regulation for each type of drug.³⁹ For example, the government's proposed levels for cannabis can be found in section 1.1 of this Legislative Summary.

However, new section 253(4) specifies that the new offences do not apply where a person consumed alcohol or drugs after ceasing to operate a conveyance and had no reason to believe they would be required to provide a sample of a bodily substance.

Amended sections 255(2.1) and 255(3.1) also provide that the maximum terms of imprisonment for impaired operation causing bodily harm or death apply to the new drug-impaired operation offences (except that set out in new section 253(3)(b)).

Amended section 255(4) stipulates that a person who is convicted of the offence set out in new section 253(3)(b) is not deemed to be convicted for a second or subsequent offence if they have been previously convicted. Similarly, the mandatory order of prohibition on operation provided by section 259(1) of the Code does not apply to a person convicted of the offence set out in new section 253(3)(b). However, the court may make an order prohibiting the offender from operating a conveyance for not more than one year pursuant to new section 259(1.01) of the Code.

2.1.1.2 NEW INVESTIGATIVE METHODS

The bill adds a new definition to section 254(1) of the Code for “approved drug screening equipment.” New section 254.01(b) of the Code specifies that this equipment is designed to ascertain the presence of a drug in a person’s body.

The amendments to section 254(2) enable a police officer who has reasonable grounds to suspect that a person has alcohol or a drug in their body to require the person to provide a sample of a bodily substance by means of “approved drug screening equipment.”

According to a Health Canada backgrounder, operators will have to provide an oral fluid sample.⁴⁰ In December 2016, Public Safety Canada announced a pilot project in which certain police services would test the use of screening devices (saliva testing devices) to combat drug-impaired driving (involving drugs such as cannabis, cocaine, methamphetamine and opioids).⁴¹

2.1.1.2.1 DRUG RECOGNITION EXPERT (OR EVALUATING OFFICER)

Since 2008, a peace officer who has reasonable grounds to believe that a person has a drug in their system may require that person to undergo an evaluation (Drug Evaluation and Classification Program) performed by a drug recognition expert (section 254(3.1) of the current Code).⁴²

New section 254(3.5) of the Code codifies the recent decision in *R. v. Bingley*, in which the Supreme Court determined whether drug recognition experts’ opinions are admissible as expert opinion without a *voir dire*.⁴³ The Supreme Court ruled that evaluating officers do not have to undergo an expert witness hearing before offering an opinion on a driver’s impaired driving in their testimony.

2.1.1.2.2 NEW PRESUMPTION (TYPE OF DRUG THAT CAUSED IMPAIRMENT)

New section 254(3.6) of the Code sets out a presumption that, where the analysis of a blood sample demonstrates the presence in a person’s body of a drug that the drug recognition expert identified as impairing the person’s ability to operate a conveyance, that drug:

- is the drug that was present in the person’s body at the time when they operated the conveyance (in the absence of evidence to the contrary); and
- was the cause of that impairment (on proof of the person’s impairment while operating a conveyance).

2.1.2 TRANSITIONAL PROVISION (CLAUSE 10)

Clause 10 provides that any approved instrument, ASD or approved container approved according to the definitions set out in the previous version of section 254(1) of the Code is deemed to be approved pursuant to new section 254.01 of the Code.

2.2 PART 2: OFFENCES RELATING TO CONVEYANCES – ALCOHOL AND DRUGS

2.2.1 AMENDMENTS TO THE *CRIMINAL CODE* (CLAUSES 12 TO 31)

2.2.1.1 OFFENCES AND SENTENCING (NEW SECTIONS 320.13 TO 320.26 OF THE *CRIMINAL CODE*)

2.2.1.1.1 OFFENCES AND PUNISHMENT

Most of the current Code offences related to conveyances are retained in the bill (with some punishments amended), with the exception of the following (which, by their omission, are repealed):

- causing death by criminal negligence (street racing) (section 249.2);
- causing bodily harm by criminal negligence (street racing) (section 249.3);
- dangerous operation of motor vehicle (street racing) (section 249.4);
- failure to keep watch on a person being towed (section 250);
- offences relating to an unseaworthy vessel and an unsafe aircraft (section 251); and
- flight causing bodily harm or death (sections 249.1(3) and 249.1(4)).

The following sections of this Legislative Summary present the various conveyance-related offences in the form of tables and compare the punishments currently provided in the Code (“current legislation”) with the punishments provided in the bill.

It should be noted that the House of Commons rejected a Senate third reading amendment⁴⁴ aimed at preventing conviction for the *simpliciter* offences of impaired operation and of failure or refusal to comply with a demand (new sections 320.14(1) and 320.15(1) of the Code) from being considered serious criminality within the meaning of section 36(1) of the *Immigration and Refugee Protection Act*⁴⁵ unless the person was sentenced to imprisonment for more than six months for the offence.

2.2.1.1.1.1 DANGEROUS OPERATION

Table 1 – Dangerous Operation:
Current Punishment and Punishment Under Bill C-46

| Offence | Punishment | | | |
|-------------------------------|--|---------------------------|---|---|
| | Current Legislation (ss. 249 and 787) | | Bill C-46 (Part 2) (New ss. 320.13, 320.2 and 320.21) | |
| Dangerous operation | Indictment | Summary Conviction | Indictment | Summary Conviction |
| | Max: 5 years | Max: \$5,000 and 6 months | Max: 10 years | Max: 2 years less a day |
| Operation causing bodily harm | Indictment | | Indictment | Summary Conviction |
| | Max: 10 years | | Max: 14 years Min: ^a \$1,000; 30 days; 120 days | Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days |
| Operation causing death | Indictment | | Indictment | |
| | Max: 14 years | | Max: Life Min: ^a \$1,000; 30 days; 120 days | |

Note: a. The minimum punishment varies depending on whether the offence is a first, second, third or subsequent offence.

New section 320.13 refers to the operation of a conveyance in a manner that is dangerous to the public, while “having regard to all of the circumstances.” However, these circumstances are not defined, unlike section 249(1)(a) of the current Code, which states that it is an offence to operate

a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place.

2.2.1.1.1.2 OPERATION WHILE IMPAIRED

Table 2 – Operation While Impaired:
Current Punishment and Punishment Under Bill C-46

| Offence | Punishment | | | |
|---|--|--|--|---|
| | Current Legislation (ss. 253, 255(1), 255(2), 255(2.1), 255(3), 255(3.1) and 255(3.3)) | | Bill C-46 (Part 2) (New ss. 320.14, 320.19, 320.2 and 320.21(1)) | |
| Operation while impaired | Indictment | Summary Conviction | Indictment | Summary Conviction |
| | Max: 5 years Min: ^a \$1,000; 30 days; 120 days | Max: 18 months Min: ^a \$1,000; 30 days; 120 days | Max: 10 years Min: ^{a, b} \$1,000; 30 days; 120 days | Max: 2 years less a day Min: ^{a, b} \$1,000; 30 days; 120 days |
| Operation while impaired (low blood drug concentration) | | | Summary Conviction | |
| | | | Max: \$1,000 | |
| Operation while impaired causing bodily harm | Indictment | | Indictment | Summary Conviction |
| | Max: 10 years Min: ^a \$1,000; 30 days; 120 days | | Max: 14 years Min: ^a \$1,000; 30 days; 120 days | Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days |
| Operation while impaired causing death | Indictment | | Indictment | |
| | Max: Life Min: ^a \$1,000; 30 days; 120 days | | Max: Life Min: ^a \$1,000; 30 days; 120 days | |

Notes: a. The minimum punishment varies depending on whether the offence is a first, second, third or subsequent offence.
b. In the case of a first offence for operation while impaired by alcohol (new section 320.14(1)(b)), the person must pay a minimum fine of \$1,500 if the BAC is equal to or exceeds 120 mg of alcohol in 100 mL of blood and \$2,000 if the BAC is equal to or exceeds 160 mg of alcohol in 100 mL of blood.

New section 320.14(1) sets out four separate impaired operation offences (without indicating whether they cause bodily harm or death):

- operation while a person’s ability to operate is impaired “to any degree” by alcohol or a drug (or both) (new section 320.14(1)(a));
- operation with a BAC that is equal to or exceeds 80 mg of alcohol in 100 mL of blood (new section 320.14(1)(b));⁴⁶
- operation with a blood drug concentration that is equal to or exceeds that prescribed by regulation (new section 320.14(1)(c)); and
- operation with a BAC and blood drug concentration that are equal to or exceed those prescribed by regulation (new section 320.14(1)(d)).

New section 320.14(4) also sets out an offence punishable on summary conviction of operating with a blood drug concentration that is equal to or exceeds that prescribed by regulation for the drug in question, but less than the concentration provided for in section 320.14(1)(c). The punishment for committing an offence under new section 320.14(4) is a fine of not more than \$1,000 (new section 320.19(2)).

2.2.1.1.1.3 FAILURE OR REFUSAL TO COMPLY WITH A DEMAND

Table 3 – Failure or Refusal to Comply with a Demand:
Current Punishment and Punishment Under Bill C-46

| Offence | Punishment | | | |
|--|---|--|--|--|
| | Current Legislation (ss. 254(5), 255(2.2), 255(3.2) and 255(3.3)) | | Bill C-46 (New ss. 320.15, 320.19(1), 320.19(4), 320.2 and 320.21) | |
| Failure or refusal to comply with a demand | Indictment | Summary Conviction | Indictment | Summary Conviction |
| | Max: 5 years | Max: 18 months Min: ^a \$1,000; 30 days; 120 days | Max: 10 years Min: ^a \$2,000; 30 days; 120 days | Max: 2 years less a day Min: ^a \$2,000; 30 days; 120 days |
| Failure or refusal to comply with a demand when the person knows, or ought to know, that he or she caused an accident resulting in bodily harm | Indictment | | Indictment | Summary Conviction |
| | Max: 10 years Min: ^a \$1,000; 30 days; 120 days | | Max: 14 years Min: ^a \$1,000; 30 days; 120 days | Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days |
| Failure or refusal to comply with a demand when the person knows, or ought to know, that he or she caused an accident resulting in death | Indictment | | Indictment | |
| | Max: Life Min: ^a \$1,000; 30 days; 120 days | | Max: Life Min: ^a \$1,000; 30 days; 120 days | |

Note: a. The minimum punishment varies depending on whether the offence is a first, second, third or subsequent offence.

Finally, new section 320.15(4) specifies that a person convicted of an offence of failure or refusal to comply with a demand cannot be convicted of the same offence a further time respecting the same transaction.

2.2.1.1.1.4 FAILURE TO STOP AFTER AN ACCIDENT

Table 4 – Failure to Stop After an Accident:
Current Punishment and Punishment Under Bill C-46

| Offence | Punishment | | | |
|--|--|---------------------------------|--|--|
| | Current Legislation (ss. 252 and 787) | | Bill C-46 (New ss. 320.16, 320.19(5), 320.2 and 320.21) | |
| Failure to stop after an accident | Indictment | Summary Conviction | Indictment | Summary Conviction |
| | Max: 5 years | Max: \$5,000 and 6 months | Max: 10 years | Max: 2 years less a day |
| Failure to stop after an accident resulting in bodily harm | Indictment | | Indictment | Summary Conviction |
| | Max: 10 years | | Max: 14 years Min: ^a \$1,000; 30 days; 120 days | Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days |
| Failure to stop after an accident resulting in death | Indictment | | Indictment | |
| | Max: Life | | Max: Life Min: ^a \$1,000; 30 days; 120 days | |

Note: a. The minimum punishment varies depending on whether the offence is a first, second, third or subsequent offence.

2.2.1.1.1.5 FLIGHT FROM A PEACE OFFICER

Table 5 – Flight from a Peace Officer:
Current Punishment and Punishment Under Bill C-46

| Offence | Punishment | | | |
|-------------------------------------|--|---------------------------|---|-------------------------|
| | Current Legislation (ss. 249.1 and 787) | | Bill C-46 (New ss. 320.17 and 320.19(5)) | |
| Flight from a peace officer | Indictment | Summary Conviction | Indictment | Summary Conviction |
| | Max: 5 years | Max: \$5,000 and 6 months | Max: 10 years | Max: 2 years less a day |
| Flight causing bodily harm or death | Indictment | | (Not applicable) ^a | |
| | Max: 14 years (for bodily harm) Max: Life (for death) | | | |

Note: a. Interestingly, the offence of flight causing bodily harm or death was not included in Bill C-46, as this offence – added to the Code in 2000 – is different from the offence of dangerous operation causing bodily harm or death (section 249 of the Code). According to the courts, an operator can try to flee the police, committing the offence of flight while operating a conveyance, without this operation necessarily constituting dangerous driving (for example, by driving at a speed close to the legal limit).⁴⁷

2.2.1.1.1.6 OPERATION WHILE PROHIBITED

Table 6 – Operation While Prohibited:
Current Punishment and Punishment Under Bill C-46

| Offence | Punishment | | | |
|----------------------------|---|---------------------------|--|-------------------------|
| | Current Legislation (ss. 259(4) and 787) | | Bill C-46 (New ss. 320.18(1) and 320.19(5)) | |
| Operation while prohibited | Indictment | Summary Conviction | Indictment | Summary Conviction |
| | Max: 5 years | Max: \$5,000 and 6 months | Max: 10 years | Max: 2 years less a day |

Someone registered in and complying with a provincial alcohol ignition interlock device program does not commit an offence for operation while prohibited (new section 320.18(2)).

2.2.1.1.2 SENTENCING

2.2.1.1.2.1 AGGRAVATING CIRCUMSTANCES

Currently, the only aggravating circumstance for sentencing for conveyance-related offences is provided for in section 255.1 of the Code; it entails having a BAC exceeding 160 mg of alcohol in 100 mL of blood. The aggravating circumstances outlined in section 718.2, however, do not pertain to transportation offences.

New section 320.22 of the Code provides a number of aggravating circumstances that the court must take into account during sentencing (in addition to any other aggravating circumstances):

- whether the commission of the offence resulted in bodily harm to, or the death of, more than one person;

- whether the offender was operating a motor vehicle in a race with at least one other motor vehicle or in a contest of speed;
- whether a person under the age of 16 years was a passenger in the conveyance;
- whether the offender was being remunerated for operating the conveyance;
- whether the offender's BAC at the time of committing the offence was equal to or exceeded 120 mg of alcohol in 100 mL of blood;
- whether the offender was operating a large motor vehicle; and
- whether the offender was not permitted, under a federal or provincial Act, to operate the conveyance.

2.2.1.1.2.2 DELAY OF SENTENCING

Currently, section 255(5) of the Code provides that the court may discharge a person under section 730 instead of convicting that person of the offence of operation while impaired (section 253), on the condition that the discharge is accompanied by an order to attend curative treatment for the consumption of alcohol or drugs (if evidence shows that the person is in need of curative treatment).

New section 320.23, however, provides for the possibility of delaying sentencing so that an offender convicted of a *simpliciter* offence of impaired operation or of the failure or refusal to comply with a demand can attend a treatment program approved by the province in which the offender resides. If sentencing is delayed, a prohibition order against driving is ordered by the court for that period, pursuant to new sections 320.24(6) to 320.24(9). If the offender successfully completes the treatment program, the court is not required to impose the minimum punishment outlined in new section 320.19 or a prohibition order under new section 320.24, but neither can it discharge the offender.

2.2.1.1.2.3 PROHIBITION ORDERS

Currently, section 259 of the Code provides that, in addition to the punishment that it may impose, the court shall make an order prohibiting an offender convicted under section 253 or section 254, or discharged under section 730, from operating a motor vehicle for a period of one to three years for a first offence, two to five years for a second offence, and at least three years for each subsequent offence (section 259(1)).

New section 320.24(1) of the Code provides for a similar order to be made respecting an offender convicted of a *simpliciter* offence of impaired operation or of failure or refusal to comply with a demand. The prohibition period varies from one year to three years for a first offence and from two years to 10 years for a second offence, and is at least three years for any subsequent offence (new section 320.24(2)), in addition to any court-imposed punishment. On 16 October 2017, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-46 by making a prohibition order effective on the day that it is made (new section 320.24(5.1)).

Where a person has been convicted of an impaired operation offence with a low blood drug concentration (new section 320.14(4)), the court may make an additional order prohibiting the offender from operating a conveyance for a maximum of one year (new section 320.24(3)).

For all other offences (that is, except for *simpliciter* offences of impaired operation, failure or refusal to comply with a demand and impaired operation with a low blood drug concentration), the court may make an additional order prohibiting the offender from operating a conveyance (new section 320.24(4)). The prohibition period is:

- at the court’s discretion if the offender is liable to imprisonment for life;
- a maximum of 10 years if the offender is liable to imprisonment for more than five years; and
- a maximum of three years in any other case (new section 320.24(5)).

In addition, new section 320.24(9) of the Code provides that a new order prohibiting the operation of a conveyance may apply consecutively to an order already in effect.

Under new section 320.24(10), a person may not be registered in an alcohol interlock device program (see new section 320.18(2)) until the expiry of a certain period of time – the “minimum absolute prohibition period” – depending on whether the offence is a first offence or a subsequent offence. Sections 259(1.1) and 259(1.2) of the current Code contain similar provisions. Table 7 compares the current minimum absolute prohibition periods with those set out in the bill.

Table 7 – Minimum Periods of Absolute Prohibition on the Operation of a Conveyance Under Current Legislation and Bill C-46

| First or Subsequent Offence | Current Legislation (s. 259(1.2)) | Bill C-46 (new s. 320.24(10)) |
|-----------------------------|---|---|
| First offence | Three months after the punishment is imposed or any greater period that may be set by order of the court | Any period that may be set by order of the court |
| Second offence | Six months after the punishment is imposed or any greater period that may be set by order of the court | Three months after the punishment is imposed or a longer period that may be set by order of the court |
| Subsequent offences | Twelve months after the punishment is imposed or any greater period that may be set by order of the court | Six months after the punishment is imposed or a longer period that may be set by order of the court |

2.2.1.1.2.4 STAY OF ORDER PENDING APPEAL

New section 320.25 of the Code provides that the judge may direct that a prohibition order under new section 320.24 be stayed if an appeal is taken against the conviction or sentence. Section 261 of the Code currently provides essentially the same thing.

2.2.1.1.2.5 EARLIER AND SUBSEQUENT OFFENCES

Currently, section 255(4) of the Code stipulates that a person convicted of an offence under section 253 (operation while impaired) or section 254(5) (failure or refusal to

comply with a demand) is deemed to be convicted of a subsequent offence if the person has previously been convicted of:

- a *simpliciter* offence of impaired operation, impaired operation causing bodily harm or death (sections 253, 255(2) and 255(3)), or the former offence of operation of a vessel while the person's ability is impaired (previous version of section 258(4));⁴⁸
- failure or refusal to comply with a demand (section 254(5));
- failure to keep watch on a person being towed (section 250);
- an offence related to an unseaworthy vessel or unsafe aircraft (section 251);
- failure to stop after an accident (section 252); or
- operation while disqualified (sections 259 and 260).

For the purpose of imposing a sentence for a *simpliciter* offence of impaired operation or of failure or refusal to comply with a demand, new section 320.26 of the Code provides that any previous conviction for the following offences will be considered to be an earlier offence:

- an impaired operation offence (except for an impaired operation offence with a low blood drug concentration, as a result of an amendment to Bill C-46 made on 16 October 2017 by the House of Commons Standing Committee on Justice and Human Rights);
- a failure or refusal to comply with a demand offence; or
- an offence under sections 253 to 255 of the Code as they read before the bill comes into force.

2.2.1.2 INVESTIGATIVE MATTERS

(NEW SECTIONS 320.27 TO 320.3 OF THE *CRIMINAL CODE*)

2.2.1.2.1 (ROADSIDE) TESTING FOR THE PRESENCE OF ALCOHOL OR A DRUG

New section 320.27(1) of the Code largely reproduces what is currently provided in section 254(2). Under the provisions of the new section, if a peace officer (on the road) has reasonable grounds to suspect the presence of alcohol in the body of a person who has operated a conveyance within the preceding three hours, the peace officer may require the person to perform physical coordination tests⁴⁹ or provide breath samples by means of an ASD, or both. If a peace officer has reasonable grounds to suspect the presence of drugs, the peace officer may require the person to perform the physical coordination tests or provide a sample of a bodily substance by means of approved drug screening equipment, or both.

2.2.1.2.1.1 MANDATORY ALCOHOL SCREENING

New section 320.27(2) authorizes a peace officer to conduct random roadside screenings for the presence of alcohol in the body without needing to have reasonable grounds to suspect that an offence has been committed. However, such a provision is not included for drug screenings.⁵⁰

The mandatory screening (also called “random breath testing” or “preliminary testing”) provision in Bill C-46 is similar to the model adopted by Australia, which is considered the leader in mandatory screening.⁵¹ There, it is referred to as “mobile” mandatory screening.

This provision of the bill is subject to very few restrictions. It provides that the peace officer (i) needs to be in possession of a screening device and (ii) must be acting “in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law.”

Alternatives to the model set out in Bill C-46 exist, including the following:

- mandatory screening only at organized and announced roadside checkpoints (“fixed or stationary” testing, which Ireland adopted);⁵² and
- mandatory screening following a motor vehicle accident that caused injuries or death (the model set out in the former Bill C-556).⁵³

While studies have demonstrated the effectiveness of random roadside testing in reducing the number of impaired driving-related accidents, they have also emphasized the importance of accompanying measures, such as an increased police presence and provincial and national public awareness campaigns.⁵⁴

Pursuant to an amendment passed by the Standing Senate Committee on Legal and Constitutional Affairs on 21 May 2018⁵⁵ (and concurred in by the Senate Chamber at third reading after a contrary amendment was defeated),⁵⁶ new section 320.27(2) was removed from the bill. In its message to the Senate, the House of Commons rejected this amendment on the grounds that “mandatory alcohol screening is a proven traffic safety measure that will deter impaired driving and save lives.”⁵⁷ As a result, the mandatory screening provision was reintroduced into the version of the bill that received Royal Assent.

2.2.1.2.2 TAKING AND EVALUATING SAMPLES (AT THE POLICE STATION)

New sections 320.28(1) and 320.28(2) of the Code provide for the taking of breath or blood samples if a peace officer has reasonable grounds to believe that a person operated a conveyance:

- while his or her ability to operate it was impaired by alcohol, a drug, or a combination thereof; or
- while the person had a BAC or blood drug concentration, or a combination thereof, that is equal to or exceeds those set out in new section 320.14.

In addition, as regards drugs, new section 320.28(2) provides that the person may be required to submit to an evaluation conducted by a drug recognition expert.⁵⁸

New section 320.28(3) applies where a person was not subject to a demand made under section 320.28(1) and an evaluating officer has reasonable grounds to suspect

that the person has alcohol in his or her body. The evaluating officer may demand that breath samples be taken.

New section 320.28(4) applies where, on completion of the evaluation, the evaluating officer has reasonable grounds to believe that one or more types of the drugs set out in section 320.28(5), or a combination thereof with alcohol, is impairing the person's ability to operate a conveyance. The officer may then demand that the person provide samples of oral fluid, urine or blood. The types of drugs in question are depressants, inhalants, dissociative anaesthetics, cannabis, stimulants, hallucinogens and narcotic analgesics.

New sections 320.28(6) to 320.28(10) specify certain conditions relating to blood samples.

2.2.1.2.3 WARRANTS TO OBTAIN BLOOD SAMPLES

New sections 320.29 and 320.3 of the Code provide that a justice may issue a warrant, by telephone or other means of telecommunication, authorizing the taking of a blood sample to determine a person's BAC or blood drug concentration, or both. The application for the warrant must be made according to the terms and conditions set out in section 320.29, one being that the person is unable to consent to the taking of samples of his or her blood because of a physical or mental condition.

Compared to current section 256(1)(a) of the Code, the bill increases from four to eight hours the period during which there are reasonable grounds to believe that the person operated a conveyance and was involved in an accident that resulted in bodily harm to himself or herself or to any other person or the death of another person. In addition, the new provisions no longer specify that the physical or mental inability to consent to the taking of the person's blood must result from the consumption of alcohol or a drug, as is the case with current section 256(1)(b)(i) of the Code.

2.2.1.3 EVIDENTIARY MATTERS (NEW SECTIONS 320.31 TO 320.35 OF THE *CRIMINAL CODE*)

New sections 320.31 to 320.35 of the Code describe various evidence-related legal presumptions and procedures that apply to impaired operation offences, respecting:

- samples of breath (new section 320.31(1)) and blood (new section 320.31(2));
- elements that do not constitute evidence that an analysis of a blood sample was performed improperly (new section 320.31(3));
- presumptions concerning BAC (new section 320.31(4)), as well as presumptions relating to drugs (new section 320.31(6));
- the admissibility of the evaluating officer's opinion (without qualifying the evaluating officer as an expert) in determining whether a person's ability to operate a conveyance has been impaired by a drug (new section 320.31(5));⁵⁹
- the admissibility of the result of an analysis of a sample that a person was not required to provide (new section 320.31(7));

- the inadmissibility of evidence of a person's failure or refusal to provide a sample that he or she was not required to provide (new section 320.31(8));
- the admissibility of a statement made to a peace officer (new section 320.31(9));
- the admissibility of evidence of failure to comply with a demand (new section 320.31(10));
- issues relating to the certificate of an analyst, qualified technician or qualified medical practitioner describing the procedures carried out involving the taking or analysis of samples of a bodily substance (new section 320.32);
- the document printed out from an approved instrument (new section 320.33);
- the disclosure of information to the accused by the prosecutor (new section 320.34); and
- the presumption of operation when a person occupied the seat or position ordinarily occupied by a person who operates a conveyance (new section 320.35).

2.2.1.3.1 PRESUMPTION OF ACCURACY OF RESULTS

New section 320.31(1) of the Code provides for a presumption of accuracy for the results of analyses of breath samples, meaning that a person's BAC when the analyses were made is presumed to correspond to the results. Certain conditions must be met:

- The qualified technician must conduct a system blank test and a system calibration check before each sample is taken.
- The samples must have been taken at intervals of 15 minutes.
- The results of the analyses rounded down to the nearest multiple of 10 must not differ by more than 20 mg of alcohol in 100 mL of blood.

New section 320.32(1) provides that a certificate of an analyst, qualified medical practitioner or qualified technician describing the procedures they carried out involving the taking of a sample is evidence of the alleged facts. Lastly, new section 320.33 stipulates that a document printed out from an approved instrument is evidence of the alleged facts.

In *R. v. St-Onge Lamoureux*, the Supreme Court upheld that Parliament could, without infringing on the *Canadian Charter of Rights and Freedoms*,⁶⁰ eliminate the possibility of using the "two-beer defence" *by itself* to call into question the results of breathalyzers.⁶¹ Therefore, in addition to the "two-beer defence," the accused must present evidence directly related to the operation or functioning of breathalyzers. The Court clarified the evidence that the defence can use to rebut the presumption of accuracy:

Although Parliament now requires evidence tending to establish a deficiency in the functioning or operation of the instrument, this does not mean that there are limits on the evidence that can reasonably be used by the accused to raise a doubt in this regard. The accused can request the disclosure of any relevant evidence that is reasonably available in order to be able to present a real defence. If the prosecution denies such a request, the accused can invoke the rules on non-disclosure and the available remedies for non-disclosure (see *R. v. O'Connor*, [1995] 4 S.C.R. 411). In short, the accused might rely, for example, on a maintenance log that shows that the instrument was not maintained properly or on admissions by the technician that there had been erratic results, or he or she might argue that health problems had affected the functioning of the instrument.⁶²

According to the 2015 Department of Justice backgrounder, the Supreme Court decision in *R. v. St-Onge Lamoureux*

resulted in a wave of defence applications for disclosure of manuals and maintenance records and other documents relating to the maintenance of the approved instruments. These unintended consequences of the court's ruling have effectively increased court time for impaired driving cases.⁶³

Indeed, Bill C-46 governs the disclosure of the evidence the Crown must provide to the defence. New section 320.34(1) of the Code provides that the prosecutor must disclose to the accused the following information:

- (a) the results of the system blank tests;
- (b) the results of the system calibration checks;
- (c) any error or exception messages produced by the approved instrument at the time the samples were taken;**
- (d) the results of the analysis of the accused's breath samples; and
- (e) a certificate of an analyst stating that the sample of an alcohol standard that is identified in the certificate is suitable for use with an approved instrument.

In addition, the accused "may apply to the court for a hearing to determine whether further information should be disclosed." The court must decide the likely relevance of the information sought by the defence to determining whether the approved instrument was in proper working order (new section 320.34(3)). To limit the duration of the process, the bill establishes a deadline for holding this hearing, namely, at least 30 days before the day on which the trial is to be held (new section 320.34(4)).

As for the blood analysis, new section 320.31(2) of the Code stipulates a presumption of accuracy for the results of analyses of blood samples, meaning that a person's BAC or blood drug concentration when the analyses were made is presumed to correspond to the results. While new section 320.31(2) provides for the possibility of the accused presenting evidence tending to show that the blood analysis was performed improperly, new section 320.31(3) sets out what does *not* constitute such evidence.

New section 320.31(5) also addresses the *R. v. Bingley* decision by making an evaluating officer's opinion admissible in evidence without qualifying the evaluating officer as an expert.

2.2.1.3.2 PRESUMPTION OF IDENTITY

A presumption of identity is provided in new sections 320.14(1)(b) and 320.14(1)(d), and new sections 320.14(4) and 320.31(4) of the Code, namely, the BAC of a person **within two hours after the person ceased to operate a conveyance** is conclusively presumed to be the concentration established by the results of the analyses (breath or blood samples). In cases where samples are taken more than two hours after the person ceased to operate a conveyance, the results are adjusted by adding 5 mg of alcohol for every interval of 30 minutes in excess of those two hours. **Following amendments, the application of this presumption was limited to** instances in which the person's BAC was **equal to or** exceeded 20 mg of alcohol in 100 mL of blood.

The “bolus drinking” and “intervening drink” defences do not call into question the functioning of the approved instrument or the presumption of accuracy. Instead, they address the presumption of identity. By adding new section 320.14(1)(b) and repealing section 258(1)(d.1) of the current Code, the bill completely eliminates the “bolus drinking defence.”⁶⁴

In addition, the bill limits the “intervening drink” defence to situations in which the accused is acting in good faith. More specifically, new section 320.14(5) sets out a list of requirements for making this defence:

- The accused consumed alcohol after having ceased to operate the conveyance.
- The accused had no reasonable expectation, after having ceased to operate the conveyance, that he or she would be required to provide a breath or blood sample.
- His or her alcohol consumption is consistent with the BAC as determined by the approved instrument or a blood analysis and a BAC of less than 0.08 at the time he or she was operating the conveyance.

Furthermore, Bill C-46 limits defences that are similar to the “intervening drink” defence but used for the consumption of drugs (new section 320.14(6) of the Code) and the consumption of both drugs and alcohol (new section 320.14(7) of the Code).

As for drug-impaired operation of a conveyance, new section 320.31(6) provides for another presumption of identity regarding the presence of a drug in a person's body, namely:

- that drug is presumed to have been the drug that was present in the person's body at the time the person operated the conveyance (in the absence of evidence to the contrary); and
- that drug is presumed to have been the cause of the impairment (on proof of the person's impairment).

2.2.1.3.3 PRESUMPTION OF OPERATION

For prosecutions of the offence of operation while impaired or of failure or refusal to comply with a demand (new sections 320.14 and 320.15 of the Code), new section 320.35 provides for a presumption of operation. Thus, once it has been

demonstrated that the accused occupied the seat or position ordinarily occupied by a person who operates a conveyance, the accused is presumed to have been operating the conveyance (in the absence of evidence to the contrary). Section 258(1)(a) of the Code currently includes a similar provision, but the wording states that the accused is “deemed to have had the care or control” of the conveyance.

According to the Supreme Court’s decision in *R. v. Appleby*, the accused must meet a burden of proof by a preponderance of evidence or a balance of probabilities, not merely by raising a reasonable doubt, in order to challenge this presumption.⁶⁵

2.2.1.4 GENERAL PROVISIONS (NEW SECTIONS 320.36 TO 320.4 OF THE *CRIMINAL CODE*)

New section 320.36 of the Code prohibits the use of a bodily substance obtained and the use or disclosure of the results of its analysis for unauthorized purposes.⁶⁶ Everyone who contravenes these provisions is guilty of an offence punishable on summary conviction.

New section 320.38 authorizes the Governor in Council to make regulations:

- prescribing the qualifications required for a peace officer to be an evaluating officer and respecting the training of evaluating officers;
- prescribing the blood drug concentrations for certain drugs and the BAC for the purpose of the newly created offences (new sections 320.14(1)(c), (d) and 320.14(4));
- prescribing the physical coordination tests to be conducted under section 320.27(1)(a); and
- prescribing the tests to be conducted and procedures to be followed during an evaluation under section 320.28(2)(a) (to detect the presence of drugs) and the forms to be used to record the results of the evaluation.

New section 320.39 specifies the types of instruments, containers and equipment that the Attorney General of Canada needs to approve, by order:

- a device designed to ascertain the presence of alcohol in a person’s blood;
- equipment designed to ascertain the presence of a drug in a person’s body;
- an instrument designed to receive and analyze a sample of a person’s breath to determine their BAC; and
- a container designed to receive a sample of a person’s blood for analysis.

2.2.1.5 REVIEW AND REPORT (CLAUSE 31.1)

On 16 October 2017, the House of Commons Standing Committee on Justice and Human Rights amended Bill C-46 by adding clause 31.1. This provision provides that the Minister of Justice and Attorney General of Canada must, within three years after this provision enters into force, undertake a comprehensive review of the implementation and operation of the provisions enacted by the Act and prepare a

report setting out his or her conclusions and recommendations. This report must be laid before Parliament. **As a result of an amendment passed by the Standing Senate Committee on Legal and Constitutional Affairs on 23 May 2018, this provision now states that this report must include an evaluation of whether there has been differential treatment of any particular group based on a prohibited ground of discrimination.**

2.2.2 TRANSITIONAL PROVISIONS (CLAUSES 32 TO 38)

Clauses 32 to 38 of the bill provide for the transition from the procedures and trials begun under the current regime when the bill comes into force. At that time, the new provisions of the Code will apply.

2.2.3 CONSEQUENTIAL AMENDMENTS (CLAUSES 39 TO 50)

Bill C-46 makes a number of consequential amendments to other Acts, including the *Customs Act*,⁶⁷ the *Corrections and Conditional Release Act*⁶⁸ and the *Criminal Records Act*.⁶⁹ Most of the amendments are technical amendments to incorporate into these laws the changes to the conveyances provisions of the Code.

It should be noted that, in this regard, Bill C-46 (clause 42) differs from bills C-73 and C-226, which contained substantive amendments to the *Criminal Records Act*. Bills C-73 and C-226 would have repealed the current exception that enables a person to keep their pardon (now called a “record suspension”) if they are subsequently convicted of an impaired driving offence.⁷⁰ Bill C-46 preserves this exception.

2.3 PART 3: COORDINATING AMENDMENTS AND COMING INTO FORCE

2.3.1 COORDINATING AMENDMENTS (CLAUSE 51)

Clause 51 coordinates the coming into force of clauses 7(1) and 7(3) of Bill C-46 with that of clauses 10(3) and 10(4) of Bill C-39, An Act to amend the Criminal Code (unconstitutional provisions) and to make consequential amendments to other Acts.⁷¹ These provisions concern section 258(1)(d) of the Code, which is amended by both bills. Section 258 of the Code sets out a framework of legal presumptions that relieve the Crown of the burden of proof for certain aspects of a prosecution under section 255 of the Code (impaired driving offences).

Bill C-39 amends the Code to remove passages and repeal provisions that have been ruled unconstitutional by the Supreme Court of Canada. Note also that clause 25 of Bill C-39 coordinates its own coming into force with the possible coming into force of Bill C-226.

In *R. v. St-Onge Lamoureux*, the Supreme Court found some portions of section 258(1)(c) unconstitutional. While the constitutionality of section 258(1)(d) was not challenged in that case, clause 10(3) of Bill C-39 makes a comparable amendment, as this provision has wording similar to that of section 258(1)(c).

The most likely scenario is that Bill C-39 and Part 1 of Bill C-46 will receive Royal Assent and come into force in the near future, but not necessarily at the same time. In that case, the coordination provisions will apply. Ultimately, the version of section 258(1)(d) contained in Part 1 of Bill C-46 will have force of law until Part 2 of the bill comes into force (which will result in the repeal of that provision and all the other *Criminal Code* transportation provisions). However, the amendments set out in the two bills are nearly identical. Those in Bill C-46 simply reflect amendments made to other provisions.

2.3.2 COMING INTO FORCE (CLAUSE 52)

Clause 52 provides that the provisions in Part 2 come into force on the 180th day after the day on which the bill receives Royal Assent.

NOTES

1. [Bill C-46, An Act to amend the Criminal Code \(offences relating to conveyances\) and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament.
2. House of Commons, Standing Committee on Justice and Human Rights, [Fifteenth Report](#), 1st Session, 42nd Parliament, October 2017.
3. **Senate, Standing Senate Committee on Legal and Constitutional Affairs, [Twenty-Fourth Report](#), 1st Session, 42nd Parliament, 31 May 2018. See also [Observations to the twenty-fourth Report of the Standing Senate Committee on Legal and Constitutional Affairs \(Bill C-46\)](#).**
4. [Bill C-73, An Act to amend the Criminal Code \(offences in relation to conveyances\) and the Criminal Records Act and to make consequential amendments to other Acts](#), 2nd Session, 41st Parliament.
5. [Bill C-226, An Act to amend the Criminal Code \(offences in relation to conveyances\) and the Criminal Records Act and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament.
6. [Criminal Code](#) [the Code], R.S.C. 1985, c. C-46.
7. Marijuana, hashish and hashish oil come from a type of hemp called *Cannabis sativa*. The term “cannabis” is used to refer to all three substances.
8. [Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts](#), 1st Session, 42nd Parliament. See also Health Canada, “[Canada takes action to legalize and strictly regulate cannabis](#),” News release, 13 April 2017.
9. THC (or Δ^9 -tetrahydrocannabinol) is the main psychoactive compound in cannabis.
10. Health Canada, “[Backgrounder: Changes to Impaired Driving Laws](#),” Backgrounder, April 2017.
11. [R. v. Bingley](#), 2017 SCC 12.
12. Health Canada (2017), “Backgrounder.”
13. A defence raised when the accused alleges that he or she has consumed alcohol after having driven but before providing a breath sample.
14. [R. v. St-Onge Lamoureux](#), 2012 SCC 57.

15. A defence also known as the “Carter defence,” where the accused disputes the breathalyser result and instead relies on testimony as to how much alcohol he or she had consumed prior to getting behind the wheel.
16. A defence raised when the accused states that he or she consumed alcohol just before driving; consequently the BAC did not exceed the legal limit at the time of driving because the alcohol was still being absorbed.
17. The random breath testing (also called “mandatory screening” or “preliminary testing”) provisions allow police officers to order drivers to provide a breath sample using a device at the roadside without having to suspect that they have been driving while impaired.
18. Thus, even though Bill C-46 does not expressly provide for the offence of “vehicular homicide,” as is found in some other countries, including the United States, causing death while driving can still be prosecuted in Canada under a wide range of *Criminal Code* provisions, such as impaired driving, criminal negligence or homicide. See [Bill C-652, An Act to amend the Criminal Code \(vehicular homicide\)](#), 2nd Session, 41st Parliament, which died on the *Order Paper* with the calling of the general election in August 2015.
19. Samuel Perreault, “[Impaired driving in Canada, 2015](#),” *Juristat*, Catalogue no. 85-002-X, Canadian Centre for Justice Statistics, Statistics Canada, 14 December 2016, p. 4.
20. According to Statistics Canada, of the 72,039 impaired driving incidents reported by police in 2015, only 2,786 were cases of drug-impaired driving. Perreault (2016), pp. 5–6.
21. Ashley Maxwell, “[Adult criminal court statistics in Canada, 2014/2015](#),” *Juristat*, Catalogue no. 85-002X, Canadian Centre for Justice Statistics, Statistics Canada, 21 February 2017, p. 5.
22. *Ibid.*, pp. 5–6.
23. *Ibid.*, pp. 6–7.
24. *Ibid.*, “Table 3 – Cases completed in adult criminal court, by type of offence, Canada, 2013/2014 and 2014/2015,” p. 18.
25. If the offence is prosecuted by indictment, section 255(1) of the Code provides for a mandatory minimum fine of not less than \$1,000.
26. Sections 259 *et seq.* of the Code set out a framework of mandatory orders of prohibition on the operation of a motor vehicle whose durations vary with the criteria provided.
27. Perreault (2016), p. 18.
28. Law Reform Commission of Canada, “Part Four: Testing Persons for Impairment in the Operation of Vehicles,” in *Report on Recodifying Criminal Procedure, Volume One: Police Powers, Title I: Search and Related Matters*, 1991, p. 84.
29. The “presumption of accuracy” presumes that the results of the breath test are accurate, and the “presumption of identity” presumes that the results reflect the BAC level at the time the individual was driving. These presumptions have been amended over time and are set out in sections 258(1)(c), 258(1)(d.01) and 258(1)(d.1) of the current Code. Bill C-46 amends the requirements for overturning the presumption of identity.

Another presumption provides that an accused person who occupied the seat ordinarily occupied by a person who operates the vehicle is deemed to have had the care or control of that vehicle (s. 258(1)(a)). This presumption, upheld in 1988 by the Supreme Court of Canada in [R. v. Whyte](#), [1988] 2 S.C.R. 3, remains essentially unchanged in Bill C-46 (new s. 320.35 of the Code).

30. Under section 254(2) of the Code, a police officer must have reasonable suspicions to order an individual who has been pulled over to blow into an approved screening device [ASD]. It is not an offence to fail an ASD test. A failure simply provides the officer with reasonable grounds to believe that the driver has exceeded the allowable limit and allows the officer to bring the driver to the police station for a breath test. Only the result of this test, administered by a qualified technician, can be used to prove BAC in court.
31. From 1967 to 1985, the Alcohol Test Committee was called the “Special Committee on Breath Testing.” For more information, see the Canadian Society of Forensic Science, [ATC – Alcohol Test Committee](#).
32. *R. v. St-Onge Lamoureux*, para. 40.
33. For further information on Bill C-73, see Maxime Charron-Tousignant and Dominique Valiquet, [Legislative Summary of Bill C-73: An Act to amend the Criminal Code \(offences in relation to conveyances\) and the Criminal Records Act and to make consequential amendments to other Acts](#), Publication no. 41-2-C73-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 1 September 2015.
34. House of Commons, Standing Committee on Public Safety and National Security, [Eighth Report](#), 1st Session, 42nd Parliament, March 2017.
35. [Bill C-247, An Act to amend the Criminal Code \(passive detection device\)](#), 1st Session, 42nd Parliament.
36. According to section 254(2) of the Code, the officer must have reasonable grounds to *suspect* that a person has alcohol in their body and operated a conveyance in the preceding three hours in order to demand that the person perform coordination tests or provide a breath sample using an ASD. Section 254(3) then requires the officer to have reasonable grounds to *believe* that a person committed an impaired driving offence (section 253) in the past three hours in order to require further testing by a qualified technician with an approved instrument. The ASD results can provide such reasonable grounds. The test using the approved instrument may be used as evidence in court, while the ASD results cannot.
37. House of Commons, Standing Committee on Justice and Human Rights, [Eighth Report](#), 1st Session, 42nd Parliament, February 2017.
38. [Bill S-230, An Act to amend the Criminal Code \(drug-impaired driving\)](#), 1st Session, 42nd Parliament.
39. This regulatory authority is provided in new section 253.1 of the Code.
40. Health Canada (2017), “Backgrounder.”
41. Public Safety Canada, “[Pilot project to test use of roadside screening devices for drug-impaired driving](#),” News release, 14 December 2016.
42. [Evaluation of Impaired Operation \(Drugs and Alcohol\) Regulations](#), SOR/2008-196, s. 3; Royal Canadian Mounted Police, [Drug Recognition Expert](#); and Canadian Centre on Substance Abuse and Addiction, [Drug Evaluation and Classification Program, Policy Brief, May 2018](#).
43. The stage in a trial during which, among other things, the court determines whether a witness is qualified to testify in the case in question.
44. **Senate, [Debates](#), 1st Session, 42nd Parliament, 12 June 2018, 1750; and Senate, [Debates](#), 1st Session, 42nd Parliament, 20 June 2018, 1700.**
45. [Immigration and Refugee Protection Act](#), S.C. 2001, c. 27, s. 36(1). This provision provides, among other things, that permanent residents and foreign nationals are deemed inadmissible on grounds of serious criminality if they are convicted of an offence punishable by a maximum term of imprisonment of at least 10 years or if a term of imprisonment of more than six months is imposed on them.

46. Currently, under section 253(1)(b) of the Code, anyone who operates a conveyance with a BAC *exceeding* 0.08 commits an offence. In contrast, new section 320.14(1)(b) provides that the same offence occurs when a person has a BAC that is *equal to or exceeds* 0.08.
- In practice, the approved instrument gives results to the nearest milligram, but the results are rounded down. For example, a concentration of 0.089 is rounded down to 0.080. New section 320.32(1)(c) takes this into account, as was recommended by the Alcohol Test Committee of the Canadian Society of Forensic Science. See Canadian Society of Forensic Science, Alcohol Test Committee, [Recommended Operational Procedures](#), 2016, p. 5. According to information provided by the committee, “truncated” means replacing the final decimal place with a zero.
47. See [R. v. Akapew](#), 2009 SKCA 137; [R. v. Roberts](#), 2005 ABCA 11; [R. v. Fonseca](#), 2012 BCPC 13; and [R. v. Wells](#), 2003 BCPC 401. See also the parliamentary debates on the amendments to Bill C-202, An Act to amend the Criminal Code (flight) (S.C. 2000, c. 2): House of Commons, Standing Committee on Justice and Human Rights, [Evidence](#), 2nd Session, 36th Parliament, 25 November 1999.
48. Section 255(4)(c) refers to the previous version of section 258(4), which corresponds to section 240(4) of the *Criminal Code* as it appeared in the revised statutes of 1970. See [Revised Statutes of Canada, 1985: Table of Concordance](#).
49. *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, s. 2.
50. Other jurisdictions allow such tests to detect the presence of drugs. See, for example, Ireland, [Road Traffic Act 2016](#), c. 11.
51. See, for example, New South Wales Government [Australia], [Road Transport Act 2013 No 18](#), Schedule 3, s. 3(2).
52. Ireland, [Road Traffic Act 2016](#), c. 11; and Ireland, [Road Traffic Act 2010](#), s. 10(4) (Mandatory intoxicant testing).
53. [Bill C-556, An Act to amend the Criminal Code \(breath alcohol analysis\)](#), 2nd Session, 41st Parliament.
54. See Jason Ferris, Madonna Devaney et al., [A national examination of Random Breath Testing and alcohol-related traffic crash rates \(2000–2012\)](#), March 2015 [Australia]; and J. Henstridge, R. Homel et al., [The Long-Term Effects of Random Breath Testing in Four Australian States: A Time Series Analysis](#), Department of Transport and Regional Development, April 1997 [Australia]. In addition, note that the Supreme Court of Canada has already considered stops at roadblocks ([Dedman v. The Queen](#), [1985] 2 SCR 2; and [R. v. Hufsky](#), [1988] 1 SCR 621) and stops justified under provincial road safety laws ([R. v. Ladouceur](#), [1990] 1 SCR 1257; Ontario, [Highway Traffic Act](#), R.S.O. 1990, c. H-8, s. 216; and Quebec, [Highway Safety Code](#), CQLR, c. C-24.2, s. 636). See also House of Commons, Standing Committee on Public Safety and National Security, [Evidence](#), 1st Session, 42nd Parliament, 6 February 2017 (in which a legal opinion by Peter Hogg was cited as part of the study of Bill C-226).
55. **Senate (31 May 2018). See also *Observations to the twenty-fourth Report of the Standing Senate Committee on Legal and Constitutional Affairs (Bill C-46)*.**
56. **Senate, *Debates* (12 June 2018), 1730.**
57. **Senate, *Debates* (20 June 2018), 1700.**
58. Since 2008, when a peace officer has reasonable grounds to believe that a person has a drug in their body, the peace officer may require that person to undergo an evaluation (Drug Evaluation and Classification Program) performed by a drug recognition expert. See *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, s. 3.
59. See *R. v. Bingley*.

60. [Canadian Charter of Rights and Freedoms](#), [Charter], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
61. *R. v. St-Onge Lamoureux*, para. 80.
62. *Ibid.*, para. 78.
63. Government of Canada, "[The Dangerous and Impaired Driving Act – Criminal Code Reforms for Transportation-Related Offences](#)," Backgrounder, June 2015.
64. The Supreme Court had, however, ruled that section 258(1)(d.1) was valid under the Charter (*R. v. St-Onge Lamoureux*, para. 90).
65. *R. v. Appleby*, [1972] S.C.R. 303, upheld in *R. v. Whyte*, in which the Supreme Court specified that this presumption, which imposes on the accused the burden of proof to establish that he or she did not enter the vehicle to set it in motion, is justified by section 1 of the Charter, even though it infringes on section 11(d).
66. The results may be used for the purpose of the administration or enforcement of a federal or provincial act related to drugs or alcohol or to the operation of a motor vehicle, vessel, aircraft or railway equipment (new s. 320.36(2)), as well as for statistical or research purposes if the results are made anonymous (new s. 320.36(3)).
67. [Customs Act](#), R.S.C. 1985, c. 1 (2nd Supp.).
68. [Corrections and Conditional Release Act](#), S.C. 1992, c. 20.
69. [Criminal Records Act](#), R.S.C. 1985, c. C-47.
70. Currently, a person whose record has been suspended and who is subsequently convicted of an impaired driving *simpliciter* offence (or a refusal *simpliciter* offence) on summary conviction will not have his or her record suspension automatically cease to have effect. See *Criminal Records Act*, s. 7.2(a)(ii) and [M.Y. v. Canada \(General Attorney\)](#), 2016 FCA 170, paras. 11–15.
71. [Bill C-39, An Act to amend the Criminal Code \(unconstitutional provisions\) and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament.