



DRUG-IMPAIRED DRIVING: CONSULTATION DOCUMENT

DEPARTMENT OF JUSTICE CANADA

BACKGROUND INFORMATION AND LEGISLATIVE PROPOSALS TO ENHANCE CRIMINAL CODE DRUG-IMPAIRED DRIVING INVESTIGATIONS

This document was prepared from work undertaken by
the Impaired Driving Working Group
of the Federal/Provincial/Territorial
Coordinating Committee of Senior Officials

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INTRODUCTION

In 1999, the House of Commons Standing Committee on Justice and Human Rights reviewed the impaired driving provisions of the *Criminal Code* and heard from police and scientific witnesses that drug-impaired driving is a serious problem on Canadian roads. This included impairment by illicit drugs and legal drugs that are abused. In its report, *Toward Eliminating Impaired Driving*, the Standing Committee recommended that federal/provincial/territorial officials consider ways to improve the *Criminal Code*'s provisions relating to the investigation of drug-impaired driving. The Working Group on Impaired Driving under the Coordinating Committee of Senior Officials in Justice Ministries undertook this task.

LEGISLATION

Section 253 of the *Criminal Code* creates two separate and distinct offences. Under paragraph 253(a) of the *Criminal Code*, it is an offence for anyone to operate a motor vehicle, vessel, aircraft or railway equipment while his or her ability to operate it is impaired by alcohol or a drug. The combination of a drug and alcohol is also included, even if each alone would not create impairment.

Under Paragraph 253(b) of the *Criminal Code*, it is an offence to operate a motor vehicle, vessel, aircraft or railway equipment with a blood alcohol concentration that exceeds 80 milligrams of alcohol in 100 milliliters of blood. There is no "legal limit" in 253(b) for any drug, other than alcohol. Forensic scientists have advised that drugs, unlike alcohol, are often extremely difficult to link to a particular concentration level that will cause impairment in the general population of drivers. Moreover, analysis for some drugs in certain bodily fluids may simply indicate drug use many days, or even months, in the past.

Sections 254, 256 and 258 of the *Criminal Code* set out extensive procedures that permit a peace officer to gather evidence of alcohol-impaired driving and produce this evidence before the court, typically to prove the paragraph 253(b) offence. An officer may demand a sample of breath into an "approved screening device" when the officer has reasonable suspicion that there is any alcohol in the driver's body. With reasonable grounds to believe that a driver has committed a section 253 offence in the previous three hours, the officer may demand a sample of breath into an "approved instrument". If the driver is unable to provide a sample of breath into an approved instrument, the officer may demand a blood sample. If a blood sample is taken for alcohol analysis, it may also be analyzed for the presence of a drug. As recommended by the Standing Committee, Parliament amended section 256 of the *Criminal Code* in 2000, so that an officer may apply for a warrant to obtain a blood sample from an unconscious driver who is reasonably believed to have committed, in the previous four hours, a

section 253 drug-impaired driving offence involving a collision resulting in injury or death. Prior to the amendment, the warrant application could only have been made in relation to alcohol.

INVESTIGATIONS

Currently for section 253(a) drug-impaired driving investigations, officers would usually rely upon symptoms of impairment and driving behaviour and witness testimony. If officers do not have specific drug assessment training, this task can be nearly impossible. Trained officers, who rely upon voluntary physical tests and voluntary bodily fluid samples, may not be able to follow their suspicions in many cases because the suspect can decline to participate voluntarily in the drug assessment testing and there is no legislated demand that officers can make to compel participation in the tests.

With drinking and driving investigations, the police may rely upon: observations of well-known symptoms of alcohol impairment and driving behaviour (for 253(a)), or breath/blood testing (for 253(b)), or both. If the officer has no grounds to believe that the individual is impaired by alcohol (that is, there is no indication of alcohol whether by admission or other observations), then the officer has no current authority to compel the individual to be tested in relation to drug impairment.

Currently, situations where blood would be demanded for alcohol testing from a conscious driver (that could be further tested for drugs) are relatively infrequent. Situations where a 256 warrant would be used to obtain blood from an unconscious driver for alcohol or drug testing are also rare.

THEORY OF DRUG EVALUATION BY TRAINED OFFICERS

In British Columbia and some other Canadian jurisdictions, officers that do have specific drug assessment training and certification will seek voluntary tests from drug-impaired driving suspects in their investigations. They use a protocol that has been long used by a number of U.S. states, sometimes under highway traffic legislation and sometimes under penal legislation. Legislation in the United States deems the driver to have given his or her consent to chemical testing of his or her blood, breath or urine if that individual is lawfully arrested for driving while impaired by alcohol or drug. This provision known as the “implied consent law” is extremely helpful to law enforcement agencies in the United States. Failure to submit to such chemical tests will result in penal sanctions. Such legislation not only requires the suspect to provide a sample, it also provides the officer with the means to detain and/or arrest the individual in order to secure evidence.

In order to understand the legislative options that follow, it is necessary to be familiar with the nature of the protocol for drug-impaired driving investigations. If conducted properly, the investigation by trained officers will result in an accurate assessment of the suspect's drug impairment, if any, for paragraph 253(a) purposes.

The evaluation of a suspect conducted by a trained peace officer has been developed in California and successfully implemented in many jurisdictions to combat drug impaired driving and is known as the Drug Recognition Expert (DRE) Program. Under this program, officers go through extensive training to enable the officers to conduct various tests and to assess the suspect and determine if there is drug impairment and the nature of the drug causing it. If the officer, after conducting the various tests, concludes that there is drug impairment, she or he then requests a blood or urine sample for analysis. After a blood or urine sample is obtained, it is then analyzed to determine the presence of a drug (not concentration). If the officer has properly conducted the test and accurately assessed the suspect, his or her conclusions on the nature of the drug causing the impairment should match the analysis conducted by the laboratory technician on the blood or urine sample. Where there is such a match, a prosecution will proceed.

Phase I involves the investigating officer's attention being drawn to a pattern of driving which would appear to be erratic or a departure from the norm. At this point, the officer would initiate contact with the suspect driver by pulling the vehicle over and approaching the driver, or the contact could begin upon attending at the scene of an accident. While interacting with the driver, the officer would be able to make physical observations of the driver. These observations may include common indicators of impairment such as slurred speech, blood shot eyes, coordination difficulties while producing a driver's licence, etc. The officer may also ask the driver to perform standardized field sobriety tests (SFST) at the roadside (such as walk-and-turn, one-leg stand, horizontal gaze nystagmus) in order to further establish the officer's grounds for a belief of impairment. If the observations of the officer are consistent with an alcohol-impaired individual, the officer would then make a demand for a breath sample from the suspect. If there is no indication of alcohol, yet the officer suspects drug impairment, the officer could request a saliva sample. The test of the saliva sample takes approximately 5 minutes and can be done at the roadside. However, the saliva "screen" may not have a wide range of drugs that it can identify. Some jurisdictions have used sweat swabs taken across a driver's forehead but like saliva tests, the "screen" may not have a wide range of drugs that it can identify. If based on the general observations or the SFST or saliva/sweat swab test results, the officer reasonably believes the suspect is impaired by a drug; she/he should have grounds to demand the suspect return to the police station for a DRE evaluation.

Phase II of the DRE investigation takes place at the police detachment where a breath sample is obtained to confirm that the cause of the impairment is not alcohol. If in fact the individual's blood alcohol level is consistent with the alcohol impairment indicators, then the officer would not pursue a drug impaired investigation and would simply recommend charges for driving while impaired by alcohol (that is, alcohol would be determined as the cause of the impairment) or driving with a blood alcohol concentration that exceeds the "legal limit".

If the individual has passed the "approved instrument" test, thus eliminating alcohol as the cause of the impairment, the officer would commence performing a series of drug evaluation tests. These tests include:

1. Eye examination to measure pupil size, vertical and horizontal movement of the eyes, and convergence of the eyes. The pupil size and the ability for movement will fluctuate depending on the degree of impairment and the drug causing it.
2. A dark room examination is conducted to again measure pupil size and to perform an ingestion examination that allows the officer to determine if there is any drug residue left in either the nasal or throat passage. This examination takes place in a completely dark room where the suspect must remain for approximately 90 seconds prior to an examination with a flashlight. The officer will shine the flashlight from various directions into the suspect's eyes and, with a measuring apparatus, note the various measurements of the pupil and how the eye has reacted to the change in light. The drug ingested will affect how the eye reacts. As well, the officer will then request the suspect to open his or her mouth in order to view the mouth and throat and will further inspect the nasal passage of the suspect.
3. Sobriety tests requiring divided attention skills are also performed. These tests include balance test, walk and turn, one leg stand, and finger to nose. Each of these tests will not only permit observations of coordination skills, they will further test the ability of the individual to concentrate on numerous tasks simultaneously. Each test will both assist in determining the degree of impairment and provide indicators as to the nature of the drug that has been ingested.
4. Physical examinations are also performed by the officer, who will check vital signs, including taking the suspect's pulse and blood pressure, checking for muscle tone, and searching for injection sites. The nature of the drug ingested will affect these vital signs and accordingly they are helpful in the drug evaluation.
5. The officer will then interview the suspect in order to obtain either admissions of drug ingestion or other information that may give assistance in evaluating the suspect.

Performing the drug evaluation tests takes approximately 45 minutes. At the conclusion of this phase, the officer would be in a position to render an opinion with respect to the individual's impairment and its cause.

Phase III of the investigation requires a toxicological examination where the suspect is asked to provide a sample of blood or urine to be analyzed. This phase of the investigation is critical in that the analysis will detect traces of any drug that has been ingested. When the analysis is consistent with the opinion of the evaluator who performed the DRE tests, the forensic evidence then confirms the opinion of the evaluator. It must be underlined that analysis of the blood or urine sample is not for the purpose of indicating when a particular drug was ingested and/or when the individual would have been experiencing impairment caused by the specific drug. It is the officer's evaluation and observations of indicators of impairment that are consistent with the drug found in the blood or urine sample that enables the prosecution to satisfy the court that the individual was impaired by a drug when driving.

In summary, the first phase involves initial contact with the suspect driver at roadside by an officer who, by general observations or "standardized field sobriety tests" administered by a trained officer or by a saliva or sweat swab, may have reasonable grounds to believe that there is drug impairment and proceed with the second phase. The second phase is a more complete series of physical tests at the police station conducted by an officer trained as a "Drug Recognition Expert" who classifies the family of drugs that the suspect is believed to be impaired by. The third phase involves analysis of the sample of blood or urine provided by the driver. There are present concerns with this system (which is currently used in some Canadian jurisdictions, such as British Columbia, but only where the suspect voluntarily participates) in that many drug-impaired drivers will not agree to participate in the testing. Therefore, a legislated system allowing police to make demands is desirable.

OPTIONS FOR ENHANCING DRUG IMPAIRED DRIVING INVESTIGATIONS

There are several legislative options for enhancing the investigating officer's ability to secure evidence and the prosecution's ability to have the evidence admitted at trial.

1. Section 253(b) Legal Limits for Drugs, other than alcohol

One option is to introduce "legal limit" offences for drugs, alongside alcohol, within paragraph 253(b) of the *Criminal Code*. Most U.S. states and European countries do not attempt to set specific "legal limits". A few do set "zero limits", however, there is great concern, for example, with cannabis because a zero limit overreaches the goal of sanctioning drivers who are not only using the drug but

who are also impaired by the drug. With cannabis, presence may not show recent use, let alone impairment.

2. Legislated Demands related to a DRE Program – Phase I

As many officers are now trained to administer SFST tests at the roadside, it would assist if, based upon a reasonable suspicion of a drug in the body, a peace officer with certification to administer SFST could be authorized to demand that a driver perform the SFST tests at roadside. In respect of elevating “suspicion” of a drug in the body to “reasonable grounds” to believe the 253(a) offence has occurred, this would be analogous to the demand for a breath sample on an “approved screening device”, typically used with respect to paragraph 253(b) alcohol investigations (failure on the “approved screening device” is not an offence but leads to the reasonable grounds required for the officer to demand a sample of breath into an “approved instrument”). A “fail” result on SFST would not result in a charge but could provide the reasonable grounds that are needed to demand that the suspect participate in a DRE evaluation. A similar legislative proposal that may assist in alcohol impaired driving investigations would be to extend the same SFST demand, based upon a reasonable suspicion of alcohol in the body, and allow a fail result to lead to the demand for a breath sample on an “approved instrument”. This could assist officers where there is no readily available “approved screening device”.

Based upon a reasonable suspicion of a drug in the body, a peace officer could be authorized to demand a saliva or sweat sample at roadside. This would be analogous to the demand for a breath sample on an “approved screening device”, typically used with respect to paragraph 253(b) investigations. A “fail” result would not lead to a charge. It would provide reasonable grounds to demand DRE tests. The officer needs the ability to confirm the suspicion at the roadside before continuing with a drug-impaired investigation. Testing of a saliva or sweat sample at roadside could confirm the officer’s suspicion.

The choice of SFST, or a saliva or sweat swab would be left to the peace officer and not the suspect.

Also, an officer at roadside who gathers evidence (admissions or observations of indicators of impairment) and who believes on reasonable and probable grounds that a suspect was driving while impaired by a drug needs legislative authority to demand that the suspect participate in a DRE evaluation.

Based upon a reasonable belief that the driver has committed a paragraph 253(a) offence involving a drug or a combination of alcohol and a drug in the previous three hours, a peace officer could be authorized to demand that the driver accompany the officer for the purpose of providing a DRE evaluation by an officer certified to administer DRE tests. DRE test results, as with “approved instrument” results for alcohol, would be admissible in evidence, in this case to

prove the paragraph 253(a) offence. (The Working Group considered the option of legislating a power of detention while the officer seeks a warrant to compel the person to participate in a DRE evaluation. There were two divergent areas of concern 1) whether this would be too time-consuming, particularly with drugs that have a short-term impairing effect and 2) whether there would be a stronger case with a warrant provision, should there be *Charter* challenges.)

3. Legislated Demands Related to a DRE Program – Phase II

Legislation is required to permit a DRE officer to perform the DRE evaluation and compel the suspect to participate. It may also be necessary to set out in legislation or in regulations the formal process of the DRE evaluation (similar to legislation recognizing “approved instruments” for alcohol testing). The thinking is that certification to standards will ensure that the officer follows the protocol. There is a view, however that this may be overly restrictive of a process that may evolve over time and that certification of the officer could help to avoid having to set out in legislation or regulation what the various DRE steps are.

4. Legislated Demands Related to a DRE Program – Phase III

A demand for a confirmatory bodily fluid sample, based upon a reasonable belief that the driver has committed a paragraph 253(a) offence involving a drug, or a combination of alcohol and a drug, in the previous three hours, is necessary and could involve the taking of a urine sample, a blood sample or saliva sample. As with the DRE results, this result would be admissible as evidence to prove the offence, as opposed to the initial observations/SFST/saliva swab or sweat swab results that would only be used to determine whether the officer had the reasonable grounds necessary to demand the DRE tests/bodily fluid tests. Matters of continuity of exhibits, etc. appear to have been handled without difficulty in British Columbia. It is believed that a *Criminal Code* amendment would be required to ensure that the analyst’s results may be admitted upon certificate in a trial.

5. Refusal Offences

There is a need to create a refusal offence related to SFST, DRE, and bodily sample demands that would parallel the refusal offences that attach to the “approved screening device” and “approved instrument”/blood sample demands currently in the *Criminal Code*. Without sanctions, there would be no improvement over the present situation of voluntary participation in the drug testing protocol.

CHARTER SENSITIVITY

These legislative proposals are Charter sensitive. These proposals would require the suspect to participate in a process that may result in incriminating evidence. In assessing these proposals, consideration would have to be given to the current *Criminal Code* provisions that permit demands to be made to provide evidential (“approved instrument”) breath samples and DNA samples, which have survived Charter challenges. Consideration would also have to be given as to the point in time at which a suspect must be given information on the right to counsel.

Comments on this consultation paper should be sent by December 1, 2003 to:

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