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LEGISLATIVE SUMMARY



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

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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-73
(Legislative Summary)

Publication No. 41-2-C73-E

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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

1 BACKGROUND

On 16 June 2015, 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 Act¹), was introduced in the House of Commons by the Minister of Justice and Attorney General of Canada, the Honourable Peter MacKay. The bill died on the *Order Paper* when the general election was called on 2 August 2015.

1.1 PURPOSES OF THE BILL AND PRINCIPAL AMENDMENTS

Bill C-73 reforms the sections of the *Criminal Code*¹ governing offences in relation to conveyances, primarily with respect to penalties and evidence. Although the types of offences generally remain the same, the bill increases the minimum and maximum penalties and, for the impaired driving offence, restricts the defences available to the accused – such as the “intervening drinking defence”² – and addresses the Supreme Court of Canada ruling in *R. v. St-Onge Lamoureux*³ regarding the “two-beer defence.”⁴

Specifically, the bill:

- repeals the offence of street racing (clause 4);
- harmonizes penalties for transportation offences (new sections 320.13 to 320.26 of the Code); for example:
 - the maximum penalties for offences not causing bodily harm or death (*simpliciter* offences) are doubled,
 - the maximum penalty for all offences causing bodily harm is 14 years of imprisonment, and
 - the minimum penalty for the offence of impaired driving (and refusal to comply with a demand) causing the death of another person is increased from a \$1,000 fine to six years of imprisonment;
- removes the “bolus drinking defence”⁵ (new section 320.14(1)(b) of the Code);
- restricts the intervening drink defence (new section 320.14(4) of the Code); and
- governs disclosure in response to the Supreme Court ruling in *R. v. St-Onge Lamoureux* (new section 320.35 of the Code).

Although the bill reforms most of the transportation-related offences, it does not amend the offences of criminal negligence (sections 219 to 221 of the Code)⁶ or manslaughter (section 236 of the Code).⁷ The bill also does not:

- reduce the maximum allowable blood alcohol concentration (BAC) set out in the Code; it remains 80 milligrams (mg) of alcohol per 100 millilitres (mL) of blood (0.08);⁸ or
- provide for random roadside breath testing, despite the 2009 recommendation in this regard by the House of Commons Standing Committee on Justice and Human Rights.⁹

1.2 IMPAIRED DRIVING IN CANADA

1.2.1 STATISTICS

Although the number of impaired driving cases has decreased since the 1980s, impaired driving remains the leading cause of criminal death in Canada.¹⁰

Alcohol is responsible for the vast majority (98%) of cases of impaired driving.¹¹

In 2010–2011, impaired driving accounted for 12% of all criminal court cases, the highest proportion among all offence types.¹² However, impaired driving accounted for only 3.64% of police-reported offences in 2014.¹³

The conviction rate for impaired driving cases (84%) is higher than the general conviction rate (64%).¹⁴ It has remained fairly stable for the last decade.

In general, it takes longer to resolve an impaired driving case than any other type of criminal case before the courts. In nearly one quarter of cases, the entire process takes more than a year.¹⁵

Finally, in the vast majority of impaired driving convictions (89%), the penalty was a fine; in a smaller proportion of convictions (8%), it was imprisonment.¹⁶

1.2.2 HISTORY OF CRIMINAL LAW WITH RESPECT TO 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 BACs 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.”¹⁷

One of the aims of Bill C-73 is to simplify and clarify the transportation sections of the Code. The following sections of this Legislative Summary explain 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.¹⁸

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).¹⁹

For close to 50 years, the Alcohol Test Committee²⁰ 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.²¹

1.2.2.2 THE “TWO-BEER DEFENCE” AND *CARTER* (1985)

The “two-beer defence” – also known as the “Carter defence” – originated in the 1985 Ontario Court of Appeal *R. v. Carter* decision.²² By presenting the court with a consumption scenario (for example, “I only had two beers,” despite a breath test to the contrary), corroborated by a toxicologist’s testimony, the accused was able to raise a reasonable doubt, undermine the results of the breath test, overcome the presumptions and obtain an acquittal. Although the accused’s testimony concerning his alcohol consumption could be considered subjective recall and therefore unreliable, case law prevented the breath-test results from being used to assess the accused’s credibility.²³

While often resting on shaky foundations, the two-beer defence turned out to be effective. According to the evidence heard in 2008 by the Standing Senate Committee on Legal and Constitutional Affairs as part of its consideration of Bill C-2 (which would become the *Tackling Violent Crime Act*), this defence was resulting in an acquittal rate of roughly 50%.²⁴ In *R. v. St-Onge Lamoureux* (see section 1.2.2.5 of this Legislative Summary), the Supreme Court expressed the opinion that “it has now been shown that the success rate of this defence is hard to justify in light of the scientific reliability of the instruments.”²⁵

1.2.2.3 THE “BOLUS DRINKING” AND “INTERVENING DRINK” DEFENCES (1995)

Unlike the two-beer defence, the “bolus drinking”²⁶ and “intervening drink”²⁷ defences do not challenge the validity of the breath test, but instead target the presumption of identity. The accused claims that the BAC reading is not the level that existed while driving, because he or she consumed alcohol shortly before driving (bolus drinking) or after being stopped by the police (intervening drink).

Rob Moore, the then parliamentary secretary to the Minister of Justice, described these kinds of defences in the House of Commons as follows:

The accused may still be acquitted if he or she can show that they could have been under 80 at the time [of] driving without contradicting the BAC results on the approved instrument at the police station. This could happen if, for example, the person downed several drinks and was arrested before the alcohol was absorbed. It could also occur that after driving, but before testing, the person consumed alcohol and it was absorbed by the time the approved instrument test was taken.²⁸

In the 1995 *R. v. St. Pierre* case,²⁹ the accused – who had consumed vodka between the time she was stopped by the police and when she took the breath test (intervening drink defence) – overcame the presumption of identity and was acquitted, since there was no evidence other than the breath test to establish her BAC level at the time of driving. In reaching this conclusion, the Supreme Court of Canada ruled that the accused could rebut the presumption of identity simply by showing that *there was a difference* between the BAC when driving and at the time of the test.³⁰ Therefore the accused did not have to provide evidence showing a BAC level of *under 0.08* at the time she was driving.

In response to this decision, Parliament amended the Code in 1997 to limit the bolus drinking and intervening drink defences.³¹ This amendment requires an accused attempting to rebut the presumption of identity to present evidence that his or her BAC did not exceed 0.08 while driving.³²

Although rarer than the two-beer defence, the bolus drinking and intervening drink defences are said to be raised in the most serious cases involving death or serious injury.³³ According to the Supreme Court, these kinds of defences “denote either significant irresponsibility with regard to public safety or a pathological reaction by the accused,”³⁴ and the accused risks charges for obstruction of justice.³⁵

1.2.2.4 THE *TACKLING VIOLENT CRIME ACT* (2008)

The widespread acceptance by the courts of the two-beer defence violated the fundamental principle behind the prosecution of the offence of driving with a BAC over 0.08: the reliability and primacy of the breath-test results.³⁶ In some cases, the presumption of accuracy became practically useless:

[I]n cases involving a *Carter* defence, prosecutors partly abandoned section 258 and attempted to prove their cases the long way around without aid of the statutory presumption of accuracy or, more precisely, the burden of its accompanying jurisprudence. Ironically then, the very legislation that was designed to facilitate proof of the prohibited condition in order to help combat the menace of drinking and driving had become an obstacle to be avoided by the prosecution.³⁷

One of the aims of the *Tackling Violent Crime Act*,³⁸ which amended the Code and came into force in 2008, was to limit the two-beer defence. Since the Act has come into force, an accused may no longer rebut the presumption of accuracy simply by presenting that person's consumption scenario. Instead, the accused must:

- raise a reasonable doubt as to the proper functioning or operation of the approved instrument;
- demonstrate that the result of the test resulted from the malfunction or improper use of the approved instrument; and
- present evidence that his or her BAC while driving did not exceed the legal limit.³⁹

According to the Supreme Court, this amendment "was a response to the serious disconnect that existed in the fact that the *Carter* defence had a high success rate despite the recognized scientific reliability of the results."⁴⁰

In addition, the *Tackling Violent Crime Act* further restricted the bolus drinking and intervening drink defences, which had already been restricted in 1997. The new amendment required that the accused's evidence of alcohol consumption be compatible with the results of the standard instrument.⁴¹

Lastly, the Act introduced a new regime for detecting and investigating drug-impaired driving. It gave police the authority to demand roadside standardized field sobriety tests, bring stopped drivers to the police station for a drug recognition expert evaluation and take saliva, urine or blood samples.⁴²

1.2.2.5 *R. v. ST-ONGE LAMOUREUX* (2012)

There have been numerous court rulings involving the impaired driving provisions of the Code. One of the most recent is *R. v. St-Onge Lamoureux*, in which the Supreme Court of Canada had to determine whether certain Code provisions were consistent with the *Canadian Charter of Rights and Freedoms*. According to the Department of Justice Canada, some of the amendments in Bill C-73 address this major ruling.⁴³

At issue was whether certain legal presumptions in sections 258(1)(c), 258(1)(d.01) and 258(1)(d.1) of the Code breached the right to make full answer and defence (section 7 of the Charter), the protection against self-incrimination (section 11(c) of the Charter) and the presumption of innocence (section 11(d) of the Charter). If so, the Supreme Court had to rule whether these breaches were reasonable and demonstrably justified in a free and democratic society within the meaning of section 1 of the Charter.

The impugned provisions contain three legal presumptions, and an individual accused of driving with a BAC of over 0.08 must meet certain requirements in order to rebut them. Table 1 summarizes the requirements by presumption.

Table 1 – Presumptions Regarding Impaired Driving and Requirements for Their Rebuttal as Considered in *R. v. St-Onge Lamoureux*

Presumption (<i>R. v. St-Onge Lamoureux</i> , para. 15)	Requirements for Rebuttal (<i>R. v. St-Onge Lamoureux</i> , paras. 17–19)
<p>A presumption of accuracy of the breath test results (s. 258(1)(c)).</p> <p>A presumption of identity according to which the results are presumed to correspond to the blood alcohol level of the accused at the time of the alleged offence (s. 258(1)(c)).</p>	<ol style="list-style-type: none"> 1. Raise a reasonable doubt about the proper functioning and operation of the instrument (s. 258(1)(c) and s. 258(1)(d.01)). 2. <u>Raise a reasonable doubt showing that the breath test results were caused by the malfunction or improper operation of the instrument (s. 258(1)(c)).</u> 3. <u>Present evidence raising a reasonable doubt that the blood alcohol level actually exceeded 0.08.</u> <p>Note: The evidence needed to satisfy the first two requirements relates to circumstances directly associated with the taking of blood alcohol samples, whereas a <i>Carter</i> defence will usually be needed to satisfy the third.</p>
<p>A presumption of identity according to which a blood alcohol level over 0.08 at the time of the analysis is presumed to be the same as the blood alcohol level of the accused at the time of the alleged offence (s. 258(1)(d.1)).</p>	<ol style="list-style-type: none"> 1. Show that the accused's alcohol consumption was consistent with a blood alcohol level not exceeding 0.08 at the time of the offence. 2. Show that the accused's alcohol consumption was consistent with the breath test results. <p>Note: These requirements demand a <i>Carter</i> defence.</p>

Note: The Supreme Court ruled that the requirements underlined in the table infringe the presumption of innocence provided for in section 11(d) of the *Canadian Charter of Rights and Freedoms* and are not justifiable in a free and democratic society within the meaning of section 1 of the Charter.

In its analysis, the Supreme Court referred to prior case law stating that a statutory presumption violates the right to be presumed innocent if its effect is that an accused person can be convicted even though the trier of fact has a reasonable doubt.⁴⁴

It pointed out that, in practice, a breathalyzer can malfunction or be used improperly,⁴⁵ and the trier of fact would be bound by legal presumptions despite the fact that he or she could entertain a reasonable doubt about the validity of the test results.⁴⁶

In the majority opinion of the Court:

- Requiring an accused to raise a reasonable doubt as to the proper functioning or operation of the instrument and then demonstrate a causal connection between that malfunction or improper operation and the determination that the blood alcohol level of the accused exceeded the legal limit constitutes a serious infringement of the right to be presumed innocent that cannot be justified in a free and democratic society.⁴⁷
- Furthermore, requiring the accused to also show that his or her blood alcohol level did not exceed 0.08 at the time of the offence is not justified, since the accused would have already raised a reasonable doubt as to the reliability of the results.⁴⁸

Therefore, the majority ruled that although sections 258(1)(c), 258(1)(d.01) and 258(1)(d.1) of the Code infringe the presumption of innocence in section 11(d) of the Charter, only the requirements for rebuttal in section 258(1)(c) were not justified in a free and democratic society, in accordance with section 1 of the Charter. The ruling struck the following from section 258(1)(c): “all of the following three things –” and

that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed.

In other words, the second and third requirements of section 258(1)(c) were struck down, and the majority found that Parliament was justified in requiring that evidence in the accused's defence must be directed at the functioning or operation of the instrument.⁴⁹

To sum up, according to *R. v. St-Onge Lamoureux*, sections 258(1)(d.01) and 258(1)(d.1), as well as section 258(1)(c) without the second and third requirements, are justified within the meaning of section 1 of the Charter.

2 DESCRIPTION AND ANALYSIS

2.1 AMENDMENTS TO THE *CRIMINAL CODE* (CLAUSES 2 TO 28)

Clause 4 replaces most of the transportation provisions in the Code (sections 249 to 261) with new Part VIII.1, "Offences in Relation to Conveyances" (new sections 320.11 to 320.41). These new provisions harmonize and increase penalties for all conveyance-related offences (dangerous operation, impaired operation, failure or refusal to comply with a demand, failure to stop after an accident, flight, and operation of a conveyance while prohibited).

Key points include the following:

- Minimum penalties have been added for these convictions:
 - Dangerous operation (indictable or summary offence)⁵⁰
 - Dangerous operation causing bodily harm (indictable or summary offence)
 - Failure or refusal to comply with a demand (indictable offence)
 - Failure to stop after an accident (indictable or summary offence)
 - Failure to stop after an accident resulting in bodily harm (indictable or summary offence)
 - Flight (indictable or summary offence)
 - Operation of a conveyance while prohibited (indictable or summary offence)
- The following offences are now hybrid offences:⁵¹
 - Dangerous operation causing bodily harm
 - Impaired operation causing bodily harm
 - Failure or refusal to comply with a demand when the driver knows or should know that the accident resulted in bodily harm
 - Failure to stop after an accident resulting in bodily harm

- Maximum prison sentences (indictable offence) for offences resulting in bodily harm have been increased from 10 years to 14 years.⁵²
- The maximum prison sentence for dangerous operation resulting in death (indictable offence) has been increased from 14 years to life.

2.1.1 INTERPRETATION, RECOGNITION AND DECLARATION (NEW SECTIONS 320.11 AND 320.12 OF THE *CRIMINAL CODE*)

2.1.1.1 INTERPRETATION

Because the definitions in the Code that cover transportation have been repealed, new section 320.11 provides new definitions for transportation offences. Many existing definitions have been updated, others have been left out, and some new definitions have been added:

- The definition for “Alcohol Test Committee” (which is assigned a role under new sections 320.32(2), 320.35(1) and 320.35(5)) has been added.
- The definition for “conveyance” (a motor vehicle, a vessel, an aircraft or railway equipment) has been added.
- The definitions for “street racing” and “aircraft” were repealed and have been left out.
- The French definition for “approved instrument” has been changed from “alcootest approuvé” to “éthylomètre approuvé.”
- The definition for “operate” has been updated, and now includes the concept of having “care or control” of a vehicle, which was formerly included in the wording of the offences in the Code.

2.1.1.2 RECOGNITION AND DECLARATION

As recommended in the report of the House of Commons Standing Committee on Justice and Human Rights in June 2009⁵³ and in a Department of Justice Canada discussion paper in 2010,⁵⁴ new section 320.12 of the Code recognizes and declares certain principles:

- Operating a conveyance is a privilege that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety.
- The protection of society is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug.
- The analysis of a sample of a person’s breath by means of an approved instrument produces reliable and accurate BAC readings.
- Evaluating officers (police officers) are qualified to evaluate whether a person’s ability to operate a conveyance is impaired.

According to the 2010 Department of Justice Canada discussion paper, these “express legislative provisions” have the advantage of being included in the Code rather than in the preamble of an Act, so they are more accessible to the courts, prosecutors, defence counsel and the accused. It should be noted that the bill also contains a preamble outlining certain principles and values to guide the interpretation of its provisions. It emphasizes the following:

- the fact that dangerous driving and impaired driving are unacceptable and that they injure or kill thousands of people in Canada every year;
- the severity of penalties;
- the importance of simplifying the law;
- the importance of protecting the public from the dangers posed by consuming large quantities of alcohol immediately before driving;
- the importance of deterring persons from consuming alcohol after driving in circumstances where they have a reasonable expectation that they would be required to provide a sample of breath or blood; and
- harmonization of:
 - prohibitions and penalties, and
 - federal and provincial legislation.

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

2.1.2.1 OFFENCES AND PUNISHMENT

Most of the current Code offences related to conveyances are included in the bill, 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 while 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)
- Flight causing bodily harm or death (sections 249.1(3) and 249.1(4))⁵⁵

The following sections present the various transportation offences in the form of tables and compare the punishments currently provided in the Code (“current legislation”) with the punishments provided in the bill.

2.1.2.1.1 DANGEROUS OPERATION

Table 2 – Dangerous Operation:
Current Punishment and Punishment Under Bill C-73

Offence	Punishment			
	Current Legislation (ss. 249 and 787)		Bill C-73 (New ss. 320.13, 320.19(1), 320.2 and 320.21(3))	
Dangerous operation	Indictment	Summary Conviction	Indictment	Summary Conviction
	Max: 5 years	Max: \$5,000 and 6 months	Max: 10 years Min: ^a 30 days; 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days; 1 year
Dangerous operation causing bodily harm	Indictment		Indictment	Summary Conviction
	Max: 10 years		Max: 14 years Min: ^a 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a 30 days; 120 days; 1 year
Dangerous operation causing death	Indictment		Indictment	
	Max: 14 years		Max: Life	

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 in 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.

2.1.2.1.2 OPERATION WHILE IMPAIRED

Table 3 – Operation While Impaired:
Current Punishment and Punishment Under Bill C-73

Offence	Punishment			
	Current Legislation (ss. 253, 255(1), 255(2), 255(2.1), 255(3), 255(3.1) and 255(3.3))		Bill C-73 (New ss. 320.14, 320.19(1), 320.19(2), 320.2 and 320.21(1))	
	Indictment	Summary Conviction	Indictment	Summary Conviction
Operation while impaired	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 30 days; 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^{a, b} \$1,000; 30 days; 120 days; 1 year
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 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a 30 days; 120 days; 1 year
Operation while impaired causing death	Indictment		Indictment	
	Max: Life Min: ^a \$1,000; 30 days; 120 days		Max: Life Min: 6 years	

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 s. 320.14(1)(b)), on summary conviction 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.

Currently, under section 253(1)(b) of the Code, anyone who operates a motor vehicle with a BAC *exceeding* 0.08 commits an offence. In contrast, new section 320.14(1)(a) 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.⁵⁶

2.1.2.1.3 FAILURE OR REFUSAL TO COMPLY WITH A DEMAND

Table 4 – Failure or Refusal to Comply with a Demand:
Current Punishment and Punishment Under Bill C-73

Offence	Punishment			
	Current Legislation (ss. 254(5), 255(2.2), 255(3.2) and 255(3.3))		Bill C-73 (New ss. 320.15, 320.19(1) and 320.19(3), 320.2, 320.21(1) and 320.21(2))	
	Indictment	Summary Conviction	Indictment	Summary Conviction
Failure or refusal to comply with a demand	Max: 5 years	Max: 18 months Min: ^a \$1,000; 30 days; 120 days	Max: 10 years Min: ^a 30 days; 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a \$2,000; 30 days; 120 days; 1 year
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 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a 30 days; 120 days; 1 year
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: ^b 6 years	

- Notes: a. The minimum punishment varies depending on whether the offence is a first, second, third or subsequent offence.
- b. A person who commits an offence under new s. 320.15(3) by failing or refusing to comply with a demand when the person knows, or ought to know, that he or she caused an accident that resulted in the death of another person, but who then provides a sample at a police station under new s. 320.28(c)(ii), is not liable to the minimum punishment if his or her blood alcohol concentration is less than 0.08.

2.1.2.1.4 FAILURE TO STOP AFTER AN ACCIDENT

Table 5 – Failure to Stop After an Accident:
Current Punishment and Punishment Under Bill C-73

Offence	Punishment			
	Current Legislation (ss. 252 and 787)		Bill C-73 (New ss. 320.16, 320.19(1), 320.2 and 320.21(3))	
	Indictment	Summary Conviction	Indictment	Summary Conviction
Failure to stop after an accident	Max: 5 years	Max: \$5,000 and 6 months	Max: 10 years Min: ^a 30 days; 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days; 1 year
Failure to stop after an accident resulting in bodily harm	Indictment		Indictment	Summary Conviction
	Max: 10 years		Max: 14 years Min: ^a 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a 30 days; 120 days; 1 year
Failure to stop after an accident resulting in death	Indictment		Indictment	
	Max: Life		Max: Life	

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

2.1.2.1.5 FLIGHT

Table 6 – Flight: Current Punishment and Punishment Under Bill C-73

Offence	Punishment			
	Current Legislation (ss. 249.1 and 787)		Bill C-73 (New ss. 320.17 and 320.19(1))	
Flight	Indictment	Summary Conviction	Indictment	Summary Conviction
	Max: 5 years	Max: \$5,000 and 6 months	Max: 10 years Min: ^a 30 days; 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days; 1 year
Flight causing bodily harm or death ^b	Indictment		–	
	Max: 14 years (for bodily harm) Max: Life (for death)			

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

b. This offence is not replicated in Bill C-73.

2.1.2.1.6 OPERATION WHILE PROHIBITED

Table 7 – Operation While Prohibited:
Current Punishment and Punishment Under Bill C-73

Offence	Punishment			
	Current Legislation (ss. 259(4) and 787)		Bill C-73 (New ss. 320.18 and 320.19(1))	
Operation while prohibited	Indictment	Summary Conviction	Indictment	Summary Conviction
	Max: 5 years	Max: \$5,000 and 6 months	Max: 10 years Min: ^a 30 days; 120 days; 1 year; 2 years	Max: 2 years less a day Min: ^a \$1,000; 30 days; 120 days; 1 year

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

Someone registered in and complying with a provincial alcohol ignition interlock device program does not commit an offence for operation while prohibited.

2.1.2.2 SENTENCING

2.1.2.2.1 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. Indeed, as was mentioned in the 2010 Department of Justice Canada discussion paper, the aggravating circumstances outlined in section 718.2 do not relate to transportation offences.⁵⁷

However, new section 320.22 provides a number of points that the court must take into account during sentencing:

- 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;⁵⁸ and
- whether the offender was not permitted, under a federal or provincial Act, to operate the conveyance.

According to the 2010 Department of Justice Canada discussion paper, many of these factors are already taken into account by the courts at sentencing.⁵⁹ Other aggravating factors are also mentioned in the document, but are not included in the bill: causing property damage or committing an offence while operating an emergency conveyance.

2.1.2.2.2 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 prohibition order includes attending 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 an offender convicted of a *simpliciter* offence for impaired operation or for the failure or refusal to comply with a demand can attend a treatment program approved by the province in which the offender resides.⁶⁰ If sentencing is delayed, a prohibition order against driving is ordered by the court for that period, pursuant to new sections 320.24(5) to 320.24(7). In that case, 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.

2.1.2.2.3 MANDATORY 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 provides for a similar order to be made respecting an offender convicted of an offence under any of new sections 320.13 to 320.18. This order takes effect when it is issued or, in the case of a sentence of imprisonment, once the offender is released. Table 8 outlines the various prohibition periods stipulated.

Table 8 – Periods of Mandatory Prohibition
on the Operation of a Conveyance Under Bill C-73

Type of Offence	Duration
<i>Simpliciter</i> offences (new ss. 320.13(1), 320.14(1), 320.15(1), 320.16(1), 320.17 or 320.18(1))	First offence: 1 to 3 years
	Second offence: 2 to 10 years
	Each subsequent offence: Minimum of 3 years
Offences causing bodily harm (new ss. 320.13(2), 320.14(2), 320.15(2) or 320.16(2))	First offence: 2 to 10 years
	Second offence: Minimum of 3 years
	Each subsequent offence: Minimum of 5 years
Offences causing death (new ss. 320.13(3), 320.14(3), 320.15(3) or 320.16(3))	First offence: Minimum of 3 years
	Each subsequent offence: Minimum of 10 years

In addition, new section 320.24(7) of the Code provides that a new order prohibiting the operation of a conveyance applies consecutively to an order already in effect. Currently, section 259(2.1) leaves this issue for the court to decide.

Under new section 320.24(8), 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 program concerns a first offence or a subsequent offence. Sections 259(1.1) and 259(1.2) of the current Code contain similar provisions. Table 9 compares the current minimum absolute prohibition periods with those set out in the bill.

Table 9 – Minimum Periods of Absolute Prohibition
on the Operation of a Conveyance Under Current Legislation and Bill C-73

First or Subsequent Offence	Current Legislation (s. 259(1.2))	Bill C-73 (new s. 320.24(8))
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

Lastly, section 259(2) currently provides for additional prohibition periods that may be ordered by the court at its discretion and that vary depending on the punishment imposed and the sentence to which an offender is liable. This provision is not retained in the bill.

2.1.2.2.4 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 provides essentially the same thing.

2.1.2.2.5 EARLIER AND SUBSEQUENT OFFENCES

Currently, section 255(4) of the Code stipulates that a person convicted of an offence under section 253 (impaired driving) or section 254(5) (failure or refusal to comply with a demand) is deemed to be convicted for a subsequent offence if the person has previously been convicted of:

- impaired driving not causing bodily harm or death, impaired driving causing bodily harm or death (sections 253, 255(2) and 255(3)), as well as the former offence of operation of a vessel while the person's ability is impaired (previous version of section 258(4));⁶¹
- 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 an offence under sections 320.13 to 320.18, new section 320.26 provides that any of the following offences for which the offender was previously convicted is considered an earlier offence:

- the offences under sections 320.13 to 320.18;
- the following offences, if they arose out of the operation of a conveyance:
 - causing death by criminal negligence (section 220),
 - causing bodily harm by criminal negligence (section 221), and
 - manslaughter (section 236);
- the offences in force before the bill comes into force:
 - dangerous operation (section 249),
 - flight (section 249.1),
 - causing death by criminal negligence (street racing) (section 249.2),
 - causing bodily harm by criminal negligence (street racing) (section 249.3),
 - dangerous operation of a motor vehicle while street racing (section 249.4),
 - failure to stop after an accident (section 252),
 - impaired driving (section 253),
 - failure or refusal to comply with a demand (section 254), and
 - operation while disqualified (section 259).

2.1.3 INVESTIGATIVE MATTERS (NEW SECTIONS 320.27 TO 320.31 OF THE *CRIMINAL CODE*)

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

New section 320.27 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 or a drug 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 tests⁶² or provide samples of breath by means of an approved screening device or both.

However, new section 320.27(2) adds a non-exhaustive list of reasonable grounds to suspect that a person has alcohol in his or her body, something that is not part of the Code at present. These grounds are:

- the erratic movement of the conveyance;
- the person's admission of alcohol consumption;

- an odour of alcohol on the person's breath or emanating from the conveyance; and
- the person's involvement in an accident that resulted in bodily harm or death.

New section 320.28 provides for specific measures where a person involved in an accident that resulted in the death of another person or bodily harm that endangers the life of another person fails or refuses to comply with a demand made under new section 320.27 (to perform physical coordination tests or provide samples of breath or both). In this case, the peace officer must:

- inform the person of the minimum punishment to which he or she is liable if the other person is dead (six years);
- inform the person of his or her right to contact counsel; and
- bring the person to a police station in order to retain and instruct counsel, and have the opportunity to provide the samples referred to in new sections 320.29(1)(a)(i) (samples of breath) and 320.29(1)(a)(ii) (samples of blood).

2.1.3.2 THE TAKING AND EVALUATION OF SAMPLES (AT THE POLICE STATION)

New sections 320.29(1) and 320.29(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 or a drug.

New section 320.29(3) applies where a person was not subject to a demand made under section 320.29(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 samples of breath be taken.

New section 320.29(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 320.29(5), whether or not in combination 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 anesthetics, cannabis, stimulants, hallucinogens and narcotic analgesics.

New sections 320.29(6) to 320.29(9) specify certain conditions relating to samples of blood.

2.1.3.3 WARRANTS TO OBTAIN BLOOD SAMPLES

New sections 320.3 and 320.31 of the Code provide that a justice may issue a warrant, by telephone or other means of communication, authorizing the taking of a sample of blood 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 320.3, 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.

Current section 256(1)(a) specifies that the justice may issue a warrant if there are reasonable grounds to believe that, in the previous four hours, the person committed an offence under section 253 (operating a conveyance while impaired) and was involved in an accident that resulted in bodily harm to any person or the death of another person. The bill increases this period to eight hours.⁶³ 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.⁶⁴

2.1.4 EVIDENTIARY MATTERS (NEW SECTIONS 320.32 TO 320.36 OF THE *CRIMINAL CODE*)

New sections 320.32 to 320.36 of the Code describe various evidence-related legal presumptions and procedures that apply to impaired driving offences, respecting:

- samples of breath (new section 320.32(1)) and blood (new section 320.32(3));
- the proper functioning of the approved instrument (new section 320.32(2));
- elements that do not constitute evidence that an analysis of a sample of blood was performed improperly (new section 320.32(4));
- presumptions concerning BAC (new section 320.32(5)), as well as presumptions relating to drugs (new section 320.32(7));
- the admissibility of the evaluating officer's opinion (as an expert) in determining whether a person's ability to operate a conveyance has been impaired by a drug (new section 320.32(6));⁶⁵
- the admissibility of the result of an analysis of a sample that a person was not required to provide (new section 320.32(8));
- 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 320.32(9));
- the admissibility of a statement made to a peace officer (new section 320.32(10));
- evidence of failure to comply with a demand (new section 320.32(11));
- 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 320.33);
- the document printed out from an approved instrument (new section 320.34);
- the disclosure of information to the accused by the prosecutor (new section 320.35); and
- the presumption of operation when a person occupied the seat or position ordinarily occupied by a person who operates a conveyance (new section 320.36).

2.1.4.1 PRESUMPTIONS OF ACCURACY OF RESULTS

New section 320.32(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 approved instrument must have been in proper working order;
- the samples must have been taken at intervals of 15 minutes; and
- 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.

To determine whether the approved instrument was in proper working order, new section 320.32(2) provides for a presumption of proper working order if the qualified technician complied with the operational procedures determined by the Alcohol Test Committee. New section 320.33(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 320.34 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 Charter, eliminate the possibility of using the two-beer defence *by itself* to call into question the results of breathalyzers.⁶⁶ 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.⁶⁷

According to the 2015 Department of Justice Canada 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. The proposed Bill would simplify establishing BAC and eliminate the need for expert evidence at trial. Most notably, the legislation would provide that blood alcohol evidence would be considered to be conclusively proven if proper breath test procedures are followed and that only scientifically-relevant information needs to be disclosed for a case of driving over the legal limit.⁶⁸

Indeed, the bill governs the disclosure of the evidence the Crown must provide to the defence. New section 320.35(1) provides that the prosecutor must disclose to the accused the information that, according to the Alcohol Test Committee documentation, "is sufficient to adequately assess whether the approved instrument was in proper working order."⁶⁹

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 320.35(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 320.35(4)).

As for the blood analysis, new section 320.32(3) 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. New section 320.32(3) provides the accused the opportunity to present evidence tending to show that the analysis was performed improperly, and new section 320.32(4) specifies the evidence that does not constitute such evidence.

2.1.4.2 PRESUMPTION OF IDENTITY

A presumption of identity is provided in new section 320.14(1)(b) and new sections 320.21(2) and 320.32(5) of the Code, namely, that the BAC of a person at the time of an offence is conclusively presumed to be the concentration established by the results of the analyses (samples of breath or blood). In cases where samples are taken after a period of two hours, the results are adjusted by adding 5 mg of alcohol for every interval of 30 minutes in excess of those two hours.

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), the bill completely eliminates the bolus drinking defence.⁷⁰

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(4) 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 sample of breath or blood; and
- 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.

As for drug-impaired driving, new section 320.32(7) 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).

2.1.4.3 PRESUMPTION OF OPERATION

For prosecutions of operation while impaired or failure or refusal to comply with a demand offences (new sections 320.14 and 320.15 of the Code), new section 320.36 provides for a presumption of operation. 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) 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.⁷¹

2.1.5 GENERAL PROVISIONS (NEW SECTIONS 320.37 TO 320.4 OF THE *CRIMINAL CODE*)

New section 320.37 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.⁷² Everyone who contravenes these provisions is guilty of an offence punishable on summary conviction.

New section 320.39 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 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 320.29(2)(a) (to detect the presence of drugs) and the forms to be used to record the results of the evaluation.

2.1.6 TRANSITIONAL PROVISIONS (CLAUSES 22 TO 28)

Clauses 22 to 28 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 AMENDMENTS TO THE *CRIMINAL RECORDS ACT* (CLAUSES 29 TO 31)

Under the *Criminal Records Act*, a person who has been convicted of an offence under a federal statute must wait between five and 10 years before applying for a record suspension (known as a “pardon”).⁷³ The *Criminal Records Act* also provides for the automatic cessation of effect or the revocation of the record suspension where the person whose record has been suspended commits a subsequent offence.

In general, if the subsequent offence is:

- a criminal offence (or an offence under the Code or the *Controlled Drugs and Substances Act* that is punishable on summary conviction), the record suspension automatically ceases to have effect;⁷⁴
- an offence under a federal statute punishable on summary conviction, the Parole Board of Canada may revoke the record suspension at its discretion.⁷⁵

However, the *Criminal Records Act* provides an exception to the cessation of effect of a record suspension for the offence of impaired driving *simpliciter* (and the offence of refusing to comply with a demand). Accordingly, a person whose record has been suspended and who is subsequently convicted of impaired driving *simpliciter* (or a refusal offence) on summary conviction will not, at present, have his or her record suspension automatically cease to have effect.⁷⁶

Clause 31 repeals this exception. A subsequent conviction for an impaired driving *simpliciter* offence (or a refusal offence) – punishable either on indictment (criminal offence) or on summary conviction – will automatically result in the record suspension's ceasing to have effect.

2.3 COMING INTO FORCE (CLAUSE 42)

Clause 42 provides that the bill's provisions, with the exception of the coordinating provision (clause 41), come into force on the 90th day after the day on which the bill receives Royal Assent.

NOTES

1. [Criminal Code](#), R.S.C. 1985, c. C-46.
2. See section 1.2.2.3 of this Legislative Summary.
3. [R. v. St-Onge Lamoureux](#), [2012] 3 S.C.R. 187.
4. See section 1.2.2.2 of this Legislative Summary.
5. See section 1.2.2.3 of this Legislative Summary.
6. A 2010 Department of Justice Canada discussion paper (Department of Justice Canada, [Modernizing the Transportation Provisions of the Criminal Code](#), Discussion Paper, 2010), further to the 2009 report by the House of Commons Standing Committee on Justice and Human Rights (House of Commons, Standing Committee on Justice and Human Rights, [Ending Alcohol-Impaired Driving: A Common Approach](#), 2nd Session, 40th Parliament, June 2009), recommended the creation of an offence of criminal negligence *simpliciter*, meaning that there is no bodily harm or death. Bill C-73 does not provide for such an offence.

7. Even though Bill C-73 does not specifically 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.) As well, unlike in some other countries, Canadian criminal law does not provide for the specific offence of “armed car-jacking.”
8. Maintaining the criminal blood alcohol concentration (BAC) at 0.08 is consistent with the reports of the House of Commons Standing Committee on Justice and Human Rights, which in 1999 and 2009 did not recommend that the federal government reduce the criminal BAC level from 0.08 to 0.05 (House of Commons, Standing Committee on Justice and Human Rights, *Toward Eliminating Impaired Driving*, May 1999; and House of Commons, Standing Committee on Justice and Human Rights (June 2009)).
9. House of Commons, Standing Committee on Justice and Human Rights (June 2009). This type of check, permitted in such other countries as Australia and certain European countries, allows a police officer to demand a breath sample at any time, even in the absence of a reasonable suspicion that the driver has consumed alcohol. For more information, see Department of Justice Canada (2010).
10. Samuel Perreault, “[Impaired driving in Canada, 2011](#),” *Juristat*, Catalogue no. 85-002-X, Canadian Centre for Justice Statistics, Statistics Canada, 10 January 2013, p. 4.
11. According to 2010 data, the average BAC of drivers convicted of impaired driving varies between 0.144 and 0.169. Despite the legislative changes made in 2008, the number of drug-impaired driving cases remains low, accounting for approximately 2% of all impaired driving cases. (Perreault (2013), p. 5.)
12. *Ibid.*, p. 13.
13. Statistics Canada, “Table 1: Police-reported crime for selected offences, Canada,” [Police-reported crime statistics, 2014](#), 22 July 2015, p. 6.
14. Perreault (2013), p. 16.
15. *Ibid.*, p. 14. In January 2015, the Quebec Court (Gatineau district) ordered a stay of proceedings in more than 50 impaired driving cases due to unreasonable delays. (See “[50 criminal drunk driving cases stayed in Gatineau court](#),” *CBC News*, 30 January 2015.)
16. The average length of a custody sentence increased in the last decade from 67 days in 2000–2001 to 90 days in 2010–2011. (Perreault (2013), pp. 17–18.)
17. 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.
18. 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 now set out in sections 258(1)(c), 258(1)(d.01) and 258(1)(d.1) of the *Criminal Code*. Bill C-73 amends the requirements for overturning the presumption of identity.

Another presumption is that an accused 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-73 (new s. 320.36).

19. Under section 254(2) of the *Criminal 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.
20. 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](#).
21. *R. v. St-Onge Lamoureux*, para. 40.
22. *R. v. Carter* (1985), 19 C.C.C. (3d) 174. See also *R. v. Gilbert*, (1994), 92 C.C.C. (3d) 266.
23. See [R. v. Boucher](#), [2005] 3 S.C.R. 499.
24. Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Minutes of Proceedings*, [Issue No. 9](#), 2nd Session, 39th Parliament, 21 February 2008, p. 37 (Andrew Murie, Chief Executive Officer, MADD Canada; and Robyn Robertson, President and CEO, Traffic Injury Research Foundation).
25. *R. v. St-Onge Lamoureux*, para. 45.
26. “‘Bolus drinking’ is the defence used when the accused claims to have quickly consumed several drinks just before driving and therefore claims that their BAC was not over 80 at the time of driving.” (Department of Justice, “[The Dangerous and Impaired Driving Act – Criminal Code Reforms for Transportation-Related Offences](#),” Background, June 2015.)
27. “The ‘intervening drink defence’ is when an accused claims to have consumed alcohol after being stopped by the police or after a collision and therefore claims that their BAC would not have been over 80 while driving.” (Department of Justice (June 2015).)
28. House of Commons, [Debates](#), 1st Session, 39th Parliament, 30 January 2007, 1645.
29. [R. v. St. Pierre](#), [1995] 1 S.C.R. 791.
30. *Ibid.*, para. 45.
31. *Criminal Law Improvement Act*, 1996, S.C. 1997, c. 18, s. 10(2). In 1999, driving a vehicle with a BAC over 0.160 became an aggravating circumstance. As well, the court could order the offender to undergo treatment or use an alcohol ignition interlock device (*An Act to amend the Criminal Code (impaired driving and related matters)*, S.C. 1999, c. 32).
32. *Criminal Code*, s. 258(1)(d.1)(i).
33. Senate, Standing Committee on Legal and Constitutional Affairs (21 February 2008), p. 37 (Andrew Murie, Chief Executive Officer, MADD Canada).
34. *R. v. St-Onge Lamoureux*, para. 90.
35. *R. v. St. Pierre*, para. 62.
36. *R. v. Powichrowski*, 2009 ONCJ 490, para. 23, cited by the Supreme Court in *R. v. St-Onge Lamoureux*, para. 10.
37. *Ibid.* Section 258 provides a legal presumption regime which exempts the Crown from proving certain elements.
38. [Tackling Violent Crime Act](#), S.C. 2008, c. 6.
39. *Criminal Code*, ss. 258(1)(c) and 258(1)(d.01). In *R. v. St-Onge Lamoureux*, the Supreme Court struck down the second and third requirements.
40. *R. v. St-Onge Lamoureux*, para. 65.

41. *Criminal Code*, s. 258(1)(d.1)(ii). In *R. v. St-Onge Lamoureux*, the Supreme Court upheld this requirement.
42. For more information about the amendments brought by the *Tackling Violent Crime Act*, see Laura Barnett et al., [Legislative Summary of Bill C-2: An Act to amend the Criminal Code and to Make Consequential Amendments to Other Acts](#), “Part 3: Drug-Impaired Driving,” Publication no. LS-565E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 29 October 2007.
43. Department of Justice Canada (June 2015).
44. *R. v. St-Onge Lamoureux*, para. 24.
45. According to the Alcohol Test Committee of the Canadian Society of Forensic Science, instruments can malfunction or be used improperly when samples are taken and at various steps in the maintenance of the instruments. (*R. v. St-Onge Lamoureux*, paras. 25–26.)
46. *Ibid.*, para. 27.
47. *Ibid.*, para. 59.
48. *Ibid.*, para. 63.
49. *Ibid.*, para. 3.
50. In this Legislative Summary, the short form “summary offence” is used instead of “offence punishable on summary conviction,” which is the longer term found in the *Criminal Code*.
51. The Crown may now choose to proceed either by summary conviction or by indictment for a number of offences. They are called “hybrid” or “dual” offences and are treated as indictments until the Crown indicates how it will proceed.
52. The exceptions are the offence of “flight resulting in bodily harm,” which was not included in this bill, and the offence of “operation of a conveyance while prohibited,” which is only a *simpliciter* offence.
53. House of Commons, Standing Committee on Justice and Human Rights (2009), Recommendation 9:

The Committee recommends that Parliament provide guidance to the judiciary through a legislative preamble or statement of principles, which acknowledges the inherent risks of impaired driving and the importance of meaningful and proportionate consequences for those who endanger the lives of others and themselves.
54. Department of Justice Canada (2010), pp. 3 and 4 (see note 6).
55. It can be assumed that a person who has caused bodily harm or death while fleeing could also be charged with an offence such as dangerous operation or criminal negligence.
56. Canadian Society of Forensic Science, Alcohol Test Committee, [Recommended Operational Procedures](#), 2014, p. 5. According to information provided by the committee, “truncated” means replacing the final decimal with a zero.
57. See Department of Justice Canada (2010), pp. 7–8.
58. This term is not defined in the bill; however, Department of Justice Canada (2010), p. 8, refers to a semi-trailer.
59. See Department of Justice Canada (2010), pp. 7–8.
60. It appears as though only the following provinces and territories have such a program: Nova Scotia, New Brunswick, Manitoba, Prince Edward Island, Saskatchewan, Alberta, Yukon and Northwest Territories. (Guy Cournoyer and Gilles Ouimet, *Code criminel annoté 2015*, Éditions Yvon Blais, s. 255(5), p. 545. [Available in French only])

61. 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](#)."
62. [Evaluation of Impaired Operation \(Drugs and Alcohol\) Regulations](#), SOR/2008-196.
63. *Criminal Code*, s. 256(1)(a).
64. *Ibid.*, s. 256(1)(b)(i).
65. In [R. v. Bingley](#), 2015 ONCA 439, the Court of Appeal for Ontario found that the testimony of the evaluating officer as an expert was admissible without the need to hold a voir dire (a mini-hearing held during a trial on the eligibility of prospective jurors or the admissibility of contested evidence; see [Duhaime's Law Dictionary](#)) and that the officer could therefore give an opinion regarding the accused's ability to drive. However, the officer must be a certified expert accredited by the International Association of Chiefs of Police (*Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*).
66. *R. v. St-Onge Lamoureux*, para. 80.
67. *Ibid.*, para. 78.
68. Department of Justice Canada (June 2015).
69. Canadian Society of Forensic Science, [Alcohol Test Committee Position Paper: Documentation Required for Assessing the Accuracy and Reliability of Approved Instrument Breath Alcohol Test Results](#).
70. The Supreme Court had, however, ruled that section 258(1)(d.1) was valid under the Charter (*R. v. St-Onge Lamoureux*, para. 90).
71. [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).
72. The results may be used for the purpose of the administration or enforcement of a federal or provincial statute (new s. 320.37(2)), as well as for statistical or research purposes if the results are made anonymous (new s. 320.37(3)).
73. [Criminal Records Act](#), R.S.C. 1985, c. C-47, s. 4.
74. *Ibid.*, s. 7.2(a).
75. *Ibid.*, s. 7(a).
76. *Ibid.* s. 7.2(a)(ii). However, it appears that the Parole Board of Canada can still decide to revoke the record suspension (s. 7(a) of the *Criminal Records Act*).