



Legalization of Cannabis and Corresponding Charter Issues



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Legalization of Cannabis and Corresponding Charter Issues

By the

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Acknowledgments



Dedication

This project is dedicated to the memory of Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director (1992-2024), whose vision, dedication, and contributions were integral to this report.

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Legalization of Cannabis and Corresponding Charter Issues

Table of Contents

I. Introduction.....	3
II. Cannabis and its Effects	5
A. Definition of Cannabis	5
B. Effects of Cannabis	6
III. Legalization of Cannabis in Canada	7
A. The <i>Cannabis Act</i>	7
B. Amendment of the <i>Criminal Code</i>	8
C. Effects of the Amendment	12
IV. The Use of Cannabis in Canada	13
V. Drug-Impaired Driving Penalties Under Provincial and Territorial Laws	14
A. Alberta.....	15
B. Ontario	17
C. British Columbia.....	18
D. Quebec	19
E. Manitoba	19
F. Nova Scotia.....	20
G. Saskatchewan.....	21
H. Yukon.....	21
VI. Roadside Testing for Cannabis Impaired Driving.....	22
A. Testing Drug-impaired Drivers.....	22
B. Approved Roadside Drug Screening Devices.....	24
VII. Issues with Drug Screening Devices	26
A. Efficiency of the Dräger DrugTest 5000	27
B. Law Enforcement and the Use of the Dräger DrugTest 5000	29
VIII. Possible Charter Challenges	33
A. Accuracy	34
B. Section 10(b) of the <i>Charter</i>	35
C. Sections 7 and 8 of the <i>Charter</i>	36
D. Caselaw	37
IX. Recommendations.....	41
A. Withdrawal of the Dräger DrugTest 5000	41

B. Law Enforcement Personnel	42
1. Police officers and drug recognition experts should receive effective and regularly updated training to detect the level of impairment of an individual driving under the influence of a drug.	42
2. Police forces should ensure more police officers receive this training to ensure that all suspected drug-impaired drivers can be evaluated within a reasonable time following arrest or detention.	42
3. The federal government should fund a public education program against drug driving. This program should include educating the public more about the roadside drug testing process, and the laws and penalties for driving under the influence of drugs.	42
Bibliography	43
Legislation.....	43
Jurisprudence	43
Secondary Materials: Books & Articles	44
Secondary Material: Government Documents.....	47
Secondary Material: Other (Websites).....	49

I. Introduction

Driving while impaired by alcohol or drugs is one of the main factors that lead to serious car accidents in Canada. Traditionally, impaired driving was associated with alcohol, but over the years drug impairment has also caused dangerous car crashes and deaths.

Today, drug-impaired driving is a serious public health issue in Canada. Like alcohol, drugs can impair an individual's ability to drive safely and increase the chance of a collision.

Driving while impaired by a drug, has long been a criminal offence in Canada. However, until recently, the police did not have any enforcement means in respect to suspected drug-impaired drivers.

In 1921, the Canadian Parliament made it an offence to drive while intoxicated. In 1925, the *Criminal Code*¹ prohibited driving under the influence of narcotics, but it created enforcement issues as there are different kinds of drugs that can impair an individual's capability to drive a car safely. In 1951, this provision was broadened to include driving while under the influence of any drug.²

Before 2008, the drug-impaired driving provisions were basically enforced and challenged by indisputable evidence of a driver's impairment, which meant that a driver had to be clearly high in order to be caught and indicted.³

¹ *Criminal Code*, RSC 1985, c C-46.

² Legislative Background: reforms to the Transportation Provisions of the *Criminal Code* (Bill C-46), online: Government of Canada, Department of Justice < <https://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/c46/p1.html>>.

³ E Chamberlain and R Solomon, "Drug-Impaired Driving in Canada: Review and Recommendations" (2012), online: madd < https://www.madd.ca/media/docs/MADD-Canada_Drug-Impaired-Driving-Policy_November-2012.pdf> at 1 [E Chamberlain and R Solomon].

In 2008, the *Criminal Code* was amended, and new methods were authorized to ease the investigation of drug-impaired driving. These methods included the Standardized Field Sobriety Tests (SFST)⁴ used at the roadside and the Drug Recognition Evaluation (DRE)⁵.

The 2008 drug-impaired driving amendments improved enforcement but only to a certain degree, therefore a stronger process was needed.

In 2018, Parliament passed Bill C-45, the *Cannabis Act*⁶, which legalized recreational marijuana in Canada. At the same time, Bill C-46 was passed to prohibit drug-impaired driving. This was done as part of *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts*.⁷

Detecting drug-impaired driving has become more important after the legalization of cannabis in 2018. Surveys have indicated that the number of Canadians driving after using cannabis has grown. Moreover, driving after cannabis consumption is now more common among young drivers than driving after consuming alcohol.⁸

According to then Government of Canada:

After alcohol, cannabis is the drug most often linked to car accidents. Cannabis can affect concentration, coordination and slow reaction time. Using it and

⁴ SFSTs are a set of three tests conducted by specially trained Police officers to assess a driver's motor skills, balance, coordination, and ability to safely operate a vehicle. What is a Standard Field Sobriety Test (SFST)?, online: legalline < <https://www.legalline.ca/legal-answers/what-is-a-standard-field-sobriety-test-sfst/>>. ; Annual National Data Report to Inform Trends and Patterns in Drug-Impaired Driving, online: Government of Canada, Public Safety Canada < <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2020-did-fad/index-en.aspx>> [Annual National Data Report 2020].

⁵ Police were allowed to request impaired driving suspects to participate in a DRE. DREs are conducted by trained and certified officers in order to determine if the driver is impaired by drugs. If the police officer concludes that a suspect is impaired by drugs, then they can then ask for a blood, urine or saliva sample from the suspect. Rielle Capler et al., "Cannabis Use and Driving: Evidence Review" (31 January, 2017), online: Canadian Drug Policy Coalition < https://drugpolicy.ca/wp-content/uploads/2016/11/CDPC_Cannabis-and-Driving_Evidence-Review-Full_Jan31-2017_FINAL.pdf> at 15.

⁶ *Cannabis Act*, SC 2018, c 16.

⁷ *An Act to Amend the Criminal Code (Offences Relating to Conveyances) and to Make Consequential Amendments to Other Acts*, SC 2018, c 21.

⁸ Youth and Impaired Driving, online: madd < <https://madd.ca/pages/programs/youth-services/statistics-links/>>.

driving increases the risk of having a car accident which can result in serious injuries or death.⁹

In 2018, the Federal Government of Canada approved a roadside drug testing device called the Dräger DrugTest 5000. In 2019, a second roadside drug screening tool – Abbott SoToxa - was approved by the federal government.

The Dräger DrugTest 5000 has received criticism from police forces, lawyers and the general public. There have been many issues related to its reliability and efficiency, and concerns related to the impact it may have on legal rights which may result in legal challenges under the *Charter of Rights and Freedoms*¹⁰ (the *Charter*). Although Abbott SoToxa has also been utilized by police in Canada, this report will focus on the use of, and concerns surrounding the Dräger DrugTest 5000.¹¹

II. Cannabis and its Effects

Cannabis can make someone feel relaxed and happy but at the same time it can have a negative impact on the brain and can cause “confusion, sleepiness and/or impaired ability to remember, concentrate or react quickly” and also create anxiety or panic.¹²

A. Definition of Cannabis

The World Health Organization defines Cannabis as follows:

Cannabis is a generic term used to denote the several psychoactive preparations of the plant *Cannabis sativa*. The major psychoactive constituent in cannabis is Δ-9 (delta-9) tetrahydrocannabinol (THC). Compounds which are structurally similar

⁹ Is cannabis safe to use? Facts for youth aged 13–17 years, online: Government of Canada <<https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/is-cannabis-safe-use-facts-youth.html>>.

¹⁰ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. [*Charter*].

¹¹ Bryan Eneas, “2 impaired drivers busted as Regina police roll out new THC-screening device” (20 February 2020), online: CBC <<https://www.cbc.ca/news/canada/saskatchewan/rps-sotoxa-device-1.5470643>>.

¹² Jeffrey R Brubacher, “Cannabis and Motor Vehicle Crashes” (July August 2011), online: BC Medical Journal (BCMJ) <<https://bcmj.org/cohp/cannabis-and-motor-vehicle-crashes>> [Jeffrey R Brubacher].

to THC are referred to as cannabinoids. In addition, a number of recently identified compounds that differ structurally from cannabinoids nevertheless share many of their pharmacological properties. The Mexican term 'marijuana' is frequently used in referring to cannabis leaves or other crude plant material in many countries. The unpollinated female plants are called *hashish*. Cannabis oil (hashish oil) is a concentrate of cannabinoids obtained by solvent extraction of the crude plant material or of the resin.¹³

Cannabis, which is used for medical and recreational reasons, comes from the cannabis sativa plant that has chemical substances known as cannabinoids. “Cannabinoids affect cell receptors in the brain and body, and how those cells behave and communicate with each other.”¹⁴

Tetrahydrocannabinol or THC is the most common cannabinoid that causes the intoxicating effect of cannabis. Another known cannabinoid is cannabidiol, or CBD, which does not create a high and is usually used for therapeutic treatments.¹⁵

B. Effects of Cannabis

The short-term effects of cannabis can vary depending on the method of consumption. Those who smoke cannabis, can feel the effects within minutes. Whereas those who chew, swallow or eat a capsule, tincture, or food item, may not feel the effects for a few hours.¹⁶

When it comes to driving, many drugs can impair a person’s ability to drive safely. Some drugs “can reduce alertness, alter depth perception, impair concentration and attention span, slow reaction time, and affect motor skills and visual function.”¹⁷

¹³ Alcohol, Drugs and Addictive Behaviours Unit, online: World Health Organization < <https://www.who.int/teams/mental-health-and-substance-use/alcohol-drugs-and-addictive-behaviours/drugs-psychoactive/cannabis>>.

¹⁴ Cannabis and Driving, online: madd < https://madd.ca/pages/impaired-driving/overview/cannabis-and-driving/?gclid=CjwKCAjwqJ_1BRBZEiwAv73uwJpptZdMuQm309PbPkMhi4aAKaxfy9R962EfBELcGr6A084VJBIrGhoCTR0QAvD_BwE#1> [Cannabis and Driving].

¹⁵ Cannabis and Driving.

¹⁶ A Quick Take on Cannabis and Its Effects, online: healthline < <https://www.healthline.com/health/what-is-cannabis>>.

¹⁷ Cannabis and Driving.

Many people think that it is safe to drive under the influence of cannabis since drivers will be slower and more cautious. But in fact, cannabis can have serious side effects on the drivers such as “reduced concentration, slower reaction time, attention span and ability to react to unexpected events.”¹⁸ Also, studies have showed that drivers can “increase variability in lane position following distance and speed after cannabis use.”¹⁹

According to Health Canada:

Using cannabis or any cannabis product can impair your concentration, your ability to think and make decisions, and your reaction time and coordination. This can affect your motor skills, including your ability to drive. It can also increase anxiety and cause panic attacks, and in some cases cause paranoia and hallucinations.²⁰

It is important to note that the impairment caused by cannabis and alcohol is different in many ways. Cannabis users usually drive slowly and try not to pass other vehicles, while drunk drivers are generally aggressive and tend to drive faster. In addition, cannabis users overestimate their impairment while individuals who use alcohol tend to underestimate their impairment.²¹

III. Legalization of Cannabis in Canada

Medical cannabis has been legal in Canada since 2001. The sale, possession, and use of recreational cannabis was legalized in Canada in 2018.²²

A. The *Cannabis Act*

On April 13, 2017, the federal government introduced the *Cannabis Act* (Bill C-45) in order to legalize and regulate the use of cannabis in Canada. An Act to amend the *Criminal Code*

¹⁸ Cannabis and Driving.

¹⁹ Cannabis and Driving.

²⁰ Workplace Strategies: Risk of Impairment from Cannabis, online: Canadian Centre for Occupational Health and Safety (CCOHS) < https://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf > at 9 [Workplace Strategies].

²¹ Jeffrey R Brubacher.

²² Workplace Strategies at 3.

(Bill C-46), was introduced at the same time with the *Cannabis Act*, containing initiatives to reinforce existing drug-impaired driving laws.²³

On June 21, 2018, Royal Assent was given to Bill C-45²⁴ and Bill C-46.²⁵ Canada was the second country in the world to legalize the use of recreational cannabis for adults.²⁶

The *Cannabis Act* legalized the use of recreational cannabis in Canada. The objectives of the *Act* are to:

prevent young persons from accessing cannabis, to protect public health and public safety by establishing strict product safety and product quality requirements and to deter criminal activity by imposing serious criminal penalties for those operating outside the legal framework.²⁷

Under the *Cannabis Act*, provinces and territories can set their own restrictions and rules on the sale of cannabis, where stores can be located and how they can be operated.²⁸

With the legalization of cannabis, over 80 percent of Canadians expressed concerns about drug-impaired driving.²⁹ Therefore, Parliament enacted Bill C-46.

B. Amendment of the *Criminal Code*

Bill C-46 amended the *Criminal Code* in 2018 to criminalize driving with prohibited levels of certain drugs, to add penalties and to provide further tools to the police to detect and deter drug-impaired driving.³⁰

²³ Evidence Brief: Driving Under the Influence of Cannabis – Risk Factors and Preventive Interventions, online: Public Health Ontario < <https://www.publichealthontario.ca/-/media/documents/E/2017/eb-duic-interventions.pdf?la=en> > at 2.

²⁴ Bill C-45, SC 2018, c 16, online: Parliament of Canada < <https://www.parl.ca/DocumentViewer/en/42-1/bill/c-45/royal-assent> > [Bill C-45].

²⁵ Bill C-46, SC 2018, c 21, online: Parliament of Canada < <https://www.parl.ca/documentviewer/en/42-1/bill/c-46/royal-assent> >.

²⁶ Analysis of trends in the prevalence of cannabis use and related metrics in Canada.

²⁷ Bill C-45 (Historical), online: openparliament.ca < <https://openparliament.ca/bills/42-1/C-45/> >.

²⁸ Objectives of Cannabis Legislation and Regulations, online: Alcohol and Gaming Commission of Ontario (AGCO) < <https://www.agco.ca/content/objectives-cannabis-legislation-and-regulations> >.

²⁹ Behaviours and Beliefs Related to Cannabis Before Legalization: A Public Safety Perspective, online: Government of Canada, Public Safety Canada < <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2018-r005/index-en.aspx#a06> >.

³⁰ Annual National Data Report 2020.

Drug-impaired driving is defined as:

the operation of a motor vehicle while under the influence of any type of psychoactive substance (illegal substances, prescription medication, over the-counter medication) or a combination of drugs and alcohol that is established or likely to impair abilities required for safe driving.³¹

Bill C-46 has three main elements to address drug-impaired driving:

- authorizing the police to use approved drug screening equipment (e.g., oral fluid drug screeners) to detect the presence of a drug in a driver;
- creating new criminal offences of being at or over a prohibited blood drug concentration for certain impairing drugs within two hours of driving (the levels would be set by regulation);
- strengthening the existing legal framework to enhance the investigation and prosecution of the current offence of driving while impaired by a drug.³²

This Bill also created new offences for having specific levels of a drug in the blood within two hours of driving. The penalties would depend on the drug type and the levels of drug or the combination of alcohol and drugs. It also broadened police powers to gather evidence of drug-impaired driving.³³

Section 320.14 (1) of the *Criminal Code* reads:

Everyone commits an offence who

(a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;

(b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

³¹ Drug-Impaired Driving in Canada, online: Drug-Impaired Driving Learning Centre < <https://druggeddriving.tirf.ca/wp-content/uploads/2018/10/DIDLC-Drug-Impaired-Driving-in-Canada-Factsheet-7.pdf> > at 1.

³² Questions and Answers - Amendments to the *Criminal Code* relating to drug-impaired driving and alcohol-impaired driving, online: Government of Canada, Department of Justice < <https://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/qa-qr.html> > [Questions and Answers - Amendments to the *Criminal Code*].

³³ R Solomon, E Chamberlain, M Vandenberghe, "Canada's New Cannabis-Related Driving Legislation: The Elusive Quest for an Effective Deterrent" (October 2018), 23 Can Crim L Rev 265.

(c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or

(d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

Drug Recognition Experts are officers who are trained to perform different tests to find out if a driver is impaired and by what kind of drugs. If an officer believes a driver's ability to drive safely has been impaired by drugs after a Drug Recognition Evaluation (DRE) takes place, the driver can be charged under section 320.14 of the *Criminal Code*.³⁴

Section 320.19 (1) states:

Every person who commits an offence under subsection 320.14(1) or 320.15(1) is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of,

(i) for a first offence, a fine of \$1,000,

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,

(i) for a first offence, a fine of \$1,000,

(ii) for a second offence, imprisonment for a term of 30 days, and

(iii) for each subsequent offence, imprisonment for a term of 120 days.

The prohibited blood drug concentrations are set by regulation which came into force on June 26, 2018. For THC, the prohibited levels are:

- at or over 2 ng (nanograms) but under 5 ng of THC per milliliter (ml) of blood for the straight summary conviction offence

³⁴ How Do Police Test for Cannabis-Impairment?, online: Legalline.ca <<https://www.legalline.ca/legal-answers/how-is-impairment-due-to-cannabis-tested-by-the-police/>> [How Do Police Test for Cannabis-Impairment?].

- at or over 5 ng of THC per ml of blood for the drug-alone hybrid offence
- at or over 2.5 ng of THC per ml of blood combined with 50 mg of alcohol per 100 ml of blood for the drugs-with-alcohol hybrid offence.³⁵

In addition, article 320.27(1) of the *Criminal Code* mentions that if a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a conveyance, the peace officer may require the person to perform the physical combination tests, and provide a breath or saliva test through an approved screening device.

Article 320.28(2) states that if a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by a drug or by a combination of alcohol and a drug, the peace officer can require the person to submit to an evaluation conducted by an evaluating officer or provide a blood sample.

Article 320.28(4) states that if the evaluating officer has reasonable grounds to believe that one or more of the types of drugs is impairing the person's ability to operate a conveyance, the evaluating officer shall identify the type or types of drugs in question and may require the person to provide a sample of oral fluid or urine or a blood test.

Article 320.28(5) mentions cannabis, among others, as one of the types of drugs that can be identified by police officers.

Reasonable grounds to suspect impairment, could include a driver "erratically moving in and out of lanes, following other vehicles at unsafe distances, having red eyes, muscle tremors or unusual speech patterns, etc."³⁶

³⁵ Frequently Asked Questions - Drug-Impaired Driving Laws, online: Government of Canada, Department of Justice <<https://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/qa2-qr2.html>> [Frequently Asked Questions - Drug-Impaired Driving Laws].

³⁶ How Do Police Test for Cannabis-Impairment?

C. Effects of the Amendment

The amended legislation contains new offences and new tools to detect and prosecute drug-impaired drivers. It aimed to ensure that a strong drug-impaired driving system was in place prior to the legalization of cannabis.³⁷

This legislation allows police to use approved drug screening equipment to detect the recent presence of several drugs, including THC from cannabis in a driver's body. Following a legal roadside stop, police can demand an oral fluid sample and/or conduct an SFST if they suspect that a driver was driving under the influence of a drug.³⁸

An SFST allows police officers to examine the eyes of drivers. It also allows them to see if drivers can walk in a straight line, stand, and turn, or stand on one leg.³⁹

A DRE is more detailed than an SFST and includes twelve steps. It involves conducting “clinical tests, such as checking blood pressure, body temperature, pulse rate, and measuring pupil size in different lighting conditions.”⁴⁰

It is important to note that these rules apply to those who use cannabis for medical and those who use it for recreational purposes.

According to Litwiniuk & Company:

The key thing to remember is that under Canadian law, impaired driving is a criminal offence, regardless of the substance that causes impairment, or whether that substance is legal,” Litwiniuk says, “If you’re injured by a cannabis-impaired driver, your legal remedies are exactly the same as if that driver were impaired by alcohol.” It makes no difference whether cannabis was consumed recreationally or under prescription, he adds. “Medicinal use of cannabis was legalized in 2001 but

³⁷ Questions and Answers - Amendments to the *Criminal Code*.

³⁸ Drug-Impaired Driving, online: Government of Canada <<https://www.canada.ca/en/services/policing/police/community-safety-policing/impaired-driving/drug-impaired-driving.html>>.

³⁹ How Do Police Test for Cannabis-Impairment?

⁴⁰ How Do Police Test for Cannabis-Impairment?

driving while impaired by any prescription drug is still impaired driving and subject to the criminal penalties and civil liabilities prescribed by law.⁴¹

IV. The Use of Cannabis in Canada

In 2016, the World Health Organization stated that “cannabis is globally the most commonly used psychoactive substance under international control. In 2013, an estimated 181.8 million people aged 15-64 years used cannabis for non-medical purposes globally.”⁴²

In 2015, the Canadian Government declared that according to a 2013 UNICEF report, Canada was “rated highest amongst all nations in terms of rates of cannabis use by young people”.⁴³ Also, the Centre for Addiction and Mental Health said that Canada has one of the highest rates of cannabis use in the world. In 2017, a survey published by the Canadian Tobacco, Alcohol mentioned that more than 44% of Canadians have used cannabis in their lifetime.⁴⁴

According to a Canadian cannabis survey in 2022, “19% of Canadians age 16 years and older reported using cannabis in the past 30 days (an increase from 17% in 2021).”⁴⁵ In addition, Statistics Canada showed that the number of car crashes by drug-impaired drivers, reported by police, increased by 43 percent from 2018 to 2019.⁴⁶

Public Safety Canada reported:

UCR (Uniform Crime Reporting Survey) data indicates that the proportion of DID (Drug-Impaired Driving) incidents reported by police has significantly increased relative to alcohol-impaired driving incidents over time. This is likely due to a combination of factors including changes in the legislation that facilitated investigation and charging of DID incidents, a significant increase in law enforcement awareness raising and training on how to detect and investigate DID, while at the same time several jurisdictions have been strengthening their

⁴¹ Suing for Cannabis Impairment, online: Litwiniuk & Company <<https://www.canadianlawyermag.com/news/general/suing-for-cannabis-impairment/275891>>.

⁴² Workplace Strategies at 3.

⁴³ Workplace Strategies at 3.

⁴⁴ Workplace Strategies at 3.

⁴⁵ Canadian Cannabis Survey 2022: Summary, online: Government of Canada <<https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/research-data/canadian-cannabis-survey-2022-summary.html>> [Canadian Cannabis Survey 2022].

⁴⁶ Annual National Data Report 2020.

administrative sanctions regime (e.g., BC's immediate roadside prohibition policy) and using it more frequently than the *Criminal Code* route.⁴⁷

Public Safety Canada added:

Police-reported data for 2021 indicated that in all of Canada, police reported 71,495 impaired driving incidents, a decrease of almost 6,000 incidents from 2020 (Statistics Canada, 2022).

While the overall volume of impaired driving incidents declined, DID incidents reported by police continued to increase as a proportion of all impaired driving incidents, as they have since 2009. In 2021, there were 7,454 DID police-reported incidents, an increase from 7,411 in 2020 and 6,285 in 2019.⁴⁸

In 2020, Canada Border Services Agency (CBSA) made 126 DID arrests, compared to 128 arrests for alcohol impaired driving; 88% of the DID arrests were based on the results of the SFST. In 2019, there were 223 DID arrests and 285 for alcohol impaired driving.⁴⁹

V. Drug-Impaired Driving Penalties Under Provincial and Territorial Laws

After the amendment of the *Criminal Code*, provinces and territories enacted legislation to complete the *Code*'s provisions. These laws generally impose a short-term administrative licence suspension (24 hours up to 30 days) for drivers affected by alcohol or a drug. Additional sanctions can include “licence reinstatement fees, attendance at driver education or rehabilitation programs, vehicle impoundment and participation in an ignition interlock program”. In addition, the provincial and territorial laws often impose zero-tolerance alcohol and drug limits for novice drivers.⁵⁰

In most provinces and territories, laws have specific measures to impose penalties for impaired driving. These include:

⁴⁷ Annual National Data Report to Inform Trends and Patterns in Drug-Impaired Driving 2022, online: Public Safety Canada < <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2022-did-fad/index-en.aspx#s5> > [Annual National Data Report 2022].

⁴⁸ Annual National Data Report 2022.

⁴⁹ Annual National Data Report 2022.

⁵⁰ Impaired Driving in Canada, online: Canadian Centre on Substance Use and Addiction < <https://www.ccsa.ca/sites/default/files/2019-04/CCSA-Impaired-Driving-Canada-Summary-2019-en.pdf> > at 2.

- Novice drivers and commercial drivers must have zero blood-drug contents.
- Licenses can be suspended on the roadside for drug-screening test failures.
- Offenders of drug-impaired laws must attend mandatory educational programs.⁵¹

A. Alberta

In addition to the penalties mentioned in the *Criminal Code*, Alberta has its own laws that apply to drug-impaired drivers and drunk drivers.

In December 2020, Alberta introduced the new Immediate Roadside Sanctions Program (replacing the Alberta Administrative License Suspension program) that applies to impaired driving under the *Traffic Safety Act*.⁵²

The Immediate Roadside Sanctions (IRS) are a series of penalties for impaired drivers, including penalties such as “driver’s licence suspensions, new fines, vehicle seizures, mandatory education, and participation in the Ignition Interlock Program.”⁵³

Under the IRS program there is zero tolerance for any alcohol and drugs for novice drivers, and impaired drivers will receive an immediate 90-day licence suspension followed by an additional 12-month licence suspension with the option to participate in the IRS: FAIL Ignition Interlock Program.⁵⁴

Alberta’s impaired-driving legislation imposes a maximum \$1,000 fine for a blood test positive for two to five nanograms per milliliter of THC and a minimum \$1,000 fine for a first-time offence for over five nanograms per milliliter.⁵⁵

⁵¹ Driving While High: What Are the Laws in Canada? (19 April 2021), online: canadadrives < <https://www.canadadrives.ca/blog/driving-tips/cannabis-impaired-driving- DUI-laws-canada> >.

⁵² *Traffic Safety Act*, RSA 2000, c T-6.

⁵³ *Provincial Administrative Penalties Act*, SA 2020, c P-30.8.

⁵⁴ Michael Oykhman, How Long will my IRS Suspension be? (19 August 2024) online: Strategic Criminal Defence < <https://www.strategiccriminaldefence.com/faq/how-long-will-my-irs-suspension-be/> >.

⁵⁵ Impaired Driving, online: Calgary Police Service < <https://www.calgary.ca/cps/traffic/impaired-driving.html> > [Calgary Police Service].

The Immediate Roadside Sanctions Program, in accordance with section 88.1 of the *Traffic Safety Act*, applies to drivers if a police officer has reasonable grounds to believe that:

- the driver operated a motor vehicle while their ability to do so was impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug.
- ...
- within 2 hours after ceasing to operate a motor vehicle, the driver had a blood drug concentration that is equal to or exceeds any blood drug concentration for the drug that is prescribed by regulation under the *Criminal Code*.
- within 2 hours after ceasing to operate a motor vehicle, the driver had a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that is prescribed by regulation under the *Criminal Code* for instances where alcohol and that drug are combined.⁵⁶

This means that if a police officer in Alberta has reasonable grounds to believe that a driver is impaired, an immediate roadside sanction can be imposed. In addition, police can proceed with charges under the *Criminal Code*, which can result in further penalties imposed by the courts.⁵⁷

Furthermore, if police suspect a driver is impaired by drugs, they can ask the driver to take a saliva test for any presence of THC, cocaine, or methamphetamine.⁵⁸ If there is any indication of drug presence, the police can ask for an impaired driving investigation which can include a SFST, a DRE and a blood sample. If the investigation shows the driver is impaired, charges can be laid, and the driver's licence can be suspended. Drivers who refuse to take any of these tests, can face the same penalties.⁵⁹

⁵⁶ Immediate Roadside Sanctions and IRS: fail – an introduction (7 November 2022), online: DDSG Criminal Law <<https://www.dsscrlaw.com/2022/11/07/immediate-roadside-sanctions-irs-fail/>>.

⁵⁷ What are Immediate Roadside Sanctions (IRS)?, online: Cory Wilson, Criminal Defence Lawyer <<https://wilsoncriminaldefence.com/faqs/what-are-immediate-roadside-sanctions/>>.

⁵⁸ Checkstop Program, online: Alberta <<https://www.alberta.ca/checkstop-program.aspx>> [Checkstop Program].

⁵⁹ Checkstop Program.

B. Ontario

Ontario has a zero-tolerance policy when it comes to drug and alcohol legal limits for new, young and commercial drivers. Drivers are not allowed to have any cannabis in their system if they are driving and they:

- are 21 or under
- have a G1, G2, M1 or M2 licence
- are driving a vehicle that requires an A-F driver's licence or Commercial Vehicle Operator's Registration (CVOR)
- are driving a road building machine.⁶⁰

When police officers find that a driver was impaired by any drug or alcohol, drivers face the following penalties, among others:

- an immediate licence suspension;
- financial penalties;
- possible vehicle impoundment;
- possible criminal record;
- possible jail time.⁶¹

Licences can be suspended, and fines can be imposed on those who violate the zero-tolerance rule. Those who violate the rule more than once can face tough penalties such as mandatory education and treatment programs. The zero-tolerance policy does not apply to medical cannabis users, but they can still face some penalties if they drive under the influence of cannabis.⁶²

Moreover, if a police officer suspects that a driver is impaired by drugs or alcohol, they can ask for a roadside SFST. If officers have reasonable grounds to believe that a driver is impaired, they can ask for a DRE. If drivers fail these tests, they can face licence suspension and

⁶⁰ Cannabis and Driving, online: Ontario < <https://www.ontario.ca/page/cannabis-and-driving> > [Cannabis and Driving, Ontario].

⁶¹ Cannabis and Driving, Ontario.

⁶² Cannabis and Driving, Ontario.

criminal charges. In addition, police officers can request an oral fluid test if they suspect that a driver has drugs in their body.⁶³

C. British Columbia

British Columbia amended its *Motor Vehicle Act*⁶⁴ to provide police with more tools to deal with drug-impaired driving. New drivers in the Graduated Licensing Program are subject to a zero-tolerance restriction for the presence of drugs in their body.

Article 215(3) of the *Motor Vehicle Act* states:

A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable grounds to believe that a driver's ability to drive a motor vehicle is affected by a drug, other than alcohol,

- (a) request the driver to drive the motor vehicle, under the direction of the peace officer, to the nearest place off the travelled portion of the highway or industrial road,
- (b) serve the driver with a notice of driving prohibition, and(c)if the driver is in possession of a driver's licence, request the driver to surrender that licence.⁶⁵

In 2019, the administrative driving prohibition was broadened to include drug-affected driving. Police officers can impose one of three new administrative driving prohibitions, when:

- a person has a blood drug concentration equal to, or exceeding, the amount prescribed for that drug within two hours of operating a motor vehicle;
- a person has a combined blood alcohol concentration and blood drug concentration equal to, or exceeding, the amount prescribed in instances where alcohol and that drug are combined, within two hours of operating a motor vehicle; or
- a person operates a motor vehicle while their ability to do so is impaired by a drug or a combination of alcohol and a drug, as determined by an evaluation by a drug recognition expert.⁶⁶

⁶³ Impaired Driving, online: Ontario, Ministry of Transportation <<http://www.mto.gov.on.ca/english/safety/impaired-driving.shtml#novice>>.

⁶⁴ *Motor Vehicle Act*, RSBC 1996, c 318.

⁶⁵ *Motor Vehicle Act*, RSBC 1996, c 318, Part 4.

⁶⁶ Driving Prohibitions Expand with Cannabis Legalization, online: British Columbia, BC Gov News <<https://news.gov.bc.ca/factsheets/driving-prohibitions-expand-with-cannabis-legalization>>.

In addition, there is a 90-day administrative driving prohibition for drug-impaired drivers, or drivers with a blood drug concentration equal to or exceeding the legal limits under the *Motor Vehicle Act*.⁶⁷ To investigate drug-impaired driving, police officers can ask for a SFST and a DRE.

D. Quebec

In 2019, the *Highway Safety Code*⁶⁸ in Quebec was amended to prohibit individuals from driving if there was any presence of cannabis or any drug in their saliva.⁶⁹

Quebec has the following measures:

- a peace officer may immediately suspend, for 90 days, the licence of any person driving a road vehicle if, according to the evaluation conducted by an evaluating officer, the person is impaired by cannabis or any other drug or by a combination of cannabis or any other drug and alcohol;
 - The offender's vehicle could be seized if, in the past, the offender was found guilty of an offence in connection with alcohol or a drug.
- a peace officer may also immediately suspend, for 90 days, the licence of any person who fails or refuses to comply with an order given to the person by a peace officer to submit to physical coordination tests or to provide samples of saliva that the peace officer deems necessary to carry out the appropriate analysis with the help of the approved drug detection equipment.⁷⁰

E. Manitoba

In Manitoba, it is illegal to drive while impaired by any drug, including cannabis.

Penalties under the *Criminal Code* are imposed on impaired drivers who will face a minimum fine of \$1,000 for a first offence, a court-ordered driving prohibition that can extend up to three years for a first offence, and jail time for subsequent offences.⁷¹

⁶⁷ Cannabis, online: British Columbia < <https://www2.gov.bc.ca/gov/content/safety/public-safety/cannabis>>.

⁶⁸ *Highway Safety Code*, C -24.2.

⁶⁹ The legislation on Cannabis, Amendments to the Highway Safety Code in Relation to the Legalization of Cannabis, online: Quebec < <https://encadrementcannabis.gouv.qc.ca/en/loi/modification-du-code-de-la-securite-routiere/>> [The legislation on Cannabis].

⁷⁰ The legislation on Cannabis.

⁷¹ Cannabis in Manitoba, online: Manitoba

As of Dec. 16, 2019, *The Highway Traffic Act* was amended to adopt an immediate roadside prohibitions approach to deal with persons driving under the influence of alcohol.⁷²

Licence suspensions, vehicle impoundment, and ignition interlock use requirements were also imposed on impaired drivers under the *Highway Traffic Act*.⁷³ In addition, police officers can request a SFST and a DRE. Police also use oral fluid drug screening devices and can ask drivers who fail those tests to provide a blood sample to determine if they are over the legal limit.⁷⁴

F. Nova Scotia

In Nova Scotia, the police can ask those who are suspected of impaired driving to take a SFST. If they fail the SFST, a Drug Recognition Expert can ask for other tests to determine if they are impaired.

After completing an SFST, if an officer has grounds to lay a charge of impaired driving, the driver's license can be suspended for 24 hours. A saliva sample can be requested from the driver. If the results show that there was impairment, a charge is laid, and the driver's license is suspended for 90 days.⁷⁵

After completing an SFST, if an officer has reason to suspect that the driver was impaired by cannabis while driving, but does not have the grounds to lay a criminal charge, they can immediately suspend the driver's license as follows:

- first incident – 7 days
- second incident – 15 days
- third incident – 30 days

< <https://www.gov.mb.ca/cannabis/knowthelaw/youcantdriveimpaired.html>> [Cannabis in Manitoba].

⁷² Impaired driving suspension, online: Manitoba Public Insurance <<https://www.mpi.mb.ca/Pages/impaired-driving-suspensions.aspx>>.

⁷³ *The Highway Traffic Act*, CCSM c H60.

⁷⁴ Cannabis in Manitoba.

⁷⁵ Cannabis Impaired Driving, online: Nova Scotia <<https://novascotia.ca/cannabis/impaired-driving/>> [Cannabis Impaired Driving, Nova Scotia].

This process is similar to the one applied to drivers who have alcohol in their system but are below the legal limit. Additionally, as with alcohol, there is a zero-tolerance policy for drivers in the graduated licensing program.⁷⁶

G. Saskatchewan

In Saskatchewan, there is zero-tolerance for drug-impaired driving. Impaired driving has the same penalties for alcohol and drugs, including “license suspensions, vehicle seizures, financial penalties and the requirement to complete an impaired driving education program.”⁷⁷ Penalties are different depending on whether the driver was new, and if it was their first or second offence.

Police officers can ask for a SFST, DRE, or saliva testing if they have reasonable suspicion to believe a driver is impaired.⁷⁸

H. Yukon

The Yukon has one of the highest rates of impaired driving in Canada. Impaired driving includes “alcohol, illegal drugs, cannabis, over-the-counter drugs, and prescription medicine.”⁷⁹

The Yukon has a zero-tolerance impairment policy for new drivers. Driving under the influence can result in immediate suspensions and vehicle impoundment. Penalties also include one-year license suspensions, fines and possible jail time.

⁷⁶ Cannabis Impaired Driving, Nova Scotia.

⁷⁷ Cannabis Use and Driving, online: SGI < <https://www.sgi.sk.ca/cannabis-use-and-driving> > [Cannabis Use and Driving].

⁷⁸ Cannabis Use and Driving.

⁷⁹ Impaired Driving (Yukon), online: Criminal Code Help < <https://www.criminalcodehelp.ca/offences/impaired-driving-by-province/impaired-driving-yukon/#:~:text=Yukon%20Impaired%20Driving%20Laws,-If%20you%20have&text=The%20Yukon%20has%20one%20of.counter%20drugs%2C%20and%20prescription%20medicine> >.

VI. Roadside Testing for Cannabis Impaired Driving

In September 2017, the Government of Canada announced that it was investing \$161 million over five years to support the implementation of the new drug-impaired driving test. The government also wanted to put police officers in a position where they could notice the signs and symptoms of impaired drivers, establish strategies and raise public awareness about the dangers and consequences of driving while impaired.⁸⁰

The federal government assigned \$81 million to provinces and territories to provide police officers with training on the SFST and the Drug Recognition Expert program; to supply them with adequate equipment and tools and to collect data on drug-impaired driving.⁸¹

A. Testing Drug-impaired Drivers

As mentioned earlier, with the legalization of cannabis, the Government of Canada amended the *Criminal Code* to create new offences and provide additional tools to law enforcement to detect and deter drug-impaired driving.

Unlike alcohol, it is not easy to detect drugs on a driver's breath. Therefore, drugs are usually detected through saliva, blood or urine. A positive drug test does not necessarily mean that the driver is impaired as the "non-active metabolites of some drugs may remain in a driver's system long after their impairing effects have worn off."⁸²

Oral fluid or saliva screening devices can be used by police at roadside to see if a driver is drug-impaired:

These devices are non-invasive, easy to use, and provide rapid results, although the cost of these devices is slightly greater than a breath testing instrument. In jurisdictions where such devices are approved, they are used by officers at the roadside to test drivers for the presence of drugs when impairment is suspected.

⁸⁰ Annual National Data Report 2020.

⁸¹ Annual National Data Report 2020.

⁸² E Chamberlain and R Solomon at 2.

Drivers are asked to provide a saliva sample which is collected from the mouth using an absorbent swab. Although there are variations between different oral fluid screening devices, they all provide an immunoassay of the saliva specimen when added to a proprietary diluent mix, and analysed by lateral flow technology for the presence of drugs at specific cut-off values. Test results are available after several minutes, and many devices include a panel for several categories of drugs. Typical drug types included in the panel are cannabis, cocaine, methamphetamines, and opioids.⁸³

Officers can also ask for an SFST instead of, or together with the saliva test. If a driver fails the SFST, a drug recognition officer can ask for a DRE to find out if the driver is impaired.⁸⁴

SFSTs usually take place at the roadside to provide early signs of impairment. DREs take place at the police station and involve a bodily fluid sample, which can provide more evidence to reinforce a drug-impaired driving charge.

According to Public Health Ontario:

Enforcement of drug-impaired driving legislation is based on the assessment of functional impairment using a Standardized Field Sobriety Test (SFST). Drivers who demonstrate impaired performance must undergo evaluation by an officer trained in the Drug Evaluation and Classification (DEC) program.⁸⁵

Section 3 of the *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*⁸⁶ lays out the steps for evaluation. The Drug Recognition Experts do not need to depend on the evaluation to demand a blood sample if they reasonably believe that the driver's ability to drive was impaired by a drug or a combination of alcohol and a drug.⁸⁷

⁸³ What is the Drug-Impaired Driving Learning Centre (DIDLC)?, online: Drug-Impaired Driving Learning Centre < <https://druggeddriving.tirf.ca/wp-content/uploads/2018/10/DIDLC-Tools-Technologies-Factsheet-8.pdf>> at 6 [What is the Drug-Impaired Driving Learning Centre (DIDLC)?].

⁸⁴ MacGillivray Law, online: < <https://macgillivraylaw.com/content/2019/2/15/problems-with-the-new-drug-impaired-driving-laws>> [MacGillivray Law].

⁸⁵ Evidence Brief: Driving Under the Influence of Cannabis and Risk of Motor Vehicle Collision, online: Public Health Ontario < <https://www.publichealthontario.ca/-/media/documents/E/2017/eb-duic-mvc.pdf?la=en>> at 12.

⁸⁶ *Evaluation of Impaired Operation (Drugs and Alcohol) Regulations*, SOR/2008-196.

⁸⁷ Gordon Scott Campbell, John P. Allen, Bernard Aron and Mr. Justice Rick Libman, "Changes to the Road: How Bill C-46 and the Ontario Cannabis Act Together Increase the Risk for Unreasonable Searches and Seizures" (August 2018).

It is important to mention that the same rules apply to medical cannabis where there is no authorization for driving. Medical cannabis users cannot drive during or immediately after the use of cannabis.⁸⁸

B. Approved Roadside Drug Screening Devices

Similar to alcohol breath testing equipment, the process for approving drug screening equipment requires drug screening devices to be evaluated by the Drugs and Driving Committee of the Canadian Society of Forensic Science. If the Drugs and Driving Committee determines that a drug screening device meets its evaluation standards, it will be recommended to the Attorney General of Canada for consideration and approval.⁸⁹

Drug screening devices must be approved by order of the Attorney General of Canada before they can be used by law enforcement. The use of approved drug screening equipment can help investigate drug-impaired driving, including the new offences under the *Criminal Code*.⁹⁰

Section 320.11 of the *Criminal Code* defines approved drug screening equipment as “equipment that is designed to ascertain the presence of a drug in a person’s body and that is approved by the Attorney General of Canada under paragraph 320.39(b)”.

In 2018, the Department of Justice stated the following:

Oral fluid drug screeners ... can detect some or all of THC, cocaine and methamphetamine, the three most common impairing drugs found in Canadian drivers. Police can demand an oral fluid sample if the officer has a reasonable suspicion that the driver has drugs in their body based on objectively visible facts, such as:

- red eyes

⁸⁸ Driving While High: What Are the Laws in Canada? (19 April 2021), online: canadadrives <<https://www.canadadrives.ca/blog/driving-tips/cannabis-impaired-driving-dui-laws-canada>>.

⁸⁹ Questions and Answers - Amendments to the *Criminal Code*.

⁹⁰ Approved Drug Screening Equipment Order, Canada Gazette EXTRA Vol 152, No 3 (19 July 2018), online: Government of Canada <<https://canadagazette.gc.ca/rp-pr/p1/2018/2018-07-19-x3/html/extra3-eng.html>>. [Approved Order]

- muscle tremors
- agitation
- speech patterns

If a driver tests positive on an oral fluid screening test, the positive result would confirm the presence of the drug and, combined with other signs of impairment observed by the police at the roadside, would provide grounds for the investigation to proceed further either by making a demand for drug recognition and evaluation (DRE) or a blood sample.⁹¹

In 2018, the Attorney General of Canada approved the first roadside drug screening equipment the Dräger DrugTest 5000 STK-CA and the Dräger DrugTest 5000, when used together.⁹²

The Dräger DrugTest 5000 STK-CA is the oral fluid collection system, and the Dräger DrugTest 5000 is the reader.⁹³ The Draeger was approved to test for both cannabis and cocaine.⁹⁴

The Attorney General also approved the SoToxa™, an Abbott SoToxa™ Test Cartridge and the Abbott SoToxa™ Oral Fluid Collection Device, when used together.⁹⁵ SoToxa was only approved to test for THC.⁹⁶

According to the Dräger company’s website, the Dräger DrugTest 5000 device “indicates that it is a mobile drug screening system that uses oral fluid (saliva) to test for seven types of drugs.”⁹⁷

The Drug-Impaired Driving Learning Centre stated:

The Dräger DrugTest 5000 test system, which includes the Dräger DrugTest 5000 analyser and test kits comprised of a test cassette with an oral fluid collector. The

⁹¹ Workplace Strategies at 12.

⁹² Approved Drug Screening Equipment Order (SOR/2018-179) [Approved Drug Screening].

⁹³ Omar Ha-Redeye, “Doubts Over Roadside Drug Testing Being Conducted Reasonably” (1 October 2018), online: CanLII Connects < <https://canliiconnects.org/en/commentaries/63931> > [Omar Ha-Redeye].

⁹⁴ Jeff Labine, “Taking a Closer Look at Roadside Drug Testing Unit” (21 August 2019), online: Edmonton Journal < <https://edmontonjournal.com/news/local-news/taking-a-closer-look-at-roadside-drug-testing-unit> >.

⁹⁵ Approved Drug Screening.

⁹⁶ Brian Platt, “Justice Minister Approves Second Device for Testing Drivers’ Saliva for Cannabis Use” (12 July 2019), online: National Post < <https://nationalpost.com/news/politics/justice-minister-approves-second-device-for-testing-drivers-saliva-for-cannabis-use> > [Brian Platt].

⁹⁷ Say it – Don’t spray it: The limits of Saliva Testing, online: Aitken Robertson Professional Corporation < <https://fightthecharges.com/saliva-testing/> >.

collector is used to swab the mouth for one to four minutes, and then is inserted into the test cassette before introduction into the analyser. The analysis takes about eight minutes and the result for each drug category is displayed on the screen. The Dräger DrugTest 5000 can detect amphetamines, methamphetamines, opiates, cocaine, benzodiazepines, cannabis, methodone and ketamine.⁹⁸

The Dräger DrugTest 5000 does not determine the level of THC in a driver's bloodstream. It simply indicates the presence or absence of THC by a positive or negative result. If there was indication of THC presence, then police can ask for a blood or urine sample to determine if there was impairment. If those samples show the driver has 2.5 nanograms or more in a 100 ml sample of their blood, than they can be charged.⁹⁹

Under Bill C-46, police have the discretion to demand a roadside saliva test on approved drug screening equipment. It does not determine whether the driver has recently used cannabis and cannot prove impairment.¹⁰⁰ Therefore, getting a positive test result that shows the presence of cannabis does not automatically show impairment.¹⁰¹

VII. Issues with Drug Screening Devices

Police officers need reliable roadside drug testing devices to investigate suspected impaired drivers. Breathalyzer equipment has been in use for decades to investigate impaired drivers. However, proper detection of drug-impaired drivers is often much more difficult.¹⁰²

⁹⁸ What is the Drug-Impaired Driving Learning Centre (DIDLC)? at 7.

⁹⁹ Aaron Beswick, "One Lawyer is Just Itching to Challenge the RCMP's Roadside Marijuana Consumption Detector" (10 December 2018), online: SALTWIRE < <https://www.saltwire.com/halifax/news/local/one-lawyer-is-just-itching-to-challenge-the-rcmps-roadside-marijuana-consumption-detector-267136/> > [Aaron Beswick].

¹⁰⁰ A Look at Roadside Tests If You Want to Open a Cannabis Store (5 September 2019), online: AAPS < <https://www.aaps.ca/blog/a-look-at-roadside-tests-if-you-want-to-open-a-cannabis-store> >.

¹⁰¹ Workplace Strategies at 11.

¹⁰² Hallvard Gierde, Grethe Brennhovd Clausen, Espen Andreassen and Havard Furuhaugen, "Evaluation of Dräger DrugTest 5000 in a Naturalistic Setting" (2 February 2018), online: Journal of Analytical Toxicology < <https://academic.oup.com/jat/article/42/4/248/4835625> > [Hallvard Gierde].

A. Efficiency of the Dräger DrugTest 5000

When a device is authorized and approved by the Attorney General, law enforcement agencies are not obligated to use it. Rather, use of approved drug screening equipment by these agencies is voluntary.¹⁰³

Therefore, police agencies are not obligated to use approved oral fluid drug screeners or to purchase the Dräger DrugTest 5000. They can use other tools and techniques instead, such as SFSTs and DREs.¹⁰⁴

As the use of the Dräger DrugTest 5000 device is not compulsory, many police departments across Canada have decided not to use it, stating concerns over its bulkiness and accuracy in cold weather.¹⁰⁵

The Dräger company has recommended using the testing device in “temperatures ranging from four to 40 degrees Celsius”, which can be very challenging for law enforcement in Canada where temperatures can drop below freezing for at least six months out of the year. Therefore, many police forces have been delaying the use of this device.¹⁰⁶

According to the Canadian government:

While the devices worked in all weather conditions, there were some temperature-related issues that arose when the devices were used in extreme cold temperatures. Proportionally, tests conducted outside of suggested operating temperatures were more likely to produce drug-positive results (i.e., while 64% of all tests occurred outside of suggested operating temperatures, 80% of all positive results were produced outside the suggested range). At present, it is unknown whether this finding is attributable to technical or procedural issues, for example whether the devices are more likely to show positive results when tested in

¹⁰³ Approved Order.

¹⁰⁴ Frequently Asked Questions - Drug-Impaired Driving Laws.

¹⁰⁵ Omar Ha-Redeye.

¹⁰⁶ Approved Roadside Saliva Test Faces Court Challenge in Canada -- CFN Media, online: newslife <<https://www.newsfilecorp.com/release/44422/Approved-Roadside-Saliva-Test-Faces-Court-Challenge-in-Canada-CFN-Media>>.

extreme cold temperatures. Consequently, further research on the reliability of devices used outside of standard operating temperatures is merited.¹⁰⁷

In 2017, the device was an issue for law enforcement in Ireland, where the device was found not to be reliable for roadside testing in temperatures under 4 degrees. Police officers had to detain drivers and take them to the police station so that they could be tested indoors, where temperatures were warmer.¹⁰⁸

In addition, there have been concerns about the results from the device. A study published in the Journal of Analytical Toxicology, looking into the use of the device in Norway, showed that it made “fairly large proportions of false-positive or false-negative results compared to drug concentrations in blood.”¹⁰⁹ The study found the proportion of false positives was 14.5 per cent for cannabis.

Furthermore, a false positive result gives police officers the right to request more tests and allows them to take the driver into custody for further testing which might take some time, leading to potential *Charter* rights issues.

According to MacGillivray:

The saliva test in combination with a Field Sobriety Test can take up to 20 minutes. Then, a blood test can take 2-3 hours to administer and process the results. The law pertaining to alcohol says an individual’s rights are suspended while a police officer is collecting a breath sample for alcohol. However, administering a breathalyzer test only takes minutes. The breathalyzer also provides a blood alcohol level reading instantly, unlike with the drugalyzer which only indicates the presence of drugs in a driver’s system, not the concentration.¹¹⁰

¹⁰⁷ Final Report on the Oral Fluid Drug Screening Device Pilot Project, online: Government of Canada, Public Safety Canada < <https://www.publicsafety.gc.ca/cnt/rsres/pblctns/rl-fl-drg-scrnng-dvc-plt/index-en.aspx>>.

¹⁰⁸ Sarah Leamon, “How the Draeger DrugTest 5000, Canada’s New Roadside Testing Device, Falls Short” (24 August 2018), online: cannabislifenetWORK.com < <https://cannabislifenetWORK.com/how-the-draeger-drugtest-5000-canadas-new-roadside-testing-device-falls-short/>> [Sarah Leamon].

¹⁰⁹ Hallvard Gierde.

¹¹⁰ MacGillivray Law.

Bill Blair, then the Minister of Border Security and Organized Crime Reduction stated that “when alcohol roadside screening devices first emerged, there was also a period of learning and various devices came forward until the police community settled “on one.” "I think we're going through that process now," he added.¹¹¹

Moreover, the Dräger DrugTest 5000 is not made to detect impairment. It only detects the presence of drugs in the saliva. This was confirmed by Einat Velichover, a business development manager at Dräger. He stated: “Our device is there to really just identify whether there is a presence of THC. It is not meant to measure impairment and we never claimed that it does.”¹¹² This means that drivers who are not impaired by drugs may be detained, investigated, and charged with impaired driving if the device gives a positive result for the presence of a drug in their body.¹¹³ That issue caused considerable concern for police forces in provinces and territories, making many reluctant to use the Dräger DrugTest 5000.

B. Law Enforcement and the Use of the Dräger DrugTest 5000

According to a press release by the Dräger company in 2020, the Dräger DrugTest device has been used by law enforcement departments across Canada including Ontario, Manitoba, Saskatchewan, Prince Edward Island, Alberta, and Nova Scotia.¹¹⁴ However, various law

¹¹¹ Laura Kane, “Federal Government Funds Millions to Help B.C. Police Spot Drugged Driving” (22 May 2019), online: Canada’s National Observer < <https://www.nationalobserver.com/2019/05/22/news/federal-government-funds-millions-help-bc-police-spot-drugged-driving>>.

¹¹² Cannabis Impairment Test to Face Legal Challenge (17 April 2019), online: Licensed Producers Canada < <https://licensedproducerscanada.ca/news/cannabis-impairment-test-to-face-legal-challenge>>.

¹¹³ A Brief Introduction to the Draeger DrugTest 5000, online: Sarah Leamon Law Group < <https://www.sarahleamonlaw.com/blog/2018/8/20/a-brief-introduction-to-the-draeger-drugtest-5000>> [Sarah Leamon Law Group].

¹¹⁴ One Year After Federal Approval, Dräger DrugTest 5000 Remains the Only Device Approved for Roadside Testing of THC and Cocaine in Canada, online: Dräger < https://www.draeger.com/Corporate/Content/08ca_drugtest-5000-anniversary.pdf>.

enforcement departments across Canada expressed concerns about the reliability of this device.¹¹⁵

In 2018, a National RCMP spokeswoman, Sgt. Marie Damian, said “the force will have a limited rollout of the device in consultation with provinces and municipalities”. “Standardized field sobriety tests and drug recognition experts will continue to be the primary enforcement tools,” she added.¹¹⁶

In **Alberta**, police departments decided to delay the purchase and use of the Dräger 5000 after it was approved by the Attorney General. They opted to wait for other devices to be approved by the federal government before making any decision.¹¹⁷

The Edmonton Police Service received a small number of the Dräger DrugTest 5000 devices. They stated that getting more of these devices would depend on their evaluation and performance, as well as the approval of other roadside testing devices.¹¹⁸

In 2018, Edmonton’s then Police Chief, Rod Knecht stated that “they have very few of the devices and officers will be testing them out”. He affirmed that there were a lot of concerns about the reliability of Dräger DrugTest 5000. “We know every time we use it, we are going to get a not guilty plea. That’s going to plug up the court system” he added.¹¹⁹

¹¹⁵ Brian Platt, “Police Use Roadside Saliva Tests for the First Time, With Mandatory Breath Tests Soon to Follow” (4 December 2018), online: National Post < <https://nationalpost.com/news/politics/police-use-roadside-saliva-tests-for-the-first-time-with-mandatory-breath-tests-soon-to-follow>>.

¹¹⁶ Laura Kane, “VPD Among Canadian Police Forces that Won't Use Roadside Marijuana Tester” (26 September 2018), online: < <https://vancouverjournal.com/news/local-news/vpd-among-canadian-police-forces-that-wont-use-roadside-marijuana-tester>> [Laura Kane].

¹¹⁷ Sam Nar et al., “What to Expect — How Canada’s New Cannabis Legislation Affects Drivers” (21 February 2019), online: Calgary Journal < <https://calgaryjournal.ca/news/4493-driving-high-what-to-expect-how-canada-s-new-cannabis-legislation-affects-drivers.html/>>.

¹¹⁸ Cannabis, online: Edmonton Police Service < <https://www.edmontonpolice.ca/TrafficVehicles/ImpairedDriving/Cannabis>> [Edmonton Police Service].

¹¹⁹ Quinn Ohler, “Edmonton Police Still Undecided on Marijuana Roadside Testing Equipment” (24 September 2018), online: Global News < <https://globalnews.ca/news/4483050/edmonton-police-marijuana-roadside-testing-equipment/>>.

In Edmonton, trained police officers use the SFST at the roadside when they suspect the driver has a drug in their body. If the SFST shows impairment, then the driver will be taken to a police station for a DRE.¹²⁰

Calgary Police exercised caution regarding the use of the Dräger DrugTest 5000, instead usually relying on SFSTs and DREs.¹²¹

In 2022, Highway patrol officers in Alberta were provided with the ability to use the Draeger DrugTest 5000.¹²²

In **Ontario**, police departments were not sure, in 2018, whether their officers would use the Dräger DrugTest to find impaired drivers.¹²³

"At this point, no decision has been made as to when or how many we will be buying, but it is certainly something that we're looking into," said Sgt. Kerry Schmidt, spokesperson for the Ontario Provincial Police's Highway Safety Division.¹²⁴

However, various police and law enforcement departments across Ontario have begun to utilize the Dräger DrugTest. In 2019, the Ontario Provincial Police began utilizing the test to detect drug-impaired driving. Inspector Glen Miller shared that “[u]tilizing advanced technology such as the Dräger Drug Test 5000 enables our officers to perform the requisite tests in determining the illegal level of Cannabis in a driver of a motor vehicle.”¹²⁵

¹²⁰ Edmonton Police Service.

¹²¹ Calgary Police Service.

¹²² Danina Falkenberg, “Driving high? Alberta highway patrol officers can now test for drugs” (5 May 2022), online: CityNews <<https://calgary.citynews.ca/2022/05/05/alberta-highway-patrol-drive-high/>>.

¹²³ Muriel Draaisma, “OPP Undecided on Use of New Roadside Drug Testing Equipment as Legalization Looms” (16 September 2018), online: CBC News <<https://www.cbc.ca/news/canada/toronto/opp-roadside-drug-testing-equipment-dr%C3%A4ger-drug-test-1.4825889>> [Muriel Draaisma].

¹²⁴ Muriel Draaisma.

¹²⁵ CTV Windsor, “OPP use new drug tester during truck safety blitz” (21 August 2019), online: CTV News <<https://windsor.ctvnews.ca/opp-use-new-drug-tester-during-truck-safety-blitz-1.4559378>>.

Like other police forces across Canada, the Ontario Provincial Police also uses SFSTs and DREs to determine a driver's level of impairment.¹²⁶

In **British Columbia**, the Vancouver Police Department was also reluctant to use the Dräger DrugTest 5000. It stated that it would not use the device because it does not work in cold temperatures, it is bulky and takes long time to produce a sample.¹²⁷ The Vancouver Police Department has instead focused on training its officers in standardized field sobriety testing.¹²⁸

Police Chief Adam Palmer said about the Dräger DrugTest 5000: “It’s not something that we’re going to be deploying here in Vancouver”. “There may be other agencies in British Columbia that will deploy it, and other places in Canada, but our experts have looked at it, and it doesn’t meet our requirements so we’re going to pass on this one.”¹²⁹

In **Manitoba**, RCMP spokesperson Sgt, Paul Manaignre said “the device is in use, but not relied upon. Enforcement officers are cautious and use other forms of testing and observation when charging people with impaired driving.” “We are going to focus on a very lengthy trial period to make sure the devices produce the results that we have been told that they are going to produce,” he added.¹³⁰

In **Saskatchewan**, Saskatoon police received the Dräger DrugTest 5000 to use in their operations at the beginning of 2019.¹³¹

¹²⁶ Roadside Drug Testing Equipment In Ontario, online: Jonathan Lapid DUI Lawyer < <https://jonathanlapid.com/roadside-drug-testing-equipment-in-ontario/>>.

¹²⁷ Laura Kane.

¹²⁸ Laura Kane.

¹²⁹ Terry Schintz, “Vancouver Police Won’t be Using Federally Approved Marijuana Testing Device” (24 September 2018), online: Global News < <https://globalnews.ca/news/4483098/vancouver-wont-use-marijuana-device/>>.

¹³⁰ Yvette Brend, “Drug-Testing Device Gives False Positives on Poppy Seeds, CBD Oil, Says Vancouver Lawyer” (6 May 2019), online: CBC News < <https://www.cbc.ca/news/canada/british-columbia/saliva-test-drug-false-positives-poppy-seeds-tea-cbd-oil-1.5124765>>.

¹³¹ Alex MacPherson, “Police to Roll Out Roadside Drug Tests by End of February” (24 January 2019), online: Saskatoon StarPhoenix < <https://thestarphoenix.com/news/local-news/police-to-roll-out-roadside-drug-tests-by-end-of-february>> [Alex MacPherson] .

Staff Sgt. Patrick Barbar stated that the device will be an addition to existing tools for identifying suspected impaired drivers. “This is not an evidentiary device ... This instrument is not the evidence that will convict someone or acquit them,” he added. “This is a positive or negative (readout). If it tests positive, it gives the police authority to conduct further testing to determine whether or not criminal charges will be laid ... Even a positive doesn’t necessarily mean the person will get charged.”¹³²

In 2022, the RCMP in the **Northwest Territories**, began using roadside cannabis-screening technology including the Dräger DrugTest 5000.¹³³

The RCMP stated “that they had deployed devices designed to take a saliva sample and test for the presence of tetrahydrocannabinol, also known as THC, the main psychoactive substance in cannabis. They said the technology would help them detect impaired drivers and make roads safer.”¹³⁴

Even though many police forces raised concerns about the Dräger DrugTest 5000’s bulkiness and inaccuracy in cold weather, many police forces have expressed their belief that this device can be a valuable and a supplement tool to identify drug-impaired drivers. However, with the addition of this test, there also come potential legal challenges.

VIII. Possible Charter Challenges

The Dräger DrugTest 5000 is different from a roadside breathalyzer used to identify drunk drivers. There are serious concerns with individuals’ rights at the roadside when using this

¹³² Alex MacPherson.

¹³³ N.W.T. RCMP deploy controversial roadside cannabis screening devices, online: Chat News Today <<https://chatnewstoday.ca/2022/08/13/n-w-t-rcmp-deploy-controversial-roadside-cannabis-screening-devices/>>.
[N.W.T. RCMP]

¹³⁴ N.W.T. RCMP

device. The random saliva screening for drugs will likely result in challenges under the *Charter*.¹³⁵

A. Accuracy

Lawyers who deal with impaired driving cases affirmed that they would challenge the reliability of the Dräger device, pointing to the device's poor performance in cold weather which can lead to significant numbers of false positives. As mentioned earlier, and according to the Dräger company, the oral fluid must be collected and analyzed in a temperature range between 4 and 40 degrees Celsius, but this obviously does not work in Canada's cold winters. Canada has temperatures below freezing for at least six months of the year, and it is hard to figure out how the Dräger device is going to work in such a cold weather. Therefore, drivers can argue that this device is unreliable and inaccurate, and that can lead to *Charter* challenges in the Courts.¹³⁶

In addition, these lawyers claim that the saliva tests usually take longer than roadside breath tests, meaning drivers are detained without arrest for a long period of time which can constitute a breach of their *Charter* rights.¹³⁷

Another problem is that studies have showed, also as mentioned above, that the test has a 14 percent chance of giving positive results even if the driver did not consume any drugs and has no sign of THC in their body. These false positive results allow police to take the driver to the police station for more testing and that can violate the driver's rights.

Moreover, one of the biggest problems with the Dräger device is that it only detects the presence of THC in the saliva. It does not detect impairment. Therefore, drivers who are not affected by drugs can be detained, investigated and maybe charged with impaired driving if the

¹³⁵ *Charter*.

¹³⁶ Sarah Leamon Law Group.

¹³⁷ Brian Platt.

device detects the simple presence of a drug and issues a positive result for it. This also can be a violation of the *Charter*.¹³⁸

B. Section 10(b) of the *Charter*

According to section 10(b) of the *Charter*, Canadians have a right to a lawyer immediately when an arrest or detention takes place. Section 10(b) states that “everyone has the right on arrest or detention...to retain and instruct counsel without delay and to be informed of that right.”

However, in cases of roadside drug and alcohol testing, that right is usually delayed if the testing is not done right away. If these tests are not done quickly enough, they can violate the driver’s section 10(b) *Charter* right.

The roadside saliva testing done by the Dräger DrugTest 5000 cannot be done immediately. According to the Dräger company, the test can take between five to ten minutes.¹³⁹

The device requires that the driver insert a swab inside their mouth, between the gum and the cheek, for about four minutes to collect a proper sample. The sample is then inserted into the device so the analysis takes place.¹⁴⁰

Some lawyers have raised concerns about the time it takes to do the test.

Lawyer Paul Doroshenko said:

... for this thing, it takes 10 minutes to set up, then you’ve got to roll this thing around in your mouth for one to four minutes and then it takes 10 minutes to give you a result. By the time you are done, we are talking 35 minutes.¹⁴¹

¹³⁸ Sarah Leamon.

¹³⁹ Dräger DrugTest 5000 Drug Testing Device, online: Dräger <<https://www.draeger.com/Products/Content/drugtest-5000-pi-9071987-en-us.pdf>> at 6.

¹⁴⁰ Sarah Leamon.

¹⁴¹ Aaron Beswick.

Lawyer Michael Spratt stated:

In the meantime, they would be arrested, detained, have their car impounded and be legally obliged to accompany the police to the police station. And under threat of further criminal punishment obliged to provide a blood test. This is incredibly intrusive behaviour and behaviour that is not permitted under the Canadian *Charter of Rights and Freedoms*.¹⁴²

According to lawyer Kyla Lee, “a person could be detained, and subject to this search, for close to fifteen minutes. All the while, there is no right to call a lawyer.”¹⁴³

In addition, the Dräger company recommends a ten-minute deprivation period from eating, drinking or smoking before providing a sample, otherwise the results will be impacted. This will require the police to monitor these drivers for ten minutes at the roadside, and drivers will have to be truthful about the events that took place before the stop.¹⁴⁴

C. Sections 7 and 8 of the *Charter*

Challenges to the drug testing programs can also rely on sections 7 and 8 of the *Charter*. Section 7 talks about the right to life, liberty and security of the person and the right not to be deprived thereof, except in accordance with the principles of fundamental justice. Security of the person includes “liberty from physical constraint, privacy, and freedom from state intrusion into personal matters.”¹⁴⁵

Many court decisions have held that mandatory drug and/or alcohol testing violates the security of the person.¹⁴⁶ Section 8 states that “everyone has the right to be secure against

¹⁴² Lynn Desjardins, “Cannabis Roadside Test Will Face Legal Challenges, Says Lawyer” (31 August 2018), online: Radio Canada International (RCI) < <https://www.rcinet.ca/en/2018/08/31/thc-canada-impaired-driving-police/>>.

¹⁴³ Kyla Lee, “Government-Approved Saliva Drug Tester Fatally Flawed” (1 August 2018), online: Kyla Lee: Vancouver DUI Lawyer < <https://kylalee.ca/government-approved-saliva-drug-tester-fatally-flawed/>>.

¹⁴⁴ Sarah Leamon.

¹⁴⁵ Nancy Holmes, “Drug Testing: Legal Implications” (10 November 1999), online: <[>](https://publications.gc.ca/collections/Collection-R/LoPBdP/CIR/901-e.htm#(i)%20Section%207%20of%20the%20Charter(txt)) [Nancy Holmes].

¹⁴⁶ *R v Chatham* (1987), 23 C.R.R. 344; *R v Racette* (1988), 48 D.L.R. (4th) 412; and *Jackson v Joyceville Penitentiary* [1990] 3 F.C. 55 (T.D.).

unreasonable search or seizure.” This section means that we have the right to be free from unreasonable searches, which can include breath searches.

According to the Supreme Court of Canada, section 8 protects our personal privacy.¹⁴⁷ When it comes to the reasonableness of the search and seizure, we must consider whether the drug testing itself was reasonable.¹⁴⁸

It is important to note that the application of these sections is limited by section 1 of the *Charter*, which permits reasonable limits prescribed by law and can be demonstrably justified in a free and democratic society. This means that random drug screening can be considered a violation of sections 7, 8 or 10(b). However, the violation can be justified under the reasonableness test of section 1.

D. Caselaw

In *R v Orbanski; R v Elias*¹⁴⁹, the Supreme Court of Canada ruled that roadside drug and alcohol testing is a violation of the *Charter* but the violation is justified under section 1 of the *Charter*.

The Supreme Court stated that there is “no question that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective.”¹⁵⁰

The Supreme Court further stated:

[...] while both Elias and Orbanski were detained for the purpose of s. 10(b), hence triggering the right to counsel, the operational requirements of the statutory regimes in place in Manitoba prescribed a limitation of the right to counsel. This limitation is justifiable in a free and democratic society given the importance of detecting and deterring drunk driving, the highly regulated nature of driving on public roads, the limits placed by the common law on the types of screening that

¹⁴⁷ *Hunter v Southam Inc.* (1984), 2 S.C.R. 145.

¹⁴⁸ Nancy Holmes.

¹⁴⁹ *R v Orbanski; R v Elias*, 2005 SCC 37 (CanLII), [2005] 2 SCR 3 [*R v Orbanski*].

¹⁵⁰ *R v Orbanski* at para 55.

can be conducted at the roadside, and the limited use that can be made of the compelled evidence collected during the screening process.¹⁵¹

In *Goodwin v British Columbia (Superintendent of Motor Vehicles)*¹⁵² the Supreme Court stated in regard to section 8 of the *Charter*:

As Dickson J. wrote for a unanimous court in *Hunter* [*Hunter v Southam Inc.* (1984), 2 S.C.R. 145] assessing whether the law authorizing a search or seizure is reasonable requires determining whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

The protection s. 8 provides for an individual's privacy — personal, territorial and informational — is essential not only to human dignity, but also to the functioning of our democratic society. At the same time, s. 8 permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere. The tension articulated in *Hunter* between the competing individual and state interests, and the adequacy of the safeguards provided, remain foundational to this analysis.¹⁵³

The Supreme Court further added that the “objective of removing impaired drivers from the roads is compelling.”¹⁵⁴

The seizure of a driver's breath through a roadside approved screening device (ASD) analysis is the first step in the province's regulatory response to impaired driving, one that permits the province to both identify and suspend the licences of drivers whose blood alcohol concentration exceeds 0.05. The breath demand is a critical component of the province's efforts to protect British Columbians from impaired drivers by suspending the privilege of driving for those who drive while impaired. This compelling purpose of preventing death and serious

¹⁵¹ *R v Orbaniski* at para 60.

¹⁵² *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 (CanLII), [2015] 3 SCR 250 [*Goodwin*].

¹⁵³ *Goodwin* at para 55.

¹⁵⁴ *Goodwin* at para 58.

injuries on public highways weighs heavily in favour of the reasonableness of the breath seizure.¹⁵⁵

In the 2022 case, *Gray v Nova Scotia*¹⁵⁶ - which is related to the Dräger DrugTest 5000- the plaintiff filed a lawsuit claiming that section 320.27(1) of the *Criminal Code* (mentioned above) violates sections 8 and 10(b) of the *Charter*.

In this case, the plaintiff was a medical cannabis user. She was arrested in Nova Scotia during a stop traffic. She provided a sample of oral fluid for analysis using approved drug screening equipment (ADSE) which was a Dräger DrugTest 5000 and a Dräger DrugTest 5000 STK-CA. Her oral fluid test was positive for THC. Consequently, her driver’s license was suspended. However, a drug recognition evaluation performed by an evaluating officer determined that the plaintiff was not impaired at that time. As a result, the charges were dropped, and the plaintiff was released.¹⁵⁷

In his decision, Justice Bodurtha relied on *R v Orbanski and Goodwin*:

As to the nature and purpose of the provision, the Supreme Court of Canada has held that reducing the “carnage” of impaired driving is a compelling and worthwhile objective ([referring to] *Orbanski* at para. 55 and *Goodwin* at paras. 58-59). This purpose can be found in the similarly worded recognition and declaration in section 320.12 of the *Criminal Code*. Roadside screening is one aspect of a regime for deterring and punishing impaired drivers. The objective is to determine whether further testing is required, based on reasonable suspicion that the subject has a drug in their body and has driven within the previous three hours.¹⁵⁸

Justice Bodurtha found the law, section 320.27(1), to be reasonable when it comes to the *Criminal Code* immediacy requirement, based on the standards for approving screening devices.

¹⁵⁵ *Goodwin* at para 59.

¹⁵⁶ *Gray vs Nova Scotia (Attorney General)*, 2022 NSSC 333 (CanLII) [*Gray*].

¹⁵⁷ *Gray* at para 4.

¹⁵⁸ *Gray* at para 62.

He also stated that “the plaintiff cites no evidentiary basis for the claim that temperature variations will have a substantial effect on the effectiveness of the device.”¹⁵⁹

Justice Bodurtha concluded:

I find that the manner of the search was reasonable. I find that the plaintiff has not established that the search authorized by section 320.27(1) was unreasonable under section 8 of the *Charter*. Simply put, there is no reason to depart from precedent holding that roadside screening searches are reasonable.¹⁶⁰

Justice Bodurtha added:

In reaching a determination, I agree with the well-established authorities that found roadside screening procedures to be justified infringements of section 10(b) of the *Charter*. As a result, I find that section 320.27(1)(c) of the *Criminal Code* does violate section 10(b), but is justified under section 1. Section 320.27(1)(c) of the *Criminal Code* addresses a pressing and substantial objective – reducing the damage caused by impaired driving - and the law is proportionate.¹⁶¹

In considering the section 1 analysis under the minimal impairment branch, the Crown is not required to prove that the impugned law is the most minimally impairing possible scheme. In this case, the only alternative suggested by the Plaintiff is that there be no device-based roadside screening for the presence of drugs. Although, the ADSE may be marginally more invasive and time-consuming than the ASD [approved screening devices], and its results may not provide a perfect correlation to impairment, this does not mean it cannot be justified under section 1. I find that the Crown has established that any *Charter* violation under section 10(b) is justified under section 1.¹⁶²

¹⁵⁹ *Gray* at para 70-71.

¹⁶⁰ *Gray* at para 74.

¹⁶¹ *Gray* at para 98.

¹⁶² *Gray* at para 99.

IX. Recommendations

The Alberta Civil Liberties Research Centre recommends the following measures:

A. Withdrawal of the Dräger DrugTest 5000

1. The federal government should withdraw the Dräger DrugTest 5000 since it is not efficient, otherwise it will not serve public safety, and it is going to face many legal challenges. Canada has cold weather for at least six months of the year. Therefore, Canadians cannot get reliable tests, and the device should not be used.
2. The Dräger DrugTest 5000 is not technologically advanced enough to deal with Canada's cold temperatures. If the federal government decides to keep it, then more research is needed to be done on the reliability of this device in various weather conditions in order to be consistent with the *Charter* rights.
3. Oral fluid or saliva screening devices can be a valuable tool for police officers involved in drug-impaired driving enforcement. However, these devices must be efficient in order to be used.
4. Oral fluid or saliva screening devices are made to help, not to eliminate other tools used by police to stop drivers they think are impaired. If they suspect that a driver's ability to operate a motor vehicle is impaired, police should ask for a field sobriety test. If the driver fails the test, they can be taken to the police station for a blood test and/or for a drug recognition evaluation.

5. It is fundamental liberty and freedom, that individuals are not forced to take the Dräger test. That should not happen unless there is confirmation from the government that the test is accurate.

B. Law Enforcement Personnel

1. Police officers and drug recognition experts should receive effective and regularly updated training to detect the level of impairment of an individual driving under the influence of a drug.
2. Police forces should ensure more police officers receive this training to ensure that all suspected drug-impaired drivers can be evaluated within a reasonable time following arrest or detention.
3. The federal government should fund a public education program against drug driving. This program should include educating the public more about the roadside drug testing process, and the laws and penalties for driving under the influence of drugs.

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