



Canada Safety Council

# Canada's Blood Alcohol Laws – an International Perspective

Update to 2002 Report  
March, 2006

Prepared for the Canada Safety Council by  
Professor David M. Paciocco,  
Faculty of Law, University of Ottawa

The 2002 report *Canada's Blood Alcohol Laws – an International Perspective* addressed claims that Canada lags behind other countries in its fight against impaired driving by maintaining a .08 BAC limit in the *Criminal Code*. This update supplements the original report to provide a current reference for government decision makers considering policy alternatives, as well as interested members of the public.

## Canada's Blood Alcohol Laws – an International Perspective Update to 2002 Report (March, 2006)

### Contents

|      |                                                                    |    |
|------|--------------------------------------------------------------------|----|
| I.   | Introduction.....                                                  | 1  |
| II.  | Permissible BACs in Canada .....                                   | 5  |
| III. | Permissible Blood Alcohol Levels Vary.....                         | 9  |
| IV.  | The Trend.....                                                     | 12 |
| V.   | Divergent Responses to BACs -<br>Comparing Apples and Oranges..... | 15 |
| VI.  | Conclusion .....                                                   | 31 |

### Tables

|    |                                                                                             |    |
|----|---------------------------------------------------------------------------------------------|----|
| 1. | Provincial BAC Levels and Sanctions.....                                                    | 6  |
| 2. | Lowest Permissible BAC Levels by Country .....                                              | 10 |
| 3. | Lowest Permissible BAC Breakdown<br>Organized by Country (Canada Excluded).....             | 11 |
| 4. | Point at which Jurisdictions Adopted BACs of .05 or Lower.....                              | 13 |
| 5. | First Offences in .05 Jurisdictions.....                                                    | 20 |
| 6. | Potential Penalties at <u>.06</u> for .05 Jurisdictions and Canada:<br>First Offenders..... | 24 |
| 7. | Potential Penalties at <u>.09</u> for All Comparison Jurisdictions:<br>First Offender ..... | 25 |

This update and the original report may be downloaded from the Canada Safety Council's website ([www.safety-council.org](http://www.safety-council.org)).

## I. Introduction

In March of 2002 I prepared a report for the Canada Safety Council entitled, *Canada's Blood Alcohol Laws – an International Perspective*.<sup>1</sup> That Report was commissioned to give assistance to government decision makers, stakeholders and the public, in interpreting international trends relating to permissible blood alcohol concentration (the “BAC”) for those operating motor vehicles.<sup>2</sup> The 2002 Report, which focused on developments in 20 similarly situated countries,<sup>3</sup> was timely because of proposals being advanced at the time to lower the permissible BAC in the *Criminal Code of Canada* from its current level of .08<sup>4</sup> to .05. A similar change is once again being considered. I have therefore been asked to update the 2002 Report to determine whether recent developments internationally have changed the conclusions reached in that 2002 Report. I have concluded in this updated Report that, although there have indeed been changes,<sup>5</sup> they do not alter the conclusions arrived at four years ago.

---

<sup>1</sup> That Report is available at [www.safety-council.org](http://www.safety-council.org).

<sup>2</sup> The purpose of that 2002 Report was not to comment on the science of whether drivers pose a sufficient enough danger at BACs of .05 to criminalize their behaviour nor was it to engage in the broader policy debate. As indicated, it was to identify what assistance Canadians could draw from international BAC trends when considering whether to change the tolerable BAC limit in the *Criminal Code*.

<sup>3</sup> Australia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom and the United States. The examination of the law in these 20 countries has to take into account that two of them are federal systems, the United States and Australia, in which the states and not the federal government have the jurisdiction to pass laws relating to blood alcohol content for drivers. [In Canada the provinces do not have independent jurisdiction of the kind possessed by American and Australian states, although, as will be discussed in more detail below, Canadian provinces do have a degree of concurrent jurisdiction that cannot be overlooked. They can legislate permissible levels of BAC for the purpose of imposing administrative licence suspensions, but not for the purpose of creating offences.] This means that while Canada is being compared with 20 other countries, there are actually 77 independent jurisdictions being compared with Canada, comprising 18 unitary states, the 51 American jurisdictions (including the District of Columbia), and the 8 Australian jurisdictions (Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, and Western Australia).

<sup>4</sup> The reference to .08 is to a blood alcohol level of 80 milligrams of alcohol in 100 millilitres of blood, or 80 grams per cent, as the Americans describe it.

<sup>5</sup> As was true in the 2002 Report, because of language and access issues, it has been difficult always to obtain original information on international BAC trends and related rules. This had made it necessary to use secondary sources or to rely on information furnished by embassies or agencies that are prepared to co-operate. As detailed in this updated Report, at times information is summarized or incomplete, or descriptions are abridged, or the information is contradicted by other sources. Whenever possible, I have attempted to confirm information found in secondary materials with other sources but it remains possible errors may occur. Given the general availability of original information and the reliability of the secondary sources used, I am confident that those incidental errors that may occur will not affect the validity of the overall conclusions.

The changes that have occurred include, most notably, that since the 2002 Report, the BAC level in almost half of the United States has been lowered from .10 to .08, making .08 the uniform permissible BAC level in that country. Moreover, since the 2002 Report the BAC level has been lowered to .05 in Italy<sup>6</sup> and Switzerland,<sup>7</sup> while Norway has gone from .05 to adopt a .02 level.<sup>8</sup> Finland has made its laws tougher. It has retained the .05 BAC it had in place but now permits incarceration at this level.<sup>9</sup> With the exception of Portugal, which lowered the rate to .02 but raised it back to .05 after a two year trial period,<sup>10</sup> all of the changes have therefore been downward. Moreover, the plurality of 20 comparison countries adopting a .05 or lower BAC relative to those maintaining a .08 or greater BAC has now increased from 13:7 to 15:5.<sup>11</sup> These new developments therefore confirm two of the observations made in the 2002 Report, notably that:

- “internationally, the trend [in defining permissible BACs] has been downward in recent years,”<sup>12</sup> and
- “dealing specifically with the comparison countries examined in this study, most of the 20 comparison countries begin to impose legal consequences on ordinary drivers at .05”<sup>13</sup>

Even with these developments, the key or primary conclusion reached in the 2002 Report is also true today:

- “when a complete and contextual examination is done, the picture that emerges is simply too complex to produce trends that can give real guidance to Canada.”<sup>14</sup>

---

<sup>6</sup> Decreto-Legge, 27 Guigno 2003, N.151, Art. 5.

<sup>7</sup> Email confirmation from Swiss Embassy, 9 March 2005, on file with the author.

<sup>8</sup> Email confirmation from Norwegian Embassy, 6 March 2005, on file with author.

<sup>9</sup> Email confirmation from Embassy of Finland, 7 March 2006, on file with author. At the time of the 2002 Report, the penalty for a .05 BAC was a fine. The criminal approach kicked in if impairment was proved, or a BAC of .12 realized. This was changed in the *Penal Code of Finland*, s.3 (1198/2002).

<sup>10</sup> European Transport Safety Council (ETSC), “Drink driving: Legislation,” – “Comparative study of road traffic rules and corresponding enforcement actions in the Member States of European Union – Final Report – Annex 2 –Table 1: General Information on the Rules, “rule changes – Portugal,” [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php)”

<sup>11</sup> See Table 3 below.

<sup>12</sup> David M. Paciocco, *Canada's Blood Alcohol Laws – An International Perspective*, at 3, [www.safety-council.org](http://www.safety-council.org).

<sup>13</sup> David M. Paciocco, *Canada's Blood Alcohol Laws – An International Perspective*, at 3, [www.safety-council.org](http://www.safety-council.org).

<sup>14</sup> David M. Paciocco, *Canada's Blood Alcohol Laws – An International Perspective*, at 4, [www.safety-council.org](http://www.safety-council.org).

Indeed, it remains the case that it would be simplistic and misleading to rely on the lowering trend and on the increased ratios of countries applying a .05 BAC to conclude that the *Criminal Code* should be changed to .05 to stay in line with international trends. There are three reasons why things are not so straight-forward.

First, arguments based on statistical surveys are notoriously malleable. For example, the same statistics generated by changes over the last four years show that while two new jurisdictions have adopted .05 since the last Report (Switzerland and Italy), 24 jurisdictions (all in the United States) have moved to .08, a fact some might suggest shows that the real trend is towards adopting .08 in preference to .05 BAC. I do not think that would be a fair conclusion for reasons that are developed below, but it illustrates the point; while it is often true that statistics can be categorized and interpreted to support competing arguments, this is certainly so in the BAC area.

The second reason is that the relative offences differ internationally. As noted in the 2002 Report, legislation varies not only in terms of what the permissible BAC is from jurisdiction to jurisdiction but also in terms of who the legislation applies to. Some enactments, for example, apply to those who have care or control of a motor vehicle<sup>15</sup> even if not intending to drive<sup>16</sup> whereas other enactments apply only to those who drive or attempt to drive.<sup>17</sup> In a number of jurisdictions different BACs are permissible for different kinds of drivers; several jurisdictions permit little or no blood alcohol content for young or new drivers<sup>18</sup> while some impose lower levels on persons operating heavy or commercial

---

<sup>15</sup> "Care or control" of a motor vehicle involves the use of the motor vehicle or its fitting or equipment. A non-controversial example would be a person who goes into the car to "sleep it off" and who then leaves the motor running in order to heat the vehicle. Persons who are in care or control of a motor vehicle and who are impaired by alcohol might accidentally set the vehicle in motion, thereby posing a danger to persons and property.

<sup>16</sup> This is the case in Canada and in Australian jurisdictions.

<sup>17</sup> See, for example, *Land Transport Act 1998, No. 10, New Zealand*, s.56(2), and most American jurisdictions, where legislation tends to focus on driving.

<sup>18</sup> In Australia for example, where legislation varies between Australian states, limits of .02 are imposed on new drivers (Australian Capital Territory, New South Wales, Northern Territory, Tasmania) or youthful drivers (Queensland, South Australia), whereas higher limits are imposed on ordinary drivers. In Canada, most provinces have graduated licencing programs with lower BACs for new drivers. Meanwhile among fifteen EU countries surveyed, only three, Austria, Denmark and Greece, had different BACs for new drivers: European Transport Safety Council (ETSC), "Drink driving: Legislation," – "Comparative stud of road traffic rules and corresponding enforcement actions in the Member States of European Union – Final Report – Annex 2, Table 1: General Information on the Rules." [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php)"

vehicles.<sup>19</sup> In addition, some jurisdictions use BACs over the designated limit as evidence of impairment rather than as *per se* offences;<sup>20</sup> in other words, if the driver shows no signs of impairment, it is no offence to exceed the designated BACs. There is a risk that comparing offences straight-up ignores important differences.

It is the third reason however that is the most material one. In Canada, driving or having care or control of a motor vehicle with more than the legal limit is a crime. Even first offenders can be imprisoned. Meanwhile, of those jurisdictions (as opposed to countries) that do use BACs of .05 or lower, only eight of 22 treat persons having BACs over .05 but under .08 as having committed an offence liable to imprisonment. This means that of the 77 comparative jurisdictions, only eight – just over 10% – criminalize drivers at BACs between .05 and .08, which is what is being proposed for Canada. Asking whether Canada's .08 BAC limit is in keeping with the international trend of .05 is therefore a simplistic and misleading way to pose the question, for it ignores the crucial issue of how that BAC would be regulated or enforced. If international trends are going to be used at all it is arguable that a more relevant question is whether Canada's decision not to use the criminal law for drivers between .05 and .08 is in keeping with the international trend. The answer is that it is.

---

<sup>19</sup> Among EU countries, in Austria, Spain, and Greece there is a lower BAC level for heavy vehicles and commercial passenger vehicles (European Transport Safety Council (ETSC), "Drink driving: Legislation," – "Comparative stud of road traffic rules and corresponding enforcement presumptive evidence however that the driver is committing the crime of "driving under the influence": *Montana Code Annotated* 2005, 61-8-406 and 42-2-104 (administrative offence), and 61-8-401(4) (for criminal offence). In Germany the situation is comparable. A .05 BAC is an administrative rather than criminal offence but BAC readings also serve as presumptive evidence of impairment at designated levels: *German Criminal Code*, 315c. When the 2002 Report was prepared, Alabama also had a presumptive offence rather than a *per se* offence regime. That has since changed: *Code of Ala. & 32-5A-191* (2005).

<sup>19</sup> *Highway Traffic Act*, S.S., c.H-3.1, s.91.actions in the Member States of European Union – Final Report – Annex 2, Table 1: "General Information on the Rules, 'specific rules for particular categories of drivers'." [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php)"), and in some of the states of the United States there are lower levels for commercial vehicles. NHTSA, "On DWI Laws in Other Countries," March 2000 at 11 and 12.

<sup>20</sup> In Colorado, for example, under the *Colorado Revised Statute*, 42-4-1301. s.6(a)(11), the designated BAC is not a *per se* offence but rather a basis for presuming that a driver is impaired. In Montana, it is an administrative offence to have a BAC of more than .08, subject to a modest fine. A BAC of .08 furnishes presumptive evidence however that the driver is committing the crime of "driving under the influence": *Montana Code Annotated* 2005, 61-8-406 and 42-2-104 (administrative offence), and 61-8-401(4) (for criminal offence). In Germany the situation is comparable. A .05 BAC is an administrative rather than criminal offence but BAC readings also serve as presumptive evidence of impairment at designated levels: *German Criminal Code*, 315c. When the 2002 Report was prepared, Alabama also had a presumptive offence rather than a *per se* offence regime. That has since changed: *Code of Ala. & 32-5A-191* (2005).

There is yet another level of complexity. It is incomplete to focus solely on the *Criminal Code* limit in comparing Canadian BAC law to international standards. This study confirms that it is already the case in nine of 13 jurisdictions in Canada that there is no lawful right to drive with BACs over .05; police in those provinces and territories can issue a licence suspension for drivers over .05, and in the case of Saskatchewan, at BACs over .04.<sup>21</sup> If international trends are going to be used to inform the public, stakeholders and government decision makers the question at issue cannot therefore simply be about how the BAC level in the *Criminal Code* compares. It must be how all of Canada's BAC laws compare. Even when this more relevant question is posed the complexity of transnational laws and sentencing regimes prevents much guidance from being gained. What this Report shows is that in spite of recent developments, the .05/.08 debate remains, at bottom, a question of policy, not international comparison.

## II. Permissible BACs in Canada

In order to begin comparing Canadian legislation to that found in other jurisdictions, the law relating to BACs in Canada has to be set out. Given that nothing has changed since 2002, I will do it in a more summary way than I did in the 2002 Report.

### A. The Criminal Code Provisions

The BAC provision of the *Criminal Code* is section 253(b). It provides in relevant part:

253. Every one commits an offence who operates a motor vehicle ... or has the care or control of a motor vehicle...whether it is in motion or not,
- (b) having consumed alcohol in such quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.

Looking only at the *Criminal Code* creates the impression that Canada has a BAC limit of .08. This is incomplete. As intimated, a fulsome description of the law in Canada has to reflect that both the Federal and many provincial governments have enacted legislation relating to BACs.<sup>22</sup>

---

<sup>21</sup> *Highway Traffic Act*, S.S., c.H-3.1, s.91.

<sup>22</sup> For complex constitutional law reasons explained in the 2002 Report, Canadian provinces cannot do as the Federal government can, and create criminal offences or punish drivers for having BACs. They can however

## B. Provincial Legislation

For ordinary drivers,<sup>23</sup> most provinces in Canada make it impermissible to operate or have care or control of a motor vehicle at levels approximating .05. Nine of 13 jurisdictions issue drivers with temporary suspensions to drivers having BACs at or over that level.<sup>24</sup> The other four issue immediate licence suspensions to anyone with a BAC of more than .08.<sup>25</sup> This survey of provincial laws represents a modest change from the 2002 Report. At that time, Alberta, Quebec and the Yukon did not have BAC limits tied to temporary suspensions. Now every province does. As a result of these recent changes, the current regime charts out this way:

**TABLE 1 - PROVINCIAL BAC LEVELS AND SANCTIONS**

| Province | Provincial BAC Level for Ordinary Drivers                                                                                                                                                                                                                 | Sanction           | Special BACs                                        |
|----------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|-----------------------------------------------------|
| Alberta  | .08 BAC reverse onus. If a peace officer reasonably suspects that a driver's ability is affected by alcohol, the peace officer can suspend the licence for 24 hours, but if the driver demonstrates a BAC of less than .08, the licence is to be returned | 24 hour suspension | "novice drivers" cannot have any BAC. <sup>27</sup> |

---

ensure the safety of roads within a province by suspending licences at designated BACs, or by developing graduated licencing schemes that make driving conditional on abstinence from alcohol.

<sup>23</sup> Most provinces prohibit new or novice drivers from driving with any blood alcohol level. See the chart below.

<sup>24</sup> As indicated, Saskatchewan the cut off is .04: *Highway Traffic Act*, S.S., c.H-3.1, s.91.

<sup>25</sup> There are two basic approaches taken by those jurisdictions that do impose immediate licence suspensions. The first is straightforward – licences are suspended when a BAC test shows the prohibited level. Four jurisdictions use a more complex process. In those jurisdictions (Alberta, British Columbia, Northwest Territories and Nunavut), a peace officer can issue a temporary suspension only with reasonable suspicion or grounds to believe that the driver is impaired. The BAC is used to enable drivers who can show their BACs to be below the prohibited level to terminate the suspension early, in Alberta by showing it to be less than .08, and in the other three jurisdictions by demonstrating that it is less than .05. A driver can demonstrate this by volunteering for a breathalyzer or with medical evidence.

<sup>26</sup> *Traffic Safety Act*, R.S.A., 2000, c. T-6, s.89.



|                       |                                                                                                                                                                                                                                                                                                  |                                                                                                                                         |                                                                                                                                      |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
|                       | forthwith. <sup>26</sup>                                                                                                                                                                                                                                                                         |                                                                                                                                         |                                                                                                                                      |
| British Columbia      | .05 BAC reverse onus. If a peace officer has reasonable grounds to believe that a driver's ability is affected by alcohol, the peace officer can suspend the licence for 24 hours, but if the driver demonstrates a BAC of less than .05, the licence is to be returned forthwith. <sup>28</sup> | 12 hour suspension                                                                                                                      | for drivers with conditional licences Peace Officer can issue 12 hour suspension for any level of BAC. <sup>29</sup>                 |
| Manitoba              | more than .05 BAC <sup>30</sup>                                                                                                                                                                                                                                                                  | 24 hour suspension at .05 and 90 day suspension if over .08 <sup>31</sup>                                                               | N/A                                                                                                                                  |
| New Brunswick         | .05 BAC or more <sup>32</sup>                                                                                                                                                                                                                                                                    | 24 hour suspension                                                                                                                      | for "novice drivers," if any BAC present, 24 hour suspension <sup>33</sup>                                                           |
| Newfoundland          | .05 BAC or more <sup>34</sup>                                                                                                                                                                                                                                                                    | 24 hours on first suspension progressing to 6 months for repeat offences <sup>35</sup> and 90 day suspension if over .08. <sup>36</sup> | if "novice drivers" have any BAC, licence is suspended for 2 months, progressing for repeat offences to up to 6 months <sup>37</sup> |
| Northwest Territories | .05 BAC reverse onus. If a peace officer has reasonable grounds to believe that a driver's                                                                                                                                                                                                       | 24 hours <sup>39</sup>                                                                                                                  | no special legislation                                                                                                               |

<sup>27</sup> *Traffic Safety Act*, R.S.A., 2000, c. T-6, s.90.

<sup>28</sup> *Motor Vehicle Act*, RSBC 1996, c.318, s.215(2),(6).

<sup>29</sup> *Motor Vehicle Act*, RSBC 1996, c.318, s.90.3. At the time of the 2002 Report, it was possible for a driver holding a conditional licence to have the suspension terminated by proving that their BAC was less than .03. This opportunity has now been repealed: B.C. Reg. 588/2004.

<sup>30</sup> *Highway Traffic Act*, S.M., c.H-60, s.265(1).

<sup>31</sup> *Motor Vehicle Act*, S.M., c. H-60, s.263.1.

<sup>32</sup> *Motor Vehicle Act*, RSNB, c. M-17, s.310.01

<sup>33</sup> *Motor Vehicle Act*, RSNB, c. M-17, s.310.02(5).

<sup>34</sup> *Highway Traffic Act*, RSNL 1990, c.H-3, s.60.1.

<sup>35</sup> *Highway Traffic Act*, RSNL 1990, c.H-3, s.60.2.

<sup>36</sup> *Highway Traffic Act*, RSNL 1990, c.H-3, s.60.1(9)(b).

<sup>37</sup> *Highway Traffic Act*, RSNL 1990, c.H-3, s.60.4.

|                      |                                                                                                                                                                                                       |                                                                                                        |                                                                                                                            |
|----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------|
|                      | ability is affected by alcohol, the peace officer can suspend the licence for 24 hours, but if the driver demonstrates a BAC of less than .05, the licence is to be returned forthwith. <sup>38</sup> |                                                                                                        |                                                                                                                            |
| Nova Scotia          | .05 BAC or more <sup>40</sup>                                                                                                                                                                         | 24 hour suspension                                                                                     | learners and newly licensed drivers (24 months) cannot have any BAC                                                        |
| Ontario              | .05 BAC or more <sup>41</sup>                                                                                                                                                                         | at .05, 12 hour suspension; at more than .08, 90 day suspension <sup>42</sup>                          | new drivers cannot have any BAC, enforced by 30 day suspension and fine <sup>43</sup>                                      |
| Prince Edward Island | .05 BAC or more <sup>44</sup>                                                                                                                                                                         | at .05, 24 hour suspension, 90 days for new drivers; at more than .08, 90 day suspension <sup>45</sup> | young drivers, under 19, BAC of .01, new drivers, no BAC permissible, enforced by 90 day suspension and fine <sup>46</sup> |
| Quebec               | more than .08 BAC <sup>47</sup>                                                                                                                                                                       | 30 days                                                                                                | new drivers, BAC of 0.0, enforced by 30 day suspension <sup>48</sup>                                                       |
| Saskatchewan         | .04 BAC or more <sup>49</sup>                                                                                                                                                                         | 24 hour suspension                                                                                     | BAC of .04 for                                                                                                             |

<sup>38</sup> *Motor Vehicles Act*, SNWT, c. M-16, s.116.1. The .06 level used at the time of the 2002 Report has been changed to .05: S.N.W.T., c.14, s.16.

<sup>39</sup> The former legislation provided for 4-24 hour suspensions.

<sup>40</sup> *Motor Vehicle Act*, RSNS, 1989, c.293, s.279C.

<sup>41</sup> *Highway Traffic Act*, R.S.O., 1990, c. H-8, s.48.

<sup>42</sup> *Highway Traffic Act*, R.S.O., 1990, c. H-8, s.48.3.

<sup>43</sup> *Highway Traffic Act*, R.S.O., 1990, c. H-8, s.48.1.

<sup>44</sup> *Highway Traffic Act*, RSPEI, c.H-5, s.277.1

<sup>45</sup> *Highway Traffic Act*, RSPEI, c.H-5, s.277.2.

<sup>46</sup> *Highway Traffic Act*, RSPEI, c.H-5, s.277.1(13).

<sup>47</sup> *Highway Safety Code*, S.Q., c.24, s.202.4

<sup>48</sup> *Highway Safety Code*, S.Q., c.24.2 s.202.4.

|         |                                                                                                                                                                                                                                                   |                                                                          |                        |
|---------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------|------------------------|
|         |                                                                                                                                                                                                                                                   |                                                                          | younger drivers        |
| Yukon   | An officer has reasonable grounds to believe that a driver has more than .08 BAC can issue an immediate suspension. <sup>50</sup>                                                                                                                 | The shorter of 90 days, or until the .08 criminal charge is adjudicated. | no special legislation |
| Nunavut | .05 BAC reverse onus. Peace officer can suspend licence if there are reasonable grounds to believe that the ability of the driver is affected by alcohol, but the suspension ends if the driver demonstrates a BAC of less than .05 <sup>51</sup> | 24 hour suspension                                                       | no special legislation |

Canadian BAC law is therefore complex. The law prohibits BACs criminally at .08, and administratively in 9 of 13 jurisdictions at .05 or lower. This should be borne in mind as this study is reviewed.

### III. Permissible Blood Alcohol Levels Vary

In the 2002 Report I observed that while it is standard for countries to establish permissible BAC levels, those levels vary widely. The same holds true today. There continues to be substantial variation. A 2003 survey of 83 countries<sup>52</sup> found that permissible BAC's ranged from zero (10 countries, including the Czech Republic,<sup>53</sup> Hungary, and Romania), to .15 in Swaziland. Almost all possible BACs below .09 were represented in that survey, including .01 in Albania; .02 in Estonia, Norway, Poland, Sudan and Sweden; .03 in five countries

<sup>49</sup> *Highway Traffic Act*, S.S., c.H-3.1, s.91.

<sup>50</sup> *Motor Vehicles Act*, R.S.Y. 2002, c.153.

<sup>51</sup> Nunavut incorporates the law from the Northwest Territories, pursuant to the *Nunavut Act*, S.C., 1993, c.28, s.29. It has therefore adopted the same changes made for the Northwest Territories since the 2002 Report.

<sup>52</sup> The survey actually included 88 countries including five Islamic countries that do not permit any alcohol consumption.

<sup>53</sup> NHTSA, "On DWI Laws in Other Countries," March 2000 at 10.

including China and Japan; .05 in 35 countries; .06 in Peru; and .08 in some 21 countries.<sup>54</sup> Wikipedia reports BACs for 119 jurisdictions. They range from no BAC limit (Dominican Republic, Comoros, Congo, Ethiopia and Togo) to .08 in 22 jurisdictions, including across all of North America. Variations exist not only in countries having divergent political traditions like the Czech Republic and the United States but also among countries having broadly similar political traditions. In the 20 countries or 77 jurisdictions being compared with Canada in this study and the 2002 Report, permissible BACs now vary from .02 to .08. This represents a change since the 2002 Report. At that time the range was .02 - .10; as described above, since that Report was prepared almost half of the American States have lowered their BAC limits<sup>55</sup> from .10 to .08, making the .10 obsolete among comparative jurisdictions.

The following table shows the permissible BAC in each of the comparison countries for ordinary drivers, and notes, where applicable, the existence of contextual variations in permissible BACs within those countries.

**TABLE 2 -LOWEST PERMISSIBLE BAC LEVELS BY COUNTRY**

| <b>Country</b> | <b>Lowest BAC Limit</b>                           | <b>Contextual Limits</b>                                               |
|----------------|---------------------------------------------------|------------------------------------------------------------------------|
| Canada         | .08 - Federal Limit<br>.05 range - most provinces | Some provinces use .00 for inexperienced drivers                       |
| Australia      | .05                                               | Some states use .02 for new drivers, or designated commercial vehicles |
| Austria        | .05                                               | .01 for heavy vehicles                                                 |
| Belgium        | .05                                               |                                                                        |
| Denmark        | .05                                               |                                                                        |
| Finland        | .05                                               |                                                                        |
| France         | .05                                               |                                                                        |
| Germany        | .05                                               | Higher levels are established for motorboat operators                  |
| Greece         | .05                                               | Lower levels required for professional drivers                         |

<sup>54</sup> Drive and Stay Alive Inc., *Drunk Driving Blood Alcohol Limits Worldwide*, [www.driveandstayalive.com](http://www.driveandstayalive.com), last visited 03/16/06.

<sup>55</sup> See the discussion below relating to the United States.

|                |                   |                                                                                          |
|----------------|-------------------|------------------------------------------------------------------------------------------|
| Italy          | .05 <sup>56</sup> |                                                                                          |
| Ireland        | .08               |                                                                                          |
| Luxembourg     | .08               |                                                                                          |
| Netherlands    | .05               |                                                                                          |
| New Zealand    | .08               |                                                                                          |
| Norway         | .02               |                                                                                          |
| Portugal       | .05               |                                                                                          |
| Spain          | .05               | Lower levels for professional drivers and new drivers                                    |
| Sweden         | .02               |                                                                                          |
| United Kingdom | .08               |                                                                                          |
| United States  | .08               | Some states have BAC levels of .04 for commercial drivers or .02 or .00 for new drivers. |

In simple terms, leaving Canada aside, the following results can be generated and placed in table form:

**TABLE 3 - LOWEST PERMISSIBLE BAC BREAKDOWN ORGANIZED BY COUNTRY (Canada Excluded)**

|                                        |                                                                                                                                                                           |
|----------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Blood Alcohol Content of .05 or lower  | FIFTEEN COUNTRIES<br>Australia, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Norway (.02), Portugal Spain, Sweden (.02), Switzerland. |
| Blood Alcohol Content of .08 or higher | FIVE COUNTRIES<br>Ireland, Luxembourg, New Zealand, United Kingdom, United States                                                                                         |

Among comparison countries, therefore, three out of four have .05 BACs. This is in keeping with more broadly international standards; seventy-two percent of 83 countries

<sup>56</sup> Italy's BAC was lowered from .08 to .05 since the 2002 Report:

surveyed in one study had permissible BACs of .05 or lower.<sup>57</sup> When *jurisdictions* rather than *countries* are examined, things change; 56 out of 77 of the comparable countries have BACs of .08, although this measure is heavily skewed by the 51 American jurisdictions. Without question, .05 BAC limits are the prevalent practice, but as will be described below, the relevance of that observation to proposed changes to the *Criminal Code of Canada* is seriously muted.

## IV. The Trend

The 2002 Report had identified a lowering trend for BACs but cautioned that this trend did not signal a recent flurry of legislative changes that should, by virtue of its momentum, carry Canada along. This remains true.

As indicated, since the 2002 Report each of the 21 American states that had BACs of .10, as well as Massachusetts which had no BAC at all, has moved to .08. This wave of change was inspired, however, by a single federal initiative. On October 23, 2000 President Clinton signed legislation requiring each state to pass .08% BAC legislation or lose a portion of their federal highway funding. Gradual reductions in highway funding began on 1 October 2003 of 2% a year, culminating in a reduction of 8% by 1 October 2006. Not surprisingly, this galvanized the universal response described. Given the financial disincentive to retaining a .10 BAC, it is difficult to gauge how widespread the support among states for lowering the BACs really was. Only two of the states, Michigan<sup>58</sup> and Nevada,<sup>59</sup> have made their views clear. Each has included sunset clauses with their legislation that will cause the .08 BACs to revert to .10 BACs on October 1, 2013 when the terms of the federal legislation expire.

As for those jurisdictions that have adopted BACs of .05, as the 2002 Report showed this did not happen as a result of a recent push but rather gradually over the course of 25 years. Developments in the past four years can best be described in similar terms, rather than as part of a recent trend. Countries adopting .05 BACs have done so over a 30

---

<sup>57</sup> Drive and Stay Alive Inc., *Drunk Driving Blood Alcohol Limits Worldwide*, [www.driveandstayalive.com](http://www.driveandstayalive.com), last visited 03/16/06.

<sup>58</sup> MCLS & 257.625 (2005).

<sup>59</sup> Acts 2003, ch 421, & 15; Nev. Rev. Stat. Ann. & 484.379 (2005).

year period, with most of the .05 Western European nations having changed their legislation predominantly over the span of the last ten years.

**TABLE 4 - POINT AT WHICH JURISDICTIONS  
ADOPTED BACs OF .05 OR LOWER**

| JURISDICTION                  | WHEN ADOPTED .05 OR LOWER           |
|-------------------------------|-------------------------------------|
| Victoria, Australia           | 1976, June (no date available)      |
| New South Wales, Australia    | 1982, 17 December                   |
| Queensland, Australia         | 1982, 20 December                   |
| Tasmania, Australia           | 1983, 6 January                     |
| Western Australia, Australia  | 1988, September (no date available) |
| Sweden                        | 1990, 1 July                        |
| Australian Capital Territory  | 1991, 1 January                     |
| Northern Territory, Australia | 1992 (no month or date available)   |
| South Australia               | 1992, 1 July                        |
| Finland                       | 1994 (no month or date available)   |
| Belgium                       | 1994, 1 December                    |
| Netherlands                   | 1994 (no month or date available)   |
| France                        | 1995, September (no date available) |
| Austria                       | 1998, 6 January                     |
| Portugal                      | 1998, 3 January                     |
| Denmark                       | 1998, 1 March                       |
| Greece                        | Unavailable date prior to 1999      |
| Spain                         | 1999, 6 May                         |

|             |                   |
|-------------|-------------------|
| Germany     | 2001, January     |
| Norway      | 2001, March       |
| Italy       | 2003, June        |
| Switzerland | 2004, December 21 |

The recent initiatives by Italy and Switzerland could well be in response to the push that has been going on since 2001 when the European Commission began to encourage uniformity throughout the European Union by recommending .05 BAC limits. The European Transport Safety Council concluded that those “efforts have failed.”<sup>60</sup> While there are reports that the United Kingdom may yet agree to a .05 BAC limit,<sup>61</sup> Ireland and Luxemburg apparently continue to resist. Malta also has a BAC of .08, while a number of the former Eastern European members have lower BACs than .05 (Estonia and Latvia at .02; Lithuania at .04, and the Czech Republic, Hungary and Slovakia at zero).<sup>62</sup> Those nations would have to raise their BACs to achieve uniformity among European Union nations.

Without in any way commenting on the inherent wisdom of lowering BACs, it is therefore difficult to treat recent instances of jurisdictions lowering their BACs as a reflection of their views on the objective desirability of doing so. All of the jurisdictions that have lowered their BACs in the last five years have been subject to political persuasion within their federations. For this reason, and because of pockets of resistance and the slow movement that has occurred, little weight can be given to arguments that rely on “international trends” in the debate about the appropriate BAC for the *Criminal Code of Canada*.

<sup>60</sup> European Transport Safety Council (ETSC), “Drink driving: Legislation,” [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php)”

<sup>61</sup> European Transport Safety Council (ETSC), “Drink driving: Legislation,” – “Comparative stud of road traffic rules and corresponding enforcement actions in the Member States of European Union – Final Report – Annex 2, Table 1: General Information on the Rules, ‘Rules Changes.” [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php) and see The Royal Society for the Prevention of Accidents, *Drinking and Driving Policy Paper* (updated May 2005), recommending the movement to .05.

<sup>62</sup> Wikipedia Encyclopedia, “Driving under the influence,” [http://en.wikipedia.org/wiki/Driving\\_under\\_the\\_influence](http://en.wikipedia.org/wiki/Driving_under_the_influence)



## V. Divergent Responses to BACs - Comparing Apples and Oranges

The key point made in the 2002 Report was not its caution about how permissible BAC levels vary, nor was it the observation that trends are of marginal utility because they are too long-term and gradual to serve as revelations. Instead, the key point was that what most diminishes the value in using international trends to support an initiative to reduce BACs in the *Criminal Code of Canada* to .05 is the divergent way in which different jurisdictions use BACs. Some jurisdictions treat the violation of a .05 BAC limits as a crime. Others jurisdictions treat .05 BAC offences as serious traffic tickets. What is being proposed when it is recommended that the BAC in the *Criminal Code of Canada* be lowered to .05 is that Canada treat .05 as a crime rather than as a serious traffic ticket. Using the criterion of the risk of imprisonment to differentiate criminal and administrative approaches, at the time of the 2002 Report only six of the 20 comparable jurisdictions that had .05 BACs treated violations as crimes (Belgium, Norway,<sup>63</sup> Sweden,<sup>64</sup> and three Australian states, namely Northern Territory, Queensland and Tasmania). As the following survey shows, since 2002 two more nations have moved from .08 to .05 BACs. One of them, Italy, has chosen to treat a violation as a crime. The other, Switzerland, has not. A third nation, Finland, now treats a .05 BAC violation as a crime. This still means that of the 22 comparable jurisdiction using a .05 or lower cut-off, only eight use the criminal method being advocated for Canada – slightly over one third, while two thirds do not. When comparable jurisdictions are counted, only eight of 77, slightly more than 10%, see fit to treat .05 as a crime.

There is even danger in lumping nations or jurisdictions into two groups, as the approaches taken internationally to punishing BAC violations vary tremendously within each category.

---

<sup>63</sup> The 2002 Report described Norway as taking an administrative law approach. This was based on the description found in the "NHTSA "On DWI Laws in Other Countries", March 2000. A response from Embassy of Norway of 6 March 2006, on file with the author, describes the possibility of conditional imprisonment at .05.

<sup>64</sup> The 2002 Report described Sweden as taking an administrative law approach. This was based on the description found in the "NHTSA "On DWI Laws in Other Countries", March 2000. A response from Embassy of Sweden of 6 March 2006, on file with the author, describes the possibility of prison at a BAC of .03 since 1998.

While the statistics have changed, then, the relevant conclusion has not. Saying Canada should do as other nations do by focusing solely on relative BAC range remains an exercise in comparing apples and oranges, just as it was in the 2002 Report.

To make that point, it is worth revisiting in summary terms from the 2002 Report the difference between criminal and administrative responses. It is also worth illustrating how the *Criminal Code of Canada* houses a criminal method. With that foundation, the comparative international approaches can then be set out.

#### **A. Criminal and Administrative Responses**

The importance of distinguishing between criminal offences and administrative responses is recognized universally. The distinction is needed, in part, to preserve the efficacy or impact of criminal law. Quite simply, treating a wide range of behaviour that varies in its seriousness as having the same general stature as offences like murder, sexual assault, and narcotics trafficking can diminish the inherent moral opprobrium that a criminal approach carries. It can devalue the impact of a criminal conviction. The distinction is also important to keep from punishing individuals disproportionately. As the 2002 Report explained, criminal offences are intended to carry deep stigma for those convicted – the deepest stigma a society can impose. Convictions for those offences invariably include “labeling” of offenders with criminal records and carry collateral consequences such as formal or informal disqualifications from public offices, professional association, employment or international travel. Criminal convictions also tend to carry more punitive sanctions than an administrative approach does. While many administrative sanctions are enforced by the threat of short periods of incarceration, criminal provisions always use the risk of incarceration, and typically for longer periods. Along with the increased risk of stigma and incarceration the criminal approach also tends to carry with it increased powers of arrest and detention. As a result of the tremendous impact they have on the welfare and liberty of those accused, it is not surprising that criminal prosecutions are most often more complex and expensive and usually result in greater procedural and evidentiary rights for those charged than administrative approaches do. Administrative offences therefore tend to be more efficient and easier to enforce.

In spite of importance of the distinction between criminal and administrative approaches, it is not always easy to determine whether particular legislation is criminal or administrative in nature. This is because no universal, airtight formula has been devised for

making that distinction. Where there is no risk of incarceration, however, it is easy to tell; the provision will necessarily be administrative. The risk of incarceration was therefore made the sole criterion in the 2002 Report for distinguishing between criminal and international approaches to BACs internationally. Not only does incarceration furnish a functional test, it is also a particularly relevant measure. Short of capital punishment (which has no relevance here) incarceration is generally considered to be the most significant consequence of a conviction. The risk of incarceration, as a restraint on liberty, also tends in Canadian *Charter of Rights* law to be the benchmark for elevated constitutional rights. Finally, requiring a risk of incarceration errs, if at all, by treating what might be administrative provisions as criminal rather than by underestimating criminal responses. Given the conclusion in this Report that criminal approaches are rare among comparable jurisdictions employing .05 BACs, using what might be an overly generous benchmark of incarceration to identify criminal approaches makes that conclusion even firmer. Consistent with the 2002 Report, and for the foregoing reasons, international BAC offences that permit incarceration are therefore again identified in this updated Report as criminal, and those that do not permit incarceration are characterized as administrative.<sup>65</sup>

## **B. The Canadian Approach**

As explained in the 2002 Report, Canada takes both a criminal and an administrative approach to driving in excess of permissible BACs. Section 253(b) represents the criminal response. The provision is in our criminal statute, the *Criminal Code of Canada*. At the option of the prosecutor, the BAC offence can be prosecuted as an indictable offence, invoking Canada's most exacting criminal procedures. Whether prosecuted indictably or not, conviction leads to a criminal record. Section 253(b) is therefore intended to, and does, stamp BAC offences with criminal stigma. Then there is the defining characteristic, the risk of incarceration. It is provided for in sections 255(1) and 259(1) of the *Criminal Code*:

---

<sup>65</sup> In the Transport Canada Publication, "Assessing the Potential Impact of Lowering the Legal Blood Alcohol Limit to 50 MG% in Canada," TP 13321 E, November 1998, prepared by the Addiction Research Foundation, a different method of characterization, which is not explained, was used. When discussing the *per se* limit of 50, the authors characterized Finland, Greece, Netherlands, and Portugal as criminal. Using the minimum criteria of the risk of incarceration for offenders as the criteria for identifying criminal approaches, none of these jurisdictions were criminal at levels between .05 and .08 at the time, because in none of them permitted first offenders go to jail at such levels.

**255(1)** Every one who commits an offence under section 253 ... is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

- (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
  - (i) for the first offence, to a fine of not less than six hundred dollars,
  - (ii) for a second offence to imprisonment of not less than fourteen days, and
  - (iii) for each subsequent offence, to imprisonment of not less than ninety days;
- (b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years, and
- (c) where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.

Section 259(1) states in relevant part:

**259(1)** When an offender is convicted of an offence under section 253 ... the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place ...

- (a) for the first offence, during a period of not more than three years plus any period to which the offender is sentenced to imprisonment, and not less than one year;
- (b) for a second offence, during a period of not more than five years plus any period to which the offender is sentenced to imprisonment, and not less than two years; and
- (c) for each subsequent offence, during a period of not less than three years plus any period to which the offender is sentenced to imprisonment.

The penalties for driving with more than .08 are decidedly strict. Anyone convicted of a first offence under section 253(b) of driving or being in care or control of a motor vehicle with a BAC of more than .08 will receive a minimum fine of \$600 or more, and a

minimum driving prohibition of between one and three years,<sup>66</sup> and is in jeopardy of receiving a term of incarceration.<sup>67</sup> For subsequent offences, incarceration is required, and minimum driving prohibitions increase to two years and three years respectively, with the possibility for third offences of a lifetime prohibition. The *Criminal Code of Canada* treats BAC offences as serious crimes.

Provincial BAC legislation takes an administrative approach. As described, provinces deal with BAC offences by using licence suspensions, either immediate short term suspensions, or longer term suspensions.

Canada therefore retains both a criminal law and an administrative response to driving with impermissible BACs. The Canadian criminal response kicks in when BACs exceed .08. The administrative response varies from province to province, but in nine of 13 jurisdictions, kicks in at BACs of .05 or lower. How does this compare internationally?

### **C. Criminal and Administrative Responses Internationally**

The following Table, revised since the 2002 Report, addresses whether, on a first conviction, the approach taken for ordinary drivers is administrative or criminal in those jurisdictions using a BAC below .08.<sup>68</sup> To assist in comparisons, potential fines and licence suspensions or prohibitions are included in the Table. For the purposes of the table, no distinction is drawn between suspensions and prohibitions.

---

<sup>66</sup> In Canada we distinguish between licence suspensions and driving prohibitions. A licence suspension is imposed by the provinces, who grant the licence. Variable lengths of suspension are imposed from province to province where a driver is convicted of a section 253(b) offence. A driving prohibition is a criminal sanction imposed at the time of sentencing, pursuant to the *Criminal Code*, and prohibits driving anywhere in Canada.

<sup>67</sup> In practice it is so rare for first offence drivers to be incarcerated for low level readings in the .08 - .12 range, that it is almost safe to say that it never happens. First, because of the inaccuracy in calibrating approved breath test machines, most police forces do not lay charges unless the sample exceeds the permissible BAC by at least .01. Even if charges are laid, for a first offence the typical response is a fine, absent aggravating circumstances. Although there is no set grid beyond the minimum fine of \$600, the practice is to increase the fine, and the length of the prohibition, as the BAC rises.

The reluctance to use jail as an option for lower BACs is an international trend. It has been observed that even in those countries that permit incarceration at lower levels, "the use of incarceration as a penalty at low BACs ... appears to be rare in practice." Addiction Research Foundation, "Assessing the Potential Impact of Lowering the Legal Blood Alcohol Limit to 50 MG% in Canada", a study commissioned by Transport Canada., at 27. Exceptionally, in a number of American jurisdictions, mandatory jail sentences, usually of 48 hours up to 10 days, are used for first offenders with low BACs. In Canada, jail is not exceptional for *repeat* offenders. Indeed, it is required.

<sup>68</sup> It is common for jurisdictions to legislate increased penalties for subsequent convictions under BAC legislation. Whether particular regimes take a criminal or administrative approach can best be demonstrated, however, by examining the response to first offenders.

**TABLE 5<sup>69</sup> - FIRST OFFENCES IN .05 JURISDICTIONS**

| Country               | BAC                                                            | JAIL <sup>70</sup> /FINE                                                | SUSPENSION                                                                                  |
|-----------------------|----------------------------------------------------------------|-------------------------------------------------------------------------|---------------------------------------------------------------------------------------------|
| Canada                | .05 administrative<br>.08 criminal                             | - jail possible at .08<br>- mandatory minimum fine                      | - minimum prohibition of one year                                                           |
| Austria <sup>71</sup> | .05 administrative                                             | - jail possible only with accident<br>- fines increase with BAC         | - suspension at .08                                                                         |
| Belgium <sup>72</sup> | .05 criminal                                                   | - jail possible at .05 (15 days - 6 months) <sup>73</sup><br>- set fine | - suspension at .05                                                                         |
| Denmark <sup>74</sup> | .05 administrative<br>.20 criminal                             | - no jail possible until .20<br>- fines increase with BAC               | - .05 no suspension<br>- .12 conditional suspension<br>- .20 unconditional disqualification |
| Finland <sup>75</sup> | .05 criminal                                                   | - jail possible at .05, of up to six months                             | - suspension possible                                                                       |
| France                | .05 administrative <sup>76</sup><br>.08 criminal <sup>77</sup> | - jail only possible at .08 <sup>78</sup><br>- fine at .05              | - suspension possible at .05 <sup>79</sup>                                                  |

<sup>69</sup> This was table 7 in the 2002 Report. Table 6 of the 2002 Report, "Permissible BAC Levels in the United States" is omitted in this update Report because BACs in the United States are now uniform.

<sup>70</sup> This column shows whether jail is possible for a simple, first BAC offence comparable to section 253(b).

<sup>71</sup> Source: NHTSA "On DWI Laws in Other Countries", March 2000; email correspondence confirmation from Austrian embassy, 8 March 2006, on file with author.

<sup>72</sup> Source: NHTSA "On DWI Laws in Other Countries", March 2000.

<sup>73</sup> In Transport Canada Publication, "Assessing the Potential Impact of Lowering the Legal Blood Alcohol Limit to 50 MG% in Canada," TP 13321 E, November 1998, prepared by the Addiction Research Foundation, the authors report that in Belgium, "eventual prison is possible," suggesting that jail is typically not imposed for first offenders.

<sup>74</sup> Source: NHTSA "On DWI Laws in Other Countries", March 2000; confirmed European Transport Safety Council, Table 5, Sanction Regime, [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php), last visited 03/16/06.

<sup>75</sup> Source: Email confirmation from Embassy of Finland, 7 March 2006, on file with author; [www.poliisi.fi/poliisi/home.nsf/pages/3DEF6EF2FAABAF61C2256C3700306344?OpenDocument](http://www.poliisi.fi/poliisi/home.nsf/pages/3DEF6EF2FAABAF61C2256C3700306344?OpenDocument). At the time of the 2002 Report, the penalty for a .05 BAC was a fine. The criminal approach kicked in if impairment was proved, or a BAC of .12 realized. This was changed in the *Penal Code of Finland*, s.3 (1198/2002).

|                           |                                                                                               |                                                                                |                                                       |
|---------------------------|-----------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|-------------------------------------------------------|
| Germany <sup>80</sup>     | .05 administrative<br>.11 criminal unless<br>presumption of<br>unfitness to drive<br>rebutted | - jail only possible at<br>.11<br>- fine at .03 if accident;<br>at .05 without | - 1 month suspension at<br>.05 increasing with<br>BAC |
| Greece <sup>81</sup>      | .05 administrative<br>.11 criminal                                                            | - jail only possible at<br>.11<br>- fine at .05                                | - suspension only<br>possible at .08                  |
| Italy <sup>82</sup>       | .05 criminal                                                                                  | - jail possible at .05                                                         | - disqualification of 15<br>days to 90 days           |
| Netherlands <sup>83</sup> | .05 administrative<br>.21 criminal                                                            | - jail only possible at<br>.21 <sup>84</sup><br>- fine at .05                  | - suspension only<br>possible at .13 or<br>higher     |
| Norway <sup>85</sup>      | .02 administrative <sup>86</sup><br>.05 criminal <sup>87</sup>                                | - jail possible at .15<br>- fine possible                                      | - suspension at .05                                   |

<sup>76</sup> Source: NHTSA "On DWI Laws in Other Countries", March 2000, Code La Route, Livre 2, R.234-1.

<sup>77</sup> Source : Code La Route, chapitre 4, Article L234-1, Article 2.

<sup>78</sup> Source: Code La Route, chapitre 4, Article L234-1.

<sup>79</sup> Source: Code La Route, chapitre 4, Article L234-2.

<sup>80</sup> Source: Summary sheet supplied to author by German Embassy, Ottawa, 13 March 2006 - on file with author and NHTSA "On DWI Laws in Other Countries", March 2000: but see the summary furnished at European Transport Safety Council, Table 5, Sanction Regime, [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php), last visited 03/16/06 which appears to contain an oversimplified description of the penalty regime, as does The Royal Society for the Prevention of Accidents, Drinking and Driving Paper, Undated May 2005.

<sup>81</sup> Source: Summary sheet supplied to author by Greek Embassy, Ottawa, on request - on file with author.

<sup>82</sup> Source: Decreto-Legge, 27 Guigno 2003, N.151, Art. 5; European Transport Safety Council, Table 5, Sanction Regime, [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php), last visited 03/16/06.

<sup>83</sup> Source: NHTSA "On DWI Laws in Other Countries", March 2000.

<sup>84</sup> Source: [www.alcoveb.com](http://www.alcoveb.com) "Alcohol Health - Legislation on BAC levels" records prison as an option at a BAC of .25; but see European Transport Safety Council, Table 5, Sanction Regime, [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php), last visited 03/16/06 which appears to contain an oversimplified version of the penalty regime.

<sup>85</sup> Source: correspondence from Norwegian Embassy, 6 March 2006, on file with the author, confirming [www.alcoveb.com](http://www.alcoveb.com), Alcohol Health - Legislation on Blood Alcohol Levels. In the Transport Canada study, "Assessing the Potential Impact of Lowering the Legal Blood Alcohol Limit to 50 MG% in Canada," TP 13321 E, November 1998, prepared by the Addiction Research Foundation, Norway is recorded as permitting *conditional* jail terms for BACs between .051 and .100. *Contra* NHTSA "On DWI Laws in Other Countries", March 2000, based on a survey response from the Norwegian equivalent to the NHTSA, which is apparently inaccurate in disclaiming entirely the possibility of jail.

<sup>86</sup> At the time of the 2002 Report, available information was that the administrative level was .05. It was changed to .02 in January 2001. Source: Summary sheet supplied to author by the Norwegian Embassy, Ottawa, 9 March 2006, on request - on file with author.

|                                            |                                                                                         |                                                             |                                                           |
|--------------------------------------------|-----------------------------------------------------------------------------------------|-------------------------------------------------------------|-----------------------------------------------------------|
| Portugal <sup>88</sup>                     | .05 administrative<br>.12 criminal - (becomes offence under Code of Criminal Procedure) | -jail possible at .12<br>- fine at .05, increasing with BAC | - suspension at .05                                       |
| Spain <sup>89</sup>                        | .05 administrative                                                                      | - jail not possible<br>- fine at .05                        | - suspension at .05                                       |
| Sweden <sup>90</sup>                       | .02 criminal                                                                            | - jail possible at .03 with aggravated sentence at .10      | - suspension at .03                                       |
| Switzerland <sup>91</sup>                  | .05 administrative<br>.08 presumed under the influence <sup>92</sup>                    | - DUI jail possible                                         | - possible at .05<br>- 3 month mandatory at .08 and above |
| Australian Capital Territory <sup>93</sup> | .05 administrative<br>.08 criminal                                                      | - jail possible at .08<br>- fine at .05                     | - suspension at .05                                       |
| New South Wales <sup>94</sup>              | .05 administrative<br>.08 criminal                                                      | - jail possible at .08<br>- fine possible at .05            | - prohibition mandatory at .05                            |
| Northern Territory <sup>95</sup>           | .05 criminal                                                                            | - jail possible at .05<br>- fine possible at .05            | - suspension possible at .05, mandatory at .08            |
| Queensland <sup>96</sup>                   | .05 criminal                                                                            | - jail possible at .05<br>- fine possible at .05            | - suspension at .05                                       |

<sup>87</sup> At the time of the 2002 Report, available information was that criminal sanctions began at 1.5.: ([www.alcoveb.com](http://www.alcoveb.com) "Alcohol Health – Legislation on BAC levels"). A BAC of 1.5 is in fact the level at which mandatory incarceration commences. At .05 BACs, the accused receives a "suspended" or "conditional" period of imprisonment. The offender receives a criminal record but serves the sentence in the community, subject to being arrested for perpetrating another offence while under sentence. Source: summary sheet supplied to author by the Norwegian Embassy, Ottawa, 9 March 2006, on request - on file with author.

<sup>88</sup> Source: NHTSA "On DWI Laws in Other Countries", March 2000.

<sup>89</sup> Source: NHTSA "On DWI Laws in Other Countries", March 2000. Note: At the time of the NHTSA study, the prohibited BAC limit was .08, but the study notes that as of 6 May 1999, the BAC would be lowered to .05. Efforts to obtain the Spanish legislation on the internet, or from the Spanish Embassy have proven unsuccessful. It has been assumed for the purpose of this chart that the penalty regime was not varied with that amendment.

<sup>90</sup> Source: Response from Embassy of Sweden of 6 March 2006, on file with the author, describes the possibility of prison at a BAC of .03.

<sup>91</sup> Source: Response from the Swiss embassy, 9 March 2006, on file with the author.

<sup>92</sup> Source: Swiss Road Traffic Law, Art. 741.01, 91, 741.13.

<sup>93</sup> Source: *Traffic (Alcohol and Drugs) Act 1977*, ss.4, 19, 26 and 32.

<sup>94</sup> Source: *Road Transport (General) Act 1999*, ss. 9, 24, 25 and Schedule 2.

<sup>95</sup> Source: *Traffic Act*, s.19, 20A.



|                                  |                                    |                                                                                   |                                                                       |
|----------------------------------|------------------------------------|-----------------------------------------------------------------------------------|-----------------------------------------------------------------------|
| South Australia <sup>97</sup>    | .05 administrative                 | - no jail possible for first BAC offence -fine possible at .05                    | - 2 mos. suspension mandatory at .05, with longer suspension possible |
| Tasmania <sup>98</sup>           | .05 criminal                       | - jail possible at .05<br>- fine possible at .05                                  | 3 mos. suspension mandatory at .05, with longer suspension possible   |
| Victoria <sup>99</sup>           | .05 administrative                 | - no jail possible for first BAC offence<br>- fine possible                       | - suspension at .05                                                   |
| Western Australia <sup>100</sup> | .05 administrative<br>.15 criminal | - no jail possible unless impaired; deemed at .15 to be impaired<br>- fine at .05 | - suspension at .05                                                   |

It can be seen, then, that of the 19 European countries that use a .05 BAC, only five (Belgium, Finland, Italy, Norway and Sweden) use a criminal law approach at .05, while only six (the five mentioned and France) use a criminal law approach the way Canada currently does at BACs between .08 and .10. When Australia is added to the mix, of the 22 comparative jurisdictions that have .05 BACs, only eight ((Belgium, Finland, Italy, Norway, Sweden, Northern Territory, Queensland and Tasmania) use a criminal law approach at .05, while only 11 of the 22 (the eight just mentioned plus France, Australian Capital Territory and New South Wales) use a criminal law approach the way Canada currently does at BACs between .08 and .10. Using only this measure, half of the .05 countries arguably take a “tougher” approach to BAC law at .09 than Canada, while half of these jurisdictions are in fact less onerous than we are. To get a fuller and more accurate measure of the relative responses internationally, it would be useful to hypothesize two drivers, one having a BAC of .06, and one having a BAC of .09, and to examine the potential penalties available in the comparison jurisdictions.

<sup>96</sup> Source: *Transport Operations (Road Use Management) Act 1995*, s.79(2); *Traffic Act 1949*, s.16(2).

<sup>97</sup> Source: *Road Traffic Act 1961*, s.47A.

<sup>98</sup> Source: *Road Safety (Alcohol and Drugs) Act 1970*, s6(1), 17.

<sup>99</sup> Source: *Road Safety Act 1986*, ss.3, 49, 50.

<sup>100</sup> Source: *Road Traffic Act 1974*, ss.63, 64, 64AA.

**TABLE 6 - POTENTIAL PENALTIES AT .06 FOR .05 JURISDICTIONS  
AND CANADA: FIRST OFFENDERS**

| JURISDICTION                 | JAIL                  | FINE          | SUSPENSION                                     |
|------------------------------|-----------------------|---------------|------------------------------------------------|
| Canada                       | Not possible          | Not possible  | Immediate up to 24 hours in some jurisdictions |
| Austria                      | Not possible          | Set fine      | Not possible                                   |
| Belgium                      | Possible              | Set fine      | 15-30 days                                     |
| Denmark                      | Not possible          | Set fine      | Not possible                                   |
| Finland                      | Possible              | Possible      | Up to 5 years maximum                          |
| France                       | Not possible          | Set fine      | Up to 3 years maximum                          |
| Germany                      | Not possible          | Set fine      | 1 month                                        |
| Greece                       | Not possible          | Set fine      | Not possible                                   |
| Italy                        | Possible              | Set fine      | 15-90 days                                     |
| Netherlands                  | Not possible          | Set fine      | Not possible                                   |
| Norway                       | Conditional jail only | Set fine      | Possible <sup>101</sup>                        |
| Portugal                     | Not possible          | Set fine      | 1 month(est) <sup>102</sup>                    |
| Spain                        | Not possible          | Set fine      | 3 months                                       |
| Sweden                       | Possible              | Variable fine | 2 - 12 months                                  |
| Switzerland                  | Not possible          | Set fine      | up to 12 months                                |
| Australian Capital Territory | Not possible          | Variable fine | 6 months                                       |
| New South Wales              | Not possible          | Variable fine | 6 months                                       |
| Northern Territory           | Possible              | Possible      | up to 12 months                                |

<sup>101</sup> The term is discretionary. For repeat offenders the suspension can be up to life.

<sup>102</sup> The suspension is graduated between one month to two years depending on the reading: NHTSA "On DWI Laws in Other Countries," March 2000. Since this is the lowest BAC it is assumed that the suspension would be in the one month range. The sanction description in European Transport Safety Council, Table 5, Sanction Regime, [www.etsc.be/enforcement-drinkdriving-legislation.php](http://www.etsc.be/enforcement-drinkdriving-legislation.php), last visited 03/16/06 suggests that a suspension is not possible until readings reach .12 BAC. It may therefore be that at this BAC level no suspension would be forthcoming.

|                   |              |               |                             |
|-------------------|--------------|---------------|-----------------------------|
| Queensland        | Possible     | Possible      | 3 months <sup>103</sup>     |
| South Australia   | Not Possible | Variable fine | not possible <sup>104</sup> |
| Tasmania          | Possible     | Possible      | 2 to 12 months              |
| Victoria          | Not Possible | Variable fine | up to 6 months              |
| Western Australia | Not Possible | Variable fine | 3 months                    |

As can be seen, jail is only possible at readings of .06 in 7 of the 22 comparison jurisdictions, with conditional jail (served in the community) being possible in an eighth, Norway. Incarceration is not possible in 14 of the 22 countries. There are 16 jurisdictions that have the power to impose driving suspensions at .06 BACs. Of interest, neither jail, nor driving suspensions are used at BACs of .06 in 6 of the 22 jurisdictions. These six jurisdictions treat low BAC violations as the functional equivalent of ordinary ticketed offences.

Of the 16 jurisdictions that use fines and driving suspensions those suspensions tend to be short, with 7 of those jurisdictions having suspensions of 90 days or less, and another 3 of six months or less. Only six jurisdictions can impose suspensions of up to 12 months, which is what would happen automatically in Canada were the BAC in section 253(b) to simply be lowered to .05.

**TABLE 7 - POTENTIAL PENALTIES AT .09 FOR ALL COMPARISON JURISDICTIONS: FIRST OFFENDERS<sup>105</sup>**

| JURISDICTION | JAIL           | FINE              | SUSPENSION                    |
|--------------|----------------|-------------------|-------------------------------|
| Canada       | Up to 5 years  | \$600 CDN minimum | 1 year minimum, up to 3 years |
| Austria      | Not possible   | Set fine          | 4 week minimum                |
| Belgium      | Up to 6 months | Set fine          | 15-30 days                    |
| Denmark      | Not possible   | Set fine          | Not possible                  |
| Finland      | Up to 6 months | Set fine          | Up to 5 years                 |

<sup>103</sup> The suspension is 3 to 9 months depending on reading. Since .051 is the lowest illegal reading, 3 months has been selected for the chart.

<sup>104</sup> A minimum 3 month suspension is imposed for a second offence: *Road Traffic Act 1961*, s.47B.

<sup>105</sup> The information for this table relating to Europe comes from the sources described above, and in the case of Australian and American jurisdictions, from the relevant statutes.

|                              |                       |                              |                                  |
|------------------------------|-----------------------|------------------------------|----------------------------------|
| France                       | Up to 3 years         | Set fine                     | Up to 3 years                    |
| Germany                      | Not possible          | Set fine                     | Up to 3 months                   |
| Greece                       | Not possible          | Set fine                     | 3 month set suspension           |
| Ireland                      | Up to 6 months        | Discretionary fine           | 90 days                          |
| Italy                        | Up to 30 days         | Set fine                     | 15 to 90 days                    |
| Netherlands                  | Not possible          | Set fine                     | Not possible                     |
| Norway                       | Conditional jail only | Not possible                 | Possible <sup>106</sup>          |
| Portugal                     | Not possible          | Set fine                     | A few months(est) <sup>107</sup> |
| Spain                        | Not possible          | Set fine                     | 3 months                         |
| Sweden                       | Up to 6 months        | Variable fine                | 1 month minimum up to 12 months  |
| Switzerland                  | Not Possible          | Variable fine                | Fixed 3 Month suspension         |
| United Kingdom               | Up to 6 months        | Discretionary fine           | 1 year minimum                   |
| Australian Capital Territory | Up to 6 months        | Set fine                     | 3 - 12 months                    |
| New South Wales              | Up to 9 months        | Variable Fine                | 6 month minimum                  |
| Northern Territory           | Up to 6 months        | Set fine                     | 6 months                         |
| Queensland                   | Up to 3 months        | Set fine                     | 1 - 9 months                     |
| South Australia              | Not Possible          | Variable fine                | 6 month minimum                  |
| Tasmania                     | Up to 3 months        | Set fine                     | 3 to 12 months                   |
| Victoria                     | Not possible          | Variable fine                | up to 6 months                   |
| Western Australia            | Not possible          | Variable fine                | 3 months                         |
| New Zealand                  | Up to 3 months        | Set fine                     | 6 month minimum                  |
| Alabama                      | Up to 1 year          | Variable fine                | 90 days                          |
| Alaska                       | 72 hour minimum       | \$1,500 minimum fine         | 90 day minimum                   |
| Arkansas                     | 24 hour minimum       | \$600 minimum <sup>108</sup> | 3 month minimum                  |

<sup>106</sup> Duration unavailable.

<sup>107</sup> The suspension is graduated between one month to two years depending on the reading. Since this is among the low to midrange BACs it is assumed that the suspension would be in the few month range.

<sup>108</sup> Minimum fines for US jurisdictions are reported in US dollars.

|                      |                                                      |                             |                                                              |
|----------------------|------------------------------------------------------|-----------------------------|--------------------------------------------------------------|
| Arizona              | 10 day minimum                                       | \$250 minimum               | Not possible                                                 |
| California           | 96 hours minimum up to 6 months                      | \$390 minimum               | 4 month minimum                                              |
| Colorado             | 5 day minimum up to 1 year                           | \$300 minimum               | 3 months                                                     |
| Connecticut          | Up to six months                                     | \$500 minimum               | 1 year suspension                                            |
| Delaware             | Up to six months                                     | \$230 minimum               | 1 year suspension                                            |
| District of Columbia | Up to 90 days                                        | \$300 minimum               | 6 month suspension                                           |
| Florida              | Up to six months                                     | \$250 minimum               | 180 day minimum to one year                                  |
| Georgia              | 10 day minimum up to 1 year                          | \$300 minimum               | 180 day minimum                                              |
| Idaho                | Up to six months                                     | Set fine (\$1000)           | Minimum 60 days up to 150 days                               |
| Illinois             | Not possible                                         | Variable fine               | 3 months                                                     |
| Indiana              | Up to 60 days                                        | Set fine (\$500)            | Minimum 90 days to 1 year                                    |
| Iowa                 | 48 hours minimum                                     | Set fine (\$500)            | 180 days to 1 year                                           |
| Kansas               | 48 hour minimum up to 6 months, or community service | \$500 minimum up to \$1000  | 30 days                                                      |
| Louisiana            | 10 day minimum up to 6 months                        | \$300 minimum, up to \$1000 | 90 days                                                      |
| Kentucky             | 48 hour minimum up to 30 days                        | \$200 minimum               | 6 months                                                     |
| Maine                | Not possible                                         | \$500 minimum               | 90 days                                                      |
| Maryland             | Up to 1 year                                         | Variable fine               | 45 days                                                      |
| Massachusetts        | Up to 2 ½ years                                      | \$500 minimum               | 45 – 90 days                                                 |
| Michigan             | Up to 93 days                                        | \$100 minimum               | 180 days (with possible 30 days followed by special licence) |
| Minnesota            | Up to 90 days                                        | Set fine (\$1000)           | 30 – 90 days                                                 |
| Mississippi          | Up to 48 hours                                       | \$250 minimum               | 90 days                                                      |
| Missouri             | Up to 6 months                                       | Set fine (\$500)            | 90 days                                                      |
| Montana              | Up to 10 days                                        | \$300 minimum               | 6 months                                                     |

|                |                                         |                           |                            |
|----------------|-----------------------------------------|---------------------------|----------------------------|
| Nebraska       | Possible (5 day min for second offence) | Set fine (\$400)          | 6 months                   |
| Nevada         | 2 day minimum up to 6 months            | \$400 minimum             | 90 days                    |
| New Hampshire  | Only if aggravated                      | \$500 minimum             | 9 months                   |
| New Jersey     | 12 - 48 hours                           | Set fine (\$250)          | 3 months                   |
| New Mexico     | Up to 90 days                           | Variable fine up to \$500 | 6 months                   |
| New York       | Up to 15 days                           | \$300 minimum             | 90 days                    |
| North Carolina | Minimum 24 hours to 60 days             | Set fine (\$200)          | 30 days <sup>109</sup>     |
| North Dakota   | Up to 30 days                           | \$200 minimum             | Only if bodily injury      |
| Ohio           | 72 hour minimum                         | \$250 minimum             | 6 months to 3 years        |
| Oklahoma       | Minimum 10 days up to 1 year            | Variable fine             | 180 days                   |
| Oregon         | Up to 1 year                            | \$1000 minimum            | 1 year                     |
| Pennsylvania   | Not possible                            | Set fine (\$300)          | Not possible               |
| Rhode Island   | Up to 1 year                            | \$100 minimum             | 30 – 180 days              |
| South Carolina | Minimum 48 hours – 30 days              | Set fine (400)            | 6 months                   |
| South Dakota   | Up to 1 year                            | Variable                  | 30 day minimum             |
| Tennessee      | 48 hours set                            | \$350 minimum             | 1 year                     |
| Texas          | Minimum 72 hours – 180 days             | Set fine (\$2000)         | 90 days                    |
| Utah           | 48 hour minimum                         | \$700 minimum             | 90 days                    |
| Vermont        | Up to 2 years                           | Variable fine             | 90 days                    |
| Virginia       | Up to 1 year                            | \$250 minimum             | 1 year                     |
| Washington     | 24 hour minimum up to 1 year            | \$350 minimum             | 90 days                    |
| West Virginia  | 24 hour minimum up to 6 months          | \$100 minimum             | Discretionary for 6 months |
| Wisconsin      | Not possible                            | \$150 minimum             | 6 – 9 months               |

<sup>109</sup> This is the suspension for “level 1” offences, which the one contemplated would likely be. Suspensions can go up to two years for Level I offences.

|         |                 |               |         |
|---------|-----------------|---------------|---------|
| Wyoming | Up to 6 months  | Variable fine | 90 days |
| Hawaii  | 48 hour minimum | \$150 minimum | 90 days |

There are limits in using a chart like this to compare the relative penalty regimes because every system has its subtleties. In Canada, for example, the potential period of incarceration will change depending upon whether the prosecutor elects to proceed summarily or indictably. If the Crown Attorney elects to proceed indictably, the five year period shown becomes the maximum possible sentence. If the Crown Attorney proceeds summarily, the maximum is six months. It is likely that other jurisdictions have similar nuances. Moreover, a number of the jurisdictions no doubt permit the sentences that are shown to be suspended, reducing the risks of actual incarceration, possibly even in some American states where minimum sentences apply.<sup>110</sup> In some jurisdictions driving suspensions can be shortened by taking alcohol management programs, or by installing ignition locking devices that ensure that the driver has no alcohol on their breath.<sup>111</sup> Only basic and contingent comparative observations can therefore be made on the rudimentary information provided, but those observations that are reasonably available demonstrate that Canada has one of the toughest BAC regimes for low reading, non-impaired offenders.

#### Incarceration

On paper, *in terms of possible length of incarceration*, Canadian law allows for the absolute highest possible maximum sentence among comparative jurisdictions, at five years. The next longest possible period of incarceration, even in the United States where jail is so widely used, is two years. The Canadian maximum is misleading in a hypothetical dealing with a .09 first offender as a Crown Attorney would almost certainly elect to prosecute such a case summarily. This would bring the maximum potential penalty down to six months. Even then, there are only 11 jurisdictions among the comparative countries that would carry potentially longer sentences. Indeed, jail is not even hypothetically possible in 15 of the 77 jurisdictions, including in four American states (Illinois, Maine, Pennsylvania, and Wisconsin). In addition, in New Hampshire jail is

<sup>110</sup> For example, Norway, where the period of incarceration is conditional; or Kansas, where the judge has jurisdiction to impose community service in lieu of actual incarceration.

<sup>111</sup> In Michigan a judge can reduce the suspension by conferring a special licence, and the *Criminal Code of Canada* provides for provinces to allow the use of ignition lock devices (available in Quebec but not in Ontario) for reducing the length of the absolute prohibition.

possible only with aggravated circumstances, and in Norway a sentence will be one of conditional jail rather than direct incarceration at a .09 BAC.

Of the 77 jurisdictions, 22 jurisdictions are decidedly tougher in terms of incarceration than the law in Canada would be in application. This is because in Canada it is almost inconceivable that a first offender with a BAC of .09 would go to jail for any period. The 22 tougher jurisdictions are therefore those that impose minimum periods of incarceration. They are all American jurisdictions where range from 24 days to 10 days, with most being in the one to two day range. It can therefore be said that while Canadian law allows for the longest period of incarceration, and among the longest even in cases where a prosecutor elects to proceed summarily, an accused person would almost certainly be treated more harshly in terms of incarceration in the 22 American jurisdictions that have minimum sentences.

### Fines

It is likely that a first offender in Canada at .09 would receive the minimum sentence of \$600. Although exchange rates, median incomes, and the absence of dependable information outside of North America make it impossible to be more than impressionistic and tentative, at \$600 the Canadian fine is significant by international standards. By way of direct comparison to those 44 American regimes with set minima or defined ranges, 36 have minimum fines or set fines of \$500 or less, and only 6 (Alaska, Idaho, Minnesota, Oregon, Texas and Utah) require more. It is fair comment to note that Canada imposes a significant monetary penalty, relative to other jurisdictions.

### Suspensions

Where Canadian law shows its strictness most is with its suspension or driving prohibition. Only French law, with its five year potential suspension, is more onerous on paper. Yet Canada has a one year minimum that France does not. While Finland has a three year maximum like Canada's, there is no minimum there either. Along with six other nations, Canada's one year minimum is the longest required period of suspension of any jurisdiction. There are another seven jurisdictions where suspensions can be up to one year, but there is probably little prospect that those jurisdictions would impose their maximum suspension on a .09 offender. Notably, with the possible but unlikely exception of France where discretionary suspensions could exceed those imposed in this country, none of the 22 jurisdictions that have adopted .05 BACs impose a more rigid suspension on their .09



drivers than Canada does. The Canadian suspension for a first BAC offender ranks among the strictest in the world.

## **VI. Conclusion**

I ended the 2002 Report by concluding that little can be learned from an examination of international trends about whether Canada should amend the *Criminal Code of Canada* to provide for BACs of .05. All of the observations made at that time remain true today. While most relevant comparison *countries* do use BACs of .05 in their legislation, most *independent legal jurisdictions* within those comparison countries do not. More importantly, it remains the case that the approach to BAC law internationally is so complex and varied that trends cannot be used for inspiration. The most significant reason for the marginal utility in international comparison, however, is the apples and oranges problem; most of the countries that have adopted .05 BACs tend not to use criminal law approaches, which is what Canada would be doing by amending the *Criminal Code*. Only eight of the 22 jurisdictions use a criminal law model. When the entire seventy-seven comparative jurisdictions are considered, the overall percentage of countries using a criminal approach to .05 BACs stands is approximately 10%.

A full measure of the limited use that can be made of international precedent is gained by bearing in mind that if Canada merely substitutes .05 for .08 as some are proposing, we will be treating drivers and those in care and control of motor vehicles at that level the same as we now treat .09 BAC offenders. Canada already treats .09 BAC offenders more firmly than most jurisdictions internationally. If we were to treat .05 offenders the same way we would likely have the harshest regime among comparative nations for .05 offenders. Those offenders would not be prosecuted at all in the United States where minimum sentences are used, and European and Australians tend to have less rigid enforcement regimes for .05 offenders. In Canada, the driver at .05 would face the risk of jail, which he or she would not in close to two-thirds of the 22 comparison countries. In Canada the driver would face a minimum fine that is significant by international standards, as well as a minimum licence revocation longer than any required suspension in any of the 22 comparison countries. Quite simply, if we change the .08 BAC in the *Criminal Code* to a .05 BAC, we will not be doing so to keep up with the international Joneses, for .05 is not the standard of criminality internationally. We will

instead be joining the minority of nations who criminalize this BAC, and imposing what would be the most onerous sentencing regime among comparative countries.

Whether it is a good thing or not to adopt a .05 BAC in the *Criminal Code of Canada* is beyond the scope of this study. That is a complex matter of policy, involving a careful examination of the potential benefits and a sober appreciation of the legal and social costs that increasing the net of criminality entails for society at large and for those saddled with a criminal record. What is clear, however, is that it can be distorting rather than illuminating to attempt to make the case for moving to .05 in Canada by invoking foreign legislation.

*This Report was prepared for the Canada Safety Council by  
Professor David M. Paciocco,  
Faculty of Law, University of Ottawa  
March 30, 2006*