Low-BAC Drivers and the Law

How should the law treat drinking drivers whose blood alcohol concentration (BAC) is below the Criminal Code limit of 0.08?

Although impairment begins with the first drink, the majority of drivers involved in alcohol-related fatal crashes have BACs over 0.15. These high-BAC drivers represent about one per cent of the cars on the road at night and on weekends, but nearly half of all drivers killed at those times. Most fall into one of two major categories: the young (ages 20 to 30) and the hardcore drinking driver.

The federal government shares responsibility for impaired driving with the provinces and territories. In this case the Criminal Code addresses driving or care and control of a vehicle with BACs exceeding 0.08. The Canada Safety Council recommends to continue dealing with lower-BAC drivers under provincial and territorial highway traffic acts. This practice has been well implemented in most Provinces and Territories and is providing strong deterrents to social drinkers to separate their drinking from driving. It is working as it presently exists.

Prevention is the goal

The priority must be to prevent alcohol-related traffic crashes, not merely to punish drinking drivers. Penalties for drinking and driving are very tough across Canada. The problem is that many drinking drivers do not think about consequences before taking the wheel.

Penalties, regardless of severity, have little preventive impact unless they are seen to be enforced. That is why roadside checks and visible enforcement combined with administrative penalties outside of the criminal code have been very effective deterrents.

The gauge of progress should be the rate of deaths and injuries involving a drinking driver per 100,000 drivers. Criteria such as the number of licence suspensions, severity of penalties and implementation of specific types of legislation, while relevant, are not valid measures of prevention.

Provincial and territorial highway traffic acts

CSC further believes that all jurisdictions should impose administrative licence suspensions on drivers with BACs below the Criminal Code limit or if the officer believes the driver is affected by alcohol; durations vary. Some also have remedial and/or assessment programs for low-BAC drivers with repeat suspensions.

Administrative licence suspensions provide a measured response to the risk posed by low-BAC drivers. They protect the public by taking potentially dangerous drivers off the road, and give those drivers strong penalties. These suspensions are an effective tool in the fight against impaired driving, in part because they impose swift and certain consequences. Some provinces
have licence reinstatement fees, and requirements for assessment and treatment in the case of repeat suspensions.

Under traffic codes, a person is assumed guilty, but the penalties are such that it is usually not worth going to court. In contrast, a criminal charge assumes innocence. The consequences of conviction are enormous: a criminal record limits travel and job opportunities for the rest of the offender’s life. Justifiably the legal process to charge and convict under the Criminal Code is intricate and costly.

Understandably, those charged are far more likely to contest the charge. If criminal charges were to be laid below the current threshold, there is little doubt that many would be challenged, further burdening an already overloaded court system whether by summary conviction or indictment.

Criminalization

There is no evidence that charging low-BAC drivers under the federal Criminal Code would prevent more deaths and injuries than dealing with them under provincial and territorial traffic regulations.

Making conduct criminal is society’s ultimate condemnation. The Criminal Code of Canada addresses offences such as murder, rape and assault, that violate basic societal norms. Criminal Code sanctions are very severe. For example, a criminal conviction, be it for armed robbery or for driving with a BAC over 0.08 has similar consequences. Justifiably the legal process to charge and convict an offender is intricate and costly.

Provincial and territorial transport officials, represented in the Canadian Council of Motor Transport Administrators (CCMTA), have taken a position against lowering the criminal BAC to 0.05. According to CCMTA, this would hamper the ability of the police to detect drivers with a BAC greater than 0.08 (who are a greater crash risk), due to the over-extending of enforcement resources. CCMTA says a move to criminalize drivers who are at lower risk of collision involvement would further burden an overtaxed criminal justice system without increasing the deterrent effect of the law.

Canadian criminal BAC is in line with other countries

One argument used to support reducing the legal BAC is that there is an international trend to criminalize drivers at the 50 mg% level. A study commissioned by the Canada Safety Council in 2002 and updated in 2006 and again in 2009 shows this point is not valid. Of the 77 jurisdictions examined in the report, only eight, slightly over 10 per cent, treat 50 mg% as a crime. Countries and jurisdictions with 50 mg% limits tend not to use criminal law approaches, as Canada would be doing if it were to reduce the BAC to that level in the Criminal Code.

The study, by then law professor David Paciocco from the University of Ottawa, shows Canada treats BAC offenders very harshly compared with other countries. For a first-time offender at 80 mg%, Canadian law allows for the highest possible maximum prison sentence among all the
counties in the study, five years. The next longest possible prison sentence, even in the United States where jail is more widely used, is two years.

Professor Paciocco found that Canada’s practice of not using criminal law for drivers under 80 mg% is in line with other countries, and that our impaired driving laws are among the strictest in the western world.

**Canada Safety Council recommendations**

How to deal with drivers with BACs below the Criminal Code limit has been the subject of much debate. The Canada Safety Council has developed the following recommendations to offer a realistic and practical direction for public policy.

1. **Deal with low-BAC drivers under highway traffic acts.**

   Driving ability can be impaired at low BACs, although the incidence of fatalities rises dramatically starting at 0.15. The federal Criminal Code addresses higher BAC drivers starting at 0.08, who are implicated in the majority of alcohol-related road fatalities.

   It is important to deal firmly with individuals with BACs below the 0.08 level, both to prevent them from causing immediate harm and to ensure they do not join the high-BAC group. The Canada Safety Council recommends that the responsibility to address drivers with BACs below 0.08 remain with the provinces and territories.

   Highway traffic acts provide effective regulatory tools. For example, administrative licence suspensions enable police to apprehend low-BAC drivers, remove them from the road and give them a firm warning not to continue drinking and driving. These acts also provide a means to mandate intervention programs, which can help prevent these people from becoming chronic drinking drivers.

2. **Harmonize the BAC at which administrative licence suspensions are imposed.**

   Canada’s 13 jurisdictions vary widely in their criteria for administrative licence suspensions. This inconsistency can create confusion and inequities. The Canada Safety Council recommends a common BAC for short-term suspensions in all jurisdictions. This would provide greater consistency across Canada, and would permit a stronger more consistent message to be sent to the Canadian public to increase awareness of penalties for drinking and driving.

3. **Treat administrative suspensions like traffic violations.**

   Inclusion of short-term suspensions on the driver’s record will help police and licensing authorities identify those who repeatedly drink and drive. The Canada Safety Council recommends that BAC-related suspensions be retained on a driver’s record along with demerit points, and shared with adjoining jurisdictions in the same way as other traffic violations such as speeding.
4. **Provide intervention programs for repeat administrative suspensions.**

Some jurisdictions already have requirements for assessment and treatment in the case of repeat suspensions. Such interventions are intended to address the root of the problem, such as alcohol dependency.

The Canada Safety Council recommends that Best Practices be established for such programs, and that assessment / remedial programs be provided for drivers with repeat administrative suspensions within a specified period of time. These programs should be provided at the driver’s expense.

5. **Enhance enforcement through well-publicized and visible roadside checks by police**

Visible, effective enforcement is critical in the fight against impaired driving. Roadside spot checks, in particular, have been shown to reduce the number of drunk drivers on the road.

Drivers with low BACs are difficult to detect through routine patrol or spot check programs because most show no obvious signs of impairment.

The Canada Safety Council recommends that police agencies be given resources and training to apprehend low-BAC drivers using roadside spot checks, and that they be authorized to use proven technologies such as passive alcohol sensors to detect drivers with low BACs. Subject to a ruling on the Canadian Charter of Rights and Freedom the addition of random breath testing will enhance the officer abilities to detect low BAC driver and warn the driving public about the increased detection capabilities during Ride Programs and spot checks.

6. **Increase public awareness of countermeasures for low-BAC drivers.**

Many Canadian drivers are still unaware that BAC limits lower than that in the Criminal Code already exist in most provinces/territories. This lessens the potential deterrent effect of the lower limits. (If the public does not know what they are, how can they be expected to comply?) If the administrative licence suspensions at lower BACs are to deter drivers from operating a vehicle after they have been drinking, drivers need to know about them.

The Canada Safety Council recommends that substantial efforts be initiated to increase public awareness about existing lower BAC limits and their associated sanctions, to enhance the potential deterrent effect of these measures.

---

1. *Impaired driving risk assessment: A primer for practitioners, Robyn D. Robertson / Katherine M. Wood / Erin A. Holmes, Traffic Injury Research Foundation © 2014*

2. *(CCMTA’s Position on the Criminal Code BAC, February 2003)*