



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 028 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Tuesday, October 18, 2016

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Chair

Mr. Anthony Housefather

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• (1110)

[English]

The Chair (Mr. Anthony Housefather (Mount Royal, Lib.)): I call the meeting to order.

I'd like to take this opportunity to welcome everyone to this meeting of the Standing Committee on Justice and Human Rights.

Today we're studying Bill C-247, an act to amend the Criminal Code (passive detection device). The sponsor, Mr. Sikand, is here today to testify, along with Markita Kaulius, who is the president of Families For Justice. It is a pleasure to have you here.

It's also a pleasure to welcome Mr. Di Iorio and Mr. Warawa to committee. I see them both here today.

We are going to begin. As you know, cumulatively, you have about 16 to 20 minutes to speak. I know, Mr. Sikand, you're going to speak for a little less time and Ms. Kaulius is going to speak for a little longer. Please proceed.

Mr. Gagan Sikand (Mississauga—Streetsville, Lib.): Thank you, Mr. Chair, for having me here today and for considering Bill C-247.

I would like to start by discussing the impetus of this bill. Unfortunately, a teacher in my riding lost his life at the hands of a drunk driver. Shortly after I was elected, a constituent of mine asked me to do something to address this.

It should be noted that impaired driving is still the leading cause of criminal death in Canada. Besides being a concern in and of itself, Canada ranks poorly to similar jurisdictions with these rankings. This also has a demonstrable economic cost associated to it, some \$20.62 billion.

This bill is made up of two parts. The first is to authorize the explicit use of passive alcohol sensors. The second is to change the criminal offence of impaired driving causing death and driving with a blood alcohol concentration over 80 milligrams to vehicular homicide as a result of impairment.

Speaking to the first aspect, passive alcohol sensors are classified as passive instruments because they do not require the driver to perform any act such as blowing into a mouthpiece. These devices, often shaped as a baton or fitted into the end of a specially designed police flashlight or a clipboard, detect the presence and approximate amount of alcohol in a driver's exhaled breath by sampling the ambient air near his or her mouth.

I am aware this may raise questions of whether the passive will react to a driver who perhaps has spilled alcohol in the vehicle, but studies have indicated that the possibility of passives detecting alcohol from sources other than the driver is unlikely. The passive works best when held six inches from a driver's mouth, which would ultimately decrease the likelihood of detecting alcohol from another source.

Furthermore, the greater the distance between the passive and the source of alcohol, the more diffused the alcohol will be in the ambient air. Therefore, it is unlikely that alcohol from another source would be detected. If it is, the reading wouldn't be high enough to warrant further testing.

Finally, the concern about alcohol from a source other than the driver is equally applicable to the current practices. An officer who detects the odour of alcohol coming from inside a vehicle cannot necessarily identify its source. However, research suggests that police using passives are better at detecting alcohol and determining its source than police using only their unaided senses.

It should be mentioned as of late and due to advancements in technology that this is also a feature built into the approved screening devices peace officers already have. The second part of the bill was introduced as Kassandra's law, named after Kassandra Kaulius. I would like to bring to your attention that Markita is here with Families For Justice, but she is also Kassandra's mother.

By calling the offence a homicide, I believe parliamentarians will be sending the strong message that taking someone's life while impaired is reasonably foreseeable and can never be condoned. The current offence stating that death is caused after having been impaired implies less culpability on the driver's part. It suggests a degree of accidental consequence.

I am by no means suggesting that these drivers intended to take someone's life. However, by virtue of their having a licence, I am able to assume that drivers are rational drivers. It is legitimate to believe that rational drivers are aware that impairing their motor skills will put the safety of the general public into question.

Before concluding, I would like to address the constitutional validity of the bill. Any concerns arising regarding the possible infringement of section 8 of the Charter of Rights and Freedoms, having the right to be secure against unreasonable search or seizure, have been taken into account in the creation of this bill. Our courts have consistently identified driving as a licensed and heavily regulated activity occurring on public roads. Therefore, a driver's expectation of privacy may be infringed or curtailed.

In *R. v. Smith* it was recognized, albeit a challenge under section 7, that the expectation of privacy must be assessed in regard to the nature of the activity:

Driving is a heavily regulated activity.... The police's goal is to catch the drinking driver at the roadside and not at the scene of the accident. Drivers expect to be stopped and questioned by the police concerning matters relating to the operation of their vehicles. That expectation is part and parcel of the privilege of operating a motor vehicle.

Furthermore, it could be argued that the use of a passive alcohol sensor does not constitute a search, as courts have recognized that police have common law and express statutory authority to inspect a driver's documents.

That concludes my opening statement. I would like to mention that MADD Canada and my local police chief have both endorsed this bill as well.

Thank you very much.

The Chair: Thank you very much, Mr. Sikand.

Ms. Kaulius, the floor is yours.

Ms. Markita Kaulius (President, Families For Justice): Dear honourable members of the justice and human rights committee, thank you for inviting me here today.

My name is Markita Kaulius, and I am the president of the Families for Justice society. Families for Justice is a non-profit organization made up of parents, family members, and supporters who have all had a child or loved one killed by an impaired driver in Canada.

My 22-year-old daughter, Cassandra Kaulius, was killed by an impaired driver on May 3, 2011. She was killed in a catastrophic collision, and was T-boned and crushed to death. She was struck on the driver's side door at 103 kilometres per hour by an impaired driver speeding through a red light at an intersection. My daughter was driving home after coaching a softball game and had the right-of-way to make a left turn. Cassandra lost her life because an impaired driver made the choice to drink and drive while being impaired. My world and that of my family was changed forever.

Impaired driving is the number one criminal cause of death in Canada, and every year impaired drivers leave a terrible trail of death, destruction, heartbreak, and injury. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. When it comes to the deaths and serious injuries resulting in hospitalization, impaired driving is clearly the crime that causes the most significant social loss to our country.

Research shows that drinking alcohol is the third highest factor for global disease in 2010, moving up from being ranked sixth in 1990.

When health and social costs for deaths, injuries, and damage are totalled, the costs related to impaired driving, including with alcohol and drugs, were estimated at over \$20.6 billion a year in 2010 alone.

Among psychoactive drugs, alcohol-related disorders were the top cause of hospitalization in 2011. Globally, alcohol was linked to over three million deaths in 2012, slightly more than lung cancer and HIV combined.

The numbers of impaired driving incidents have fluctuated over many years, reaching a low of more than 76,000 incidents in 2006, before increasing again to a high of more than 86,000 in 2009. More recently, the number of reported impaired driving incidents was more than 72,000 in 2014.

Over the last 30 years, we have had education and awareness campaigns through advertising to educate the public, yet we still continue to see impaired driving as the number one criminal cause of death in Canada. On average, we're losing the lives of 1,250 to 1,500 people per year in Canada. On average, over 60,000 people are injured in a crime that is 100% preventable.

These figures work out to the deaths of four to six people a day, and 175 people injured each day. The destruction to families is life changing and permanent. Many families never recover from the loss of their child or loved one.

The proposed legislation responds to serious consequences expressed by various law enforcement agencies, experts, and victims organizations, including Families for Justice, who have been urging the government to improve law enforcement's capacity to detect drug- and alcohol-impaired driving.

While this legislation is important for the passive detection device, there is compelling evidence that illegal drug use and impaired driving results in impaired cognitive function, slower reaction times, difficulty concentrating, drowsiness, disoriented feelings, difficulty judging distances and making decisions, problems staying in one lane, greater difficulty maintaining a constant speed, and in having an increased collision risk. Under the current legislation, the Criminal Code does not grant the police the authority to obtain bodily samples from drivers, unless a police officer has reasonable grounds to suspect that a driver has consumed alcohol.

A passive detection device could detect alcohol in the ambient air, which would allow officers to use a non-invasive procedure to test for the presence of alcohol by simply placing the device near the driver's face when he or she is speaking. This new method would not only empower police officers to better identify impaired drivers, but it would also have a deterrent effect and play a major role in reducing the number of impaired drivers who are choosing to get behind the wheel after drinking, despite the laws and deterrents that are already in place.

●(1115)

Drug-impaired driving is also a growing problem that largely goes unreported because of the lack of roadside measurement devices. Of all impaired driving charges, 97% are for alcohol and only 3% are for drugs. The situation will become more catastrophic if and when marijuana is legalized.

There need to be limits set on intoxication similar to those with alcohol. A 0.08 blood limit in alcohol is well known and is recognized in science-based evidence. This does not exist for marijuana. Alcohol and drugs can affect drivers' safety by impairing vehicle control and judgment. The police need consistent, strong, and fair enforcement measures to ensure that the increased use of alcohol and drugs does not impact road safety. Drivers who get behind the wheel while being impaired put themselves and everyone else at risk.

According to the Canadian Centre on Substance Abuse, in 2010, nearly as many drivers died in road crashes using drugs, at 34.2%, as those who had been drinking, at 39.1% .

In Canada, in 2012, there were 614 road fatalities where drivers had drugs present in their system, compared to 476 fatalities where alcohol was present. A change to the Criminal Code would allow the use of approved roadside screening devices to ascertain the presence of alcohol in the body of a person operating a vehicle. Currently, there are devices used in Australia and the European Union countries where police use roadside oral drug screening tests to detect the presence of drugs.

Drug-impaired numbers are under-reported because of the limited tools available for law enforcement to quickly detect the presence of drugs in the body. This leads to drug-impaired drivers often bypassing tests due to the inability of drug recognition experts, time restrictions on the tests, and second-guessing the presence of drugs in a driver, all leading to under-reporting of drug-impaired driving.

Roadside oral screening detection devices offer objective and time-efficient alternatives for the most commonly used illicit drugs.

Senator Claude Carignan has recently brought forward Bill S-230 for the addition of a drug detection device to aid the police in their duties in detecting drug-impaired drivers. This bill amends the Criminal Code to authorize the use of approved screening devices, as well, to detect the presence of drugs in the body of a person who is operating a vehicle or who had care and control of a vehicle. It also authorizes the taking of samples of bodily substances to determine the concentration of drugs in a person's body based on physical coordination tests and the results of analysis conducted using an approved screening device.

Adding a drug recognition device would also allow samples of bodily substances, be it oral fluid, blood, or urine, as required, to be taken to determine the amount of a drug in a driver's system based on the analysis with an approved screening device.

I wanted to mention that recently there were two very high-profile cases in the news where four members from two separate families were killed by impaired drivers.

On September 27, 2015, the Neville-Lake family from Vaughan, Ontario, lost their three children, Daniel, age 9, Harrison, age 5, and Milly, age 2, along with their grandfather Gary Neville. His wife and mother-in-law were seriously injured.

On January 2, 2016, the Van de Vorst family from Saskatoon, Saskatchewan, lost their son, Jordan, and his wife Chanda, and their two grandchildren, Kamryn, age 5, and Miguire, age 2.

Both families were wiped out by impaired drivers who were twice over the legal limit to drive.

Sadly, many impaired drivers know there is still a chance they will not get caught when driving impaired and they continue to take a chance, get behind the wheel, and risk their own safety, and the safety of other drivers and pedestrians. The deterrent effect of the passive detection device, as proposed in Bill C-247, would possibly prevent these types of collisions.

The impaired drivers in each of those collisions received a sentence of 10 years, which sounds like a long time, but that equates to about two and a half years per person's death. Take time off for good behaviour and early parole, and out of that 10-year sentence they will actually serve about two years or less for killing four people in each family. That works out to about six months in jail served per death.

● (1120)

On average, convicted impaired drivers are being given a two- to three-year sentence for causing a death in Canada, but the reality is the actual amount of time being served is a mere five to nine months out of a two- to three-year sentence. These types of sentences let Canadians know that they can drink and they can drive while being impaired, and if they kill someone in Canada they'll only receive a minimal sentence for taking an innocent life.

Admissions to provincial sentenced custody for impaired driving are more likely to be intermittent sentences than admissions for other offences. The most common sentence was the payment of a fine. About one in 10 received a prison sentence with a median of 33 days. That's all. Of all admissions to provincial sentenced custody for impaired driving, about four in 10 were sentences to be served intermittently. An intermittent sentence allows the person sentenced to custody to serve their sentences in separate time periods, usually on weekends. About four in 10, roughly 41% of admissions to provincial sentenced custody for impaired driving in 2010-11 were intermittent sentences, compared to 15% for all other offences.

Correctional Service Canada, which is responsible for inmates sentenced to two or more years of custody, reported just 70 admissions for impaired driving for 2010-11. This represented about 1% of all the admissions to sentenced custody to Correctional Service Canada.

Over the last five years we have seen sentences of anywhere between one day in jail, a \$1,500 fine, to seven weekends in jail, to 90 days to be served on weekends only. All of these sentences were given out to people who were convicted of impaired driving causing a death. With criminal sentences like these, they sadly have become case-setting precedents for future court cases. These are absolutely no deterrent.

We believe that if a death is involved, there should be a minimum mandatory sentence of six years for causing a vehicular homicide. Those who lost their loved ones were given a lifetime sentence of being without their children and loved ones. The people who died were given a death sentence. The impaired drivers who caused these deaths are only serving a few months in jail for taking the lives of innocent people and changing the lives of families forever.

Currently in Canada, if you're convicted of causing the death of another person by using a gun or a knife, you will receive a jail sentence of seven to 10 years. Why are people who are killing someone by impaired driving serving sentences of so much less? Many vehicles in the hands of an impaired driver become a lethal weapon. A speeding vehicle in the hands of an impaired driver is like holding a 2,000-pound to 3,000-pound weapon between their hands, and a vehicle driven by an impaired driver does far more damage than a knife or a gun ever would.

These are no accidents. There are no accidents. These are collisions. Accidents happen due to mechanical failure or weather conditions. Impaired driving is a choice made by reckless individuals who make the decision to put others at risk on our roadways. What is required now is the modernization of our existing impaired driving laws, where those who commit these crimes of impaired driving causing collisions which result in injuries or deaths of innocent people will be held accountable for their actions.

Families For Justice have submitted over 117,000 names on a petition to the federal government of Canada. The petition is signed by Canadian citizens who are asking the government to implement tougher new impaired driving laws. In speaking with thousands of Canadians over the last five years, they also want to see longer prison sentences given out, based on the severity of the crime. We hope through tougher impaired driving laws this will be an added deterrent for the public. It will let Canadians know that if they choose to drink and drive and they cause a collision while being impaired, they will be held accountable for their actions and there will be serious consequences.

●(1125)

Bill C-247 also renames the offence of impaired driving causing death as "vehicular homicide as a result of impairment". This bill calls the crimes what they truly are, vehicular homicides. A conviction should reflect the seriousness and the risks that accompany the decision to get behind the wheel, while preserving judicial discretion for judges.

There have been various transportation-related provisions to the Criminal Code that have been developed over many decades in response to specific incidents, scientific advances, and court decisions particularly relating to impaired driving. This approach has resulted in some of the inconsistencies, such as how offenders are sentenced following the conviction for impaired driving.

While some reforms have strengthened measures to combat impaired driving, they have also added to the complexity of the Criminal Code, which has affected the efficiency of investigations, prosecutions, and sentencing.

The proposed legislation would amend the Criminal Code to resolve inconsistencies and increase certain penalties to reflect the seriousness of the conduct.

Families for Justice supports the passing of Bill C-247. I hope everyone will support this bill. I recognize the need for the committee to assess the practical implications of this change to the law to ensure that the bill achieves its policy goals and ensures clarity in the Criminal Code.

We believe that police officers need to be given added tools to do their job and assist them in being able to keep Canadians safer and impaired drivers off the road. We believe that the initiative, which would increase the safety of our roads through a non-invasive procedure, should move forward.

Bill C-247, an act to amend the Criminal Code of Canada, stands before you. It is an extremely important bill and you have the opportunity to make one of the most important decisions on the future laws of Canada. Bill C-247 will address the scope of the law and ensure that you not only have concrete laws against impaired driving, but also practical and effective ways of implementing those laws.

Today I urge each of you to look at what you can do to make communities in Canada safer. People deserve the right to their life and to get home safely at the end of the day without the worry of being hit by an impaired driver or killed.

In the interest of public safety for all Canadians, I ask that you support Bill C-247 and implement the passive detection device, as statistics show that we need tougher impaired driving laws in Canada.

Thank you.

●(1130)

The Chair: Thank you very much, Mr. Sikand and Ms. Kaulius.

Ms. Kaulius, on behalf of all of the members of the committee, I want to extend to you our deepest condolences and sympathies on the loss of your beautiful daughter.

Ms. Markita Kaulius: Thank you.

The Chair: One of the things that I think you will find when you come to Parliament is that people from different parties may have divergent views on certain things, but we all share many common goals. Certainly one of those common goals is ensuring that drunk drivers are properly punished and that we avoid drunk driving as best as possible. I think you can find that all members of the committee share your goals.

Certainly all of us share in the sympathy that we have for you and all families that lose children and family members to drunk driving. We have with us Mr. Di Iorio, whose daughter was very seriously hurt in a drunk driving accident, where a beautiful girl spent a couple of years really trying to get better. He has gone through that, so we all share in that view.

Ms. Markita Kaulius: Thank you. I think one of the most important things is that, until you're forced into this situation, you have no concept of how prevalent this is and the magnitude of what it does to families. There are thousands of families every year being affected by impaired drivers and losing their loved ones. It is a crime that is 100% preventable. I know we have laws in place, but they are just not working. Deterrents are needed.

The Chair: Understood. We have two laws, Bill C-226 and C-247, that are now being studied on that issue.

We're going to move to questions. The way it works is that different members have six minutes to ask questions.

We will start with Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): Thank you very much to the both of you here.

I reiterate the comments of my colleague, the chairman, in extending our condolences and sympathy to you.

Thank you for the work you're doing here. This is making a difference, quite frankly. Over the years, those of us who have looked at these issues here recognize the important contributions that people such as yourself have made and we're very grateful for that.

Mr. Sikand, thank you for introducing this bill. You touched on this in your opening comments: would one of the concerns be that if you have a carload of people who have all been drinking and you have a designated driver, this passive detection device might pick up a positive testing on that? You seem to think it would be low enough that the police officer or the court would be able to recognize that it did or did not come from the driver. Would you address that again?

• (1135)

Mr. Gagan Sikand: As you stated, it's no different from the current situation where you have peace officers using their own senses, and officers can have false positives if they pick up, through their own senses, the smell of alcohol. If you have the aid of the passive, it is a concern, absolutely, but it's a very low concern. As I mentioned earlier, the device works best when it's six inches from the driver's face. If alcohol is picked up from a passenger or some that may have been spilled, it's usually diffused quite a bit, so that when it is picked up it doesn't give a strong reading. It may pick it up, but not enough of a reading to continue the process to the approved screening device.

Hon. Rob Nicholson: That's fair enough.

Of course, one of the most effective ways of testing this is the breath test itself, using the equipment that is in place right now. With the addition of this device, would a negative test on that stop the police officer from having the ability to take a regular breath test?

Is it necessary for the officer to have a positive test on the passive device before he can go into the next one? Don't you think that might be a challenge if the passive detection device did not pick up the alcohol, and then the police officer tried to go to the next step? That might be something that I would guess would be argued in court at some point. What do you think?

Mr. Gagan Sikand: It's a good question. This by no means replaces the current standards for reasonableness to continue the process. It's just a tool that's used in addition or, if the officers choose, instead of their senses. What we're asking for is to standardize it, make it a ubiquitous principle across all 13 jurisdictions to have this technology. It's available to us, and since the technology has advanced, it's actually available in what peace officers already carry, as a feature, to allow them to use this if they so choose. If they don't want to use the passive, that's their judgment call, but what we're asking is to make it available to them, because we really believe that it will help them, aid them—

Hon. Rob Nicholson: How far has the technology advanced? Is this made by the people who put out the Breathalyzer equipment?

Mr. Gagan Sikand: Currently the RCMP uses a model called the Dräger. It has a feature in it, just as an app, whereas the roadside screening device asks you to blow into a mouthpiece. You just click

to the right and it has a feature that will actually suck the air in, so it's built into it. They're highly effective. In the eighties, they were really large wands. Since then, the technology has come quite far.

Hon. Rob Nicholson: It would be interesting, Mr. Chairman, to actually see one of those.

The Chair: I believe on Thursday we are. The people making them are coming.

Hon. Rob Nicholson: That's good to hear.

You're actually not changing the penalty for vehicular homicide, or maybe I misread that. It would still be the same as impaired driving causing death. Is it your opinion by changing the name and the description in the Criminal Code that judges will increase the penalties for people found guilty of this?

Mr. Gagan Sikand: No, you're right. The bill doesn't change the life sentence that would be available for judges.

I believe the nomenclature of calling homicide a homicide starts the conversation and once we do that, we can continue to have the discussion towards, perhaps what you're suggesting, mandatory sentences.

Hon. Rob Nicholson: Your bill would change the Criminal Code. Are you of the belief that judges, with this different name, this different description, would give longer sentences to people found guilty?

Mr. Gagan Sikand: I can't speculate to the mindset of the judges.

Hon. Rob Nicholson: Okay, that's fair enough.

Now this is really playing the devil's advocate, from a defence lawyer's point of view. I know over the years, going back into the seventies and the eighties, there were people who refused to take a Breathalyzer test because they'd rather be convicted of that than to be convicted of impaired driving.

Do you think that this would be an added incentive for people to refuse to co-operate with the police if they are guilty of a crime like this, and to not have the Breathalyzer test or anything else? Do you think this might be an added incentive, if they potentially face the possibility of a homicide conviction?

• (1140)

Mr. Gagan Sikand: To refuse...?

Hon. Rob Nicholson: To refuse to have the Breathalyzer test.

Changing the name of this, I agree with you, makes it more serious. It doesn't change the consequences. You've still killed somebody.

But being convicted of a homicide, do you think it might be more likely that the person will refuse to have the Breathalyzer, on the same grounds that over the years people who were picked up did refuse because they'd rather be convicted of failing to have a Breathalyzer test than to be convicted of impaired driving?

That was the incentive, and might they have more of an incentive now? It's just a thought.

Mr. Gagan Sikand: I can't really speak to what somebody will or will not do, or hypotheticals.

I do believe that accurately calling the offence what it is will deter people from driving impaired.

Hon. Rob Nicholson: It's getting that message out there.

Anyway, I suppose I've run out of time.

Thank you, Mr. Chairman. I appreciate this.

The Chair: Thank you very much.

Mr. Hussen.

Mr. Ahmed Hussen (York South—Weston, Lib.): Thank you, Mr. Sikand, for coming before the committee this morning.

My question has to do with the possible other uses of the device.

Would you support, for example, the use of the passive detection device in other areas of alcohol prohibition? If police want to enforce a prohibition on alcohol consumption in outdoor festivals or concerts by underage groups and others, would you support the police using this device to assist them in that work?

Mr. Gagan Sikand: To be perfectly frank, I've never considered those situations.

However, now that you've brought that up, I don't see the difference between it being an aid, whether it's being implemented on the roadside or, as you suggested, maybe at festivals or in public in general. It's a device that's available to officers, so I believe they should have the ability to use it in whatever their role mandates.

Mr. Ahmed Hussen: Say an officer uses this device at the roadside and the officer gets a negative result. Would that then negate the ability of the officer to further investigate impairment?

Hon. Rob Nicholson: That's a good point.

Mr. Gagan Sikand: The officer ultimately uses their senses, and if, according to their senses, they, through their observations, believe that somebody is impaired and the device contradicts that, I still believe the officer has the right to continue. He has established the reasonable grounds to continue along the process through his own observations.

Mr. Ahmed Hussen: Thank you.

The Chair: We will now go to Mr. Rankin.

Mr. Murray Rankin (Victoria, NDP): I'm the vice-chair of this committee and represent the New Democratic Party.

First of all, I'd like to say to you, Ms. Kaulius, how much I respect you for being here. I feel for you in your loss. And thank you, Mr. Sikand, for this bill. I really appreciate that effort too.

I have a few questions, probably building on what Mr. Nicholson said by way of playing the devil's advocate. Forgive me, I just want to make sure we understand what we are doing should we recommend that this bill go forward.

One thing I'm worried about is the nature of the technology. You have made it clear that there have been enormous advances since the days of the wand in the 1980s. However, I'm told that there was an article in 1993 in the *American Journal of Public Health* that reviewed these passive detection devices and said there were problems in damp weather or when the temperature was below 8°. In

Canada the temperature is often below 8°, and I live in a place where there's always damp weather.

I'm wondering whether we have to be concerned about the nature of the technology. Are these things sufficiently reliable to do what you want them to do?

Mr. Gagan Sikand: I would say that they are.

The article you just made mention of is from 1993. Again, those devices had a lot of components that were external. They were wands. Now this is a feature that is built into a very compact device that officers have at their disposal and, if not at the moment, the next time they replenish...a lot of them will have that same feature available to them.

• (1145)

Mr. Murray Rankin: Yes. I'm looking forward to it. I think we're going to actually see this, which I think will be helpful, and we're going to talk to the manufacturers about that.

Most, if not all, provinces have something like the Motor Vehicle Act of British Columbia. It has the very common provision that a police officer can stop your car, and you have to provide your name and address in certain circumstances. Currently, police officers can require a breath sample only if they have reasonable grounds to believe a person has alcohol in their system.

In your answer to Mr. Nicholson, you talked about these passive detection devices essentially being just a tool, but they are not just a tool. In your bill, the presence of alcohol is established, the reasonable grounds for the search are established, if the passive detection device indicates there's alcohol around.

It seems to me that might change the way police are using their powers under motor vehicle legislation at the provincial level to stop people. Simply with a little clipboard and this device somewhere nearby, they require people to incriminate themselves, potentially.

I may be overstating that, but doesn't this provide an incredible new tool of a categorically different nature?

Mr. Gagan Sikand: I don't believe it does. Currently, if we take an officer with a regular clipboard, for example, who has stopped somebody, that officer speaks with the individual and is able to detect the presence of alcohol. That's no different from the tool detecting that presence of alcohol. Both methods will establish the grounds that require the driver to subsequently submit to the roadside screening device.

Mr. Murray Rankin: In other jurisdictions where this has been done, how much more detection does this passive alcohol detection device provide than simply the senses of a police officer?

Mr. Gagan Sikand: I don't have the numbers with me, but the detection rate is quite high.

Mr. Murray Rankin: Have there been studies to show how much higher it is than simply using your nose and other senses?

Mr. Gagan Sikand: Yes. I can provide that to the committee afterwards, if you'd like.

Mr. Murray Rankin: I would appreciate that.

This is regarding the question about the right to counsel. Given that the section says there is reasonable grounds if the little red light goes on in the passive detection device, do you think.... You talked about section 8 of the Charter of Rights, and you're confident that's not an issue, that the expectation of privacy is quite low here. But given that your statute would create reasonable grounds for a search under the Criminal Code—not just RIDE at the provincial level, or some roadside suspension, but a criminal offence of vehicular homicide—do you think there should be a right to counsel when these passive detection devices are used?

Mr. Gagan Sikand: This won't change the right that a driver has to counsel in any way. It literally is a mechanical nose, if you will, for officers to use. As the law is established now, it won't change any of those requirements or regulations.

Mr. Murray Rankin: What we're doing here, though, is a criminal offence. For example, there has been case law, the Dedman case in the Supreme Court of Canada, dealing with the RIDE program in Ontario. You made the point that driving is a privilege, and therefore, there should be a pretty low charter implication.

Here you're creating a criminal offence. You're renaming it vehicular homicide. Aren't the consequences significant? Isn't it likely a court would be more likely to intervene given the nature of this as opposed to, for example, the Dedman case, which was just an administrative sanction?

Mr. Gagan Sikand: It's not creating a new offence, so the two aspects of the bill are vastly different in their approach. The passive is on the front end, allowing peace officers to use the technology available to them to continue to have someone submit to a breath test, thereby finally establishing the offence of, for example, in Ontario, a DUI. The second part is at the end. If you have actually taken someone's life while impaired, it will have you prosecuted as someone who has committed a homicide, not as someone who happened to drink alcohol and then accidentally cause somebody's death. The two don't relate, and in that sense it's not creating a new offence.

• (1150)

The Chair: Keep it really short, Mr. Rankin.

Mr. Murray Rankin: I was just going to build on what Mr. Nicholson said. He talked about the change of name having little or no impact. We talked about the sentencing aspect. You would presumably think that it would have an impact on deterrence for the accused. You would think people would more likely think twice, knowing this technology is available. I presume that's why you suggested this.

Mr. Gagan Sikand: I believe it behooves us to accurately name the offence for what it is.

The Chair: Thank you.

Mr. McKinnon.

Mr. Ron McKinnon (Coquitlam—Port Coquitlam, Lib.): Thank you, Ms. Kaulius, for your testimony, and Mr. Sikand, for bringing this bill forward.

My question is for Mr. Sikand.

According to a paper prepared by Professor Robert Solomon of Western University for Mothers Against Drunk Driving, there is

currently nothing preventing Canadian police officers from using passive detection devices. If that is the case, what does this bill add? What does it bring to the table?

Mr. Gagan Sikand: I believe that to be accurate, as well, nothing actually prevents a peace officer from using the device at the moment, but I think it would clear up a lot of the confusion around it. An officer right now may be hesitant to use the device if he doesn't necessarily know how it will play out in court, for example. I think by explicitly allowing peace officers to use it, we are standardizing the use of the device across all the jurisdictions, as well.

It clears up any confusion around the ability for this device or feature to be used.

Mr. Ron McKinnon: Do police officers in Canada use devices of this kind currently? What can we learn from their experiences?

Mr. Gagan Sikand: I can't necessarily speak to that, to be honest. It's based on personal use. Again, the RCMP has the Dräger, which has that feature in it. You would have to speak to the particular peace officers or police jurisdictions to see if their officers use this feature or not.

Mr. Ron McKinnon: Do they use this passive device already?

Mr. Gagan Sikand: Yes, they can. How prevalent it is, I don't know.

Mr. Ron McKinnon: They can already use this. What do they do with the information? If they have a passive detection device that says there's alcohol somewhere, what do they do then? When would they use this? If they haven't witnessed overt bad driving or erratic driving, and it there's no smell of alcohol on the breath or in the car, why would they use this device? What would give them the notion that they should use it?

Mr. Gagan Sikand: For example, an officer might have been suffering from the flu or a cold and although they are better, perhaps they don't have full confidence in their ability to now detect the presence of alcohol through smell, so they can always use the passive device as a substitute.

Mr. Ron McKinnon: Let's say there's erratic driving but no smell of alcohol is detected. I'm just wondering why the officer would choose to use a device like this.

Mr. Gagan Sikand: It can be used in conjunction with their senses. Also, if you look at the process by which they go to court, now they have data that can't be refuted as easily as a prosecutor suggesting an officer was incorrect in his observations. Now they also have physical data from a machine that can also testify to the fact that there was alcohol present, which would require the driver to submit to the roadside screening device.

• (1155)

Mr. Ron McKinnon: Would this device allow them, given that perhaps there's no overt erratic driving, the ability to lay a charge of impaired driving?

Mr. Gagan Sikand: No, it just establishes reasonable grounds on which to allow you to ask a driver to submit to a roadside breath test. Once that is failed, there are grounds to have a driver submit to a Breathalyzer. Once the Breathalyzer goes red, at that point they can lay the charge.

Mr. Ron McKinnon: What about false positives? You mentioned that other passengers in the vehicle perhaps wouldn't trigger this, but perhaps someone is wearing perfume or cologne or something with alcohol in it. Perhaps they've just washed their dash with an alcohol rub or something. That potentially would give a false positive.

If we have a positive at all, we have a presumption of alcohol in the body, right? I'm wondering what you see as being the consequences of that.

Mr. Gagan Sikand: This was a concern in the past, but I believe the technology has advanced far enough that this would be very rare. The sensors are quite acute. The concentration would have to be quite high.

Again, it's used within six inches of someone's mouth, so it won't really pick up much else.

Mr. Ron McKinnon: This wouldn't be really subtle but something basically thrust in front of a driver who's told, "Speak to me".

Mr. Gagan Sikand: Not necessarily. It's just the same as if you were driving, an officer was to approach your vehicle, as they do now, and they spoke to you through the distance they have there, between the window.

Mr. Ron McKinnon: All right. Thank you.

Those are my questions.

The Chair: Thank you very much, Mr. McKinnon.

We'll move to the second round of questioning.

Mr. Fraser.

Mr. Colin Fraser (West Nova, Lib.): Thanks very much for being here and for your presentation.

Mr. Sikand, I think it was touched on that it's in use in other jurisdictions. I'm wondering if you can highlight some of the jurisdictions it's used in. In what other countries around the world do they have experience with such a passive detection device?

Mr. Gagan Sikand: I know the United States uses it. I believe New Zealand does, and Australia as well. I can provide a comprehensive list to the committee.

The Chair: We would appreciate that. Thank you.

Mr. Colin Fraser: With regard to the reliability of the machine, I assume you're aware, then, of the reliability of the machine and have full confidence that it detects alcohol on the person's breath. I'm wondering if you can describe your understanding of how the machine actually would give a reading. Does it just detect any alcohol on the person's breath? Does it have a threshold that has to be met before it gives a positive, for example?

Mr. Gagan Sikand: The thresholds can be set according to jurisdiction, and I do have confidence in the machine. Again, the way I see this being used, the most effective use of it, would be for a police officer to use their own senses but then also have the machine. The feature is very simple. You push a button, it sucks in a bit of air, you hear the fan, and it gives you the reading.

Between those two, if alcohol is there, I believe you have a high probability of establishing those grounds.

Ms. Markita Kaulius: I'd like to add something to that.

As it stands right now, if they had the passive detection device, it could detect alcohol, the sense or smell of alcohol. Then they would be required to blow into it like a Breathalyzer. It's called an ASD, which is the breath concentration. They're given a test, and then they are given a second test. If that comes up as either false or positive, they are given the opportunity to have a second blow into a machine to determine whether the reading is correct or not. It's not just one test.

Mr. Colin Fraser: I understand that. This is one of the tools, as you say, to establish reasonable grounds to suspect that the person has alcohol in their system—to put them on the ASD, the alert, in order to then determine whether there's reasonable and probable grounds, and then give them the Breathalyzer. I understand there are steps along the way here.

With regard to its utility, I'm assuming you would envision this being used at police checkpoints to screen for drinking and driving. Is that right?

Mr. Gagan Sikand: Yes, absolutely. In fact, probably one of its greatest utilities is at a checkpoint. The efficiency goes up. You have less screening time between each car or vehicle. When a vehicle comes up, instead of having to engage in conversation with the driver and really assess whether they've been drinking, it's much easier to use the tool and, if there's a negative reading, go on to the next vehicle.

They've actually done studies on how effective this is during a RIDE program, for example. Systematic stops are more effective when you use this.

• (1200)

Mr. Colin Fraser: At a checkpoint, then, you would envision this being used at every vehicle. It wouldn't be every so often, or you wouldn't need other grounds in order to think that the person may have alcohol in their system.

Mr. Gagan Sikand: It would depend on the type of checkpoint employed. I'll use the RIDE program here in Ontario as an example. I think it would be highly effective if you have everyone coming up.... The officer is making the judgment call with his own senses as well, but it's a lot easier to make that judgment call, employ the machine, see that the person hasn't been drinking, and then move on to the next vehicle, instead of having to engage the individual in a lengthy conversation in order to make that assessment.

Mr. Colin Fraser: With regard to clause 2 of your bill, section 254 of the code would be amending by adding proposed subsection 254(1.1), which says that you'd be able to allow police officers to collect "ambient air" from anyone if the officers have "reasonable grounds to believe" that the person had been operating a motor vehicle or even had care and control of a motor vehicle in the preceding three hours. Police officers suspecting that somebody had been driving could go up to the person and put this device within six inches of that person's mouth and determine whether that person had been drinking, even if they weren't in a vehicle, for example, if they were out at a restaurant.

Mr. Gagan Sikand: It doesn't change the current law at all. That's exactly what's there now for an officer to go and actually use their own senses. It would just allow the device to be used as well.

Mr. Colin Fraser: Just to touch on a point that Mr. McKinnon raised, at the checkpoint, this device would probably have to be inside the vehicle to be within six inches of the driver's mouth. Do you see any problem with that?

Mr. Gagan Sikand: Six inches is just used to describe its effectiveness. It's most effective within six inches. It will still pick something up within eight inches. You don't need to have somebody waving a wand in your face. The distance between a driver and an officer that is the normal distance when they pull you over is appropriate for it to be effective.

Mr. Colin Fraser: You say that it could be attached to a flashlight or particularly a clipboard. Would it be obvious to the driver that this device was being used, or would the officers have to indicate that this device is being used when they are perhaps putting it near or in the driver's face?

Mr. Gagan Sikand: That would depend on the model. It could be a sensor at the end of a flashlight. It could be on the end of a clipboard. In all honesty, I see officers in Canada using it as a feature in the approved screening device they already have.

Mr. Colin Fraser: As a feature in the approved screening device? In the alert? They already have it—

Mr. Gagan Sikand: When you submit to a breath test, the device is normally referred to as a Breathalyzer, but it's actually an approved screening device. When you blow into the mouthpiece, it gives a reading. That same little device actually has the ability to suck out the ambient air and also give you a reading, instead of someone having to blow into it.

The Chair: Thank you very much.

Mr. Falk.

Mr. Ted Falk (Provencher, CPC): Thank you to our witnesses.

Ms. Kaulius, I too extend my sympathies to you on the passing of your daughter.

Thank you, Mr. Sikand, for the intention of what you're trying to accomplish through your private member's bill.

I want to build a bit on the questions that Mr. McKinnon had. I'm all in favour of increasing prevention and increasing the detection of folks driving under the influence or driving while impaired and of prosecuting them properly, but you seemed to concede to Mr. McKinnon that in our legislation there's nothing today preventing a peace officer or police forces from using a passive detection device.

Moving along on that thought a bit, if there's nothing preventing them, I'm wondering if you can help me understand what value your private member's bill would actually add in the process, because it's not a prescriptive bill. It's more a descriptive bill or a permissive bill, and if that already exists, what exactly would we accomplish? You're not changing the sentencing. You're not addressing any of those issues. I know there's a bit of a change in the verbiage or in the description of what's actually happened, which I can appreciate, but really, what is the value in your bill?

•(1205)

Mr. Gagan Sikand: There's a demonstrable economic cost to using our courts and the legal system in general. Perhaps using the passive device isn't necessarily excluded, but when you explicitly

state that you can use it, one, it will encourage officers to use it, and two, it will prevent any duplication in having charter challenges or having the courts rule on this. If we can legislate that this is perfectly allowed, I think it will streamline the system in general. As well, it will make it easier to enforce the law.

Mr. Ted Falk: You haven't sold me yet. I don't think we have legislation, at least not in the Criminal Code, that addresses the use of the baton, the taser, or a firearm in the administration of a peace officer's duties, as far as being able to acquire a conviction under a certain offence is concerned, and I am wondering why you would want to change the Criminal Code to address this. I think your intention is very good, but I'm just wondering if there's really value or whether you're complicating something.

Mr. Gagan Sikand: On the contrary, I think we're simplifying it. The part of the Criminal Code that allows peace officers to have a driver submit to an approved screening device after they've established reasonableness is complicated if you introduce technology such as the passive, which they can technically use, if you read it, but by explicitly stating that an officer can use this, you've actually cut out all of that confusion.

Mr. Ted Falk: If a device like this were approved—and you may have addressed this in your presentation; I didn't write it down—do you have any statistics that would show what percentage of detection there is currently and what percentage we could expect with the use of a device similar to this?

Mr. Gagan Sikand: Again, it is highly effective. I don't want to provide the committee with inaccurate information, so if I could provide that information after, I will.

Mr. Ted Falk: Ms. Kaulius, your organization is Families for Justice and I assume you've had a chance to read the bill. What in the bill do you see that would help you achieve the goal of your organization?

Ms. Markita Kaulius: First of all, impaired driving is one of the toughest cases in criminal court to get convictions for because there are many loopholes that are used. We do have sentences of 10 years. I can count on probably one hand how many sentences are given out for that crime of 10 years. They're next to nothing. As I mentioned, when you see \$1,500 fines, \$2,000 fines, clearly people are not getting the message.

I'm from B.C., and when we implemented tougher impaired driving laws with the immediate roadside prohibition, our fatalities dropped by 52% because people knew that their vehicles would be impounded if they were deemed to be impaired. They would have to get an interlock ignition put on their vehicles, and the individual cost is about \$4,500 when everything is said and done. A lot of people stopped. In saying that, though, in the five years since this law was implemented there, we have given out over 166,453 roadside prohibitions just in B.C., because people are still willing to take the chance.

I think that this bill in changing it to vehicular homicide calls it what it is, and that may be a deterrent for some people as well. They'd know that if they decided to drink and drive and then got involved in a collision, they'd be looking at a vehicular homicide charge, and that may be a deterrent that would stop them from getting in behind the wheel.

This passive detection device, as I say, is an added tool for the police to do their job better to keep our roads safer.

• (1210)

The Chair: You have time for one short question, Mr. Falk.

Mr. Ted Falk: I don't have a short one.

The Chair: Okay. Then we're going to move on to Mr. Bittle.

Mr. Chris Bittle (St. Catharines, Lib.): Thank you, Mr. Sikand, for bringing this bill forward.

Ms. Kaulius, I'm a new father and I can't fathom what you're going through. I want to thank you for bringing your story to this committee.

I'd like to follow up on Mr. Falk's question and perhaps give you an opportunity. You spoke quite eloquently on the need for stricter drinking and driving legislation. I'm wondering if you could focus specifically on this bill and how you see the positive impacts of this bill on our criminal justice system and perhaps reducing drinking and driving.

Ms. Markita Kaulius: I think that if the public was aware that there were now new tools out there that the police could use to implement tougher screening, it may deter some people. But in saying that, just having those deterrents is one thing, but having punishments that follow up behind that for those who break the law is paramount. People right now know that, yes, we have impaired driving laws, but when you still see thousands of people willing to take the chance, they know that there is not much there in the way of punishment and they're willing to take the chance.

As I've said before, it's a new tool to be used and they can determine the breath concentration, whatever that may be, of the alcohol or whatever. I think that's an added deterrent for some people. Then they have the screening devices right after that, so you're having stages there. It's not just one test they're getting. You're having two or three before actual or possible charges are laid.

Mr. Chris Bittle: In the other jurisdictions you're aware of, is there a public education component to say the police have these new tools so the public is aware of that and that perhaps leads to that reduction?

Ms. Markita Kaulius: The penalties need to be enforced. That's the problem: we have these laws in place for many things, but the penalties don't back them up.

Everybody knows that you shouldn't drink and drive, but we still are losing thousands of people because people are willing to take the chance. They understand—and I'll be very honest here; I don't like saying this, but we spoke to 117,000 people in the last five years in doing our petition. I asked people how they felt about the criminal justice system. It bothered me because almost every answer people gave me is that our justice system in Canada is a joke. As a Canadian, I'm very upset by that, but that's how people refer to our justice system, because they say there are no punishments, or they're very little. Nobody's held accountable for anything, and there's a revolving door at the courthouse. I work in an RCMP detachment, and I see how frustrated members are when they recommend charges. They know somebody has done the crime and will get next to nothing in punishment.

Mr. Chris Bittle: Thank you.

Are either of you aware of a reduction in drinking and driving offences in the jurisdictions in which passive detection has come into law or come into effect or is being used by police?

Mr. Gagan Sikand: I don't want to misquote the jurisdictions, but I have read that not only has the detection rate gone up, but impaired driving has gone down because of the deterrence effect. I will provide this information to the committee afterwards.

Ms. Markita Kaulius: I would also note that I think Australia has gone down 39%. I know that in Colorado and Washington state, where they legalized marijuana, their impaired driving has gone up by 17%. They don't have the passive detection devices.

The Chair: Thank you very much.

We will now move to Mr. Cooper.

Mr. Michael Cooper (St. Albert—Edmonton, CPC): Thank you, Ms. Kaulius, for your powerful testimony. Certainly, I express, as I think all honourable members do, our deepest sympathies for the very awful situation.

I also want to thank Mr. Sikand for his leadership on this very important issue.

I can say I voted against this bill at second reading, primarily on the basis that I didn't see it going far enough in increasing sentencing, imposing consecutive sentencing. Both of those things are included in my colleague Steven Blaney's bill, Bill C-226. Nonetheless, I certainly support the underlying objective, which is that if we can do anything to hold to account persons who drink and drive, we should, and also do what we can to discourage drinking and driving.

I will admit that one of the concerns that I have with this bill, and it's a concern I also have in the case of Bill C-226, is this form of random breath testing, passive breath testing. I think, quite frankly, it can be a real infringement on individual liberty. That being said, I certainly am very open to supporting it if there is clear and demonstrable evidence that this is going to have a real impact on keeping people who are impaired off the road and if lives are ultimately saved.

I know, Ms. Kaulius, in response to the question from Mr. Bittle when he asked whether you or Mr. Sikand are aware of jurisdictions where this type of testing has had a demonstrable impact in keeping people off the road, you referred to Australia.

One point that I would make is if you look at Australia, they were one of the first jurisdictions to bring in a form of random breath testing back, I think, in 1980 or 1981, and that was at the first wave of awareness about drinking and driving. In Canada, we saw checkstop programs brought forward not long after and, I think if you look at the statistics, there was an immediate decrease; whereas, we are now 30 or 35 years in, in terms of awareness and prevention in Canada. I guess in that regard, the context is quite different.

Would you agree?

•(1215)

Ms. Markita Kaulius: Yes. As you say, Australia has been for many years, and I know New Zealand, France, and other countries have been using these devices and have had very good results. There's a culture and a mindset there that they treat drinking and driving differently than we do in Canada.

We've had friends from Europe, and when they come here, if they go for dinner and have a drink, there's no way. They say you can't drive back home. That's just the culture. It's a different mindset. They can't believe that we allow drinking and driving here in Canada, after so many countries in Europe and elsewhere don't allow it.

Mr. Gagan Sikand: Thank you, Mr. Cooper, for your question. You covered a number of things, but I did want this private member's bill to have the legs to make it to the end and become law. I also wanted to introduce something that would be effective, but at the same time mesh well with others who wanted to address this issue.

You cited random stops and sentencing. Again, this would mesh really well with that, because if it's ever legislated that you could have random stops, the passive device would be a great tool to detect whether that person has been driving under the influence. Also, if it's ever legislated that we have mandatory sentences in Canada, the sentence would still be under the offence of vehicular homicide, the idea of calling the offence what it is.

In that sense it meshes well with what you were talking about, and at the same time it's not overly convoluted. It should, hopefully, have the legs to become law.

•(1220)

Ms. Markita Kaulius: There are two separate bills. One is being brought forward by the Liberals and one by the Conservatives. We appreciate both members for doing this. These are both bills that need to be passed in the interest of public safety. That's the bottom line here. It's public safety for all Canadians that needs to be addressed. Right now we are losing thousands of innocent Canadians, and families are being absolutely destroyed. This is not a partisan bill. It is about public safety.

The Chair: Thank you. Mr. Cooper's time is exhausted. We're going to move to Mr. Rankin.

I just want to point out they're not bills being brought forward by the Liberals or by the Conservatives. One is being brought forward by Mr. Blaney, and one is being brought forward by Mr. Sikand. They are private member's bills, and they're all supposed to be judged on a non-partisan basis by all of us.

Mr. Rankin.

Mr. Murray Rankin: I have nothing further.

The Chair: All right.

May I ask one small question, Mr. Sikand?

I've been listening to the committee members posing questions. If I have it right, passive detection devices today are allowed. You're saying the law would make it clearer that they're allowed and they would not be subject to litigation, but essentially, they're allowed. As well, you're changing the name of the crime, but you're not changing the sentence. So the real meat of this law is proposed subsection 254

(1.2), which establishes reasonable grounds for the officer to move forward to the roadside device simply by registering a positive screening on the device.

Is that essentially correct as to what's changing in the law, that now, if this is used, the officer would then have reasonable grounds to move forward to the next step, which is the roadside test?

Mr. Gagan Sikand: Not necessarily. The passive device isn't necessarily allowed; it's just not not allowed, which is what we want to clarify to make it explicitly allowed to be used.

The Chair: Basically, there are two things then. You're saying that you want to be more comfortable...that even though the RCMP is already in possession of it, you want to make sure it is clear in the law that it's permitted so that there is not further legal contestation related to the device, and you're then establishing a standard as a result of a positive test under the device that allows you to move forward to the next step.

Mr. Gagan Sikand: Just because of the nuances.... The RCMP may be in possession of the device. Whether or not they use that feature, I don't know. That's exactly what I'd want to legislate, to make it explicitly clear that officers can use this feature without fear of recourse and its perhaps not holding up in court. That's for the passive detection. And then, yes, with the vehicular homicide, I would want to change the name.

The Chair: Thank you, and we'd really appreciate your coming back to the committee with the information you said you'd collect related to different jurisdictions and how they use the device.

Thank you very much to both of you. Your testimony was very compelling and we thank you very much.

Mr. Gagan Sikand: Thank you for your time.

The Chair: We're going to take a very short break for the next witness to come forward.

•(1220)

_____ (Pause) _____

•(1230)

The Chair: I'd ask everybody to please take their seats.

It is a great pleasure to welcome Mr. Pruden from the Department of Justice, who is the counsel on the criminal law policy section, to talk to us about Bill C-247, an act to amend the Criminal Code (passive detection device).

Mr. Pruden, as I understand it, you will not be making a statement, because this is a private member's bill. You will just be taking questions from the members of the committee.

Mr. Hal Pruden (Counsel, Criminal Law Policy Section, Department of Justice): Yes, that's correct.

The Chair: Perfect. The first question is from the Conservative side.

Mr. Falk, will you be going first?

Mr. Ted Falk: Sure.

Do you see any complications that would be present for any litigation that you're aware of from a bill like Bill C-247?

Mr. Hal Pruden: If you will permit me, I will introduce my reply by stating that there are two Criminal Code offences that relate to, let's call it, impaired driving. The first offence is operating a motor vehicle, a vessel, aircraft, or railway equipment while impaired by alcohol or by a drug. The second offence is related to alcohol alone. It's an offence to operate a vehicle, a vessel, an aircraft, or railway equipment while above the legal limit, which is 80 milligrams of alcohol in 100 millilitres of blood.

Let me further indicate that in respect of the second offence, which is sometimes called the *per se* offence—that means that simply being at that level is the offence, regardless of whether you show signs of impairment or not—if you were driving at that level, you are committing a Criminal Code offence. So the tools that were implemented by Parliament in 1969, in relation to investigating this over 80 milligrams offence, are tools that are called approved instruments. They give the actual blood alcohol concentration level evidence that can be used in court to prove the offence.

With respect to roadside investigation, in 1969 Parliament passed legislation for approved screening devices. These are screeners. The result from the screener can't be used in court. That result can only be used to go to the next level of the approved instrument. If someone fails on the screener at the roadside, the police can demand that they give a deep lung breath sample on the approved instrument, and also, I should say that the sample which is received on the approved screening device is a deep lung sample of breath.

Having laid this foundation, I should quickly mention that the threshold to make a demand on the approved instrument at the police station is a reasonable belief that the driver has committed an impaired driving crime, whether that is the crime of impaired driving or the crime of being over the legal limit.

The threshold has been called very low for the approved screening device. The threshold is simply a suspicion of alcohol in a driver's body. Currently, the suspicion is arrived at, as has been indicated by earlier witnesses, through things like odour of alcohol on the breath. One could add glossy bloodshot eyes, fumbling with documentation.

I apologize for being very long in coming to your question, but I think it should also be pointed out that police currently, either common law or under provincial statutes, have authorization to make a random stop of a driver in order to check their provincial driving licence, in order to check up on the vehicle fittings, or to check up on a driver's sobriety.

Now, I finally get to your question—

● (1235)

Mr. Ted Falk: Do you remember what the question was?

Mr. Hal Pruden: I'm hoping that I do.

The proposed legislation would give authorization under the Criminal Code for the Attorney General to approve the approved passive detection device. I apologize, because I might slip into calling it a passive alcohol sensor. The Attorney General, typically at the present time for an approved instrument and approved screening device, obtains scientific advice and a recommendation from the alcohol test committee of the Canadian Society of Forensic Science. So it's not a complication. It's a reality, I would say, but it's a practical reality that would need to be considered.

The Attorney General would turn, very likely, to the alcohol test committee and ask which passive sensing devices ought to be approved. I don't know if you will be hearing from the alcohol test committee later on this bill, but if you are, they are the alcohol breath-testing forensic sciences that provide advice to the Attorney General of Canada on equipment under the Criminal Code. Because this is under the Criminal Code, likely the Attorney General would ask for their advice.

Presently, they have not established evaluation standards for this kind of passive alcohol sensor. So that's one wrinkle or one item that people would have to keep in mind. They would have to establish standards. They would have to evaluate manufacturers' equipment that's submitted to the committee to see if it passes the evaluation standards, and then they would make a recommendation through the department to the Attorney General of Canada that the equipment passed standards. They might also state whether they believe it is suitable for use in Canada, under Canadian conditions, climate conditions included, which is what they do for the current approved screening devices and the approved instruments.

That's rather a long answer, and I don't know if it fully answers your question.

The Chair: That was six minutes.

Given that, Mr. Falk, you didn't really have a chance to ask anything. Do you want to take a bit more time?

Mr. Ted Falk: I think I can make it brief.

Given what you've just said, would there at all be a risk that by putting something like this in the Criminal Code it would de-legitimize some of the previous screening or passive tests that are in place?

Mr. Hal Pruden: I don't see that it could de-legitimize the current regime of using approved screening devices and approved instruments, or that it could cause a problem for the current officers' observations related to impairment that lead to the suspicion, that then leads to the approved screening device demand.

I should also say that this would be, as mentioned earlier, permissive, just as approved screening devices are permissive and approved instruments are permissive. They're simply authorized. The police are not required to use them, but they can use them.

Mr. Ted Falk: Thank you.

● (1240)

The Chair: Thank you very much.

Mr. Di Iorio.

[*Translation*]

Mr. Nicola Di Iorio (Saint-Léonard—Saint-Michel, Lib.): Thank you, Mr. Chair.

First, I want to echo your remarks and kind words for Ms. Kaulius. Rather than repeat everything you said, I simply want to thank her and above all encourage her to persevere and continue her work.

Second, Mr. Pruden, I would like a clarification of Bill C-247. Subclause 1(2), which proposes the new subsection 254(1.2) entitled Presence of alcohol, states "...it establishes reasonable grounds to suspect".

[English]

or, "it establishes reasonable grounds to suspect".

[Translation]

That's the innovative part of the bill.

[English]

Mr. Hal Pruden: In fact, it is a different element, in the sense that the passive detection device itself is completely new. There is no current provision in the Criminal Code that speaks of passive detection devices. What the provision would do is deem that a positive result on the passive detection device is reasonable suspicion, and reasonable suspicion is needed for a demand for a breath sample on the approved screening device.

[Translation]

Mr. Nicola Di Iorio: I also understand that the driver is not required to cooperate with the police officer who wants to use the device.

[English]

Mr. Hal Pruden: There is no compulsion on the driver to cooperate because there is no deep lung air sample required with a passive detection device. The officer simply places it near the vehicle or near the driver.

[Translation]

Mr. Nicola Di Iorio: I'll give you an example. If the driver lowers his window slightly, he can then talk to the police officer. If he manages to provide the requested documents that way, the police officer can't force him to lower his window completely. As a result, there isn't a high enough level of cooperation to allow the device to be used.

[English]

Mr. Hal Pruden: There doesn't seem to be a refusal offence with the passive sensing device, but keep in mind that the officer already, at provincial law or at common law, can demand that the driver provide their driver's licence, which requires them to roll down the window or get out of the vehicle and show the driver's licence.

[Translation]

Mr. Nicola Di Iorio: One centimetre is enough space to provide the documents. They aren't very thick.

Do you see what I mean? My concern is prevention.

We were given statistics that show the extent to which the legal system is costly. When these events are discussed, they're referred to as accidents caused by alcohol. I think we all agree that they aren't accidents. Ms. Kaulius put it very well. She said these situations are completely preventable.

I want to know, based on your review of this bill, what elements can help us find some consolation and identify prevention tools.

[English]

Mr. Hal Pruden: The deeming of a failure on a passive alcohol sensor, with which the officer can then demand a sample on an approved screening device, could be said to be another tool the officer can use, to the extent that it prevents people from going out and drinking and driving, because they can be more easily detected. For example, if the officer has a cold, they would not be detected. This way, they would be detected through the passive sensor.

It has been expressed earlier, and others have expressed it this way, that a passive alcohol sensor is an extension of the officer's nose.

[Translation]

Mr. Nicola Di Iorio: So it's something the police officer can do right now.

•(1245)

[English]

Mr. Hal Pruden: There is no prohibition on an officer using a passive alcohol sensor, although I am given to understand that police agencies are very reluctant to employ passive alcohol sensors in Canada without some Criminal Code authorization specifically speaking about passive alcohol sensors.

I know of no police agency in Canada that currently uses passive alcohol sensors.

[Translation]

Mr. Nicola Di Iorio: That's all. Thank you.

The Chair: Okay, perfect.

Thank you, Mr. Di Iorio.

Mr. Rankin, go ahead.

[English]

Mr. Murray Rankin: Mr. Pruden, thank you very much for coming.

I'd like to pursue a few things. You brought up the alcohol test committee. Earlier, I asked a witness about an article from the *American Journal of Public Health* that claimed that these testing devices were not terribly useful when temperatures were below 8° or in windy or excessively damp weather.

Are you up on the technology? Has there been improvement since then, if that is accurate?

Mr. Hal Pruden: I am not an alcohol breath test scientist, so I am not an expert in this area and can't speak to that. You would have to ask the scientists. I can say that in the early 2000s, the Winnipeg police department looked at passive alcohol sensing devices and found that, in the wintertime, the particular device they were looking at was not able to function in Canadian climate conditions.

Mr. Murray Rankin: Because the bill would require reasonable grounds to be found if the passive detection device indicated the presence of alcohol, there's then an automatic presumption that reasonable grounds exist to take it to the next stage. Isn't there a concern there may be too many false positives and it could undercut what we're trying to do in preventing drinking and driving?

Mr. Hal Pruden: I think we need to keep in mind that it's deemed to be suspicion, and suspicion is a very low threshold and suspicion is what is needed to move to the screening stage at the roadside, which is simply to ask for a sample of breath on the approved screening device. It is only if the individual driver fails on the approved screening device that they will be taken to the police station, given their right to counsel and then receive a demand from the police to provide samples on an approved instrument, and the approved instrument gives the actual readings that would be used in court.

Mr. Murray Rankin: It's a very important point you make, that it's only to provide irrefutable suspicion, if I can call it that, and that takes you to the next stage. In light of that, is there not a concern? Has your department done a charter analysis to see whether that could be problematic, given the automatic establishment of reasonable grounds?

Mr. Hal Pruden: I would skate on thin ice if I started to give charter opinion advice that was given by the charter lawyers to the Minister of Justice.

Mr. Murray Rankin: You are from the Department of Justice—

Mr. Hal Pruden: I am.

Mr. Murray Rankin: —and you're here to give evidence on behalf of the department.

Mr. Hal Pruden: I am in criminal law policy—

Mr. Murray Rankin: I think it's fair for us, if there has been charter analysis, and it seems to me you're alluding to the existence of that.... I think we would be derelict in our duties not to have the benefit of that input.

The Chair: I think we have the right to ask the question—

Mr. Hal Pruden: I'm going to ask you to appreciate that lawyers in the Department of Justice give their legal and policy advice to the Minister of Justice and Attorney General of Canada, and if we breach our duty of confidentiality, we would be at risk for consequences possibly in our employment, and certainly I would be at risk for consequences with my law society, the Law Society of Manitoba. So I would not want to share charter advice.

I could also add that I'm well aware that committees themselves, at least in the Senate in 1985, took advice independently on constitutional questions related to the gambling provisions of the Criminal Code and amendments that were being proposed by the government of the day.

That's my answer to the question.

• (1250)

Mr. Murray Rankin: Your answer to the question is that it would be improper for you to provide an opinion on that, and that your duty of confidentiality and the fact that it's not your area would preclude you from doing that.

I'm saying, then, as a member of this committee, I feel very reluctant to proceed in the face of not having such charter testimony. The whole thing is about the charter viability of it. If we're not going to get that from the Department of Justice, Mr. Chair, I would ask that we obtain counsel to find this out.

The Chair: We are going to be hearing from Professor Hogg, who will be giving his opinion about the constitutionality of the bill, and at the end of hearing from the witnesses, we can certainly discuss as a committee what we want to do, whether it's asking the Minister of Justice for any information or asking....

We can always ask.

Mr. Murray Rankin: I understand. I just feel it is surprising that we don't have, to this point, testimony from the Department of Justice on such a central feature before the committee. As you know, I have the greatest respect for Professor Hogg, but that's not who is advising the government on whether this bill is appropriate or not.

I'll leave it there.

On the issue of vehicular homicide, the renaming of this offence, do you have anything to say about how that, in your judgment, might affect those who are providing sentencing, that is, judges, or how that would affect the accused and victims?

Mr. Hal Pruden: I think I need to preface the remarks I have with a few observations. The first observation is that, in referring to "vehicular", when the offences in the Criminal Code speak of motor vehicles, vessels, aircraft, and railway equipment, it seems to narrow the current offence to simply vehicles.

When it comes to the word "homicide", currently the Criminal Code distinguishes between homicides that are culpable under the criminal law and homicides that are pure accidents and non-culpable under the criminal law. In the area of culpable homicides, we have murder, we have infanticide, and all others are manslaughter. It could be said that the proposal in the bill would diffuse the current wording and put it into a more general term, "homicide", rather than referring to the specific offences of driving while impaired or operating a vessel, railway equipment, or aircraft while impaired.

Mr. Murray Rankin: Mr. Pruden, is it therefore your view that, ironically—and I know this wasn't the intention—this bill could limit our ability to go after people for impaired operation of aircraft, railways, and the like, and that an unintended consequence would be that by calling it "vehicular homicide" we may cast doubt on whether those other offences could be proceeded with?

Mr. Hal Pruden: No. The bill does not alter paragraph 253(1)(a), which sets out the impaired operation of the various modes of transport, nor does it alter paragraph 253(1)(b), which refers to operating one of these modes of transport while over the criminal legal limit of 80 milligrams. However, what it does is to propose that in section 255, the two separate and distinct offences, when there is a death, should be referred to as "vehicular homicide". So the two separate offences would now, in section 255, be referred to as simply under the one name of "vehicular homicide", which would be unique in the Criminal Code.

Mr. Murray Rankin: That sounds like a drafting issue, though.

Mr. Hal Pruden: It's more than a drafting issue. The bill proposes that "vehicular homicide" be used as a term, and I'm suggesting that "vehicle" or "vehicular" narrows what currently exists and "homicide" expands greatly what currently exists.

The Chair: Mr. Pruden, I think that what Mr. Rankin is suggesting is that if you change the word “vehicular” to include the whole list of motor vehicles, planes, or whatever that long list was, you would avoid that and it’s a drafting issue.

Mr. Hal Pruden: That fixes that drafting issue. You run into the second problem of “homicide”—

The Chair: “Homicide” being more—yes, I understood.

Mr. Hal Pruden: —being a nebulous, broad term. I shouldn’t say “nebulous”, but it’s a broad term.

• (1255)

The Chair: That is definitely understood.

Mr. Bittle.

Mr. Chris Bittle: I have a follow-up on that point. If we changed it from “vehicular” and defined “vehicular” in this bill and changed it to perhaps “vehicular manslaughter”, would that address the concerns of the department?

Mr. Hal Pruden: It still is very broad, because dangerous driving is a form of “vehicular”—or any other mode of transport —“homicide”. So is “criminal negligence causing death” when you have one of these modes of transport involved. It just broadens it. I don’t know that there is a way to make it less broad. If those are the terms that are wanted, “vehicular manslaughter” or “homicide”, they’re broader than what the Criminal Code currently sets out. The Criminal Code refers to the two specific provisions, the impaired driving and the over-80 driving.

Mr. Chris Bittle: I’d like to clarify—and perhaps I didn’t quite understand it—and follow up on Mr. Rankin’s question.

If we’re broadening the terms, but you’re suggesting that there will be no consequence, could you explain to me what the consequences, if any, would be? If this term were adopted by Parliament, what consequences would there be, as you see it, in the criminal law?

Mr. Hal Pruden: The consequence would be that you’d have one term covering two offences, which is unique and unusual. I don’t know of any other place in the Criminal Code where that is done, where two offences are referred to by one name.

Whether it would impact upon judges would be speculative. I can’t guess as to what judges might do with a change by Parliament in giving, in section 255, a new name for the two provisions, but keeping in section 253, a different name: the current different names for the two provisions.

Mr. Chris Bittle: Okay.

You mentioned police agencies were likely not going to act on passive detection without a Criminal Code authorization. Do you know of any police agencies that are requesting this device?

Mr. Hal Pruden: I’m not aware, although I did hear the earlier testimony that indicated there is at least one police agency that is supportive of the bill.

Mr. Chris Bittle: Fair enough.

The Chair: We’re coming to the close of our meeting, but we can do a speed round if any of you have any last questions that you really want to ask.

Mr. Fraser.

Mr. Colin Fraser: Thank you very much. I have a quick question.

We heard quite a bit on the continuum of testing impairment, being that the passive detection device would be used in order to obtain reasonable grounds to suspect and then move on to the ASD.

Do you have any thought on the paragraph 253(1)(a) ground and whether this information from the passive detection device could be used as indicia of impairment in order to establish that in court?

Mr. Hal Pruden: The short answer is no, and the reason is that the passive alcohol sensor is only looking at ambient air. It is not looking, the way that an ASD would, at a deep-lung air or breath sample. It couldn’t be used to show that somehow just because it was in the ambient air this driver had alcohol in the body.

Mr. Colin Fraser: Yes, but police officers testify on 253(1)(a) grounds all the time that they smelled alcohol on the person.

This is in order to heighten their ability to sense that. Wouldn’t that be admissible as evidence then on a 253(1)(a)?

Mr. Hal Pruden: Paragraph 253(1)(a) is impaired driving, so the officer has to have evidence beyond simply that there was alcohol in the ambient air that would give the suspicion to follow a different avenue of investigation, not a 253(1)(a) investigation, but the 253(1)(b) investigation for being over 80 milligrams.

This tool is intended to help with the investigation of 253(1)(b). I don’t see that it helps the crown to advance their case, if they’re simply saying that well, they had deemed suspicion, but they’re pursuing the 253(1)(a) actual impairment offence, because all you’re showing is that there might have been alcohol in the ambient air, deemed to be alcohol in the body of the accused person. It doesn’t take you very far on a 253(1)(a) charge.

• (1300)

Mr. Colin Fraser: I guess all I’m saying is that in addition to other evidence, other indicia—the person swerving, the person having glazed eyes, the person perhaps even saying that they’ve had a couple of drinks—if, for whatever reason, the crown wasn’t able to proceed on the 253(1)(b), I don’t see why the crown wouldn’t then be able to use this information or evidence to support the 253(1)(a).

I take your point, though.

Mr. Hal Pruden: It’s ambient air. It’s not a deep-lung breath sample.

The Chair: Thank you very much.

Are there any other quick questions?

Mr. Nicholson.

Hon. Rob Nicholson: I have just a comment.

I want to be on the record, with all deference to my colleague and friend, Mr. Rankin, that none of us can or should be surprised that you’re not providing constitutional advice, Mr. Pruden. The Department of Justice, of course, provides that constitutional advice on a solicitor-client basis to the Minister of Justice, and any questions we have with respect to the constitutionality of that, we would get our own, whether it’s Professor Hogg, or some other expert here.

On that one, Mr. Pruden, I agree with your comments with respect to that. I wanted that to be put on the record.

Thank you very much.

The Chair: Mr. Pruden, thank you so much for coming before the committee. We very much appreciate it.

Mr. Hal Pruden: Gladly done. Thanks very much.

The Chair: We will see everybody on Thursday.

The meeting is adjourned.

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