

Smoke and Mirrors? With Marihuana Legalization, Parliament Proposes to Drastically Expand Police Power

By: Dylan Finlay

Case Commented On: [Bill C-46, An Act to amend the Criminal Code \(offences relating to conveyances\) and to make consequential amendments to other Acts](#), 1st Session, 42nd Parliament, 2017

Parliament is toting marihuana legalization as a necessary public safety measure. With this sentiment, Parliament is revisiting not only drug-impaired driving laws, but also alcohol-impaired driving laws. Part 2 of Bill C-46 would, if passed, allow police officers to demand that a driver provide breath samples without any suspicion that the individual had been drinking. The relevant section is reproduced below:

Mandatory alcohol screening

320.27 (2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

Parliament seeks the moral high ground in selling its proposed legislation to both the public and the judiciary. To the public, the Liberals hope to sway voters who find a 'tough-on-crime' agenda attractive – the same segment of the population that supports stiff mandatory minimum jail sentences. To be fair, as far as politics go, this strategy is sound; the segment of the population that supports legalization of marihuana because prohibition never made much sense to begin with will likely support the Bill no matter its complexities.

The judiciary will be harder to convince. Mandatory alcohol screening (as it is proposed by Bill C-46) violates ss 7 (the right to life, liberty and security of the person), 8 (the right against unreasonable search and seizure), 9 (the right not to be arbitrarily detained), and 10 (b) (the right to counsel on arrest or detention) of the *Canadian Charter of the Rights and Freedoms* (the *Charter*). Parliament must cast mandatory alcohol screening as a reasonable limit prescribed by law and demonstrably justified in a free and democratic society to 'save' it under s 1 of the *Charter*.

The groundwork is being laid for such an argument. On [CBC's 'The House,'](#) Justice Minister Wilson-Raybould stated: "I am confident [mandatory alcohol screening] will survive a constitutional challenge. It can be justified in terms of public safety, and safety on the roads, and preventing death" (April 13, 2017).

I do not share the Justice Minister's confidence. Mandatory alcohol screening (as it is proposed) is a flagrant affront to *Charter*-values and *Charter* jurisprudence. The Supreme Court should not find such a law constitutional.

A constitutional battle lies ahead. This post will provide a summary of police procedure and the law as it relates to alcohol screening, present arguments for and against mandatory screening's constitutionality, and ultimately conclude that mandatory alcohol screening is unconstitutional. For the purposes of this post, the focus will be on s 10(b) of the *Charter*, as this is the focus of the prevailing case law on alcohol screening generally.

The *Charter* landscape as it relates to alcohol screening

(i) The *Criminal Code* impaired driving regime

Section 254(3) of the *Criminal Code* allows a police officer with reasonable grounds to believe an individual is operating a vehicle while impaired to demand that individual provide samples of his or her breath. These samples can then be used against the individual in Court. To be considered sufficiently reliable to be accepted as evidence, these 'evidentiary samples' must be taken by a 'qualified technician'.

Section 254(3) alone is impractical because these 'evidentiary samples' require reasonable grounds – a high threshold. Reasonable grounds describes “the point where credibly-based probability replaces suspicion” – at this point “[t]he state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone” (*Hunter v Southam Inc*, [1984] 2 SCR 145 (CanLII) at p 167). Where an individual smells like alcohol and admits to drinking one or two beers, without more, a police officer could not form reasonable grounds that the individual was impaired. Reasonable grounds restrict police to catching the *highly* impaired.

Enter s. 254(2). Section 254(2) of the *Criminal Code* provides a solution whereby a police officer with “reasonable grounds to *suspect* that a person has alcohol or a drug *in their body*” ('reasonable suspicion') can demand that the individual provide screening samples. These samples are provided at the roadside, and are meant to be minimally intrusive. These samples provide evidence on which to base the reasonable grounds required for evidentiary samples.

Screening samples are a double-edged sword. They are a practical because they are taken forthwith (immediately/without delay) and at the roadside. It is precisely for this reason that screening samples are incompatible with s 10 of the *Charter*, which requires that detained individuals be provided with an opportunity to contact counsel. The trade-off is that screening samples cannot be produced as evidence at the accused individual's trial.

(ii) *R v Dedman* and the police power to conduct random traffic stops

In *Dedman v The Queen*, [1985] 2 SCR 2 (CanLII), the Supreme Court considered the constitutionality of RIDE (Reduce Impaired Driving Everywhere) programs. Such programs allow police to stop and interact with drivers at random in an attempt to gain further suspicion that the driver has been drinking, and thereby detain him or her for alcohol screening.

Le Dain J. (writing for the majority) held that such programs were lawful. Random vehicle stops “fell within the general scope of the duties of a police officer to prevent crime and protect life and property by the control of traffic” (para 68). The finding was an application of the

‘*Waterfield* test,’ a doctrine that empowers police through the common law police duties to preserve the peace, prevent crime, and protect life and liberty (*R v Waterfield and Another*, [1964] 1 QB 164, [1963] 3 All ER 659 (CCA) at para 26).

(iii) *R v Thomsen*, screening samples are a reasonable limit prescribed by law

In *R v Thomsen*, [\[1988\] 1 SCR 640 \(CanLII\)](#), the Supreme Court considered whether an individual subject to a screening demand is ‘detained’ as required by s 10 of the *Charter*. Le Dain J. (writing for a unanimous Court) held that the screening process did constitute a detention (para 14). Furthermore, because screening samples are to be taken “forthwith” and at the “roadside”, the law was implicitly incompatible with s 10 rights (para 19). As such, the Supreme Court asked whether the law was ‘saved’ by s 1.

R v Oakes, [\[1986\] 1 SCR 103 \(CanLII\)](#), establishes that to be ‘saved’ by s 1, the law must have a pressing and substantial objective and the means chosen must be proportionate to that objective. A law is proportionate if the means adopted are rationally connected to that objective, it is minimally impairing of the right in question, and there is proportionality between the salutary and deleterious effects of the law (paras 69-70).

In *Thomsen*, the Supreme Court found that the law did have a pressing and substantial objective, providing a list of 10 conclusions (reproduced here are the most relevant, from para 21):

- (1) The problem of the drinking driver has been recognized by the Ministers of Justice of Canada and by experts in traffic accident research for many years.
- (2) The problem of the drinking driver has not been controlled. It is very serious and must be addressed by urgent measures.
- (3) There is a direct relationship between drinking drivers and automobile accidents.
- ...
- (8) The detection of drivers who are impaired at the moderate level of impairment through observation by trained police officers is ineffective.
- (9) Increased penalties have not been an effective deterrent.
- (10) The most effective deterrent is the strong possibility of detection.

Without much further analysis, the Supreme Court concluded that “the limitation on the right to retain and instruct counsel at the roadside testing stage is a reasonable one that is demonstrably justified in a free and democratic society” (at para 22).

In *R v Orbanski; R v Elias*, [\[2005\] 2 SCR 3 \(CanLII\)](#), the Supreme Court revisited the subject, in more detail. In considering whether screening samples minimally impaired s 10(b) of the *Charter*, Charron J. (writing for the majority) stated (at para 57):

The infringement on the right to counsel is also no more than necessary to meet the objective. As described earlier, the scope of authorized police measures is carefully limited to what is reasonably necessary to achieve the purpose of screening drivers for impaired driving. Further, the limitation on the right to counsel has strict temporal limits - there is no question that the motorist who is not allowed to continue on his way but, rather, is requested to provide a breath or blood sample, is entitled to the full protection of the *Charter* right to counsel.

Earlier in her judgement, Charron J. had stated (at paras 47 and 49):

Whether a particular screening measure will fall within the scope of authorized police action is a question that necessarily calls for a case-specific inquiry. In more obvious cases of drinking and driving, observation of the driver alone may suffice for effective screening. But one can think of many examples in which observation of the driver through the open car window will not be sufficient to enable the officer to draw the line between those drivers with a permissible amount of alcohol in their body and those who have reached the impermissible level.

...

To return to the case-specific inquiry relevant to this appeal, in *Orbanski*, the officer asked the driver if he had been drinking, to which *Orbanski* answered that he had had one beer at two o'clock. Similarly, in *Elias*, the driver was asked whether he had been drinking, and he replied that he had. In both cases, the driver's answer was part of the information used by the officer to form the reasonable suspicion necessary to request a roadside breath sample in the case of *Elias*, and the reasonable and probable grounds necessary to request a breathalyzer test in the case of *Orbanski*. The questions were relevant, involved minimal intrusion and did not go beyond what was necessary for the officer to carry out his duty to control traffic on the public roads in order to protect life and property. In my view, the police officers were authorized in each case to make such inquiries.

In *R v Woods*, [\[2005\] 2 SCR 205 \(CanLII\)](#), the Supreme Court noted that s 254(2)'s requirement that the screening sample be taken "forthwith" allowed the section to "pass constitutional muster". In doing so, the Court recognized that the current screening regime violates ss 8, 9, and 10 of the *Charter*, but found it is saved by s 1 (at para 15).

Is mandatory alcohol screening constitutional?

(1) The case for constitutionality

The case for the constitutionality of mandatory alcohol screening naturally flows from the constitutionality of the screening sample regime as it currently exists. The Supreme Court has recognized that the current screening regime based on reasonable suspicion of impairment violates ss. 8, 9, and 10 of the *Charter* (*Woods*), but that such a regime is justified under s. 1. The same argument applies to mandatory alcohol screening.

Preventing impaired driving is indeed a pressing and substantial objective. Liberal MP Bill Blair reminded the public in [announcing the Bill](#) that impaired driving remains the leading criminal cause of death. Two of the conclusions presented by *Thomsen* are particularly relevant to mandatory alcohol screening:

(8) The detection of drivers who are impaired at the moderate level of impairment through observation by trained police officers is ineffective.

...

(10) The most effective deterrent is the strong possibility of detection.

The government's research apparently concludes that impaired drivers often escape detection at check stops – failing to trigger a police officer's reasonable suspicion (as reported by CBC, see [here](#)). The 'reasonable suspicion' standard results in a law that is ineffective in detecting, and subsequently deterring, impaired drivers. A new regime is required.

A case can be made that mandatory alcohol screening is minimally intrusive. Mandatory screening does not affect all people, only drivers. Because driving is a regulated activity, one expects one's rights to be restricted when driving. For example, police can stop any vehicle without grounds if the purpose is to check the driver's sobriety (*Dedman*). Asking a driver to provide a mandatory screening sample is only one further infringement in an activity that, by its nature, is regulated in a way that infringes on rights. Considering that regulation of driving implicitly impairs rights anyway, surely mandatory screening is minimally intrusive enough to be justified in preventing impaired driving's continued carnage.

Mothers Against Drunk Driving ([MADD](#)) paints 'mandatory screening' as minimally intrusive: "Drivers remain in their cars, and the process is routine, quick and causes minimal delays for sober drivers." The sentiment is simple; if you are sober you have nothing to worry about.

(2) The case against constitutionality

In my opinion, the stronger argument lies in the case against constitutionality because mandatory screening is, in fact, highly intrusive. Mandatory screening compels an individual to actively provide a bodily sample to a police officer. The public accepts that a police officer may pull over an individual's vehicle to check sobriety. Most individuals see no issue with answering a few of that officer's questions, or providing identification. However, when that officer demands, without cause, that one's passive acquiescence becomes active compliance, a line is crossed. It is both the intrusive nature of providing a bodily sample (rather than a statement or document), and the fact that such a sample is demanded without even the minimal threshold of reasonable suspicion being met, that heightens its intrusiveness. Because of its intrusiveness, mandatory alcohol screening does not minimally impair *Charter* rights.

It is a misconception that "[d]rivers remain in their cars, and the process is routine" (MADD). More often than not, a police officer does not allow an individual to remain in his or her car to collect screening samples. In many cases, police place the individual in the rear of the police vehicle. In a few cases, the individual is even searched and handcuffed (*R v Schwab*, [2015 ABPC 180 \(CanLII\)](#); *R v Ogertschnig*, [2008 ABPC 293 \(CanLII\)](#)).

It is also a misconception that the process is "quick and causes minimal delays for sober drivers" (MADD). Section 320.15(1) of Bill C-46 makes it an offence to fail or refuse to comply with a mandatory screening demand. While breath testing is cast as being easy, in fact many people require a few attempts to provide an adequate sample. Many people are charged under the current s. 254(5) (failing or refusing to comply with a demand), and many are found not guilty. Therefore, it is inevitable that some people, who genuinely attempt to provide a sample demanded of them and are factually innocent, will be charged with a criminal offence. With the new legislation, this could happen without the police having any reason to believe the person had consumed alcohol.

Bill C-64 does away with the 'case-specific inquiry' proposed by *Orbanski* and *Elias*. Charron J. was careful to hold that the scope of authorized police action would only include what is reasonably necessary to achieve the purpose of screening drivers for impaired driving – police can employ more intrusive investigative techniques with greater suspicion. Mandatory screening is limited by only the most basic and obvious police realities (the police officer must be in possession of a screening device, and acting with lawful authority). An unchecked police power cannot be found to minimally impair *Charter* rights.

In *Schwab*, where police subjected an individual to a pat-down search prior to providing screening samples, Rosborough J. queried “whether the court in *Thomsen* would have decided the issue before it in the same manner if it had known that the [alcohol screening] protocol was not simply the quick and non-intrusive blowing of breath into a device at roadside” (at para 61). If the Court in *Thomsen* had known that the alcohol screening protocol would extend to even those drivers that police do not suspect to have been drinking, would the Court have found the currently proposed screening regime constitutional? In this way, Bill C-46 contradicts *Thomsen*, and the prevailing jurisprudence on alcohol screening’s constitutionality.

Mandatory alcohol screening may indeed deter impaired driving. But we must ask how far are we willing to undermine *Charter* values to achieve this end? In the case of mandatory screening, the ends do not justify the means. But perhaps this legislation is nothing but smoke-and-mirrors, an attempt by the Liberals to appeal to tough-on-crime voters while lifting a prohibition against marihuana that has been in place for nearly a century.

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