Why Mandatory Roadside Breath Screening?

Bill C-46, which was introduced on April 13th of this year, addresses many of the evidentiary, procedural and technical concerns with the existing impaired driving law, creates new drug-impaired driving offences and will simplify, clarify and rationalize this complex area of the criminal law. From a traffic safety perspective, the most important change is the enactment of mandatory roadside breath screening, referred to in the Bill as "mandatory alcohol screening" (MAS).[1] However, defence lawyers and others have publicly claimed that the current impaired driving laws are working well and that MAS is unnecessary.

It is difficult to believe that anyone can credibly claim that the law is working well, when impairment-related traffic crashes kill approximately 1,000 Canadians a year and injure almost another 60,000, a disproportionate number of whom are teenagers and young adults. Traditionally, these crashes garnered little lasting public, media or political response other than the perennial demands for "tougher" laws. The quest for tough laws overshadowed calls for effective laws that would actually deter impaired driving and reduce crashes, deaths and injuries. Ironically, in the end, the federal law was neither tough nor effective, in the sense that millions of Canadians continued to drink to excess and drive with relatively little fear of detection, charge or conviction.

Consequently, Canada has long had one of the poorest impaired driving records among comparable countries. For example, the U.S. Centers for Disease Control and Prevention reported that Canada had the highest percentage of alcohol involvement in crash deaths among 20 high-income countries in 2013. Canada also had the second highest rate of alcohol-related crash deaths per 100,000, despite having one of the lowest rates of alcohol consumption. Put simply, Canadians drink considerably less than residents of many of these other countries and yet are much more likely to die in an alcohol-related crash. Except for the U.S., the laws in these countries do a far better job of separating drinking from driving. Not surprisingly, almost all of these countries have comprehensive MAS programs. Indeed, according to the 2015 World Health Organization Global Status Report on Road Safety, 121 out of 180 countries had MAS programs of some kind. Canada is not only out of step with comparable countries, but apparently with most of the rest of the world.

It has been asserted that MAS would open the door to discrimination and the targeting of visible minorities. In fact, exactly the opposite is the case. Millions of drivers are lawfully stopped each year in Canada at sobriety checkpoints and in the course of routine police patrol activities. Currently, the

[1] While we have used the statutory term "mandatory alcohol screening" (MAS) for ease of reference, other terms have been used in the research literature and in the 121 countries that have enacted these programs. The term "random breath testing" (RBT) appears to have been first used by the Australian traffic safety researchers, who remain the leading authorities in the field. In contrast, New Zealand uses the term "compulsory breath testing" (CBT), and Ireland uses the term "mandatory alcohol testing" (MAT) to describe their programs.

processing of these drivers is based on the officer's subjective assessment using only his or her own unaided senses. In contrast, MAS best practice mandates that all approaching vehicles are waved in unless a traffic back-up has developed and that all stopped drivers are tested. Thus, MAS operates in the same way as mandatory screening at airports, courtrooms and many other government buildings.

Moreover, numerous studies indicate that the police detect only a very small fraction of drinking drivers when relying on their own unaided senses, as is currently the case in Canada. As Professor Ross Homel, one of the world's leading experts on impaired driving enforcement, stated: "any method of enforcement that relies on subjective judgments of impairment…is unlikely to work over the long term simply because the perceived probability of apprehension cannot be maintained at a high level."

The enactment of MAS would change only one aspect of Canada's impaired driving enforcement process – namely, the basis for demanding a breath sample on an "approved screening device" (ASD). Canadian police already have authority to stop drivers at random to inspect their ownership, licence and insurance documents, and to question them about their vehicle, driving and sobriety. The results of an ASD test based on MAS would not be admissible in court, but rather, would be used solely to screen drivers to determine if further testing is justified. Drivers who pass the ASD test would be free to go. Drivers who fail the ASD test (typically set at a blood-alcohol concentration of 0.10%) would be required to submit to further testing on an "approved instrument" and would be afforded the right to legal counsel and all the procedural and evidentiary safeguards that such testing entails.

Research over the past 45 years in numerous countries has clearly established that well-publicized comprehensive MAS programs generate dramatic and sustained reductions in impaired driving and crash deaths. For example, personal injury crashes involving a drunk driver decreased 56% in Sweden following the introduction of MAS in 1970. MAS was largely credited with reducing the percentage of Dutch drivers with blood-alcohol concentrations over 0.05% from 15% in 1970 to 4.5% in 2000. A 2003 European Transport Safety Council study concluded that increasing MAS levels in the entire EU to 1 test per 16 inhabitants would save between 2,000 and 2,500 lives a year. When Switzerland enacted MAS in 2005, the percentage of drivers testing positive for alcohol fell from about 25% to 7.6%, and alcohol-related crash deaths dropped by approximately 25%.

A 2013 study concluded that MAS prevented an estimated 5,309 crash deaths in four Australian states over a 27-year period and was particularly effective in reducing crash deaths among 17-30 year olds. A detailed 2004 study estimated that New Zealand's MAS program resulted in a 54.1% decrease in total serious and fatal nighttime crashes and saved society more than $1 billion in 1997. Ireland's MAS legislation came into force in July 2006. By the end of 2015, total traffic deaths had fallen 54.5% and serious injuries had decreased 59.8%. Rather than overburdening criminal justice resources, MAS dramatically reduced impaired driving charges, which fell from approximately 18,650 to 6,525.

As with many legal changes, MAS will be challenged under the *Charter*. It is important to put MAS in the context of other accepted screening procedures. Millions of Canadians are routinely subject

to mandatory screening at Canadian airports, borders, courts, and other government facilities. In 2015, an estimated 131 million passengers "enplaned and deplaned" at Canadian airports, where it is not uncommon for them to: have to take off their shoes, belt and jewellery; have their carry-on belongings swabbed for explosive residue; be subject to a full body scan; empty their pockets into a tray; and/or submit to a thorough pat-down search in public. Nor is it uncommon to stand in line for 10 or 15 minutes waiting to be subject to these screening and search procedures. The roughly 91 million returning Canadians and international visitors crossing into the country each year may be subject to similar screening and search procedures.

The Canadian courts have never held these screening procedures or those imposed on anyone entering their courtrooms to violate the *Charter*. In upholding mandatory screening of courtroom entrants, the Ontario Court of Appeal stated: "… experience both here and in other jurisdictions has shown that weapons are being brought into the courthouses and it is desirable that they be detected and prohibited. The current system makes for a safer and more reassuring environment. The means chosen are non-intrusive and bear no stigma. A requirement for prior authorization based on reasonable and probable grounds would not be feasible. The law is neither vague nor over-reaching. It is constitutional."

The Ontario Court of Appeal failed to cite any statistics, studies or evidence to justify searching all courtroom entrants when acting to protect its own safety. The Court's arguments can be made with far greater force in regard to MAS. Driving is a privilege, not a right. The state has a legitimate and very substantial interest in traffic safety, and the risks posed by impaired drivers are several hundred times greater and far better documented than the risks posed by potentially violent courtroom entrants. The testing of drivers is minimally intrusive, entails no stigma and takes an average of two minutes while the driver remains seated in his or her car. Unlike the results of a courtroom search, the results of MAS are not admissible in court. The current requirement for individualized suspicion to screen drivers has significantly undermined the effectiveness of the federal law, in that it has not deterred millions of Canadians from drinking to excess and driving, nor prevented impairment-related crashes from remaining the country's largest single criminal cause of death.

Put bluntly, far more Canadians are killed in alcohol-related crashes every year than by terrorists on airplanes, travellers at our borders or courtroom entrants. MAS operates in the same way and serves the same protective purposes as airport, border and courthouse screening. MAS is no more intrusive, inconvenient or stigmatizing. Like those subject to these other screening activities, it is well established that drivers are subject to a diminished expectation of privacy. Driving is a highly-regulated licensed activity, occurring on public roads that entails potentially grave risks. Given that the courts have upheld the constitutionality of airport, border and courthouse screening, there is no principled basis for reaching the opposite conclusion regarding MAS. It is reassuring that Peter Hogg, Professor Emeritus at Osgoode Hall Law School and Canada's leading constitutional law scholar, shares our view.

We acknowledge that MAS is not a panacea, particularly if implemented in a half-hearted manner.

It will require more drivers to be stopped and far more drivers to be subject to breath screening. It is well established that the deterrent impact, and thus the traffic safety benefit, of MAS increases with the number of drivers tested. Nevertheless, decades of experience in numerous countries indicates that implementing well-publicized comprehensive MAS programs in Canada would save hundreds of lives, prevent thousands of injuries, and reduce the social costs of impaired driving by billions of dollars each year. Rather than overburdening the police, prosecutors and the courts, MAS has been shown to reduce impaired driving charges and prosecutions. The benefits of MAS will accrue to all road users, with the greatest savings of lives occurring among teenagers and young adults – the segment of the population most at risk of alcohol-related crash death.

The Federal Government is to be congratulated on introducing this critically important and overdue traffic safety measure.

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