

Recent media articles have claimed that Bill C-46 now permits the police to confront individuals in their homes or at bars and demand that they submit to mandatory alcohol screening. The articles also claim that the police can make these demands without having any suspicion or grounds to believe that the individual had been drinking.

These stories, which are based almost exclusively on interviews with criminal defence counsel, conflate two distinct provisions, namely:

- Bill C-46's new mandatory roadside breath screening provision which does not require individualized suspicion of drinking and driving; and
- the longstanding power of the police to demand that an individual who they have reasonable grounds to believe has committed an impaired driving offence within the last three hours submit to evidentiary breath testing.

Mandatory Roadside Breath Screening:

Bill C-46 authorizes the police to demand that a person who is driving submit to mandatory roadside breath screening, but only if:

- the police have lawfully stopped the driver as authorized by federal, provincial or common law;
- the demand for the breath sample is made immediately on stopping the driver;
- the officer has an approved screening device in his or her possession.

This roadside alcohol screening provision only applies to **drivers**. Mandatory roadside breath screening operates in the same way and serves the same deterrent function as airport, border, courtroom, and other mandatory screening programs. Moreover, four decades of international research indicates that mandatory breath screening is the **single, most effective** means of reducing impaired driving and related crashes, injuries and deaths. This provision finally brings Canadian impaired driving law in line with that of the great majority of comparable countries, many of which enacted comprehensive mandatory breath screening legislation 30 or 40 years ago.

Evidentiary Breath Testing:

The Canadian *Criminal Code* was amended in 1969, authorizing the police to demand that individuals submit to evidentiary breath testing in **specified circumstances**. The police could invoke this power whether the individual was driving or had left the scene and was found at home

shortly thereafter. Thus, contrary to what the newspaper articles suggest, the police have long had the power to come to the residence of a suspected impaired driver and demand that he or she accompany them and submit to evidentiary breath testing. However, the police **can only make this demand if:**

- they have reasonable grounds to believe that an individual committed an impaired driving offence within the last three hours;
- they inform the individual of his or her right to consult with a lawyer and give him or her an opportunity to do so; and
- the testing is conducted by a person (“qualified technician”) who has been designated by the federal Attorney General as being qualified to conduct evidentiary breath tests on an “approved instrument.”

Moreover, the test results are not admissible in evidence unless: the machine was properly maintained, calibrated and checked; the two evidentiary breath tests were conducted within the required timeframe; and the *Criminal Code’s* detailed procedures for evidentiary breath testing were followed.

The police are very unlikely to approach individuals at home unless they caused a crash and fled the scene or were described by reliable witnesses as being drunk while driving. There is nothing unique about the police going to a suspect’s home in the course of conducting an impaired driving or other criminal investigation. However, even in these circumstances, the individual can only be compelled to submit to evidentiary breath testing, if the police had reasonable grounds to believe that he or she had committed an impaired driving offence within the preceding three hours.

Some newspaper articles have also suggested that Bill C-46 makes individuals who drive home completely sober and then drink vulnerable to being convicted of impaired driving. Again, the articles are conflating two distinct provisions of the *Criminal Code*.

Bill C-46 makes it an offence, subject to a **major exception**, to have a blood-alcohol concentration (BAC) of .08% or more within two hours of having driven (the two-hour rule). However, the Bill **specifically** states that **no offence is committed if:** the alcohol was consumed after driving; the individual had no reason to expect that he or she would be required to submit to a breath or blood test; and the individual’s evidentiary BAC is consistent with being below .08% when driving.

This admittedly complex provision was enacted to address two questionable defences (the bolus drinking and intervening drink defences) that impaired drivers have commonly used to evade criminal conviction despite having a BAC well above the *Criminal Code* limit.

- **The Bolus Drinking Defence.** This defence is typically based on the accused unsubstantiated claim that they drank a large quantity of alcohol just before driving and that the police stopped them very shortly thereafter. The accused allege that this recently consumed alcohol had not entered their blood stream when they were stopped by the police. Thus, they claim that their BAC was below the legal limit when driving and only rose above the limit during the 1.5 to 2-hour interval from the time they stopped driving until they took the evidentiary breath tests.

- **The Intervening Drink Defence.** This defence is based on the claim that the accused consumed alcohol after driving but before submitting to evidentiary breath testing. As in the case of the bolus drinking defence, the accused alleges that their BAC was below the legal limit while driving. In some intervening drink cases, the accused consumed or claimed to have consumed alcohol that they had with them at the scene of the crash before the police arrived. In other cases, the accused fled the scene, went home and had several drinks or claimed to have done so. In both scenarios, the intervening drink defence is used to claim that the accused was sober at the time of the crash, but drank afterwards to “calm his or her nerves.”

The two-hour rule was enacted to limit the continued misuse of these two defences. Contrary to what the newspaper articles have stated, it **does not** give the police any additional powers to demand breath testing. As indicated above, the police **cannot require** an individual who is sitting at home to submit to mandatory breath screening. However, as indicated the police can go to an individual’s residence in the course of investigating an impaired driving or other criminal offence. If, on completing their investigation, the police conclude that there are reasonable grounds to believe that the individual committed an impaired driving offence within the preceding three hours, they may demand that the individual accompany them and submit to evidentiary breath testing. The two-hour rule in Bill C-46 does not give the police any new authority or power in this respect.

Conclusion:

It is extremely disappointing to see such legally inaccurate and sensationalized stories about Bill C-46. An accurate summary of the Bill and the rationale for the specific provisions is readily available on federal government and other websites. In many cases, it does not appear as if these sources were consulted or that other efforts were made to ascertain the merits of the defence counsels’ claims. Unfortunately, the public is left with a very misleading impression of this critically important traffic safety legislation.