

"Playing breathalyser roulette": Taking a breath sample without reasonable suspicion and Charter implications

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ABSTRACT Various organizations and governments throughout Canada have attempted to reduce impaired driving through public awareness campaigns as well as governmental policy. In September 2018 the Government of Canada amended the Criminal Code of Canada [Code] using Bill C-46, increasing the powers of peace officers. Code Section 320.27(2) now allows peace officers to request a breath sample from any lawfully stopped driver without needing reasonable suspicion of impairment. The legislation is aimed at preventing drivers from playing "breathalyser roulette" (Solomon & Chamberlain, 2018, p. 5) and the perception that they can conceal their drinking successfully and thus will be unlikely to be required by a peace officer to take a breathalyser test to assess sobriety. Aspects of the legislation however, may be incompatible with the Canadian Charter of Rights and Freedoms [Charter]. This paper analyses whether or not Code Section 320.27(2) is compatible with Section 8 of the Charter that protects Canadians against unreasonable search and seizure. As a future legal challenge is highly possible, this analysis was conducted to evaluate if the legislation is likely to be upheld by the Supreme Court of Canada (SCC). It was determined after legal analysis that although Code Section 320.27(2) is likely not compatible with the Charter as it fails to pass the reasonableness standard as found in *R v Bernshaw* (1995), it will probably be upheld as a reasonable limit under Section 1 of the Charter after *Oakes Test* analysis, a legal test to evaluate whether legislation is a reasonable limit or unconstitutional. The legislation is as minimally impairing on Charter rights as possible and helps to achieve a pressing and substantial legislative objective. *Oakes Test* analysis however, would be impacted if the Government fails show compelling evidence in justifying why the infringements on Charter rights is necessary for public safety. This legislation, upheld as a reasonable limit, will allow peace officers to request breathalyser samples in more cases, which will hopefully further deter impaired driving.

INTRODUCTION

There has been much debate in the media regarding Canada's amended impaired driving legislation implemented in September 2018 after Bill C-46 was passed on June 21, 2018 (CBC News, 2018; Platt, 2020; Spratt, 2018). Bill C-46 amended many sections of the Criminal Code of Canada [Code] that involved impaired driving and the obtaining of breath or saliva samples in order to reduce and catch impaired drivers (Act to Amend Criminal Code, 2018). Lawyers argue that the new legislation is "invasive and infringes on citizen's rights" (CBC News, 2018a) whereas those whose aim is to reduce impaired driving, such as Mothers Against Drunk Driving (MADD), believe the new legislation will help save lives (CBC News, 2018a; CBC News, 2018b).

Not without controversy, Justice Minister Jody Wilson-Raybould stated in December 2018 that she has "every expectation" the legislation will be challenged in the Canadian court system (Spratt, 2018). This paper thus analyses the amendment to Code Section 320.27(2). The amendment allows peace officers to demand breath samples from motor vehicle operators when they are lawfully stopped, without needing "reasonable suspicion" of impairment (Act to Amend Criminal Code, 2018). As it is no longer necessary for a peace officer to justify why a vehicle search and breathalyser test occurred, it is important to discern whether this amendment is compatible with the Canadian Charter of Rights and Freedoms [Charter].

Some argue that it is unlikely the legislation will be struck down by the Supreme Court of Canada (SCC) as the government objective to stop impaired driving is pressing and substantial (Solomon & Chamberlain, 2018). The targeted societal objective is that many people still drive under the influence causing harm to Canadian society overall, especially as impaired driving remains one of the leading criminal causes of death in Canada (Perrault, 2016; Solomon &

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Chamberlain, 2018). The Canadian Medical Association Journal (Wanniarachige, 2015) noted that roadside testing is likely the best deterrent for driving while impaired by drugs or alcohol. The logical reasoning is that increasing the ability of peace officers to use the breathalyser to test for driver sobriety will increase the deterrent effect, dissuading drivers from “playing breathalyser roulette”. Deterrence then leads to reductions in impairment related accidents and improves road safety.

Solomon and Chamberlain (2018) however, Professors of Law at Western University, mainly focus on whether or not a substantial and pressing objective exists (part one of the Oakes Test). They complete a basic legal analysis comparing use of the breathalyser to other cases where mandatory screening processes were questioned rather than substantive legal analysis on other aspects related to reasonableness and the Oakes Test. They fail to include other nuances of search and seizure specifically the legal principle of reasonableness which is important in determining whether use of the breathalyser without the need for reasonable suspicion is still compliant with the Charter.

The Oakes test, established in *R v Oakes* (1986), is a two part legal test to determine whether or not infringements of Charter rights are reasonable and justified in free and democratic societies. The test is used to analyse whether legislation can be deemed a reasonable and justifiable limit using the Charter s. 1 reasonable limits (Johnston, 2009). S. 1 empowers the government to infringe on Charter rights in a variety of circumstances (Johnston, 2009).

Peter Hogg in the 62nd meeting of the House of Commons Standing Committee on September 18, 2017 discusses at 17:04 that although concerns exist regarding the proposed legislation at the time, the legislation would likely be upheld as a reasonable limit (House of Commons Standing Committee [HCSC], 2017). At the 18:00 mark however, Hogg stated that decisions by the SCC can be unpredictable and we will never truly know the result until the SCC officially rules on a challenge (HCSC, 2017). A more detailed legal analysis is thus necessary to add to the scholarly debate and predict with greater certainty whether the new impaired driving legislation will be upheld when challenged in the SCC.

Although a Charter challenge is also possible using Section 9 (arbitrary detention) or Section 10b (counsel upon arrest), this paper will analyse Section 8 and the right to be free from unreasonable search and seizure. According to Solomon and Chamberlain (2019), this section will likely face “the most rigorous challenge” in the SCC (p. 17). This paper sets out to answer the following research question: Would Code Section 320.27(2), be upheld as a reasonable limit using Charter s. 1 by the SCC? A preliminary answer is important to determine what potential legal arguments can be made whether a challenge using Section 8 could be successful.

In answering this question, Code section 320.27(2) will be analysed to evaluate whether or not a Section 8 violation occurs. If a violation is found to occur, the Oakes Test will be conducted to determine whether or not the legislation can be upheld as a reasonable limit using Charter s. 1. It will be demonstrated that the amendment to Code Section 320.27(2) does indeed violate Section 8 as it will likely fail the SCC test for reasonableness using precedent from *R v Bernshaw* (1995), though it will likely be upheld as a reasonable limit using s.1. This however, is dependent on the Canadian government providing sufficient evidence to justify why the legisla-

tion is necessary to improve public safety.

METHODS

A keyword advanced search was conducted on the Lexum SCC database using the words “driving”, “Oakes”, and “search and seizure” to select the main legal cases. Further, a date range was set to evaluate all decisions from from January 1, 1987 (after Oakes Test implemented) to January 1, 2019. Selection was based on the search list and whether it was applicable to the analysis of Code Section 320.27(2). *Goodwin v. British Columbia* (2015), the main case, along with *R v Bernshaw* (1995), *R v Hufsky* (1988), and *R v Ladouceur* (1990) were selected. *R v Dymment* (1988), *R v Chehil* (2013), and *Hunter et al. v Southam Inc* (1984) were also selected using a snowball sampling method as they were referenced in *Goodwin v. British Columbia* (2015), and *R v Simmons* (1988) was cited as precedent in the above mentioned *R v Bernshaw* (1995). These cases helped to clarify important legal aspects. The selected SCC cases were chosen in adherence to Canadian common law principles where previous court decisions set the framework for judgments on similar issues that will be encountered in the future. Only SCC cases were selected at sets the precedent for all lower Canadian courts.

R v Hufsky (1988), and *R v Ladouceur* (1990) specify that stopping vehicles at police checkpoints and requesting basic insurance documentation does not constitute a search under s. 8 because it is not an intrusion on an individual’s reasonable expectation of privacy. The search and seizure occurs however, once a breath sample is requested. *R v Bernshaw* (1995) outlines what is required for a search to be compliant with the Charter and specifies reasonable and probable grounds for a search and seizure. *R v Simmons* (1988), cited within *R v Bernshaw* (1995), defines when the reasonable expectation of privacy is expected and that a breathalyser test would not be considered unreasonable. *R v Dymment* (1988) outlines when and how a search will be considered reasonable and elaborates on *Hunter et al. v Southam Inc* (1984) which established that a balance must be maintained between searching and individual privacy. Legal reasoning from *R v Chehil* (2013) and *Goodwin v. British Columbia* (2015) are helpful in determining whether the search or seizure was reasonable.

RESULTS & DISCUSSION

Analysis of Section 8

Section 8 provides Canadians with “the right to be secure against unreasonable search or seizure” (Charter, 1982). This right is engaged when the state conducts a search or seizure that interferes with an individual’s reasonable expectation of privacy. First, it will need to be determined if the search and seizure is authorized by law and secondly if the law is reasonable and the search is carried out in a reasonable manner.

As noted by Monahan et al., (2017), the federal government has the “exclusive legislative authority” (p. 348) over Canadian criminal law stemming from Section 91(27) of the Constitution Act of 1867 (formerly known as the British North America Act). This means that the first step of Section 8 analysis is satisfied. The second stage is determining reasonableness. As set out in *Goodwin v. British Columbia* (superintendent of motor vehicles), 2015, determining reasonableness requires steps. It must be shown jointly that the law achieves an important public objective, the process is subject to

state review in order to guard against abuse of power, and that the intrusion goes no further than necessary (*Goodwin v. British Columbia* (superintendent of motor vehicles), 2015, para. 96).

Jurisprudence to determine reasonableness

Hunter et al. v Southam Inc (1984, para. 56) established that the government has to prove that the legislation is reasonable. First, the majority in *Goodwin v British Columbia* (2015) established that keeping impaired drivers off Canadian roads is an important legislative objective to ensure public safety. The first three lines of the Bill C-46 preamble demonstrate that the legislation is directly aimed at deterring impaired driving behaviour (Act to Amend Criminal Code, 2018) which satisfies the first step of the reasonableness test.

The majority in *R v Chehil* (2013, para. 3) noted that legislative balance for Section 8 is maintained by ensuring the availability of judicial oversight to correct for potential mistakes made by law enforcement. Canada currently has a sufficient and transparent review process as those convicted can apply online to the minister of justice to review miscarriages of justice or wrongful criminal convictions (Department of Justice, 2016). Further, as of 2018, Canadians convicted of impaired driving offences do not have mandatory minimum prison terms unless they are repeat offenders (Department of Justice, 2018). If we look at additional case law from *Lemieux v British Columbia* (Superintendent of Motor Vehicles), (2019), we can see that the legislation was amended by the British Columbia legislature so as to place the burden of proof on the driver to prove they were not impaired. This means that the driver can now challenge prohibitions stemming from roadside breathalyser tests. Further, placing the burden of proof on drivers was upheld by the BC Court of Appeals and an appeal was denied leave to the SCC in April 2020 (*Larry Edward Lemieux, et al. v Superintendent of Motor Vehicles, et al.*, 2020). Although more detailed analysis could be conducted, it seems that the judicial review processes are reasonable.

Justice Karakatsanis, writing for the majority in *Goodwin v British Columbia* (2015), cited precedent from *R v Dymont* (1988) noting that the breathalyser test goes much further than simple document search as the state “invades an area of personal privacy essential to the maintenance of human dignity” (*Goodwin v British Columbia*, 2015, para. 65). The breathalyser test however, is far less intrusive than blood or DNA samples because it has a significantly lesser impact on bodily integrity and privacy interests (*Goodwin v British Columbia*, 2015, para. 65). Reasoning from *R v Simmons* (1988) adds that the reasonable expectation of privacy is lower when driving meaning that the breathalyser test can be seen as reasonable. As noted in *R v Bernshaw* (1995), the breathalyser test does not violate an individual’s reasonable expectation of privacy, because it is lower when driving due to the necessary regulation (para. 100). The case of *R v Bernshaw* (1995) highlights that reasonable grounds are still necessary to use the breathalyser test at a roadside stop.

In *R v Bernshaw* (1995, para. 51) however, Justice La Forest, writing for the majority, noted that reasonable and probable grounds to search “is not only a statutory but a constitutional requirement” for a lawful search and seizure to be permitted under Section 8. As peace officers no longer need reasonable suspicion under the amended legislation, it is probable that Code Section 320.27(2) will be found to violate Charter s. 8 in the SCC. Oakes Test analysis will therefore be required to determine if the legislation can be upheld

using the Charter s. 1 reasonable limits clause. The accuracy of the breathalyser test itself may also impact the SCC decision.

Although the minimal intrusiveness helps the reasonableness, Justice Karakatsanis cited legal precedent from *R v Chehil* (2013) noting that “the reliability of the search or seizure mechanism is directly relevant to the reasonableness...” (*Goodwin v British Columbia*, 2015, para. 67). Therefore, a search method which catches too many innocents cannot be reasonable (*R v Chehil*, 2013). Researchers at the Croatian Institute for Medical Research and Occupational Health ran a controlled experiment to test the accuracy of breathalysers used by roadside screening officers. They found that roadside screening devices are highly reliable if police officers follow the manufacturer’s instructions when measuring (Juric et al., 2018). Breathalyser accuracy however, is heavily scrutinized by lawyers (Weisgarber, 2019) which also impacts reasonableness. Information regarding the accuracy of the breathalyser test is therefore necessary in order to justify the reasonableness of the breathalyser testing procedures and may also be important when considering proportionality aspects of the Oakes Test.

Applying the Oakes Test

The Oakes Test, established in *R v Oakes* (1986), is the legal test to determine whether or not infringements of Charter rights are reasonable and justified in free and democratic societies. Using this two-part test, the government has a responsibility of proving in court that the legislation is aimed towards a pressing government objective. Secondly the government must show, that the legislation is proportional to the objective showing a rational connection, the infringements of rights are minimized, and that harms are outweighed by the benefits (Johnston, 2009).

In *Goodwin v British Columbia* (2015, para. 25), all SCC justices agreed with the government that removing impaired drivers from the highway was a pressing and substantial objective. This is consistent with *R v Hufsky* (1988), and *R v Ladouceur* (1990). Solomon and Chamberlain (2018) note that impaired driving still is a large societal issue in Canada and the Canadian Centre on Substance Use and Addiction [CCSA] (2019) adds that impaired driving remains “one of the most prominent factors contributing to serious road crashes in Canada” (p. 1).

During this analysis stage, research by Trackman et al. (1998) found that the SCC defers to the government objective in over 90 percent of Oakes Test Cases. Therefore, as long as the government uses appropriate social science statistics, it is highly probable they will likely be able to justify that a pressing and substantial objective still exists. After passing the first stage, we then move on to analysis regarding proportionality.

Proportionality analysis involves asking and answering the following three questions (*Goodwin v British Columbia*, 2015, para. 79):

1. Does a rational connection exist between the legislation and its aims?
2. Is the legislation as minimally impairing as possible of the right or freedom in question?
3. Do the societal benefits of the legislation outweigh the negative effects of an infringement on the Charter?

Solomon and Chamberlain (2018, p. 5) note the difficulty of perceiving driver impairment as the police officers are solely dependent on “behavioural and sensory observations” and that the “signs

may be difficult to detect in the brief time that motorists are stopped at checkpoints". Further, they cite research by Homel (1990), who notes that "experienced drinkers may be able to conceal signs of intoxication" and that many drivers "play breathalyser roulette" determining that the odds of getting caught whilst impaired are slight, meaning the rewards of driving impaired are greater than its risks (p. 5). Brudner (1998) adds that the SCC has loosened requirements placed on the government when proving a rational connection exists. Currently, as long as the presumed connection is not unreasonable, it can be deemed valid by the courts. Hence, it is likely a rational connection between the amendment and the legislative objective exists.

Although infringing on an individual's reasonable expectation of privacy, a breathalyser test was deemed by the SCC to be minimally intrusive compared to other search methods such as taking blood or saliva samples (*Goodwin v British Columbia*, 2015, para. 48). It will be important for the Canadian Government to prove that the method is accurate however, so that the intrusion on individual privacy is as minimal as possible. A failure by the government to prove that removing reasonable suspicion infringes on the rights of individuals could lead to Code section 320.27(2) being deemed unconstitutional.

After evaluating research by Wanniarachige, 2015 and Solomon and Chamberlain (2018) and statistics mentioned by Perrault (2016), it seems that impaired driving remains a large societal issue. As impaired driving remains a causal factor in many vehicle crashes, (CCSA, 2019), the Government of Canada will likely be successful in showing that the societal benefits outweigh the infringements on Section 8. Although a failure to demonstrate acceptable evidence would mean the legislation is deemed to violate the Charter, Johnson (2009) notes that the courts sometimes accept evidence that is tenuous. This means that even if the government case may be lacking some support, they could still succeed in convincing the SCC to uphold the provisions as a reasonable limit on S. 8.

Limitations

First, the conclusions depend on the Canadian Government showing ample, reliable, and convincing evidence to prove their case in court. If the government fails to show that the breathalyser test is accurate it would likely be determined that section 320.27(2) of the Code violates Section 8 of the Charter. It is also possible that new SCC justices will have different interpretations and create new precedents if the older ones are deemed to be outdated (Knopff et al., (2017). Principles of SCC legal interpretation can change over time as newer judges create new precedents to make up for mistakes from previous judges or when past decisions no longer align with Canadian values (Knoff et al., 2017). Second, this paper only evaluates the changes to alcohol screening procedures under Code s. 320.27(2) and analyzing other laws regarding driving under the influence warrants separate legal analysis. This is because there are potential differences that exist between the accuracy of testing devices for other substances, specifically tetrahydrocannabinol (THC) (CBC Radio, 2019).

CONCLUSIONS

It can be determined that if the Canadian government uses reliable, plentiful, and accurate social science evidence, it is likely the SCC will uphold the amendments to Code Section 320.27(2) after Oakes Test analysis. Compatibility with the Charter would mean the legis-

lation can be used to try to reduce instances of drivers playing "breathalyser roulette". Although continued debate will occur amongst lawmakers and lawyers, it is ultimately up to the courts to decide whether changes to dangerous driving legislation are compliant with the Charter. Since 2018 when this paper was initially written, the constitutionality of S. 320.27(2) was challenged in *R v Morrison* (2020) (Saskatchewan Provincial Court). Justice Baniak found that even though a s. 8 violation occurs, the infringements are minimal and justified under s. 1 (paras. 169, 170-175). Although we still do not know if this case will be appealed and granted leave by the SCC (Young, 2020), this provides additional evidence to support the findings and conclusions of this paper that the legislation will be upheld as a reasonable limit on individual Charter rights.

Although the final decision will still be unknown until the legislation goes further throughout the court system and potentially to the SCC, lawyers will continue to argue that the legislation violates the Charter. Additional legal analysis however, remains necessary to evaluate whether Code section 320.27(2) could survive a Charter challenge under other sections including s. 9 or s. 10b. Further, it will be important to also evaluate whether other amendments made to the impaired driving legislation in Bill C-46 could also withstand Charter challenges.

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