

Have Our New Impaired Driving Laws Gone Too Far

In this week's edition of the Pique is a story about the significant increase in impaired driving incidents. Staff Sgt. Paul Hayes is quoted as saying this is likely due to increased enforcement efforts, as opposed to an actual increase in people committing this offence. With this statement, it should be noted that there has been a recent revamping of our criminal driving laws.

Impaired driving laws in Canada are something of a canary-in-the-coal-mine when it comes to testing the constitutional limits of our criminal laws; due to the many exceptions to constitutional principles that protect us from abuse of police and government power. For example, police may make random road stops to check for sobriety contrary to our right against arbitrary detention; or force us to provide breath and blood samples contrary to our right not to be forced to provide evidence against ourselves, and the right to be free of unreasonable search and seizure.

Before a breathalyser machine was invented, it was difficult to successfully prosecute an impaired driver unless they were clearly intoxicated, showing obvious symptoms of intoxication. To combat this, breathalyzer machines were invented that could definitively determine whether someone was impaired. To use them effectively, however, the government had to make it legal to force people to blow, and create a presumption of reliability so that each prosecution was not required to prove the machine was reliable. Before doing so, scientists and parliamentary committees studied these machines to ensure they were accurate and reliable, so long as they were well maintained and properly operated. To make these prosecutions more efficient, Parliament also incorporated several evidentiary shortcuts that would ordinarily not be permitted.

Further, through various constitutional challenges over decades, Parliament has had to revise and add procedural requirements to minimize impact to citizens of the exceptional processes within our impaired driving laws; and to avoid wrongful convictions due to too many presumptions being permitted that could not be refuted by evidence available to the defendant. Despite this, Parliament has continued to add more evidentiary shortcuts to the impaired driving laws, thereby eliminating specific defenses to these charges.

At the same time, as new laws pertaining to driving while impaired by cannabis were introduced, the government brought in sweeping changes to *all* impaired driving laws; including codifying much of what has already been established in caselaw (precedent court decisions). They also include further provisions to make it easier to prosecute and convict impaired drivers.

I do not expect people would argue the goal of these changes is inappropriate. The real concern is whether these changes go too far. Our criminal justice system has always been based on the principle of innocent until proven guilty beyond a reasonable doubt. It is an affront to this fundamental principle that someone should have the burden of proving their innocence. It is also a fundamental right we are not arbitrarily detained nor forced to provide evidence against ourselves.

The most concerning change is that the offence no longer requires proof of being "over .08" *at the time of driving*. Now, the Crown need only prove that, *within two hours of ceasing to operate a vehicle*, a person's blood alcohol concentration (BAC) exceeds .08. Thus, a person

who had not driven for nearly two hours can be arrested and required to go to the police station to provide breath samples if an officer has reasonable and probable grounds to believe they drove while impaired earlier. They can then be charged and convicted if their BAC is greater than .08.

Thus, if the only reason a person “blows over” is that they drank alcohol after ceasing to drive, they can be convicted. It used to be the Crown was required to prove any drinking after driving would not have caused the person to rise from below .08 to above. Now, to defend oneself, a person must provide evidence to establish they: did consume alcohol after driving; did not do so with the expectation they would be required to provide a breath sample; and would have blown under .08 had they been tested at the time of driving.

No doubt, this newly worded offence was drafted this way to prevent people from avoiding a conviction by raising the possibility of drinking after driving. Unfortunately, this puts the onus on the defendant to establish that they did not deliberately drink after driving to avoid a conviction, which seems to be reversing the burden of proof. It also creates a potentially impossible task for a defendant if they are unsure of exactly how much they drank after driving.

Imagine this: You finish work and go for a beer at a pub. You have one beer and drive home. A person sees you exit the pub and drive away and reports your licence plate to police, who take the call but cannot deal with it for an hour, at which time they attend your residence, where you have been home for an hour-and-a-half eating dinner and consuming some wine. The officer asks you if you drove the vehicle home from the pub and you say, “yes”. The officer smells alcohol on your breath and demands that you accompany him/her to the police station where you provide breath samples. If you are not over .08, you have *only* had an embarrassing and upsetting experience. If you are over .08, you will be charged and must provide evidence to refute the presumption your BAC was over .08 at the time you drove, or be convicted. On top of this, you will be required to call expert evidence to address this aspect of the defence, at your cost.

Other significant changes pushing the boundaries of our *Charter* protected rights include that, if an officer has a screening device at hand, they do not require any grounds to test your BAC. Previously police needed some suspicion a driver had alcohol in their body. As well, police can now require individuals to conduct physical coordination tests, *subjectively* evaluated by the officer. If you happen to have balance or coordination problems from some source other than alcohol, you may find yourself at the police station to provide breath samples. There are a number of other presumptions that have been created that make it easier for the Crown to prove its case but may cause a person to be wrongly prosecuted or convicted if they cannot put forward sufficient evidence to rebut the presumption.

Additional important changes include increased penalties based on the level of BAC, longer maximum sentences, and double the former minimum penalty for refusing or failing to providing a breath sample (now \$2,000). There are also new aggravating factors for a judge to consider in increasing the penalty.

Given that penalties for impaired driving have been increased, it should be that much more incumbent on our legislators to ensure the laws they created do not unduly offend our

Constitutional rights. Society has a laudable goal in preventing people from causing unnecessary carnage on our roads, but we must also balance that against giving the state too much power; especially if it comes to arresting us from our own homes. As many of these new provisions will be challenged in their constitutionality, time will tell if our Courts agree with Parliament.