Legislating Under the Influence: Is the Impaired Driving Act Constitutional?

Introduction

As the Trudeau government sought to fulfill its campaign promise of legalizing cannabis with Bill C-45 (The *Cannabis Act*), it also introduced a complementary bill to address impaired driving last May. The *Impaired Driving Act,* or Bill C-46, was introduced by Justice Minister Wilson-Raybould and passed the same week as C-45. The purpose of C-46 is "to simplify the investigation and prosecution of impaired driving offences."[1] However, it is also an effort to "strengthen the legislative penalties for impaired driving," which is one of the most common criminal convictions in the country.[2]

C-46 is the criminal or regulatory component of C-45. It criminalizes driving under the influence of drugs, including cannabis. The law replaces the existing framework for impaired driving and stiffens the penalties for driving under the influence of drugs and alcohol. It has two parts: the first part addresses drug-impaired driving offences and proposes a framework for roadside testing of drivers "based on a reasonable suspicion of impairment." The second part deals with alcohol impaired driving. It makes enforcement more readily available to police officers and penalties for impaired driving are now even steeper[3]

Given the heinous nature of drinking and driving, the bill was expected to receive widespread support and pass without any opposition. However, the bill was characterized as being full of legal 'holes' and errors, and was a source of contention between the House of Commons and the Senate.[4] Multiple lawmakers and legal organizations have expressed their concerns about the constitutionality of the bill and its implications. These include the head of the Legal and Constitutional Affairs Committee (Senator Serge Joyal), the Canadian Bar Association, the Canadian Civil Liberties Association, Criminal Lawyers Association and the Indigenous Bar Association.[5] Michael Spratt, a criminal defence lawyer who testified before the Senate, predicted that "[t]he result of this [Bill C-46] is going to be racial discrimination [via police improperly singling out racialized drivers]; clogged courtrooms; and constitutional challenges for the next number of years[.]"[6] While numerous potential *Charter* violations have been identified, below are some of the concerns most prominently brought up with the legislation: potential violations of section 8, 15 and 10(b) of the *Charter*, along with additional backlog in the courts.

Despite these concerns, the House of Commons rejected the Senate's amendments which had removed the contentious provisions. The bill passed with these provisions in place. While parts of the law do not go into effect until December 2018, it is possible that Canadians will see the law's constitutionality challenged in the courts in the near future.

Infringements on Section 8: Protection against unreasonable search and seizure

Although the *Impaired Driving Act* is a companion piece to the *Cannabis Act*, the most notable and contentious provision in it does not involve cannabis. One key provision (320.37.2) in the *Impaired Driving Act* allows for mandatory alcohol screening, also labeled as random breathalyzer testing. This is where most of the bill's constitutional issues arise. Beginning in December, "[the] police can require a roadside breath test for any driver."[7] This means that police officers would no longer need a reasonable suspicion to pull someone over and demand that they partake in a breath test. Additionally, if a driver refuses to complete a test, they would face a criminal charge "with similar penalties to an impaired driving conviction."[8] This provision was characterized by the government as "the centre piece of this legislation"[9] Despite this, it continues to face criticism over its potential infringement of section 8 of the *Charter*, which is the right to be secure against unreasonable search and seizure.[10] The government has argued that the provision's removal would undermine the law's purpose, and has thus kept it in the legislation.[11]

While officers no longer need a reasonable suspicion to pull a driver over for alcohol impaired driving, they do need one to pull a driver over for drug-impaired driving and ask that they complete a drug test. The inconsistent treatment between drugs and alcohol was a deliberate choice, and the lack of reasonable suspicion required for alcohol-impaired driving is what Senators and legal organizations have taken issue with. Noted constitutional scholar Peter Hogg, however, says that this provision, stipulating no requirement of reasonable suspicion, will survive any constitutional challenge. He believes it would be justified by section 1 of the *Charter* which aims to balance individual rights and freedoms against the interests of the community as a whole.[12]

While Hogg may believe the provision would pass constitutional muster, he appears to be in the minority as there is a mountain of opinions that suggest otherwise. Quite notably, Senator Denise Batters commented that "in my five years on the committee, I have never before heard legislation so roundly denounced as unconstitutional."[13] Other senators supported her opposition to the provision, clarifying that "the experts who testified in committee were almost unanimous in saying that these measures would not pass the constitutional test or the charter test."[14] In the five months of Senate study, the chamber held thirteen meetings and heard from sixty eight expert witnesses, which was emphasized by the Senate in its substantiation of its opinion.[15] Many of the criminal defence lawyers who testified before the Senate's Legal and Constitutional Affairs Committee "expressed grave concerns about the Charter implications" of the random breathalyzer testing provision.[16] "Renowned" Professor Don Stuart, along with Senator Marc Gold, have clarified that the Supreme Court has never justified a section 8 violation under section 1.[17]

A Potential Section 15 Violation: Discriminatory Impact on Immigrants and Visible Minorities

There is no specific provision in Bill C-46 that is linked to a clear violation of section 15 of the *Charter*, which deals with equality rights. However, the impact of the legislation on

permanent residents and foreign nationals residing in Canada is far greater than for Canadian citizens. The legislation involved amendments to the Criminal Code which increased the sentence for impaired driving. Following these amendments, the consequences of an impaired driving conviction are even greater for non-citizens.

Impaired driving can be tried as either a summary or an indictable offence. Under the new legislation, the maximum sentence for a summary conviction was increased from 18 months to two years less a day. In addition, the new maximum sentence for an indictment was increased from five years to ten years. These increases are significant on their own, but an indictable conviction for impaired driving would now be considered a 'serious criminality' under the *Immigration and Refugee Protection Act*.[18] A permanent resident or a foreign national with a serious criminality conviction would become inadmissible to Canada, and face the possibility of forced removal. The "draconian" imbalance between the impact of the law for citizens and immigrants was identified months before the bill was passed. The widespread recognition of this imbalance could suggest an apparent violation of section 15.[19]

Further, some experts including Professor Don Stuart, have raised concerns that Bill C-46 may promote racial profiling, which disproportionately affects visible minorities, including members of Indigenous communities. In his testimony before the Senate, Roberto De Luca stated that "random breath testing is not a justifiable limit of Charter rights and would hurt minorities by enabling racial profiling."[20] Senator Joyal raised similar concerns regarding the law's impact on Indigenous Canadians[21]. This concern was also articulated at the Senate level, in conjunction with concerns over the constitutionality of random alcohol testing. Senator Raymonde Saint-Germain noted:

Eliminating the requirement to have reasonable grounds for suspicion that the driver has consumed alcohol gives the police officer an arbitrary power that runs the risk of increasing racial profiling. A good number of social science studies prove what most people recognize intuitively: drivers belonging to racial minorities are pulled over more often than their fellow citizens.[22]

Section 15 guarantees the equality rights of all Canadians and protects from discrimination "based on race, national or ethnic origin, colour, religion, sex age or mental or physical disability."[23] Race and colour are both protected grounds under the provision, and the practice of (arbitrary) racial profiling by the government could violate this.

Bill C-46 in light of R v Jordan

An additional concern with the *Impaired Driving Act* relates to the possibility of an impaired driving case being thrown out altogether. This is because of the *Jordan* decision in which the Supreme Court of Canada (SCC) established timelines by which a case must be dealt with in the justice system. The *Jordan*verdict addresses and protects Canadians' section 11(b) rights, which guarantees the right to be tried in a reasonable time.[24] If a case is not addressed with the timelines set out by the *Jordan* verdict, it is dismissed. Senator Batters noted that as a result of *Jordan*, serious criminal charges "are being stayed because of

extreme court delays."[25] She also argued that impaired driving cases are "one of the biggest gluts of our criminal court system," further exacerbating the problem which the SCC ruling sought to address. [26] The Canadian Bar Association warned the government that the bill "could compound problems that have resulted from the Supreme Court's landmark Jordan decision and lead to more charges getting dismissed."[27]

Other potential Charter violations

Another notable concern with the *Impaired Driving Act* is its potential infringement of section 10(b) of the *Charter*, which provides the right "to retain and instruct counsel without delay and be informed of that right."[28] Some criminal defence lawyers argue that this right is also invoked, in part because roadside testing is usually immediate. Under the previous legislation, drivers were able to refuse the roadside test without the same severity of penalty. Under the new legislation drivers are unable to delay testing to call their attorney, or refuse testing without arrest.[29] Senator Joyal has supported the contention that random roadside testing could infringe section 10(b) of the Charter.[30]

Conclusion

The *Impaired Driving Act* has received royal assent and parts of the act are currently in effect. The remaining provisions, including mandatory alcohol screening, will come into effect in December, 2018. Although the Justice Minister has expressed confidence in the law's constitutionality, some remain skeptical.

Senator Joyal, chair of the Senate's Legal and Constitutional Affairs Committee, has argued that random breath testing is "totally contrary to the Charter. There is no question about that[.]"[31] Whether or not the provision would be saved by section 1 of the *Charter* remains to be seen. He has suggested that reintegrating the requirement that police officers have a reasonable suspicion "that a driver has alcohol in his or her body before they screen for alcohol" could alleviate the potential violations of sections 8, 9 and 10(b) of the Charter. [32] His comments came months before the bill was passed, yet they were ignored. As it stands, the law has the potential to violate sections 8, 9, 10(b) and 15 of the *Charter.* Given the volume and source of criticisms of the bill, Canadians may see the law's constitutionality up for debate in the courts in the near future.

[1] *Debates of the Senate*, 42nd Parl, 1st Sess, Vol 150 Issue 160 (22 November 2017), at 1500 (Hon. Raymonde Saint-Germain).

[2] Jacqueline Bart and Annsley Kesten, "Canada's new impaired driving laws tougher on immigrants" *The Lawyer's Daily* 19 July 2018, online <https://www.thelawyersdaily.ca/articles/6948/canada-s-new-impaired-driving-laws-tougher-on-immigrants> [Canada's new impaired driving laws tougher on immigrants]

[3] *Debates of the* Senate, 42nd Parl, 1st Sess, Vol 150 Issue 214 (4 June 2018), at 2050 (Hon. Denise Batters).

[4] Cristin Schmitz, "Joyal says impaired driving bill violates Charter, is 'full of holes'; Senators worried Bill C-46 will overburden courts" *The Lawyer's Daily* 07 March 2018, online, https://www.thelawyersdaily.ca/articles/6051/joyal-says-impaired-driving-bill-violates-charter-is-full-of-holes-senators-worried-bill-c-46-will-overburden-courts> [Joyal says impaired driving bill violates Charter]

[5] *Ibid.*

[6] Cristin Schmitz, "Random breath testing coming to Canada Dec. 18; counsel foresee Charter attacks 'very early on'" *The Lawyer's Daily* 21 June 2018, online <https://www.thelawyersdaily.ca/articles/6794/random-breath-testing-coming-to-canada-dec-18-counsel-foresee-charter-attacks-very-early-on-> [Random breath testing coming to Canada Dec. 18]

[7] Brian Platt, "Canada's impaired driving laws just got a huge and controversial overhaul – here's what you should know" *National Post* 21 June 2018, online <http://nationalpost.com/news/politics/canadas-impaired-driving-laws-just-got-a-huge-and-controversial-overhaul-heres-what-you-should-know> [Canada's impaired driving laws just got a huge and controversial overhaul]

[8] *Ibid.*

[9] Brian Platt, "Senators vote to remove random roadside testing from impaired driving bill" *National Post*24 May 2018, online <http://nationalpost.com/news/politics/senators-vote-to-remove-random-roadside-alcohol-testing-from-impaired-driving-bill > Senators vote to remove random roadside alcohol testing from impaired driving bill]

[10] *Canadian Charter of Rights and Freedoms,* s 8, Part I of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11.

[11] Platt, "Senators vote to remove random roadside alcohol testing from impaired driving bill," *supra*note 9.

[12] Schmitz, "Joyal says impaired driving bill violates Charter" *supra* note 4.

[13] *Debates of the* Senate, 42nd Parl, 1st Sess, Vol 150 Issue 214 (4 June 2018), at 2050 (Hon. Denise Batters).

[14] *Ibid* at 2110 (Senator Boisvenu).

[15] *Ibid* at 2050 (Hon. Denise Batters).

[16] *Ibid*.

[17] *Debates of the* Senate, 42nd Parl, 1st Sess, Vol 150 Issue 214 (4 June 2018), at 2050 (Hon. Denise Batters).

[18] Anti Balakrishnan, "Stricter impaired driving laws could impact immigrants, lawyers say" *Law Times* 2 July 2018, online <https://www.lawtimesnews.com/author/anita-balakrishnan/stricter-laws-on-impaired-driving-could-impact-immigrants-lawyers-say-15932/>

[19] *Ibid.*

[20] Duggan, "Bar association warns impaired driving bill will compound court pressures," *supra* note 1.

[21] *Debates of the* Senate, 42nd Parl, 1st Sess, Vol 150 Issue 160 (22 November 2017), at 1510 (Senator Joyal).

[22] *Ibid* at 1500 (Hon. Raymonde Saint-Germain).

[23] *Canadian Charter of Rights and Freedoms,* s 15(1), Part I of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11.

[24] *Canadian Charter of Rights and Freedoms,* s 11(b), Part I of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11.

[25] *Debates of the* Senate, 42nd Parl, 1st Sess, Vol 150 Issue 214 (4 June 2018), at 2050 (Senator Batters)

[26] *Ibid.*

[27] Duggan, "Bar association warns impaired driving bill will compound court pressures," *supra* note 1.

[28] *Canadian Charter of Rights and Freedoms,* s 10(b) Part I of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11.

[29] Schmitz, "Random breath testing coming to Canada Dec. 18" *supra* note 6.

[30] Schmitz, "Joyal says impaired driving bill violates Charter" *supra* note 4.

[31] *Ibid.*

[32] *Ibid.*