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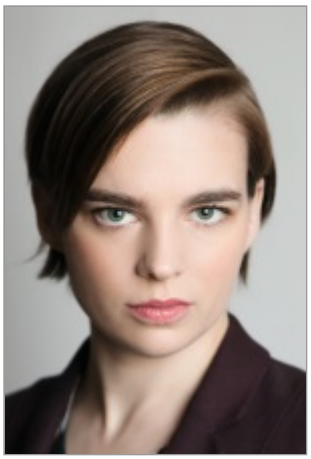
Criminal

Saskatchewan court rules mandatory roadside breath testing constitutional | Kyla Lee

By **Kyla Lee**



Kyla Lee

(August 24, 2020, 1:21 PM EDT) -- The Saskatchewan provincial court won the race to be the first court in Canada to render a decision on the constitutional validity of Bill C-46's implementation of mandatory roadside breath tests.

Justice Morris Baniak considered the issue in the case of *R. v. Morrison* [2020] S.J. No. 298 which involved a man who was stopped randomly for a sobriety check. The police observed no indicia that he had been consuming alcohol, but due to a policy in place for mandatory testing between certain hours of the day. Andrew Morrison was tested, failed and taken back to the detachment where he provided two breath samples in excess of 80 milligrams.

It was on that basis that he was charged.

Morrison challenged the constitutional validity of s. 320.27(2) of the *Criminal Code*, which allowed the police to demand the samples from him.

This controversial provision came into force and effect on Dec. 18, 2018. It permits a police officer, absent any grounds whatsoever, to demand a driver provide a sample of breath into an approved screening device. The results of that test are then used to issue a roadside prohibition or to arrest the driver for further testing on an approved instrument.

When the provision was introduced, many individuals and organizations, myself included, claimed that they were unconstitutional. This is because the law in Canada had already determined that roadside breath testing is a violation of ss. 8, 9 and 10(b) of the Charter. The violation is only saved by s. 1 on the basis of three elements: the use immunity, reasonable suspicion and forthwith requirements.

Use immunity guarantees that the results will not be used against a driver, except for the purpose of giving the officer grounds for the arrest. However, both Saskatchewan and British Columbia punish drivers on the basis of a failed roadside breathalyzer test. Alberta has legislation on the books to implement a similar punishment scheme.

The reasonable suspicion requirement means that an officer, before demanding a roadside sample, must reasonably suspect that there is alcohol in the driver's body. This has been interpreted to mean that the officer must have an objective basis for a subjectively held belief.

The only element of the three prongs of salvation under s. 1 that remains is the forthwith, or immediacy, requirement. This requirement means that an officer must demand the sample immediately and the test must be administered immediately.

Because the jurisprudence in the area is so well-canvassed by the Supreme Court of Canada, and because it has not changed over the last 30 years, despite numerous constitutional challenges, the court had no trouble coming to the conclusion that random testing did indeed infringe s. 8 of the Charter.

Interestingly, however, the court in the Morrison case did not appear to consider the weight of authority from the Supreme Court of Canada on the constitutional validity of random testing. Rather, the court looked at seminal cases on search and seizure, like *Hunter v. Southam* [1984] 2 S.C.R. 145 and the case law dealing with the challenge to the B.C. Immediate Roadside Prohibition, *Goodwin v. British Columbia (Superintendent of Motor Vehicles)* 2015 SCC 46.

In some respects, this failure to consider the presiding legal principles may open the decision up to an appeal. Certainly the issue is meritorious enough that an appeal is worthwhile.

The court ruled that the law infringed s. 8 because it exposed the driver to the potential of a criminal prosecution at a point before which credibly based probability replaced suspicion. This is a fascinating departure from the manner in which these cases are ordinarily determined on the ss. 8, 9 and 10(b) issues.

As for the application of s. 1, there is little debate that there is a pressing and substantial objective to the law, which is rationally connected to the mandatory testing power. The court really had to look at whether there was minimal impairment of the right, and whether the law was proportional.

On the issue of minimal impairment, the judge wrote:

[169] "Previous attempts or strategies to detect alcohol in a driver such as observation for signs of impairment like slurred speech or bloodshot eyes, smell of alcohol, questioning of a driver about his alcohol consumption and field sobriety tests have all had varying degrees of success but also of failure. And since driving, as stated in *Orbanski*, is not an inherent right and is subject to extensive regulations to protect life and property, and since I find that there are no obvious or apparent less restrictive schemes that the government could employ, I find that the Crown has proven, on a balance of probabilities, that the legislation impairs the accused's rights in a minimal way."

In some respects, this loses the way of s. 1's requirement for minimal impairment. It is not about whether other methods have tried and failed; it is whether on a spectrum of methods this is the least impairing way to achieve the objective. By stating that because the one extreme: requiring proof of intoxication was insufficient, the other extreme must be justifiable misses the weighing that the court is supposed to do.

I read the above passage as conflating the question of "signs of impairment" with a basis for the suspicion of alcohol in the body.

The question is not whether this extreme may be more effective, but whether there are other untested methods or methods that are effective enough that could impair the right. Section 1 is the Crown's burden. And the Crown in this case appeared to lead no evidence that there was not a happy medium between proof of intoxication and no grounds whatsoever.

This may be the aspect of the judge's reasons that is most vulnerable to an appeal, in my opinion.

Finally, the court looked at proportionality. On this branch of the s. 1 analysis, the court determined that the law was proportional because the breath samples were not determinative of guilt and because the search did not extend beyond the breath.

Again, this neglects the collateral realities of breath testing. Not only is that not the case in British Columbia or Saskatchewan, as the provision of a failed sample carries with it a mandatory vehicle impoundment, but there is also the sheer fact that the consequence of refusing the sample is a criminal prosecution.

Again, the fact that the court did not turn its analysis to the consequences of refusing to blow and how that impacted the s. 1 analysis leaves the judgment vulnerable on appeal.

Nevertheless, this is just a provincial court ruling. It is not binding on other judges and not binding outside Saskatchewan. The provincial court cannot strike down the law, it can only find a violation of the Charter and refuse to apply the law.

And so while the judgment is disappointing, this is by no means the end of the fight against random

and arbitrary breath testing in Canada.

Kyla Lee is a criminal lawyer and partner at Acumen Law Corporation *in Vancouver. Her practice focuses on impaired driving. She is the host of a podcast, Driving Law, and a weekly video series* Cases That Should Have Gone to the Supreme Court of Canada, But Didn't! *She is called to the bar in Yukon and British Columbia. Follow her at* @IRPLawyer*.*

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