

**THE HOUSE OF COMMONS STANDING COMMITTEE
ON JUSTICE AND HUMAN RIGHTS
Monday, September 18, 2017
3:30 p.m. - 4:30 p.m.**

**Submission re Bill C-46, *An Act to amend the Criminal Code*
(*offences relating to conveyances*)**

R. Solomon, Distinguished University Professor, Faculty of Law, Western University;
E. Chamberlain, PhD, Dean and Professor, Faculty of Law, Western University; and
R. Pursell, Professor, Department of Emergency Medicine, University of British Columbia,
and Medical Lead, BC Drug and Poison Information Centre

Introduction

Bill C-46¹ addresses many of the evidentiary, procedural and technical concerns with the existing impaired driving law, and will simplify, clarify and rationalize this complex area of the criminal law. It creates new drug-impaired driving offences based on *per se* drug limits that are to be enacted by regulation, and authorizes the police to demand roadside oral fluid testing if they have reasonable grounds to suspect that a driver has drugs in his or her body. The Bill will also encourage impaired driving offenders to participate the provincial and territorial alcohol interlock programs, rather than driving while prohibited, suspended and uninsured.²

We support these and many other measures in the Bill because they will improve the federal impaired driving law. However, they will not dramatically reduce impaired driving deaths and injuries. In terms of traffic safety, by far the most important measure is the mandatory roadside breath screening provision, referred to in the Bill as “mandatory alcohol screening” (MAS).³ Given the importance of MAS, and misleading claims that have been made about it, our submission will be limited to this issue.

Canada’s Impaired Driving Record

Defence counsel and others have publicly claimed that the current federal impaired driving law is working well and therefore MAS is unnecessary.⁴ With respect, how can anyone credibly claim that the law is working well, when impairment-related crashes kill approximately 1,000 Canadians a year and injure almost another 60,000,⁵ a disproportionate number of whom are teenagers or young adults? In 2013, those between the ages of 16-25 constituted approximately 13% of the population, but 31% of the alcohol-related crash deaths.⁶

Granted, progress has been made since the record high levels of alcohol-related crash deaths of the early 1980s. However, impairment-related crashes remain the number one criminal cause of death in

¹ *An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2016 [Bill C-46].

² *Ibid*, ss. 1-9.

³ Different terms are used to describe these programs in other jurisdictions. The term “random breath testing” or “RBT” appears to have been first used by the Australian traffic safety researchers, who remain the leading authorities in the field. New Zealand uses the term “compulsory breath testing” or “CBT,” whereas Ireland uses the term “mandatory alcohol testing” or “MAT.” Both terms are more accurate than RBT, but they have not come into common use.

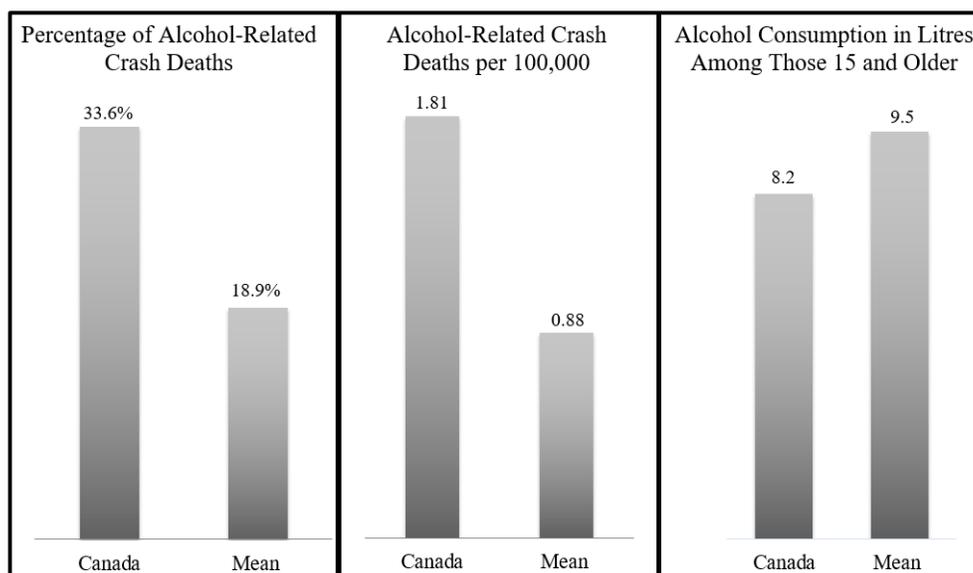
⁴ See the Criminal Lawyers’ Association, *Submissions to the Standing Committee on Public Safety and National Security (SECU)*, 1st Sess., 42nd Parl., Meeting No. 26, Thursday, September 29, 2016 at 11-12 [*Criminal Lawyers’ Submission*].

⁵ R. Solomon, C. Ellis & C. Zheng, *Alcohol and/or Drugs Among all Categories of Crash Victims Dying Within 12 Months, by Jurisdiction: Canada, 2013* (Oakville, Ontario: Mothers Against Drunk Driving (MADD) Canada, 2017) [*All Categories*].

⁶ R. Solomon, C. Ellis & C. Zheng, *Alcohol- Related Crash Deaths and Injuries, by Age and Jurisdiction: Canada, 2013* (Oakville, Ontario: Mothers Against Drunk Driving (MADD) Canada, 2017).

Canada, claiming approximately twice as many lives per year as all categories of homicide combined.⁷ In fact, Canada has long had one of the worst impaired driving records among comparable developed countries. An international review of 15 countries published in 2000 reported that Canada had the second-highest rate of alcohol involvement in fatal crashes.⁸ Similarly, the U.S. Centers for Disease Control and Prevention reported that Canada had the highest percentage of alcohol-related crash deaths among 20 high-income countries in 2013.⁹ As Figure I illustrates, Canada's per capita rate of alcohol-related crash deaths, which was second only to that of the United States, was more than double that of the other 19 countries, despite having among the lowest rates of alcohol consumption.¹⁰

Figure I: Impaired Driving and Alcohol Consumption in Canada, and the Mean Among 19 Comparable High-Income Countries: 2013



Put simply, Canadians drink considerably less than residents of many of these other countries, and yet, are much more likely to die in an alcohol-related crash.¹¹ Except for the U.S., the laws in these

⁷ In 2013, there were approximately 1,000 impairment-related crash deaths in Canada and 509 homicides. See *All Categories, supra note 6*; and Statistics Canada, *CANSIM Table 253-0001, Homicide survey, number and rates (per 100,000 population) of homicide victims, Canada, provinces and territories, annual* (Ottawa: Statistics Canada, 2017), [<http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2530001&pattern=&stByVal=1&p1=1&p2=37&tabMode=dataTable&csid=>](http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2530001&pattern=&stByVal=1&p1=1&p2=37&tabMode=dataTable&csid=>) online:

⁸ K. Stewart *et al.*, “International Comparison of Laws and Alcohol Crash Rates: Lessons Learned” in H. Laurell & F. Schlyter, eds., *Proceedings of the 15th International Conference on Alcohol, Drugs and Traffic Safety, 2000*, CD-ROM (Stockholm: International Council on Alcohol, Drugs and Traffic Safety (ICADTS), 2000).

⁹ E. Sauber-Schatz *et al.*, “Vital Signs: Motor Vehicle Injury Prevention—United States and 19 Comparison Countries” (2016) 65(27) *Morbidity and Mortality Weekly Report* 672 at 675.

¹⁰ *Ibid* at 674-75.

¹¹ For example, it is particularly disconcerting that Canada's per capita rate of alcohol-related crash deaths in 2013 was almost five times that of Germany, even though Canadians consumed 33% less alcohol per capita. See *ibid*; and Organization for Economic Co-Operation and Development (OECD), *OCED.Stat, Health Status, Non-*

countries do a far better job of separating drinking from driving. Not surprisingly, almost all of these countries have comprehensive MAS programs. Indeed, according to a 2015 World Health Organization (WHO) traffic safety report, 121 out of 180 countries had MAS programs of some kind.¹² Canada is not only out of step with comparable countries, but apparently with most of the rest of the world.

Canada's Existing System of Impaired Driving Enforcement and MAS

The Canadian Criminal Lawyers' Association and the Canadian Civil Liberties Association (CCLA) have both claimed that MAS would open the door to police discrimination and the targeting of visible minorities.¹³ Ironically, exactly the opposite is the case. Roughly four to eight million drivers are stopped each year in Canada at sobriety checkpoints, and millions more are stopped during routine police traffic and patrol activities.¹⁴ Currently, the police have authority to stop vehicles at random, inspect the drivers' documents and question them about whether they have been drinking.¹⁵ However, the police may only demand a roadside breath test on an approved screening device (ASD) if they have reasonable grounds to suspect that the driver has alcohol in his or her body. The current system establishes what is referred to as "selective breath testing" (SBT). Thus, the processing and assessing of drivers is currently based solely on the individual officer's subjective judgment, using his or her own unaided senses.

The enactment of MAS would reduce the ability of the police to target minorities or otherwise misuse their authority because best practice requires that all passing vehicles are stopped, unless a backup has developed, and that every stopped driver is tested.¹⁶ Unlike the current SBT system, the proposed MAS provisions would eliminate opportunities for subjective or arbitrary assessment of drivers. Thus, MAS operates in exactly the same way as mandatory screening at airports, courts, borders and many government buildings. These widely used and accepted screening processes are typically more intrusive and inconvenient than spending two minutes sitting in one's car going through a MAS checkpoint.

Moreover, numerous studies indicate that the police, relying on their unaided senses, as is currently the case in Canada, detect only a small percentage of drinking drivers at sobriety checkpoints. For example, a 1997 American study reported that the police missed almost 90% of drivers with blood-

Medical Determinants of Health: Alcohol Consumption, online: OECD <http://stats.oecd.org/index.aspx?DataSetCode=HEALTH_LVNG>.

¹² WHO, *Global Status Report on Road Safety 2015* (Geneva: WHO, 2015) at 32.

¹³ *Criminal Lawyers' Submission, supra note 4* at 14-16 (quoting the CCLA) and 20-21.

¹⁴ R. Solomon et al., "Predicting the Impact of Random Breath Testing on the Social Costs of Crashes, Police Resources, and Driver Inconvenience in Canada" (2011) 57(4) *Criminal Law Quarterly* 438 at 457.

¹⁵ *R. v. Dedman*, [1985] 2 S.C.R. 2; and *R. v. Orbanski*; *R. v. Elias*, [2005] 2 S.C.R. 3.

¹⁶ Email from Dr. R. Homel, Foundation Professor of Criminology and Criminal Justice, Griffith Criminology Institute, Griffith University, Brisbane to R. Solomon (24 October, 2016).

alcohol concentrations (BACs) of 0.05% to 0.079%, and over 60% of drivers with BACs above 0.08%.¹⁷ Earlier Ontario and Alberta studies reported far lower detection rates.¹⁸

As Dr. R. Homel, one of the world's leading experts on impaired driving enforcement, stated: "any method of enforcement that relies on subjective judgments of impairment ... is unlikely to work over the long term simply because the perceived probability of apprehension cannot be maintained at a high level."¹⁹ The House of Commons Standing Committee on Justice and Human Rights reached the same conclusion in its 2009 report, stating that: "the current methods of enforcing the law lead police officers to apprehend only a small percentage of impaired drivers, even at roadside traffic stops designed to detect impaired driving. This also does not speak well for the [deterrent] effect of Canada's impaired driving laws."²⁰

The enactment of MAS legislation would change only one aspect of Canada's impaired driving enforcement process – namely, the basis for demanding a breath sample on an ASD under section 254(2)(b) of the *Criminal Code*.²¹ As indicated, Canadian police already have authority to stop vehicles and question drivers. As is presently the case, the results of ASD testing based on MAS would not be admissible in criminal proceedings, but rather, would be used solely to screen drivers to determine if evidentiary breath testing is warranted. Drivers who test above a predetermined BAC on an ASD (typically .10%) would be required to accompany the officer to the police station to provide breath samples on an "approved instrument"²² and would be afforded the right to legal counsel and all the procedural and evidentiary safeguards that such testing entails. Drivers who register a "pass" on the ASD test at a MAS checkpoint would be free to go, and no record would be kept.

The International Experience with MAS

Research over the past 45 years in numerous countries has established that comprehensive MAS programs generate dramatic and sustained reductions in impaired driving and related crash deaths. For example, personal injury crashes involving drunk drivers decreased 56% in Sweden following the

¹⁷ J. Wells *et al.*, "Drinking Drivers Missed at Sobriety Checkpoints" (1997) 58(5) *Journal of Studies on Alcohol* 513 at 516.

¹⁸ See respectively, E. Vingilis, E. Adlaf & L. Chung, "Comparison of Age and Sex Characteristics of Police-Suspected Impaired Drivers and Roadside-Surveyed Impaired Drivers" (1982) 14(6) *Accident Analysis and Prevention* 425 at 427; and W. Picton, "Legislation to Allow the Safe Release of Potentially Unsafe Drinking Drivers" (1978) 40 *Criminal Reports* 30 at 35.

¹⁹ R. Homel, "Random Breath Testing The Australian Way: A Model for the United States?" (1990) 14(1) *Alcohol Health and Research World* 70 at 72 [The Australian Way].

²⁰ Canada, House of Commons, Standing Committee on Justice and Human Rights, *Ending Alcohol-Impaired Driving: A Common Approach* (June 2009) at 16 (Chair: E. Fast) *Ending Alcohol-Impaired Driving* at 16.

²¹ *Criminal Code*, R.S.C. 1985, c. C-46.

²² *Ibid* at s. 254(3)(a)(i) and (b).

introduction of MAS in 1970.²³ MAS was largely credited with reducing the percentage of Dutch drivers with blood-alcohol concentrations (BACs) over .05% from 15% in 1970 to 4.5% in 2000.²⁴ A 2003 European Transport Safety Council (ETSC) study concluded that increasing MAS testing to 1 driver per 16 inhabitants in the entire EU would save between 2,000 and 2,500 lives a year.²⁵ When Switzerland enacted MAS in 2005, the percentage of drivers testing positive for alcohol fell from about 25% to 7.6%, and alcohol-related crash deaths dropped by approximately 25%.²⁶ In 2012, the ETSC recommended that all EU countries should implement minimum MAS testing levels, and “introduce systematic breath testing” in all police traffic checks.²⁷

A 2005 study stated that the Australian MAS programs resulted in “as much as a 24% reduction in nighttime crashes, especially in metropolitan areas,”²⁸ while a 2009 review concluded that the programs reduced total crashes by 22%.²⁹ A 2013 study reported that MAS prevented an estimated 5,309 crash deaths in four Australian states over a 27-year period and was particularly effective in reducing crash deaths among 17-30 year olds.³⁰ A detailed 2004 study estimated that New Zealand’s MAS program resulted in a 54.1% decrease in total serious and fatal nighttime crashes and saved society more than \$1 billion in 1997.³¹

In Ireland, the enactment of MAS in July 2006 was credited with saving 92 lives in the first 12 months, and reducing all traffic-related hospital admissions by 10% in the first 6 months compared to

²³ J. Luoma & M. Sivak, *Why Is Road Safety in the U.S. not on Par with Sweden, the U.K. and the Netherlands?: Lessons to be Learned* (Ann Arbor, Michigan: Transportation Research Institute, The University of Michigan, 2013) at 15.

²⁴ M. Mathijssen, “Drink-Driving Policy and Road Safety in the Netherlands: A Retrospective Analysis” (2005) 41 *Transportation Research Part E: Logistics and Transportation Review* 395 at 395.

²⁵ M. Mackay *et al.*, *Cost Effective EU Transport Safety Measures* (Brussels: ETSC, 2003) at 27.

²⁶ E. Townsend, F. Achterberg & T. Janitzek, *Traffic Law Enforcement across the EU: An Overview* (Brussels: European Transport Safety Council (ETSC), 2006) at 18.

²⁷ F. Podda, *Drink Driving: Towards Zero Tolerance* (Brussels: ETSC, 2012) at 15.

²⁸ J. Grube, “Preventing Alcohol-Related Problems: Public Policy Strategies” in Transportation Research Board, *Implementing Impaired Driving Countermeasures: Putting Research into Action* (Washington, DC: Transportation Research Board, 2005) 93 at 104.

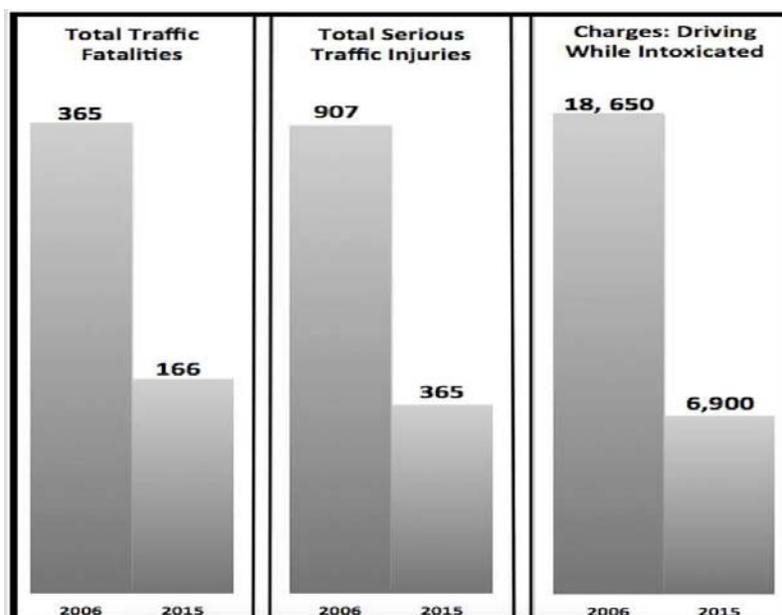
²⁹ A. Erke, C. Goldenbeld & T. Vaa, “The effects of drink-driving checkpoints on crashes—A meta-analysis” (2009) 41 *Accident Analysis & Prevention* 914 at 919 (Table 2) and 921.

³⁰ H. Jiang, M. Livingston & E. Manton, “The dynamic effects of Random Breath Testing on traffic accidents in Australian states” in *Proceedings of the 20th International Conference on Alcohol, Drugs and Traffic Safety T2013* (Brisbane: International Council on Alcohol, Drugs and Traffic Safety (ICADTS), 2013), online: ICADTS <http://t2013.com/wp-content/uploads/2013/08/160813_ICADTS_Proceedings.pdf>.

³¹ T. Miller, M. Blewden & J. Zhang, “Cost savings from a sustained compulsory breath testing and media campaign in New Zealand” (2004) 36(5) *Accident Analysis and Prevention* 783 at 791.

the corresponding period in the previous year.³² Moreover, as the following figure illustrates, total traffic fatalities and serious traffic injuries have continued to fall since the introduction of MAS. Total traffic deaths fell 54.5% and serious injuries fell by 59.8% by the end of 2015.³³ Rather than taxing criminal justice resources, MAS also dramatically reduced impaired driving charges. As of the end of 2015, impaired driving charges had fallen by 63.0%.³⁴

Changes in Total Traffic Deaths, Serious Injuries and Driving While Intoxicated Charges Following Ireland's Shift from SBT to RBT: 2006-2015



The international experience provides compelling proof of the effectiveness of MAS. While some studies were conducted decades ago, recent research in Australia, New Zealand, Ireland, the Netherlands, Denmark, other European countries, the U.S. and Hong Kong are directly relevant and can hardly be considered dated. Nor is there any rational basis for suggesting that the international research is not applicable to Canada. As indicated, New Zealand, Ireland, Queensland, and Western Australia shifted from SBT to MAS – namely, exactly what would occur if the MAS provisions in Bill C-46 were enacted. The legal systems and the general nature of the impaired driving problem in

³² Alcohol Action Ireland, *Alcohol and Driving*, online: Alcohol Action Ireland <<http://alcoholireland.ie/policy/policy-documents-2/>>.

³³ An Garda Síochána, *Annual Report 2011*, online: An Garda Síochána <<http://www.garda.ie/Documents/User/Annual%20Report%202011%20English.pdf>> at 17; An Garda Síochána, *Annual Report 2013*, online: An Garda Síochána <<http://www.garda.ie/Documents/User/Annual%20Report%202013%20-%20English.pdf>> at 15; An Garda Síochána, *Annual Report 2014*, online: An Garda Síochána <<http://www.garda.ie/Documents/User/Annual%20Report%202014%20English%20Dec%202015.pdf>> at 12; and An Garda Síochána, *Annual Report 2011*, online: <<http://www.garda.ie/Documents/User/Annual%20Report%20English.pdf>> at 23.

³⁴ S. Cave & D. McKibbin, Research and Information Service, *Bill Paper re Road Traffic (Amendment) Bill* (Belfast: Northern Ireland Assembly, 2014) at 17, online: Northern Ireland Assembly <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/general/7214.pdf>>.

these other jurisdictions are similar to those existing in Canada.

Despite claims to the contrary,³⁵ many of the MAS studies, including the most comprehensive study of the Australian MAS programs, controlled for various potentially confounding factors, such as other changes in the impaired driving law and levels of enforcement. Many of the other authors expressly considered these factors in reaching their conclusions about the effectiveness of MAS.

Finally, the statement that there is no direct evidence that MAS is more effective than SBT is simply false.³⁶ As explained above, the sharp decreases in impaired driving and related crashes, deaths and injuries were achieved when Queensland, Western Australia, New Zealand, and Ireland shifted from SBT to MAS checkpoints and mobile patrol. As perhaps best stated by Dr. R. Homel, “[n]othing in the Australian experience encourages the belief that, without the use of full random testing, roadblocks or sobriety checkpoints are capable of delivering a substantial and sustained reduction in alcohol-related casualty crashes.”³⁷

MAS and the *Canadian Charter of Rights and Freedoms (Charter)*³⁸

As with many legal changes, MAS will be challenged under the *Charter*. It is important to put MAS in the context of other accepted screening procedures. Millions of Canadians are routinely subject to mandatory screening at Canadian airports, borders, courts, and other government facilities. In 2015, an estimated 131 million passengers “enplaned and deplaned” at Canadian airports,³⁹ where it is not uncommon for them to: have to take off their shoes, belt and jewellery; have their carry-on belongings swabbed for explosive residue; be subject to a full body scan; empty their pockets into a tray; and/or submit to a thorough pat-down search in public. Nor is it uncommon to stand in line for 10 or 15 minutes waiting to be subject to these screening and search procedures. The roughly 91 million returning Canadians and international visitors crossing into the country each year may be subject to similar screening and search procedures.⁴⁰

The Canadian courts have never held these screening procedures or those imposed on anyone entering their courtrooms to violate the *Charter*. In upholding mandatory screening of courtroom entrants, the Ontario Court of Appeal stated:⁴¹

...experience both here and in other jurisdictions has shown that weapons are being brought into the courthouses and it is desirable that they be detected and

³⁵ *Criminal Lawyers’ Submission*, *supra* note 4 at 11-12, quoting the CCLA’s brief.

³⁶ *Ibid* at 11.

³⁷ *The Australian Way*, *supra* note 19 at 74.

³⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³⁹ Transport Canada, *Transportation in Canada: 2015, Overview Report* (Ottawa: Transport Canada, 2016) at 14

⁴⁰ Canada Border Services Agency (CBSA), *CBSA National Statistics: Trade and Traveller Statistics* (Ottawa: CBSA, 2010), online: CBSA <<http://www.cbsa-asfc.gc.ca/agency-agence/stats/trade-echange-eng.html>>.

⁴¹ *R. v. Campanella* (2005), 75 O.R. (3d) 342 at para. 26, citing *R. v. Lindsay* (2001), 158 Man. R. (2d) 176 (Q.B.) at para. 58; *aff’d*. (2004), 187 Man. R. (2d) 236 (C.A.) at para. 18.

prohibited. The current system makes for a safer and more reassuring environment. The means chosen are non-intrusive and bear no stigma. A requirement for prior authorization based on reasonable and probable grounds would not be feasible. The law is neither vague nor over-reaching. It is constitutional.

The Ontario Court of Appeal failed to cite any statistics, studies or evidence to justify searching all courtroom entrants when acting to protect its own safety, but simply commented: “[i]t is notorious that, unfortunately, there have been serious incidents of violence in the courthouses of this province by the use of weapons that have been brought into the courthouse.”⁴² The Court’s failure to demand any evidence to justify searching all court entrants when acting to protect its own safety stands in sharp contrast to what has traditionally been demanded of the police when acting to safeguard Canadian road users.

The Court’s arguments can be made with far greater force in regard to MAS. Driving is a privilege, not a right. The state has a legitimate and very substantial interest in traffic safety, and the risks posed by impaired drivers are several hundred times greater and far better documented than the risks posed by potentially violent courtroom entrants. The testing of drivers is minimally intrusive, entails no stigma, reveals no personal information other than a driver’s BAC, and takes an average of two minutes while the driver remains seated in his or her car. Unlike the results of a courtroom, airport or border search, the results of MAS are not admissible in court. The current requirement for individualized suspicion to screen drivers has significantly undermined the effectiveness of the federal law, in that it has not deterred millions of Canadians from drinking to excess and driving, nor prevented impairment-related crashes from remaining the country’s single largest criminal cause of death.

Put bluntly, far more Canadians are killed in alcohol-related crashes every year than by terrorists on airplanes, travellers at our borders or courtroom entrants. MAS operates in the same way and serves the same protective purposes as airport, border and courthouse screening. MAS is less intrusive, inconvenient or stigmatizing. Like those subject to these other screening activities, it is well established that drivers are subject to a diminished expectation of privacy. Driving is a highly-regulated licensed activity, occurring on public roads that entails potentially grave risks. Given that the courts have upheld the constitutionality of airport, border and courthouse screening, there is no principled basis for reaching the opposite conclusion regarding MAS. It is reassuring that Dr. P. Hogg, Professor Emeritus at Osgoode Hall Law School and Canada’s leading constitutional law scholar, shares our view.

Conclusion

Decades of experience in numerous countries indicates that implementing well-publicized comprehensive MAS programs in Canada would save hundreds of lives, prevent thousands of injuries, and reduce the social costs of impaired driving by billions of dollars each year. Rather than

⁴² *R. v. Campanella, ibid.* at para. 18.

overburdening the police, prosecutors and the courts, MAS has been shown to reduce impaired driving charges and prosecutions. The benefits of MAS will accrue to all road users, with the greatest savings of lives occurring among teenagers and young adults – the segment of the population most at risk of alcohol-related crash death.

The Federal Government is to be congratulated on introducing this critically important and overdue traffic safety measure.