Canadian Association of Chiefs of Police
Association canadienne des chefs de police

Presentation to the Standing Committee on Justice and Human Rights

C-46 - An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts

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Canadian Association of Chiefs of Police

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Introduction

The legalization of cannabis has and will continue to have implications on policing in Canada, and particularly when considering its potential effects on impaired driving. The Canadian Association of Chiefs of Police (CACP) welcomes and encourages numerous amendments in Bill C-46 to curb this issue, such as the decrease in Blood Alcohol Content (BAC) threshold, more stringent penalties for drug and alcohol-impaired driving, mandatory screening, and the admissibility of roadside statements. However, while these efforts are significant and supported by the law enforcement community, there are challenges and issues that must be considered by Parliamentarians prior to the implementation of the proposed legislative changes. Accordingly, the goal of this paper is to identify concerns related to several provisions of the Bill, and to provide recommendations.

Police Training and Resources

The CACP is concerned with the limited time within which police services must provide training to their frontline officers in order to implement Bill C-46. With the July 2018 cannabis legalization date approaching, and a lack of adequate tools and training, police services are concerned that they will not be in a position to implement the proposed legislative amendments.

Examples of training that will be required under Bill C-46 include: considerable training of Drug Recognition Evaluators (DREs), Standardized Field Sobriety Test (SFST) training and training in the use of oral fluid devices.

An additional shared concern is the allocation of resources required for the implementation of changes brought forth by Bill C-46. While the CACP is appreciative of the Federal Government's recently announced funding plan, questions remain with regard to the resource allocation and distribution and timing. The CACP encourages constructive and ongoing dialogue between the federal and provincial governments, as well as the organizations and departments that will be most impacted by Bill C-46, to ensure adequate preparation is in place prior to implementation.

Oral Fluid Testing

Currently, an officer who has a reasonable suspicion of a drug in a driver's body can only demand that the individual perform an SFST.[2] Bill C-46 would authorize the Attorney General to approve roadside drug screeners which could be used in conjunction with SFST and DRE trained officers. According to the Department of Justice, oral fluid screening devices are currently the only technology available to detect the presence of drug in the saliva. However, these devices are not determinative of blood drug levels or impairment. Their use, in combination with other indicia of impairment, may formulate reasonable grounds.

Unlike road side screening tests used in cases of suspected alcohol-impaired driving, which provide police with grounds to demand a breath sample due to the established scientific correlation between alcohol in an individual's breath and their blood (and therefore, levels of impairment), oral fluid devices offer limited grounds for a blood or DRE demand, as there is no known correlation between oral fluid THC levels and blood or impairment levels. Used as a basis for blood tests and DRE demands on its own, oral fluid testing devices can make police investigations susceptible to Charter challenges, thereby creating a potential for unlawful arrests.

The CACP recognizes that oral fluid devices cannot be used as the sole ground upon which to base a blood/DRE demand as they do not detect impairment. However, we recognize the possible utility of these tools and require funding for procurement and training for oral devices. The CACP also supports the scientific community's efforts in developing a more robust instrument down the road.

The Elimination of Suspicion in Cases of Alcohol-Impaired Driving

The proposed amendments to the Criminal Code remove the requirement of a suspicion of alcohol in the body of the accused prior to the administration of an Approved Screening Device (ASD) where a police officer is in possession of an ASD, by enabling them to demand breath samples from a person "operating a motor vehicle". However, the reasonable suspicion requirement is still present in the case of driving while under the influence of drugs. Clauses 3(1)-(5) expand the use of screening measures to include devices that test bodily samples for drugs, and allow police to demand an individual submit to a test where they have *reasonable grounds* to suspect the presence of a drug in their body.

Although the CACP supports the removal of the reasonable ground requirement currently outlined in s 254(2) of the Criminal Code for suspicion of alcohol in the body, we submit that the "is operating" language ought to be removed from the proposed amendment found in s 320.27(2). "Is operating" once formed part of the ASD demand; however, this changed in 2008 as the words precluded police from being able to screen individuals who were not driving or were not in care or control of a vehicle. With the new proposed wording, police will once again be unable to make a demand for an ASD sample at collision scenes in situations where motorists are outside of their vehicles or if they have already been taken to a hospital but fail to suspect alcohol. Removing the language "is operating" from the proposed s 320.27(2), and including a condition that an officer who suspects that an individual was operating a motor vehicle within the preceding three hours, would provide police with the necessary grounds to make ASD demands of not only those operating a motor vehicle.

[2] The SFST is a set of standardized field tests conducted by police officers who suspect that an individual has a drug in their body. The SFST includes a walk and turn test, a one-leg stand test, and horizontal gaze nystagmus examination.

Types of Drugs

The proposed amendments listed in s 320.28(5) enumerate the seven drug categories that a Drug Recognition Evaluator may identify as the cause of a motorist's impairment. These same substances are defined in the International Association of Chiefs of Police (IACP) Drug Recognition Expert (DRE) program. Under the current Criminal Code, police are under no obligation to prove the type of drug that is the cause of the impairment but only that the accused is impaired by a drug.

The CACP submits that the inclusion and codification of these drug categories will pose challenges for policing, and recommends that the provision be removed. Examples of challenges that could be faced include scenarios whereby the IACP decides to make changes to the seven defined drug categories currently contained within the DRE program, thereby creating challenges by forcing legislative amendments; inconsistencies that may be encountered if the IACP classifies a particular drug differently than does a toxicologist or a forensic laboratory; and situations where an individual is under the influence of a drug that does not fall under any of the categories outlined in s 320.28(5), such as synthetic or new designer drugs. Under this provision, where classification of the drug involved is problematic, criminal charges may be in jeopardy. Accordingly, the CACP recommends that section 320.28(5) be removed altogether.

Approved Containers

Under the proposed s 320.28(7), "a sample of blood shall be received into an approved container that shall be subsequently sealed." This removes the ability of police to use containers provided by a hospital in circumstances where an approved container is not readily accessible, thereby triggering the potential for section 8 Charter claims due to unlawful seizures. Under the current regime, prosecutors may still rely on the analysis of samples not contained in approved containers. Although the presumptions are lost, an expert may nevertheless be called to testify regarding the validity of the analysis whereas under the proposed amendment, the case may be in jeopardy. Accordingly, the CACP recommends that this provision be revoked in order to preserve the existing status quo.

Certificates

The proposed amendments eliminate wording identifying specific criteria to be included in a certificate of a qualified medical practitioner, qualified technician or analyst (currently set out in s 258(1) of the Code) in order for the certificate to be admissible. Although they are hearsay, presently, certificates that contain the criteria set out in the Criminal Code meet the admissibility criteria, thereby removing the necessity of a qualified technician/analyst from having to testify at trial.

The CACP recommends that the certificate criteria remain unchanged and enumerated in the Criminal Code. Preserving the status quo would eliminate uncertainty about the admissibility of certificates, reduce the need for qualified technicians to testify in court, and result in shorter trials. In the alternative, the CACP proposes that a prescribed form be created by regulation in order to avoid litigation on the contents of certificates and to streamline the admissibility of these key documents at trial.

Disclosure of Information

Currently, first party disclosure requirements are guided by the common law. The proposed amendments in s 320.34(1) aim to codify these requirements, stating that "the prosecutor shall disclose to the accused, with respect to any samples of breath that the accused provided under s 320.28….the results of the system

banks test; the results of the system calibration checks; any messages produced by the approved instrument at the time the samples were taken."

It is possible that this section may be interpreted to include a requirement that police now produce what are now considered to be third party records which are not typically disclosable without a court order as per the Ontario Court of Appeal decision in *R v Jackson*, as it is silent on the type of documentation that is required to support these results. The proposed section 320.34(5) also states: "for greater certainty, nothing in this section limits the disclosure to which the accused may otherwise be entitled."Currently, most approved instruments record all of the system and calibration checks, and the subject tests of the last 50 people that were tested, including their personal information.

The CACP submits that this provision has created the presumption of first party disclosure and will invite the accused to apply to a court for any other information that they may be "entitled to", which is not only contrary to established case law, but also has the potential of significantly broadening the first party disclosure requirement of police and Crown to unprecedented and unmanageable levels. Consequently, police will now be obligated to prepare, vet and disclose documents that are not otherwise relevant. Conceivably, this provision will only contribute to greater delays in the criminal justice system for police and Crown alike.

Amendment to Failure to Keep Watch on Person Towed and Unseaworthy Vessel and Unsafe Aircraft Laws

Currently, section 250 of the Criminal Code places a legal requirement on operators of vessels to ensure that a responsible person maintains watch over persons being towed. Also, s 251 places a legal responsibility on every person who knowingly sends an unseaworthy vessel or unsafe aircraft on a voyage that endanger the life of any person. Although these sections may not be commonly charged, the CACP advocates for the sections to remain in force, as they place a legal duty on operators and allow police to lay charges of criminal negligence in appropriate cases. Moreover, these offences are intended to protect life and reduce the risk of injury or death before tragedy strikes and for that reason should remain in the Criminal Code.

Per Se Limits

The proposed blood drug demand outlined in Bill C-46, specifically ss. 320.28(2), 320.14(1)(c), (d) and (4) are based on reasonable grounds to believe that a person's ability to operate a conveyance is impaired by a drug, a drug and alcohol, or if the person's blood drug concentration exceeds any of the limits prescribed by regulation. While police officers are well-equipped to determine whether a person's ability to operate a motor vehicle is impaired by alcohol, a drug or a combination of both, front line officers have no means of determining whether a motorist's blood drug concentration exceeds any of the prescribed limits. Therefore, the roadside blood demand cannot practically be made on grounds to believe the motorist has an unlawful blood drug concentration. The CACP recommends removing the latter portion of the provision that reads "or if the person's blood drug concentration exceeds any of the limits prescribed by regulation."

Retaining Samples

The proposed legislation, in subsection 320.28(8), indicates that "A person who takes samples of blood under this section *shall* cause the samples to be retained for the purpose of analysis…". This provision imposes a burden on the qualified medical practitioner or the qualified technician taking the blood sample to "cause" the samples to be retained. Doctors and nurses may not be aware of this obligation, or how to

execute it. In the context of a criminal investigation, imposing this duty on civilians could lead to disputes with law enforcement over how the samples are retained and loss of continuity.

The current Criminal Code is silent on who must "cause" a second sample to be retained, providing only that a second sample indeed be retained. This has not presented any difficulty. This provision is therefore entirely unnecessary, and may lead to difficulties in blood sample seizures if enacted.

While subsection 320.28(9) provides that the failure to use an approved container under subsection (7) or to cause a second sample to be retained under subsection (8) will not affect the *analysis* of a sample, this provision does not address its *admissibility*. The CACP therefore submits that this provision is unnecessary.

Youth Education on Drug Impaired Driving

As impaired driving is the leading criminal cause of death in Canada, the CACP expresses concerns with regard to youth perceptions towards drug impaired driving. A 2016 report titled "Canadian Youth Perceptions on Cannabis" from the Canadian Centre on Substance Abuse revealed that Canadian youth are not concerned about cannabis impaired driving as they do not believe it is as dangerous as alcohol impaired driving. Accordingly the CACP recommends introducing comprehensive programs and recognizes the role that police play in educating youth and the public about the hazards of drug and alcohol impaired driving.

Lowering of Blood Alcohol Concentration from 80 mg to 50 mg

The CACP supports the reduction of Blood Alcohol Concentration (BAC) threshold from the current 80 mg to 50 mg and in lieu of amendments to the Criminal Code, the CACP recommends the implementation of a regulated and standardized provincial/territorial scheme in order to achieve the desired objectives. Regulations would include standardized implementation of a strict roadside suspension program and additional regulatory sanctions for BAC levels between 50 and 80 mg. The CACP recommends that the federal government spearhead the development of a coordinated national approach of provincial regulations. This approach would alleviate the overburdening of the criminal justice system.

Conclusion

While Bill C-46 introduces numerous positive amendments to the Criminal Code, which recognize the dangers of impaired driving, the CACP highlights the above mentioned issues that require further consideration in order to achieve the desired objectives. Lastly, the CACP continues to advocate for an extension of time, adequate resource allocation and comprehensive training which includes a DRE program in Canada prior to the implementation of the proposed amendments in order to promote success.