Bill 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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SUBMISSIONS

THE CRIMINAL LAWYERS' ASSOCIATION

Senate Committee on Legal and Constitutional Affairs

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I. Preface

The Criminal Lawyers' Association is a non-profit organization that was founded on November 1, 1971. The Association is comprised of over 1000 criminal defence lawyers, many of whom practice in the Province of Ontario, but some of whom are from across Canada. The objects of the Association are to educate, promote, and represent the membership on issues relating to criminal and constitutional law.

The Association has routinely been consulted and invited by various Parliamentary Committees to share its views on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the Association is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, the Ontario Legal Aid Plan, and various other concerns that involve the administration of criminal justice in Ontario.

The Association has been granted standing to participate in many significant criminal appellate cases as well as other judicial proceedings. For example, the Association was granted standing in, and participated throughout, the Commission on Proceedings Involving Guy Paul Morin (the "Kaufman Inquiry"). The Association has intervened in many appeals heard by the Court of Appeal for Ontario and by the Supreme Court of Canada.

The Criminal Lawyers' Association finds it to be both a privilege and a pleasure to be given the opportunity to appear before this Committee to express its views on this particular piece of legislation.

II. Introduction

The Ontario Criminal Lawyers' Association (CLA) supports legislation that is fair, modest, and constitutional.

While the CLA supports the objective of protecting society from the dangers of impaired driving, we are unable to support bill C-46. This bill will do nothing to stop impaired driving. It will introduce a host of new legal challenges which are bound to occupy precious court resources for the foreseeable future.

The CLA cannot support this legislation in its current form. We propose a number of recommendations to address our specific concerns.

It is interesting to note that Part 2 of bill C-46 closely resembles private members bill C-226 that was introduced by the Honourable Member of Parliament for Lévis-Bellechasse, Steven Blaney. Bill C-226 was almost identical to bill C-73, the Dangerous and Impaired Driving Act, which was introduced by the Conservative government in 2015.

The Public Safety Committee studied bill C-226 and issued a report stating that:

> While the intent behind Bill C-226 is commendable, the Committee has concluded, based on the evidence provided during its study, that **the legal problems with the Bill far outweigh the potential salutary effects**. The impaired driving provisions are the most heavily litigated in the Criminal Code. As such, changes of this magnitude require a comprehensive and balanced approach to be effective. Based on testimony and briefs from witnesses including the Privacy Commissioner of Canada, the Canadian Bar Association, and Mothers Against Drunk Driving**, the Committee is not convinced that the majority of the measures proposed in Bill C-226 are either balanced or effective**. With the exception of random breath testing, Mothers Against Drunk Driving told the Committee that "Even if all these measures are upheld under The Canadian Charter of Rights and Freedoms, they would not have a major impact on impaired driving and related crashes, injuries and deaths."
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> In addition, the Committee heard from a number of witnesses that the provisions for stricter mandatory minimum penalties and random breath testing may violate the Canadian Charter of Rights and Freedoms. As this was submitted as a private member's bill, it was not subject to the usual constitutional review conducted by the Department of Justice under the Department of Justice Act. The Committee heard from several expert witnesses who raised concerns about the constitutionality of the legislation, including the Criminal Lawyers' Association who testified that "there are sections of the bill that are unquestionably unconstitutional." The Committee therefore cannot say with any degree of certainty that the majority of the provisions included in Bill C-226 would pass constitutional muster.

In May, 2017, the Committee's report was accepted by the House.

Bill C-46 is equally problematic and in many cases unconstitutional and requires enhanced scrutiny commensurate with the seismic changes it makes to the *Criminal Code*.

We are also deeply concerned by the new random breath-testing regime. Increasing police powers do not come without societal costs. The experience of 'carding' or 'street checks' is instructive on how the exercise of police authority can disproportionately affect visible minorities. Bill C-46 amounts to carding while in a car. It will be enevitably disproportionally employed against minority or marginalized communities.

Bill C-46 represents a significant expansion of state power and contains numerous investigative and evidentiary 'short cuts' that will impact Charter rights, basic fairness, and ultimately the quality of the evidence presented in court.

In addition to the serious concerns raised below the CLA fully adopts the submissions contained in the written briefs of the Quebec Bar (June 2017) and the Canadian Bar Association (September 2017)

III. Specific Areas of Concern

1. Operation while impaired

Operation while impaired
320.14 (1) Everyone commits an offence who

(a) operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;

(b) subject to subsection (5), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

(c) subject to subsection (6), has, within two hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation; or

(d) subject to subsection (7), has, within two hours after ceasing to operate a conveyance, a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

Exception — alcohol

(5) No person commits an offence under paragraph (1)(b) if

(a) they consumed alcohol after ceasing to operate the conveyance;
(b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of breath or blood; and
(c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with subsection 320.31(1) or (2) and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.

Exception — drugs
(6) No person commits an offence under paragraph (1)(c) or subsection (4) if
(a) they consumed the drug after ceasing to operate the conveyance; and
(b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of a bodily substance.

Exception — combination of alcohol and drug
(7) No person commits an offence under paragraph (1)(d) if
(a) they consumed the drug or the alcohol or both after ceasing to operate the conveyance;
(b) after ceasing to operate the conveyance, they had no reasonable expectation that they would be required to provide a sample of a bodily substance; and
(c) their alcohol consumption is consistent with their blood alcohol concentration as determined in accordance with subsection 320.31(1) or (2) and with their having had, at the time when they were operating the conveyance, a blood alcohol concentration less than the blood alcohol concentration established under paragraph 320.38(c).

Section 320.14 dramatically increases the scope and application of the current impaired and 'over 80' (and now the drug impairment equivalent) provisions of the *Criminal Code*. The provision effectively makes it an offence to have a blood alcohol concentration (BAC) equal to or greater than 80 mg or a yet-to-be determined blood drug concentration (BDC) within two hours after driving. In other words, a driver who had a BAC or BDC of ZERO while driving may still be convicted of an offence.

Insofar as these provisions rely on future regulations to set limits on blood drug concentration, it is of great concern to the CLA that the regulations be based on

unproven scientific methods. The tests relied upon by these provisions are based on science which is still in its infancy and unreliable. Grounding convictions on these bases will undoubtedly lead to miscarriages of justice.

Section 320.14 is designed to ensure that persons who consume alcohol or drugs after driving or who engage in bolus consumption are convicted, even though at the time of operation their BAC or BDC would have been under the legal limit or even zero.

In short s. 320.14 is a radical departure from the current law and operates in a manner that is overbroad, unfair, and unconstitutional.

The potential costs of this over-expansive provision in Bill C-46 come with little benefit. The purpose of this section is clearly aimed at combating bolus - and post-driving consumption (intended to frustrate police investigations). In reality, the percentage of cases in which either bolus - or post-driving consumption occurs is extremely rare and the success of these defences at trial is even rarer. Bill C-46 aims to cure a problem that does not really exist at the expense of the constitution.

Further, the exceptions provided in s. 320.14(4) effectively reverse the burden of proof onto the accused. The presumptively innocent accused – who had no BAC or BDC when driving – will effectively be required to prove that they meet all the exceptions, including proving their drinking pattern and adducing costly evidence from a toxicologist to prove their BAC at the time of driving (a provision that will preclude the poor from accessing this defence).

Ironically, Bill C-46 seeks to spare the state from this level of proof.

Recommendation: The amendments proposed by Bill C-46 are overbroad and unconstitutional. Provision 320.14 should be amended to capture the offence of <u>operating</u> (or being in care and control of) a conveyance with a BAC over 80 mg of alcohol in 100 mL of blood or a BDC over a specified limit.

Recommendation: Further study should be conducted to ensure that the bases for drawing conclusions regarding impairment by drug are scientifically reliable.

2. Samples of breath or blood — alcohol

320.28 (1) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paragraph 320.14(1)(b), the peace officer may, by demand made as soon as practicable,

(a) require the person to provide, as soon as practicable,

(i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to take one, the samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, are necessary to enable a proper analysis to be made to determine the person's blood alcohol concentration; and

(b) require the person to accompany the peace officer for the purpose of taking samples of that person's breath or blood.

Samples of breath — alcohol
(3) An evaluating officer who has reasonable grounds to suspect that a person has alcohol in their body may, if a demand was not made under subsection (1), by demand made as soon as practicable, require the person to provide, as soon as practicable, the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved instrument.

Presumption — blood alcohol concentration

320.31(4) For the purpose of paragraphs 320.14(1)(b) and (d), if the first of the samples of breath was taken, or the sample of blood was taken, more than two hours after the person ceased to operate the conveyance, the person's blood alcohol concentration is conclusively presumed to be the concentration established in accordance with subsection (1) or (2), as the case may be, plus an additional 5 mg of alcohol in 100 mL of blood for every interval of 30 minutes in excess of those two hours.

Section 320.28(1) allows a peace officer to demand a breath sample if reasonable grounds exist to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree. The demand must be made as soon as practicable.

The current breath demand provisions under s. 254(3) of the Criminal Code only allow a peace officer to make a breath demand if the demand is made as soon a practicable and if there are reasonable ground the believe the subject operated a vehicle within the last three hours.

Bill C-46 significantly changes the conditions under which a demand may be made - the three-hour time limit is completely removed.

An officer can now demand a breath sample hours or days after the operation of the vehicle. There is no time frame for the officer's belief of when the vehicle was operated. This unlimited time frame will not only dilute the quality of the evidence, but when combined with the liberal read back presumption contained in s. 320.32(5), it is overbroad and will be found to contravene an accused's *Charter* rights to a fair trial.

In other words a police officer could demand a sample of a person's breath a day after they operated a vehicle. That person BAC could be zero. But by operation of 320.31(4) the individuals could be deemed to be over the legal limit.

This is a significant change with profound and wide-ranging implications that may subject individuals to the full force of the criminal law by virtue of deeming provisions alone.

The proposed amendments removes the two-hour time limit and imposes a presumption that after the two hour period an additional 5 mg of alcohol in 100mL of blood will be added for every 30 min interval. Instigations are not

broken up into 30 minute intervals – the bill has no answer for a situation where delays over two-hours are less than a 30 minute period.

This provision is intended to eliminate the need in all cases for the Crown to call evidence from a toxicologist, even when a sample is taken many hours after driving.

This short-cut to the short-cut makes blanket assumptions about the toxicological features of the accused and may not properly reflect the elimination rates, bolus or pre-driving drinking, the existence of an elimination plateau, the retrograde extrapolation methodology, gender, height, weight, or age.

This type of blanket toxicology by legislation would render the requirement that the samples be taken as soon as practicable meaningless and redundant.

The proposed amendments will likely save court time (except for the inevitable—and invariably successful—constitutional challenges) at the expense of convicting individuals who were not impaired and who did not operate a vehicle above the legal limit

Recommendation: Section 320.28(1) should be amended to require a reasonable belief of operation of a conveyance in a prescribed time period.

Recommendation: Section 320.31(4) should be deleted and that Bill C-46 retain the current presumptions which require the Crown to adduce scientific evidence.

3. Random breath testing

Mandatory alcohol screening

320.27(2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose.

Bill C-46 also proposes to institute random roadside breath testing ("RBT"). Currently, police officers in Canada are authorized to stop a vehicle to check vehicle fitness, licence, and registration and sobriety by observing an individual's behavior, speech, and breath. What is impermissible – and indeed unconstitutional – is a random roving stop for the purpose of a search. Police may only demand a roadside breath sample (which is a form of search) if they have reasonable grounds to suspect that a driver has alcohol in his or her body, a framework frequently referred to as selective breath testing ("SBT").

Section 320.27(2) would eliminate the requirement for reasonable suspicion, authorizing a police officer to demand a breath sample.

It should be noted that reasonable suspicion is already a very low and permissive standard.

If this practice is employed at a fixed checkpoint for multiple drivers in succession, it is easy to see how the detention of many motorists will be prolonged to the point that the reasonable limit on the right to counsel justified under s. 1 of the *Charter* is exhausted. Motorists will be made to wait while an approved instrument is made available for each successive breath test. This could prove to be a logistical and constitutional nightmare as long line-ups of cars could conceivably build up at such checkpoints.

There is no requirement that RBT be instituted at fixed sobriety checkpoints. It should also be recognized that, particularly outside of fixed sobriety checkpoints, there is nothing truly random about police stops.

In 2016 the results from the Ottawa Police's Traffic Stop Race Data Collection project were released. This project was the largest project of its kind and was initiated as the result of a human rights complaint for racial profiling. The study found that visible minorities were disproportionately subjected to traffic stops. The study also found that after being stopped visible minorities were actually ticked for driving infractions less often than non-racialized individuals. In other words minorities were more likely to be stopped by the police for no reason.[1]

The impact of giving police an arbitrary personal search power, particularly for individuals from visible minorities, should not be underestimated. This factual background must inform any constitutional analysis.

RBT presents serious constitutional difficulties under ss. 8 and 9 of the Charter, and all the more so when viewed through the lens of the Charter right to equality and the disparate impact such rights violations would likely have on racialized and marginalized individuals.

The CLA adopts the following excerpt of the brief filed Canadian Civil Liberties Association (CCLA) with respect to bill C-226:

> *The key question that needs to be answered in the Canadian context is whether the introduction of RBT, after decades of random sobriety checkpoints and the implementation of SBT, would have a meaningful impact on impaired driving.*
> *Unfortunately, as further explained below, the bulk of the available evidence does not demonstrate – and was not designed to demonstrate – that RBT is better than SBT. Rather, it demonstrates that RBT is better than the absence of such measures.*
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> *Research has documented limitations on an officer's ability to detect illegal levels of alcohol consumption through simple interaction and observation, meaning that, in theory, RBT should be more effective than Canada's current SBT regime.*[2] *The real contribution of RBT and*

[1] Traffic Stop Race Data Collection Project TSRDCP: https://www.ottawapolice.ca/en/news-and-community/Traffic-Stop-Race-Data-Collection-ProjectTSRDCP.asp
[2] See Robert Solomon et al, "The Case for Comprehensive Random Breath Testing Programs In Canada:

SBT programs, however, comes not from catching individual drivers, but from general and specific deterrence.

Enforcement levels would need to be extraordinarily – and unrealistically – high in order to directly detect a significant number of impaired drivers. On the other hand, if individuals can be convinced that there is a good chance they will be caught if they drink and drive, a significant portion of the population will choose not to engage in this behaviour. The deterrent effect of well-publicized, random sobriety checkpoints can multiply enforcement efforts well beyond the specific drivers who are caught on any given night. A number of articles have cited other jurisdictions' success in combatting alcohol-impaired driving after the implementation of random breath testing, pointing to the experiences in other countries which have documented significant success deterring impaired driving after the implementation of RBT.[3] Unfortunately, many of these international comparators are of limited use.

There are several reasons that the existing studies showing dramatic decreases in drinking and driving after the implementation of RBT are of limited utility in the Canadian context. First, there are no studies design to directly assess the impact of RBT as compared with selective breath testing, which Canada has had in place for many years.[4] The vast majority of jurisdictions that implemented RBT did so decades ago, in what researchers have described as a "revolutionary" act at the time.[5] RBT was often a part of the first major legislative efforts to reduce drinking and driving in these countries.[6] While it is true that

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Reviewing The Evidence and Challenges" (2011) 49:1 Alta L Rev 37 at 45–48. See also Evelyn Vingilis & Violet Vingilis, "The Importance of Roadside Screening for Impaired Drivers in Canada" (1987) 29:1 Can J Crim 17 at 22–25; E Vingilis, EM Adlaf & L Chung, "Comparison of Age and Sex Characteristics of Police-Suspected
Impaired Drivers and Roadside-Surveyed Impaired Drivers" (1982) 14:6 Accident Analysis & Prevention 425 at 429; Joann K Wells et al, "Drinking Drivers Missed at Sobriety Checkpoints" (1997) 58:5 Journal of Studies on Alcohol 513 at 516.

[3] See e.g. Erika Chamberlain & Robert Solomon, "The 2012 Federal Legislative Review" *MADD Canada* (January 2012) 1 at 8–10 <http://www.madd.ca/media/docs/2012_federal_legislative_review.pdf>; Department of Justice Canada, *Modernizing the Transportation Provisions of the* Criminal Code - *Discussion Paper* (2010) at Annex 1, online: Government of Canada <http://www.justice.gc.ca/eng/cons/mtpcc-mdccmt/7.html#ann1>

[4] See Delia Hendrie, *Random Breath Testing: Its Effectiveness and Possible Characteristics of a 'Best Practice' Approach* (Crawley, Western Australia: Injury Research Centre, Dept of Public Health, University of Western Australia, 2003). Hendrie also remarked that "most evaluations of random breath testing have assessed the effect of the overall program, rather than comparing alternative strategies [for example SBT] or different components of enforcement and public education programs" at 24.

[5] Australia, Department of Transport and Regional Development: The Federal Office of Road Safety, *The Long-Term Effect of Random Breath Testing in Four Australian States: A Time Series Analysis*, by J Henstridge, R Homel & P Mackay (April 1997) at vi, online: Department of Infrastructure and Regional Development [AU] <https://infrastructure.gov.au/roads/safety/publications/1997/pdf/alc_random.pdf>.

[6] For example, RBT was introduced in 1976 in Victoria, Australia; in 1983 in Tasmania, Australia; in 1988 in Queensland, Australia; and in 1993 in New Zealand. See Department of Justice Canada, *Modernizing the Transportation Provisions of the* Criminal Code - *Discussion Paper* (2010) at Annex 1, online: Government of Canada <http://www.justice.gc.ca/eng/cons/mtpcc-mdccmt/7.html#ann1> [*Modernizing the Transportation Provisions*].

many jurisdictions that implemented RBT experienced dramatic declines in accident rates, Canada also underwent its own "revolutionary" period of legal, educational and enforcement reform in this area, and has experienced a similarly dramatic decline in the alcohol-related traffic deaths in the past thirty years. In 1981, 62% of drivers killed in road crashes in Canada tested positive for alcohol; by 1999, the percentage of driver fatalities involving alcohol had decreased to 33%.[7] *Since that time, alcohol-involved traffic deaths have continued to decline in Canada. In the most recent research report produced by the Traffic Injury Research Foundation of Canada the authors find that "[t]he percentage of alcohol-related fatalities generally decreased from 37.2% in 1995 to a low of 28.6% in 2005, eventually rose to 33.8% in 2010, and decreased to 29.9% in 2012."*[8] *Given the significant legal, cultural and educational shifts that have occurred in this area over the past decades, most other jurisdictions' early experiences with RBT are not useful comparators for our country today.*

Second, the introduction of RBT in other countries was accompanied by other complementary measures such as significant education and media campaigns, greatly increased enforcement, and lowered blood alcohol limits.[9] *Indeed, for RBT to deter drinking and driving effectively, it has been recommended that enforcement increase so that each license holder is tested once a year.*[10] *Even for those few select countries that did implement RBT after SBT, this legal change was accompanied by a host of other measures. It is not possible to separate the impacts of RBT from these other factors, all of which have been identified as contributing to the reduction of drinking and driving.*

Ultimately, in CCLA's view, a full review of the evidence does not provide convincing evidence that implementing RBT will necessarily have a greater impact on drinking and driving than Canada's current SBT system. The Traffic Injury Research Foundation's published Proceedings of the 2012 Drinking and Driving Symposium summarize the evidence as follows:

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[7] See DJ Beirness, & CG Davis, "Driving after Drinking: Analysis drawn from the 2004 Canadian Addiction Survey" (Ottawa Canadian Centre on Substance Abuse, 2008) at 1.

[8] See SW Brown, WGM Vanlaar & RD Robertson, "Alcohol and Drug-Crash Problem in Canada 2012 Report" (Ottawa: Traffic Injury Research Foundation of Canada, 2015) at 33, online: Canadian Council of Motor Transport Administrators <http://www.ccmta.ca/images/publications/pdf//2012_Alcohol__Drug_Crash_Problem_Report_ENG.pdf>..

[9] See Corianne Peek□Asa,, "The Effect of Random Alcohol Screening in Reducing Motor Vehicle Crash Injuries" (1999) 16:1 S1 American Journal of Preventive Medicine 57 at 66("[m]ost ofthe communities introducing random screening also introduced other measures to reduce drunk driving crash events, and few of the analyses controlled for these otherefforts").

[10] See Australia, Department of Transport and Regional Development: The Federal Office of Road Safety, *The Long□Term Effect of Random Breath Testing in Four Australian States: A Time Series Analysis*, by J Henstridge, R Homel & P Mackay (April 1997) at x, online: Department of Infrastructure and Regional Development [AU] <https://infrastructure.gov.au/roads/safety/publications/1997/pdf/alc_random.pdf>.

…existing research does not provide evidence that RBT is more effective than SBT. A systematic review of 23 studies on the effectiveness of RBT and SBT concluded that there was no evidence to suggest that the levels of effectiveness of both strategies differed. Of equal importance, the review revealed that no available studies have been designed to directly compare the effectiveness of RBT and SBT (Shults et al. 2001). Another systematic review also concluded that evaluation studies of RBT and sobriety checkpoints showed a comparable range of outcomes. Of interest, there was limited evidence to suggest that RBT may be slightly more effective than SBT, and that administering a breath test to all stopped drivers with RBT may indeed lead to a stronger perception of being caught than the more selective approach with sobriety checkpoints. However, this study also attests that the evidence is not conclusive and points to the possible confounding effect of more intensive enforcement levels that have typically been used with RBT in Australia compared to those of SBT as an explanation for the difference in effectiveness (Fell et al. 2004).
One particular study that provides some information regarding the effectiveness of RBT versus SBT comes from Australia where sobriety checkpoints were used before introducing RBT. This one study concludes that RBT is more effective than SBT but also reports that the quality of data about enforcement levels was sometimes questionable and this means that the observed difference in effectiveness between SBT and RBT could also be explained by different levels of enforcement (Henstridge et al. 1997).
To summarize, the available evidence supports both SBT and RBT and suggests that what really matters is the balance between enforcement levels that are sufficiently high and publicity about the enforcement to establish the required general deterrent effect.[11]

As stated at the outset of this section, there are reasons to believe that, in theory, RBT should be more effective than SBT. In particular, several studies cast doubt on a police officer's ability to detect problematic levels of alcohol consumption through simple interaction and observation.[12] *In the absence of extremely high levels of enforcement, however, it is unlikely that the general public will be aware of this, undermining any potential deterrent effect.*

Those who have argued in favour of RBT often suggest that the addition of a random breath search power would not be a significant intrusion into individuals' lives.

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[11] Robyn D Robertson & Ward GM Vanlaar, "Canada's Impaired Driving Framework: The Way Forward, Proceedings of the Drinking and Driving Symposium" (Ottawa: Traffic Injury Research Foundation, 2013) at 16–17.

[12] See Robert Solomon et al, "The Case for Comprehensive Random Breath Testing Programs In Canada:
Reviewing The Evidence and Challenges" (2011) 49:1 Alta L Rev 37 at 45–48. See also Evelyn Vingilis & Violet Vingilis, "The Importance of Roadside Screening for Impaired Drivers in Canada" (1987) 29:1 Can J Crim 17 at 22–25; E Vingilis, EM Adlaf & L Chung, "Comparison of Age and Sex Characteristics of Police-Suspected
Impaired Drivers and Roadside-Surveyed Impaired Drivers" (1982) 14:6 Accident Analysis & Prevention 425 at 429; Joann K Wells et al, "Drinking Drivers Missed at Sobriety Checkpoints" (1997) 58:5 Journal of Studies on Alcohol 513 at 516.

This minimization of the impact of RBT is misplaced and arises from a position of privilege.

Currently, police may not conduct a random roving stop for the purpose of conducting a search. Police who wish to take a bodily sample are required to justify this search, and individuals who refuse a justified demand face criminal sanction. The requirement for government to justify its forced intrusion into a particular individual's private life is a fundamental premise of a democratic society. It also reflects a larger framework outlining the appropriate relationship between civilians and the police.

Experience has also unfortunately demonstrated that "random" detention and search powers are too often exercised in a non-random manner that disproportionately targets indigenous individuals and other racialized and marginalized individuals.

It goes without saying that racism – systemic or otherwise – is a reality in Canadian police forces. The Supreme Court of Canada has explicitly accepted this reality:

> Furthermore, we believe it is important to note the submissions of the ACLC and the ALST that African Canadians and Aboriginal people are overrepresented in the criminal justice system and are therefore likely to represent a disproportionate number of those who are arrested by police and subjected to personal searches, including strip searches (*Report of the Aboriginal Justice Inquiry of Manitoba* (1991), vol. 1, *The Justice System and Aboriginal People*, at p. 107; Cawsey Report, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta* (1991), vol. II, p. 7, recommendations 2.48 to 2.50; Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (1996), at pp. 33-39; Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic in the Ontario Criminal Justice System* (1995)).[13]

The Ontario Court of Appeal came to similar common sense conclusions after an exhaustive review of the available evidence:

> There is, however, an ever-growing body of studies and reports documenting the extent and intensity of racist beliefs in contemporary Canadian society. Many deal with racism in general, others with racism directed at black persons. Those materials lend support to counsel's submission that wide-spread anti-black racism is a grim reality in Canada and in particular in Metropolitan Toronto.
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> That racism is manifested in three ways. There are those who expressly espouse racist views as part of a personal credo. There are others who subconsciously hold negative attitudes towards black persons based on stereotypical assumptions concerning persons of colour. Finally, and perhaps most pervasively, racism exists within

[13] *R v Golden,* [2001] 3 SCR 679 at para 83.

> the interstices of our institutions. This systemic racism is a product of individual attitudes and beliefs concerning blacks and it fosters and legitimizes those assumptions and stereotypes.[14]

Doug Beirness, a policy expert with the Canadian Centre on Substance Abuse, stated in testimony on impaired driving before the House of Commons Standing Committee on Justice and Human Rights: "there is nothing truly random about random breath testing. The term random is used in place of more accurate and contentious descriptors, such as arbitrary or capricious."[15]

Increased police powers to "randomly" stop drivers and conduct breath tests will result in increased detentions and searches. Given the existence of racial profiling in various jurisdictions across Canada,[16] it is reasonable to assume that this power will adversely impact those disproportionately targeted by police.

Those who are already disproportionately stopped while driving will now not only be pulled over and questioned, but required to exit the vehicle, stand on the roadway or sit in a police vehicle, and provide a breath sample.[17] This procedure may be tolerated by the majority of Canadians who are pulled over once every few years at a RIDE stop. But Protection against discrimination and arbitrary harassment, however, is not determined by what the majority will accept. For those individuals who are pulled over randomly five, ten, or a dozen times, for no obvious reason other than their age, perceived religion, the colour of their skin, or the neighbourhood they were driving in, being required to submit to a breathalyzer will frequently be experienced as humiliating, degrading and offensive.

The disproportionate application of the police practice of carding (as painfully described by journalist Desmond Cole[18]), the results of the Ottawa traffic study, and the disproportionate arrests of visible minorities for possession of marijuana foreshadows the future of RBT. Given the history of discretionary police power, there can be little question that RBT will disproportionately impact visible minorities. RBT will become yet another pathway for the police to stop, detain, and search racialized groups in a non-random manner.

Imagine the following fact pattern: Under the guise of RBT, police detain a young father, who is a visible minority, while he is waiting to pick up his child from a downtown elementary school. The father, as is common in Canada, is asked to step out of his vehicle to provide a breath sample. He is searched for officer saftey purposes. The father is detained by one police officer, who explains the RBT procedure and demonstrates the operation of the machine. The

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[14] *R v Parks*, [1993] OJ No 2157 (CA).
[15] *House of Commons Standing Committee on Justice and Human Rights – Evidence*, 39th Parl, 2nd Sess, No 15 (28 February 2008) at 1540 (Dr. Douglas Beirness), online: Parliament of Canada, <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3314580&Language=E&Mode=1&Parl=39&Ses=2>.
[16] David M Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905.
[17] Robyn D Robertson & Ward GM Vanlaar, "Canada's Impaired Driving Framework: The Way Forward, Proceedings of the Drinking and Driving Symposium", (Ottawa: Traffic Injury Research Foundation, 2013) at 17.
[18] Demond Cole was stopped and interrogated more than 50 times by various police forces: "The Skin I'm In" (April 2015), Toronto Life, online: <http://torontolife.com/city/life/skin-im-ive-interrogated-police-50-times-im-black/>.

father is compelled to provide a sample. A second officer is walking around the vehicle, looking in the windows, and recording information. Durring this random encounter school is let out and the interaction between the father and the police is observed by hundreds of children and community members.

This is far from the rosy best-case senarios used by RBT advocates to obscure the serious *Charter* issues noted above.

Finally, the fact that individuals do not have the ability to consult with a lawyer before being required to submit to a roadside breath test causes additional problems. Many people who have not been drinking will not know that they are legally required to submit to a random breath test, and in an effort to assert their rights they may refuse to provide a roadside sample. Although these people present no risk to public safety, they will be guilty of the criminal offence of failing to provide a breath sample.

The CLA recognizes that there are written opinions suggesting that the implementation of RBT would be constitutional. Some have even gone so far as to say that it is an "easy conclusion" that RBT would not violate the Charter.[19] While we have great respect for the opinions of those authors, CLA's view is that they were based on an incomplete view of the evidence and likely operation of RBT in Canada.

The implementation of RBT would raise significant constitutional issues, and is likely an unjustifiable violation of ss. 8, 9, 10(b) of the Charter.

Most charitably and in the best case senario: when RBT is employed at RIDE check points and when there are sufficent resources and screening devices available to minimize the length of detention there may be some merit to the position that the associated *Charter* breaches will be found to be a reasonable limit under s. 1 of the *Charter*.

This, however, is the most optimistic view and likey divorced from reality.

Proponants of RBT advocate its use at RIDE check points specifically because of the high volume of traffic. The delay in administering RBT at busy RIDE check points would likely prove unreasonable. For example, if 15 vehicles are stopped and the RBT procedure adds only one minute to the current RIDE detention (which is a fancifuly low estimate), it is conceviable that a RBT subject may be detained for an additional 15 minutes. Any prolonged extension of detention at check points may well attract *Charter* scrutiny.

It is the CLA's belief given our experience in the criminal justice system that RBT powers will not only be employed at RIDE check points.

The CLA cannot support the expansion of police power represented by RBT.

> **Recommendation: Provisions 320.27(2) should be removed from the Bill.**

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[19] See e.g. Opinion of Peter W Hogg to Wayne Kauffeldt, Chair of the Board of Governers, MADD Canada (4 August 2010), online: stevenblaney.ca <http://www.stevenblaney.ca/wp-content/uploads/2016/04/Random-Breath-Testing-Opinion-P-Hogg.pdf>.