

Peter W. Hogg
September 14, 2017

RANDOM BREATH TESTING

Submission to the House of Commons Standing Committee on Justice and Human Rights
Monday September 18, 2017, 4.30 pm to 5.30 pm

Credentials

I am the scholar in residence at the law firm of Blake, Cassels & Graydon LLP. I am a professor emeritus of the Osgoode Hall Law School, where I taught from 1970 to 2003, serving as dean of the law school for the last five of those years. I am the author of *Constitutional Law of Canada*, which is a two-volume treatise now in its fifth edition. I have also acted as counsel in constitutional cases.

My opinion

I have been asked to appear before the House of Commons Standing Committee on Justice and Human Rights and make a submission on Bill C-46, An Act to amend the Criminal Code (offences relating to conveyances). The Bill authorizes police officers to administer random breath testing (RBT), sometimes called compulsory breath testing or mandatory alcohol testing. The purpose of RBT is to check if a driver has alcohol in his or her body.

RBT is usually administered by police at a stationary roadside checkpoint where all passing vehicles are stopped briefly and where every stopped driver is given a breath test. At a stationary roadside checkpoint, the police would exercise no discretion as to which drivers were to be tested. A driver who tested positively would be directed to a police station or a police van, where a second test on a more sophisticated instrument would be administered. Only the second test would be admissible as evidence in court.

RBT can also be administered from a police car during routine traffic and patrol activities (mobile RBT). Mobile RBT is necessary in rural areas, or late at night, or in other situations where low traffic volumes would not merit setting up a stationary RBT checkpoint.

I have read the written submission to the Committee of Professor Robert Solomon, who is the foremost expert in Canada on this topic. His submission points out, with abundant evidence, that RBT would operate as a much more effective deterrent to drunk driving than the existing law under which breath testing can be undertaken only after a police officer has formed a reasonable suspicion that the driver has alcohol in his or her body. My submission proceeds from the premise that Professor Solomon is correct.

My submission is limited to the question of whether random breath testing would be constitutional, and my opinion is that it would be constitutional. My reasons follow.

Section 8: Unreasonable search and seizure

Section 8 of the Charter of Rights provides that “Everyone has the right to be secure against unreasonable search and seizure”. The compulsory taking of a breath sample is probably a “seizure” under s. 8, and it is obviously impossible to obtain a judicial warrant for

each taking. Nevertheless, a warrantless seizure will pass constitutional muster (1) if the seizure is authorized by law, (2) if the authorizing law is reasonable, and (3) if the seizure is carried out in a reasonable manner.¹

As to (1), since Bill C-46 will be enacted by Parliament as part of the Criminal Code, the taking of breath will be authorized by law.

As to (2), the law is likely to be held to be reasonable, because concerns about public safety have already made driving a heavily regulated activity, and RBT will make an important contribution to public safety. The invasion of the driver's privacy is minor and transitory and not much different from existing obligations to provide evidence of licensing, ownership and insurance (which have been upheld by the Supreme Court).² The breath sample is for screening purposes only, and will not be admissible evidence in criminal proceedings.

As to (3) (the manner of the taking), RBT will typically be applied to every driver passing through a checkpoint, so there is no stigma or humiliation involved, and no singling out of individuals on improper grounds (such as racial profiling). The experience of New Zealand, Australia and Western Europe, according to the Solomon submission, is that drivers do not need to get out of their cars, and the process is so routine and so quick that even the delay is minimal for sober drivers. Drivers in Canada, like drivers in other democratic countries, will readily understand the safety concerns behind RBT, and will quickly accustom themselves to the minor inconvenience involved. Similar inconveniences are tolerated at airports, at borders, in courtrooms and other government facilities where searches and seizures are randomly (or universally) applied in order to ensure safety.

My conclusion on s. 8 (unreasonable search and seizure) is that random breath testing will not cause any infringement of that right.

Section 9: Arbitrary detention

Section 9 of the Charter of Rights provides that "Everyone has the right not to be arbitrarily detained or imprisoned." The Supreme Court has held that random stoppings of drivers by police at fixed checkpoints or on patrol to check licensing, ownership, and insurance, as well as sobriety, are arbitrary detentions under s. 9, but the Court has nevertheless upheld laws allowing such stops as reasonable limits of the right under s. 1 of the Charter.³ These decisions will govern RBT as well. My conclusion is that RBT will be held to be an arbitrary detention, and therefore an infringement of s. 9, but one that is justified as a reasonable limit under s. 1 and therefore constitutional.

Section 10(b): Right to counsel

¹ *R. v. Collins* [1987] 1 S.C.R. 265, para. 23.

² *R. v. Hufsky* [1988] 1 S.C.R. 621, para 23.

³ *R. v. Hufsky*, previous note (random stop at checkpoint); *R. v. Ladouceur* [1990] 1 S.C.R. 1257 (random stop during routine patrol).

Section 10(b) of the Charter of Rights provides that “Everyone has the right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right.” The right to counsel is triggered when there is a “detention”, and the meaning of “detention” is the same for s. 10(b) as it is for s. 9. The Supreme Court’s decisions that a random stop of a driver is a “detention” will apply under s. 10(b), which therefore provides a right to counsel to every driver who is pulled over.

The purpose of random breath testing would be completely thwarted if every driver were entitled to demand to see a lawyer as soon as he or she was pulled over. The right would no doubt be exercised only by those who feared the outcome of the breath test, but those drivers could tie up police resources for hours while lawyers were found for them (often late at night). Of course, in all but the rarest circumstances, the only advice that the lawyers could usefully give to their clients would be that the clients were obliged by law to submit to the breath tests, but the delay in getting hold of the lawyers would often make the breath tests useless. However, s. 1 of the Charter would enable Parliament to remove the right to counsel from drivers stopped for random breath testing. That would be a reasonable limit on the right.

In *R. v. Orbanski* (2005),⁴ two drivers were stopped by the police, one because he had been driving erratically, the other in a random stop. Each driver had been given a screening breath test which had been followed by an evidentiary breath test, which had been followed by criminal charges for impairment. Each driver argued that his right to counsel had been violated because he had not been warned of his right to counsel as soon as he was pulled over by the police. The provincial statute that conferred the power to stop drivers did not say anything about the right to counsel. Charron J., for the majority of the Supreme Court, held that, since a major purpose of the police power to stop drivers was to check sobriety, and since time was of the essence in checking sobriety, the statutory power should be interpreted as *implicitly* authorizing the police to ask questions about sobriety and take screening breath tests at the roadside without warning of the right to counsel. That implicit authorization was an infringement of the right to counsel under s. 10(b), but it was a reasonable limit that was constitutional under s. 1. By this reasoning the Court made the legislation workable despite the Court’s previous rulings about detention and the right to counsel.⁵ The Charter challenges failed.

The *Orbanski* reasoning would also save RBT from the ruinous effect of the right to counsel. However, it would be desirable for Bill C-46 to explicitly state that there is no right to counsel before the screening breath test. (There would be a right to counsel if the matter proceeded to an evidentiary breath test.)⁶ An explicit denial of the right to counsel before the screening breath test would obviate the need for interpretation (although the implicit provision was enough in *Orbanski*) and make it easier for the Court to uphold the provision under s. 1.

My conclusion on s. 10(b) (right to counsel) is that RBT would involve an infringement of s. 10(b), but that it would be upheld as a constitutional limit under s. 1.

Section 1: Reasonable limits on Charter rights

⁴ [2005] 2 S.C.R. 3.

⁵ To the same effect is *R. v. Thomsen* [1988] 1 S.C.R. 621, holding that the right to counsel is also implicitly denied by the breath test legislation, and that the implicit denial is constitutional under s. 1.

⁶ So held in *R. v. Therens* [1985] 1 S.C.R. 613.

In my discussion of Charter sections 9 (arbitrary detention) and 10(b) (right to counsel), I have asserted, on the basis of previous Supreme Court cases on random stops and breath tests, that an amendment to the Criminal Code to include police authority for random breath testing (RBT) would infringe ss. 9 and 10(b), but would nevertheless be upheld as a reasonable limit under s. 1 of the Charter. In this section of the opinion, I will briefly explain how the courts decide cases under s. 1, and why I am confident that RBT will be saved by s. 1.

Section 1 of the Charter of Rights provides as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Prescribed by law: A limit on a right must be “prescribed by law”. Bill C-46 will be enacted as an amendment to the Criminal Code. Whatever is in the Criminal Code is of course prescribed by law.

Sufficiently important objective: In *R. v. Oakes* (1986),⁷ the Supreme Court established a four-step framework to determine whether a law that infringes a Charter right should nevertheless be upheld as a reasonable limit under s. 1. The first step is to ask whether the law pursues an objective that is sufficiently important to justify limiting a Charter right. The objective of RBT is to increase safety on the roads, or, more specifically, to reduce the carnage caused by impaired driving. In several cases, the Supreme Court has held that this is an objective that is sufficiently important to justify limiting s. 9 or s. 10(b) or both.⁸

Rational connection: The second step in the *Oakes* framework is to ask whether the law is rationally connected to its objective. Since RBT will increase the risk of detection of impaired driving, it has a rational connection to the objective of the law.

Minimum impairment: The third step in the *Oakes* framework is to ask whether the law impairs the right no more than is necessary to achieve that objective. The Solomon submission refers to many studies and to the experience of other countries that show that the existing state of the law (breath test screening on reasonable suspicion) has not proved to be as effective a deterrent to impaired driving as RBT (breath test screening on a random basis) would be. RBT is the next step for Canada.

Proportionality: The fourth and final step in the *Oakes* framework is to ask whether there is proportionality between the deleterious and salutary effects of the law, or, in other words, whether the Charter infringement is too high a price to pay for the benefit of the law. Since Canada has a poor impaired driving record, and RBT is a proven method of reducing impaired driving, the benefits in improved road safety, lives saved, and disability and suffering avoided, are huge. On the other side of the ledger, the RBT “detention” is brief, the breath sample can be provided without the driver leaving the car, and (since the testing is random) it will not cause any stigma or embarrassment to drivers. The intervention of counsel would be of little practical use, since in all but the rarest cases counsel could only advise their driver clients of their legal

⁷ [1986] 1 S.C.R. 103.

⁸ E.g., *Husky*, note 3, above; *Ladouceur*, note 3, above; *Orbanski*, note 4, above; *Thomsen*, note 5, above.

obligation to take the test--and any significant delay in reaching counsel would enable their clients to avoid taking a reliable test.

Conclusion on s. 1: Even without the Supreme Court cases that have already upheld random stops and breath tests (on reasonable suspicion) under s. 1, in my opinion, it is an easy conclusion that RBT would be prescribed by law and would satisfy the four steps of the *Oakes* framework. RBT's minor infringements of s. 9 and 10(b) of the Charter would be saved by s. 1.

Conclusion

My conclusion is that, if Bill C-46 were enacted to amend the Criminal Code to replace breath testing on reasonable suspicion with random breath testing, the amendment would be constitutional. Section 8 of the Charter (unreasonable search and seizure) would not be infringed. Section 9 of the Charter (arbitrary detention) would be infringed, as would s. 10(b) (right to counsel). But these infringements would be minor and would be held to be justified and constitutional under s. 1 (reasonable limits on rights). The Supreme Court has already relied on s. 1 to uphold the existing law respecting random stops and breath tests because of their contributions to road safety, and RBT does not raise any truly new issue. I am confident that a Charter challenge would be unsuccessful and that random breath testing would be upheld by the Supreme Court of Canada.

All of which is respectfully submitted,

Peter W. Hogg