Bill C-226, 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

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SUBMISSIONS

THE CRIMINAL LAWYERS' ASSOCIATION

Standing Committee on Public Safety and National Security (SECU)

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Room 228, The Valour Building, 151 Sparks St.

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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-226.

The CLA cannot support this legislation in its current form – or at all – but nonetheless we propose a number of recommendations to address our specific concerns. This once government bill - now introduced as a private members bill - requires enhanced scrutiny and study commensurate with the seismic changes it makes to the *Criminal Code*. Changes as fundamental as those proposed in bill C-226 should be the subject of more extensive study, full justice department reports, broad consultation and ideally examination by a law reform commission.

The CLA adopts the submissions of the Canadian Civil Liberties Association and relies on those submissions in addition to our own.

In our view any provisions of the bill imposing mandatory minimum sentences – of fines or jail – must be removed. Mandatory minimum sentences are an ineffective method of achieving the principles of sentencing. Minimum sentences are a one-size-fit-all solution that sacrifices fairness and proportionality without any resulting increase to public safety. Minimum sentence result in economic costs, place undue burdens on the correctional system, and perhaps most importantly they devalue principles of judicial discretion and basic fairness. The mandatory minimums contained in this bill are unconstitutional.

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-226 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.

Finally, there are sections of the bill that are unquestionably unconstitutional such as amendments that permit the use of compelled statements. The Ontario Court of Appeal and Supreme Court have been clear that this would represent a clear violation of the *Charter*.

Bill C-226 represents a continuation of the last 10-years of failed justice legislation which has been repeatedly been found to be unconstitutional.

III. Specific Areas of Concern

1. 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; or

(b) subject to subsection (4), 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.

Exception — alcohol

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

(a) they consumed alcohol after having ceased to operate the conveyance;

(b) after having ceased 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 320.32(1) or (3) 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.

Section 320.14 dramatically increases the scope and application of the current 'over 80' provisions of the Criminal Code. The provision effectively makes it an offence to have a blood alcohol concentration (BAC) over 80 mg within two hours after driving. In other words, a driver who had no blood alcohol while driving may still be convicted of an offence.

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

Bill C-226 not only expands the evidentiary short cuts but will also operate to capture individuals who are not impaired and did not operate a vehicle with a BAC over the legal limit. Bill C-226 appears to create the very novel offence of having a BAC equal to (not over) 80 after driving. In short s. 320.14(1)(b) is a radical departure from the current law and operates in a manner that is overbroad, unfair, and unconstitutional.

The potential costs of the over-expansive 'equal to or over' 80 provisions in Bill C-226 come with little benefit. The purpose of this section is clearly aimed at combating bolus - and post-driving drinking (intended to frustrate police investigations). In reality, the percentage of cases in which either bolus - or post-driving drinking occurs is extremely rare. Bill C-226 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 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. Ironically, Bill C-226 seeks to spare the state from this level of proof.

Recommendation 1: The amendments proposed by Bill C-226 are overbroad and unconstitutional. Provision 320.14(1)(b) 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.

2. Samples of breath or blood — alcohol

320.29 (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 within a reasonable time,

(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.

320.32 (1) If samples of a person's breath have been received into an approved instrument operated by a qualified technician, the results of the analyses of the samples are conclusive proof of the person's blood alcohol concentration at the time when the analyses were made if the results of the analyses are the same — or, if the results of the analyses are different, the lowest of the results is conclusive proof of the person's blood alcohol concentration at the time when the analyses were made — if

(a) when each sample was taken, the approved instrument was in proper working order;

(b) there was an interval of at least 15 minutes between the times when the samples were taken; and

(c) the results of the analyses, rounded down to the nearest multiple of 10 mg, did not differ by more than 20 mg of alcohol in 100 mL of blood.

Presumption — blood alcohol concentration

(5) For the purpose of paragraph 320.14(1)(b) and sub- section 320.21(2), 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 (3), 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.

Demand

Section 320.29(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 within a reasonable time.

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-226 significantly changes the conditions under which a demand may be made. The 'as soon as practicable' requirement is replaced by a 'reasonable time' requirement, and the three-hour time limit is completely removed.

An officer can now demand a breath sample hours and hours 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.

This is a significant change with profound and wide-ranging implications that requires significant study, consultation, and review beyond that which is available for a private member's bill.

Proof of BAC

Currently, breath samples taken after driving can be conclusive proof of BAC at the time of driving.

Bill C-226 now deems breath samples conclusive proof of BAC at the time the sample was taken – there is no mechanism (as is provided for in the current s. 258(1)) to tie BAC at the time of the sample to BAC at the time of driving.

Further, the current two-hour 'presumption of identity' contained in s. 258(1)(c) of the *Criminal Code* was created as an evidentiary shortcut for the Crown to facilitate the prosecution of driving offences without the need to adduce expert evidence. If a sample of breath is taken within two hours and if the other criteria are met, then the breath sample is deemed to be conclusive proof of BAC at the time of driving.

Without this presumption, the Crown would be required to call evidence from a toxicologist in every case to prove the driver's BAC was over the legal limit at the time of driving (or of care and control).

The current two-hour presumption is not without limit. Section 258(1)(c) of the Criminal Code requires that two breath samples be taken as soon as practicable, with an interval of at least 15 minutes, and that the first sample must be taken within two hours of driving.

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 2a: Given the impacts on trial fairness, the best evidence principle, and the 'as soon as practicable' requirement, s.**

320.32(1) should be amended to require the first breath sample be taken not later than two hours after a valid demand. The presumption of identity contained in s. 320.32(1) should not be further alleviated by s. 320.32(5). Section 320.32(5) should be removed from the Bill.

Recommendation 2b: Section 320.29(1) should be amended to require a breath demand 'as soon as practicable' and to require a reasonable belief of operation of a conveyance in a prescribed time period.

Recommendation 2c: Section 320.32(1) should be amended to reflect the current deeming provisions in s. 258(1).

3. Reasonable grounds to suspect — alcohol

320.27 (2) Without limiting the circumstances that may amount to reasonable grounds to suspect that a person has alcohol in their body, any one of the following constitutes such grounds:

(a) the erratic movement of the conveyance;
(b) the person's admission of alcohol consumption;

(c) an odour of alcohol on the person's breath or emanating from the conveyance; or

(d) the person's involvement in an accident that resulted in bodily harm to, or the death of, another person.

The proposed changes to reasonable grounds to suspect for administering an Approved Screening Device (ASD) may well offend s. 8 of the *Charter*, which provides that everyone has the right to be free from unreasonable search and seizure.

The current regime under s. 254(2) guards against unlawful searches and seizures by requiring a standard of reasonableness of the search and seizure, based on both the officer's subjective belief and an objective view of the observations. This threshold, while low, is meant to strike a balance between allowing law enforcement to investigate impaired driving and an individual's reasonable expectation of privacy.

The Supreme Court in *R v. Chehil*, [2013] 3 S.C.R. 220, outlined this balancing act, and found that a reasonable suspicion does not arise where it is merely a 'generalized suspicion'. The Court warned that this would cast the net too wide and would subject a number of presumably innocent individuals to these tests:

> [Reasonable suspicion] is a robust standard determined on the totality of the circumstances, based on objectively discernible

> facts, and is subject to independent and rigorous judicial scrutiny. As Doherty J.A. said in *R. v. Simpson* (1993), 1993 CanLII 3379 (ON CA), 12 O.R. (3d) 182 (C.A.), at p. 202, the standard prevents the indiscriminate and discriminatory exercise of police power.

The Supreme Court went on to find that the reasonable suspicion standard requires that the entirety of the circumstances, inculpatory and exculpatory, be assessed to determine whether there are ascertainable objective grounds to suspect that an individual is involved in criminal behaviour.

Bill C-226 diminishes the constellation of facts necessary for a reasonable suspicion to a checklist of behaviours (with one check being enough) that on their own will establish grounds for an ASD. Some of the proposed indicia are too tenuous to provide reasonable grounds to suspect. For example, any erratic movement could be enough for a stop, when there could be a wide variety of reasons for a moment of inattention. Further, the observation of alcohol emanating from the vehicle would capture a designated driver who is sober and whose passengers have consumed alcohol.

The provisions governing 'reasons to suspect' are overbroad and would cast too wide of a net for necessary observations for an ASD. They fail to strike the appropriate balance between the investigative powers of the police and the rights of individuals to be free from unreasonable search and seizure.

> **Recommendation 3: The Supreme Court has described reasonable grounds to suspect as a robust standard. Some of the presumptions contained in s. 320.27(2) do not met that standard. Considering the current case law (including judicial findings that alcohol on the breath is sufficient to provide reasonable suspicion – i.e. for all intents and purposes this is superfluous) the presumptions in s. 320.27(2) should be removed from the Bill.**

4. Random breath testing

320.27(3) If a peace officer has in his or her possession an approved screening device, the peace officer may, by demand, require the person who is operating a conveyance, whether it was in motion or not, 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.

The CLA wholly adopts the written submissions of the Canadian Civil Liberties Association (CCLA) with respect to random testing. These submissions are reproduced below for the reader's conveniance with full credit to Abby Deshman, Director, Public Saftey Program for the CCLA:

Bill C-226 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"). S. 320.27(3) would eliminate the requirement for reasonable suspicion, authorizing a police officer to demand a breath sample from any driver, at any time, regardless of whether or not the driver's vehicle is in motion.

As outlined below, we are less optimistic than other commentators that RBT would have a measurable impact on impaired driving in Canada. It should also be recognized that, particularly outside of fixed sobriety checkpoints, there is nothing truly random about police stops. The impact of giving police an arbitrary personal search power, particularly for individuals from visible minorities, should not be underestimated. This factual background informs our constitutional analysis, wherein we conclude that 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.

i. Would random breath testing be effective in Canada?

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.

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.[1] *The real contribution of RBT and SBT*

[1] 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

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. [2] *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.[3] *The vast majority of jurisdictions that implemented RBT did so decades ago, in what researchers have described as a "revolutionary" act at the time.*[4] *RBT was often a part of the first major legislative efforts to reduce drinking and driving in these countries.*[5] *While it is true that many jurisdictions that*

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.

[2] 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>

[3] 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.

[4] 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>.

[5] 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

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%.[6] *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."*[7] *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.[8] *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.*[9] *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

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<http://www.justice.gc.ca/eng/cons/mtpcc-mdccmt/7.html#ann1> [*Modernizing the Transportation Provisions*].

[6] 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.

[7] 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>..

[8] 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 of the communities introducing random screening also introduced other measures to reduce drunk driving crash events, and few of the analyses controlled for these other efforts").

[9] 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>.

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:

> *...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).*
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> *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).*
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> *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.*[10]

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.[11] *In*

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[10] 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.

[11] 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

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.

ii. Shifting relationships between police and civilians and differential impact on racialized individuals

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. The significance of this proposed change should not be underestimated. 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. When police operate with respect for and deference to the rights and freedoms of those they serve and protect, citizens instinctively respond with a commensurate level of respect and cooperation. This, in turn, enhances the ability of the police to play their role.

RBT, however, undoes this understanding, seeking to authorize a transformation of the relationship to one where a citizen can now be stopped and randomly tested by the police, irrespective of his or her behavior. This is not a minor change. Rather, it represents a significant departure from standard democratic policing expectations. It also represents a departure from constitutional norms, as discussed below.

Where standard expectations would dictate that an individual is susceptible to arrest only when officers reasonably suspect that the person has done something wrong, the RBT framework shifts to a position in which one must now prove that he or she has done nothing wrong. This shift is symbolically important: the presumption of innocence is replaced with a presumption of guilt. Free and democratic societies must exercise significant caution when embarking down this road.

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

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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.

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."[12] *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,*[13] *it is reasonable to assume that this power will adversely impact those disproportionately targeted by police for vehicular stops, in particular African-Canadian, indigenous, and other racialized individuals. Unfortunately, legislative and policy-based efforts to curtail racial profiling, including the new regulation promulgated in Ontario to address racial profiling and police stops,*[14] *may not be of any help to limit the number and impact of random vehicular stops for the purpose of obtaining a breath sample. Therefore it is critical that increased police powers should be accompanied by data collection requirements, and robust, layered accountability measures including an independent audit.*

The current proposal would not limit this intrusive police power to stationary checkpoints, where discretion is curtailed and therefore the risk of racial profiling or other improper exercise of police powers is reduced. Instead, individuals will be subject not only to random roadside detentions, but also to a random search and seizure power in which the individual will be required to exit his or her vehicle to provide a breath sample. 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.[15] *This procedure may be tolerated by the majority of Canadians who are pulled over once every few years at a RIDE stop. 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. This extended, arbitrary interaction will serve to heighten*

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[12] *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>.

[13] David M Tanovich, "E-Racing Racial Profiling" (2004) 41:4 Alta L Rev 905.

[14] O Reg 58/16.

[15] 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.

existing problems of racial profiling at a time when police services are struggling to address relationships with racialized and marginalized communities.

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 - and liable to the mandatory minimum punishment for - failing to provide a breath sample. An equally effective alternative in the case of an initial screening refusal would be to authorize police officers to take an evidentiary breath sample. Individuals would then have the ability to speak with a lawyer before deciding whether or not to refuse the approved instrument sample. This would eliminate unnecessary criminal charges, alleviate the pressure on our justice system and increase fairness for those subject to roadside breath demands.

iii. Constitutional considerations: arbitrary detention, unreasonable search and seizure and the right to equality

The CCLA 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.[16] *While we have great respect for the opinions of those authors, CCLA's view is that they were based on an incomplete view of the evidence and likely operation of RBT in Canada. Our own analysis is that the implementation of RBT would raise significant constitutional issues, and is likely an unjustifiable violation of ss. 8 and 9 of the Charter.*[17]

Arbitrary detention

Section 9 of the Charter protects individuals against arbitrary detention. With its 1990 decision in R v Ladouceur, in which the police pulled over a suspended licensee who appeared to be acting lawfully, the Supreme Court of Canada wrestled with the issue of roving random stops of civilian vehicles by police.[18] *While a narrow 5-4 majority allowed these stops, a powerful dissent surveyed the serious implications of such a power:*

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[16] 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>.

[17] While the proposed amendment also raises s 10(b) concerns, CCLA has chosen to focus our analysis on the ss 8 and 9 issues.

[18] *R v Ladouceur*, [1990] 1 SCR 1257, [1990] SCJ No 53 [*Ladouceur* cited to SCR].

> *The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on… racial considerations may be a factor too… If, however, no reason need be given nori s necessary, how will we ever know? The officer need only say, 'I stopped the vehicle because I have the right to stop it for no reason.*[19]

The minority stated further that, for motorists, this unlimited power to disturb individual liberty and privacy means "the total negation of the freedom from arbitrary detention guaranteed by s. 9 of the Charter."[20] *And while the majority decided that the violation of section 9 could be justified in a free and democratic society, it also stated that "more intrusive procedures could only be undertaken based upon reasonable and probable grounds."*[21]

The implementation of a random breathalyzer test would extend the already-existing police power and clearly constitute an arbitrary detention. The impact of this detention is heightened by the recognition that racialized people may be disproportionately impacted by these stops, giving rise to equality concerns. The real question, therefore, is whether this extended rights infringement can be "demonstrably justified in a free and democratic society" under s. 1 of the Charter.

The Supreme Court has established a four-part test to determine whether a limit on a Charter right is justifiable.[22] *Limits on rights must be:*

- *(a) grounded in a pressing and substantial government objective;*
- *(b) the means chosen be rationally connected to that goal;*
- *(c) they must be minimally impairing in their operation; and*
- *(d) there must be proportionality between the salutary and deleterious effects of the law.*

There is no doubt that preventing impaired driving is a pressing and substantial objective, and that the specific goal of deterring impaired driving through a perceived increase in the likelihood of apprehension is laudable. Unfortunately, as summarized in the previous section, there are serious questions as to whether implementing RBT in Canada will achieve that goal, throwing doubt on the rational connection between the proposed amendments and the ultimate objective. Additionally, the fact that the current, less intrusive Canadian regime of SBT has been remarkably successful in curbing drinking and driving over the past thirty years raises

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[19] *Ibid* at 12.
[20] *Ibid* at 10
[21] *Ibid* at 32-33.
[22] *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No. 7.

significant questions as to whether the proposed law is minimally impairing. The proportionality requirement also presents concerns. Within the Canadian context, the salutary impacts are speculative, and we should be careful not to minimize the impact of this extension of police powers. Contrary to some factual assumptions underlying other analyses, there is evidence to suggest that individuals would have to leave their cars in order to provide the breath sample,[23] *significantly extending the length and changing the nature of the detention. In addition, these stops would not just take place at fixed road blocks, but would be authorized as a roving police power – open to be used at the (frequently non-random) discretion of individual police officers. In this context, and particularly when placed against the background of racial profiling concerns, requiring individuals to leave their car and provide a breath sample will undoubtedly result in significant stigma and personal embarrassment.*

Unreasonable search and seizure

Section 8 of the Charter protects individuals against unreasonable search and seizure, including the seizure of personal bodily substances. Canadian courts have historically recognized a heightened privacy interest in a person's body, including the seizure of breath samples.[24] *In Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd. the Supreme Court expanded on the nature of the privacy interests at stake in compelled breathalyzer tests:*

> *Early in the life of the Canadian Charter of Rights and Freedoms, this court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity" (Dyment, at pp. 431-32). And in R. v. Shoker, 2006 SCC 44 (CanLII), [2006] 2 S.C.R. 399 [at para. 23], it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements."*[25]

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[23] 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.

[24] See e.g. *R v Stillman*, [1997] 1 SCR 607 at para 42,144 DLR (4th) 193; *R v Pohoretsky*, [1987] 1 SCR 945 at para 4, 39 DLR (4th) 699 [*Pohoretsky*]; and *R v Dyment*, [1988] 2 SCR 417 at 431–432, 55 DLR (4th) 503.

[25] 2013 SCC 34, [2013] 2 SCR 458 at para 50.

More recently, in Goodwin v. British Columbia (Superintendent of Motor Vehicles), Justice Karakatsanis writing for a majority of the Supreme Court stated that, while far less intrusive than other bodily seizures that take place for law enforcement purposes such as blood samples or DNA, taking breath samples remain "more intrusive than a demand for documents" and "clearly amounts to what La Forest J. described as "the use of a person's body without his consent to obtain information about him" by which the state "invades an area of personal privacy essential to the maintenance of his human dignity": R. v. Dyment, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at pp. 431-32."[26] *The result in that case – finding that British Columbia's provincial scheme to tackle impaired driving through roadside breath demands was an unjustified violation s. 8 of the Charter – underscores that there are important constitutional limits to the use of these police powers.*

The key question in a s. 8 analysis will be whether the authorizing law is reasonable. For the reasons explained in the arbitrary detention discussion above, there is little evidence that RBT will meaningfully contribute to road safety in the Canadian context. The nature of the privacy intrusion, on the other hand, is far more significant than the existing requirements to hand over a person's license, registration and insurance documents. Indeed, courts have found that these basic requests do not even constitute searches protected by s. 8.[27] *Compelled breath samples, on the other hand, engage core privacy interests, and as explained above the problematic nature of this search power is intensified when viewed through an equality lens. In CCLA's view, the mandatory implementation of random breath testing in Canada would constitute an unreasonable search and seizure in violation of s. 8 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

[26] 2015 SCC 46, [2015] 3 SCR 250 at para 65.
[27] See *R v Hufsky* [1988] 1 SCR 621 at 638, 40 CCC (3d) 398.

(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.

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)).[28]

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.
>
> 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 the interstices of our institutions. This systemic racism is a product

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

> of individual attitudes and beliefs concerning blacks and it fosters and legitimizes those assumptions and stereotypes.[29]

The disproportionate application of the police practice of carding (as painfully described by journalist Desmond Cole[30]) 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 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.

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

> **Recommendation 4: Provisions 320.27(3) should be removed from the Bill.**
>
> **In the alternative, if this Committee determines that it would like to proceed with random breath testing, this expanded police power should be limited to fixed roadside stops such as the RIDE program. These powers, if introduced, should initially be implemented as part of a pilot project and subjected to independent monitoring and evaluation to determine whether there is any impact on the frequency of impaired driving, as well as whether there is any differential impact on particular groups based on race, age, or other protected grounds.**
>
> **Recommendation 5: The implementation of random breath testing, without providing a right to counsel, will result in the needless**

[29] *R v Parks*, [1993] OJ No 2157 (CA).
[30] 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/>.

criminalization of individuals who have not been drinking, but who mistakenly believe they are asserting their rights in refusing to provide a sample. Provision 320.15(2) should be amended to remove reference to s. 320.27. The offence of refusing to provide a roadside breath sample under s. 320.29 should only be considered grounds to make a breath demand and not a separate criminal offence.

5. Mandatory Minimum Sentences

Punishment

320.19 (1) Everyone who commits an offence under subsection 320.13(1), 320.14(1), 320.15(1) or 320.16(1), section 320.17 or subsection 320.18(1)

(a) is liable on conviction on indictment to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of

(i) for a first offence, 30 days,
(ii) for a second offence, 120 days,
(iii) for a third offence, one year, and
(iv) for each subsequent offence, two years; or

(b) is liable on summary conviction to imprisonment for a term of not more than two years less a day and to a minimum punishment of

(i) for a first offence, a fine of $1,000,
(ii) for a second offence, imprisonment for a term of 30 days,
(iii) for a third offence, imprisonment for a term of 120 days, and
(iv) for each subsequent offence, imprisonment for a term of one year.

Bill C-226 amends the *Criminal Code* to add yet more mandatory minimum jail sentences and increases the available minimum fines for driving offences (MMS).

The CLA categorically rejects MMS as an effective or constitutional criminal justice tool.

A proper cost-benefit analysis should underpin any attempt to expand the use of MMS. In this regard, the issue to be determined is not whether MMS deter offenders, but rather whether MMS will do a *better job* deterring offenders as compared with the sentences currently being imposed for the selected offences. If the answer is yes, the next consideration must be whether the marginal increase in deterrence is worth the systemic and public costs of MMS.

After ten years of Conservative justice bills that blindly embraced MMS, there is no shortage of testimony about MMS' lack of utility. Quite simply, they do not

offer any more deterrence than appropriately tailored proportionate sentences.[31] Most recently preeminent Canadian criminologists Anthony N. Doob, Cheryl Marie Webster, and Rosemary Gartner conclusively dispelled any remaining notion that MMS do anything to deter crime:

> [W]e think it is fair to say that we know of no reputable criminologist who has looked carefully at the overall body of research literature on "deterrence through sentencing" who believes that crime rates will be reduced, through deterrence, by raising the severity of sentences handed down in criminal courts… crime is not deterred, generally, by harsher sentences.[32]

The CLA is pleased that the government feels the same way.[33]

The costs associated with MMS are both insidious and overwhelming.

MMS result in the insidious transfer of discretion to the police and to the Crown—the police who decide what charges to lay, and the Crown who decides how to proceed with a charge.

Crown Attorneys have discretion to accept pleas to offences that do not carry minimum penalties. The discretion to drop a minimum sentence in exchange for

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[31] This conclusion is often repeated in the literature. See for example:

- Michael Tonry "Mandatory Penalties" (1992) 16 Crime and Justice Review 243.
- D.S. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-first Century", in M. Tonry, ed., *Crime and Justice: A Review of the Research* vol 23 (Chicago: University of Chicago Press, 1998).
- L. Stolzenberg & S.J. D'Alessio "'Three Strikes and You're Out': The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates" (1997) 43 Crime and Delinquency 457 at 464.
- M.Males, D. Macallair & K. Taqi-Eddin, "Striking Out: The Failure of California's "Three-strikes and You're Out" Law" (San Francisco: Justice Policy Institute, 1999).
- N. Morgan, "Mandatory Sentences in Australia: Where Have We Been and Where Are We Going?" (2000) 24 Crim LJ 164.
- Osgoode Hall Law Journal, Symposium Mandatory Minimum Sentences: Law and Policy, Vol. 39 Nos 2 & 3.
- Marc Mauer, Executive Director, The Sentencing Project, "The Impacts of Mandatory Sentencing Policies in the United States", Testimony at the Standing Committee on Legal and Constitutional Affairs, Canada, October 28 2009.
- Paula Mallea, "The Fear Factor – Stephen Harper's Tough on Crime Agenda" Canadian Centre for Policy Alternatives, November 2010, online: <www. Policyalternatives.ca> at 14.

[32] Anthony N Doob, Cheryl Marie Webster & Rosemary Gartner, "Issues related to Harsh Sentences and Mandatory Minimum Sentences: General Deterrence and Incapacitation", Research Summaries Compiled from *Criminological Highlights*, (2014) A-1 at A-3 <http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWGGeneralDeterrenceHighlights14Feb2013.pdf>.

[33] *House of Commons Debates*, 42nd Parl, 1st Sess, vol 148, No 69 (9 June 2016) at 1835 (Bill Blair), online: Parliament of Canada: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=8350534&Language=E&Mode=1>.

a plea can result in a perverse inducement for an innocent accused to plead guilty. In the case of Bill C-226, the Crown has complete discretion over the election (summarily or indictment) and thus ultimate discretion over whether MMS will apply under s. 320.19(a)(i) to first-time impaired driving offenders.

Unlike judicial discretion, police and Crown discretion is not transparent, and is rarely reviewable. The removal of judicial discretion obscures the decision-making process. Judges are required to deliver reasons for their decisions . The police and the prosecutors are not. Judges are reviewable by appellate courts. Police and prosecutors seldom are.

The issue of Crown discretion was considered at length by the Supreme Court of Canada in *R. v. Nur*, 2015 SCC 15:

> 95 Two further objections may be raised against the argument that prosecutorial discretion can cure a sentencing provision that violates s. 12 of the *Charter*. The first is that one cannot be certain that the discretion will always be exercised in a way that would avoid an unconstitutional result. Nor can the constitutionality of a statutory provision rest on an expectation that the Crown will act properly: *R. v. Lavallee, Rackel & Heintz*, 2002 SCC 61, [2002] 3 S.C.R. 209 (S.C.C.), at para. 45. As Cory J., for the majority, stated in *R. v. Bain*, [1992] 1 S.C.R. 91 (S.C.C.), at pp. 103-4:
>
> > Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.
>
> 96 This leads to a related concern that vesting that much power in the hands of prosecutors endangers the fairness of the criminal process. It gives prosecutors a trump card in plea negotiations, which leads to an unfair power imbalance with the accused and creates an almost irresistible incentive for the accused to plead to a lesser sentence in order to avoid the prospect of a lengthy mandatory minimum term of imprisonment. As a result, the "determination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be determined in plea discussions outside of the courtroom by a

> party to the litigation" (R. M. Pomerance, "The New Approach to Sentencing in Canada: Reflections of a Trial Judge" (2013), 17 *Can. Crim. L.R.* 305, at p. 313). We cannot ignore the increased possibility that wrongful convictions could occur under such conditions.
>
> 97 Second, as noted by Doherty J.A. in the Court of Appeal below, the exercise of discretion typically occurs before the facts are fully known. An analysis that upholds s. 95(2) on the basis of the summary conviction option "does not come to grips with the timing of the Crown election and the factual basis upon which that election is made" (para. 163). The existence of the summary conviction option is therefore not an answer to the respondents' s. 12 claim. As stated in *R. v. Smickle*, 2012 ONSC 602, 110 O.R. (3d) 25 (Ont. S.C.J.), at para. 110:
>
> > The Crown discretion is exercised at an early stage when all of the facts, particularly those favourable to the defence, are often not known. Often, the full facts will not be known until the trial judge delivers his or her reasons or the jury delivers a verdict.

Prosecutorial discretion was not a cure—and arguably made worse—the constitutional deficiencies in the MMS struck down by the Supreme Court in *Nur*. The same is true of the MMS contained in Bill C-226.

MMS are resource-intensive. They increase burdens on the court, they delay trials, they increase the prison population, and they carry the future cost of less successful rehabilitation.

Additionally, MMS also have a disproportionate impact on aboriginal groups (see the Supreme Court's decisions of *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13).

MMS are the antithesis of evidence-based policy-making. They are a simple and myopic way of looking at a complex issue, and have no place in Bill C-226.

> **Recommendation 6: Mandatory minimum sentences and fines lead to unjust punishments and do not contribute to public safety. Provisions 320.19, 320.2, and 320.21 should be removed from the Bill.**

6. Mandatory requirements to serve prohibition orders and sentences consecutively

Sentences to be served consecutively
(2) A sentence imposed on a person for an offence under subsection 320.14(3) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to 30 any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection 320.14(3).

The CLA wholly adopts the written submission of the CCLA with respect to random testing. These submissions are reproduced below for the reader's conveniance with full credit to Abby Deshman, Director, Public Saftey Program for the CCLA:

> *Two provisions in the proposed legislation would require various elements of the sentence to be served consecutively. In particular, s. 320.22(2) requires anyone convicted of impaired driving causing death to serve that sentence consecutively to any other sentence the person is currently serving or receives in relation to the same incident. Similarly, s. 320.24(7) requires that the court impose driving prohibitions consecutive to any prohibition that is already in force.*
>
> *The mandatory imposition of consecutive sentences curtails a judge's ability to craft a proportionate sentence that is responsive to the seriousness of the offence and the moral blameworthiness of the offender. In particular, imposing consecutive sentences may offend the "totality principle", which "requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender."*[34] *The Supreme Court of Canada has quoted Clayton Ruby explaining this principle as follows:*
>
> > *The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.*[35]
>
> *The mandatory imposition of consecutive sentences becomes unconstitutional if the global sentence imposed on an individual is grossly*

[34] *R v M (CA)*, [1996] 1 SCR 500 at para 42, [1996] SCJ No 28 [*M(CA)*].
[35] *Ibid* at para 42.

disproportionate.[36] *Because the mandatory minimum sentence for a conviction under s. 320.14(3) is five years, and one accident may result in multiple deaths, and therefore multiple convictions, a first-time impaired driver whose circumstances include several mitigating factors may nevertheless be unjustly saddled with a crushing sentence. It is the CCLA's position that s. 320.22(2) clearly contravenes s. 12 of the Charter.*

Recommendation 7: The mandatory imposition of consecutive sentences and driving prohibitions in ss. 320.24(7) and 320.22(2) should be removed from the Bill.

7. Admissibility of evaluating officer's opinion

Recognition and declaration

320.12 It is recognized and declared that

(d) evaluating officers are qualified to evaluate 15 whether a person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

Admissibility of evaluating officer's opinion

320.32

(6) An evaluating officer's opinion relating to the impairment, by a type of drug that they identified, or by a combination of alcohol and that type of drug, of a person's ability to operate a conveyance is admissible in evidence 25 without qualifying the evaluating officer as an expert.

Presumption — drug

(7) If the analysis of a sample provided under subsection 320.29(4) indicates that the person has a drug in their body of a type that the evaluating officer has identified as impairing the person's ability to operate a conveyance, 30 that drug — or, if the person has also consumed alcohol,

the combination of alcohol and that drug — is presumed,
in the absence of evidence to the contrary, to have been
the drug that was present in the person's body at the time when the person operated the conveyance and, on proof 35 of the person's impairment, to have been the cause of that impairment.

Bill C-226 establishes several statutory presumptions regarding the reliability of evidence of drug impairment. Section 320.32(6) is unconstitutional and violates the right to make full answer and defence. It precludes accused persons from

[36] *Ibid*.

arguing and trial judges from determining on a case-by-case basis whether the proposed opinion evidence of a particular Evaluating Officer in the particular circumstances of a particular case should be admitted.

A one-size-fits-all approach to admissibility is wrong and ignores the reality that even though Evaluating Officers may have an identical designation and similar training, that training is still quite minimal. Their degrees of experience will necessarily vary. Their understanding of the science that informs their highly subjective opinions will necessarily vary. Police officers are not necessarily scientists by background. Parliament should not pre-ordain that this evidence will always be admissible in a vacuum. Admissibility should be left to the trial judge, who is best positioned to do make that decision.

As presently constructed, the responsibility for designating a police officer as an Evaluating Officer is delegated to the U.S.-based International Association of Chiefs of Police by regulation (see *Evaluation of Impaired Operation Regulations,* SOR/2008-196, s. 1), and no changes are proposed to that regulation. By so delegating this responsibility, the enactment of proposed s. 320.32(6) would mean that a foreign administrative body unilaterally determines who can give an opinion on the ultimate issue at trial in a Canadian court, stripping this responsibility away from legally-trained and thoroughly-vetted Canadian trial judges.

Opinion evidence is presumptively inadmissible in Canadian courts. Where a party seeks to lead opinion evidence of an expert, this party must seek the Court's permission and demonstrate that a strict test for admission is met (see *R. v. Mohan*, [1994] 2 S.C.R. 9). The amendments proposed in s. 320.32(6) would represent a radical, unprecedented, and unprincipled departure from these rules.

There is a sound rationale for this long-standing presumption and the strict rules that govern the admissibility of expert opinion evidence—there is a grave danger that a trier of fact may abdicate its fact-finding role and blindly follow the opinion of the expert (see *R. v. D.D.*, [2000] 2 S.C.R. 275 at paras. 53-54; *R. v. J.(J.-L.)*, 2000] 2 S.C.R. 600 at paras. 25, 26, 37). This danger is particularly acute in circumstances where the opinion is an opinion on the ultimate issue at trial.

Section 320.32(6) invites the very danger that the long-standing common law rules of evidence seek to prohibit. It renders automatically admissible an opinion on the ultimate trial issue: whether the accused person's ability to operate a motor vehicle was impaired by drug.

Some of the more serious impaired-driving-related offences where serious bodily harm and/or death result are straight indictable offences that carry the risk of significant penitentiary sentences (with mandatory minimum jail sentences now proposed) and are routinely tried by judge and jury. Particularly in a jury case, a

trial judge continues to play an important role as a gatekeeper to ensure that the jury does not hear evidence that the jury risks giving greater importance to than it deserves.

If s. 320.32(6) is enacted, it will eliminate this important gatekeeper function of trial judges that guards against wrongful convictions.

This very issue is presently before the Supreme Court of Canada. On October 13, 2016, that Court will hear an appeal in *R. v. Bingley* to consider the basis upon which the evidence of Evaluating Officers is presently admissible. The Crown in that case argues that the present *Criminal Code* provisions should be interpreted in a manner identical to the plain language of the proposed s. 320.32(6). The CLA and the CCLA have both been given permission to intervene in this case to specifically argue that the Crown's interpretation, which is identical to s. 320.32(6), should not be accepted because it is unconstitutional.

The *Bingley* case offers an excellent factual example of the risk created by s. 320.32(6): Mr. Bingley's driving was awful, and the Evaluating Officer expressed an unequivocal opinion that the consumption of drugs was the cause. The trial judge mandated a *voir dire* in that case before admitting the evidence. It was clear on the *voir dire* that, even though the officer had the required training to be designated as an Evaluating Officer, the time he had spent training was minimal, he had no experience outside of his training, and he had minimal to no understanding of the scientific principles underpinning his subjective opinions. The trial judge refused to permit the officer to give opinion evidence and Mr. Bingley was acquitted on the balance of the evidence. Were this a jury case and were s. 320.32(6) in force mandating that the jury hear this evidence, the risk of a wrongful conviction would have been significant.

Preserving the trial judge's function as the gatekeeper of admissibility is reflective of the evolving and flexible approach to expert evidence as explained by the Supreme Court in *R. v. Trochym*:

> Like the legal community, the scientific community continues to challenge and improve upon its existing base of knowledge. As a result, the admissibility of scientific evidence is not frozen in time.
>
> While some forms of scientific evidence become more reliable over time, others may become less so as further studies reveal concerns. Thus, a technique that was once admissible may subsequently be found to be inadmissible...[37]

[37] *R v Trochym*, [2001] 1 SCR 239 at paras 31-32, 276 DLR (4th) 257. See also *R v Abbey*, 2009 ONCA 624.

Applying the same rules to the admissibility of an Evaluating Officer's opinions that have applied to every other scientific discipline for decades is sound in policy, sound in law, and guards against wrongful convictions.

Section 320.32(6) should not be enacted. It is unnecessary. Where the evidence of an Evaluating officer is necessary and reliable in a particular case, it will still be admitted for use by the trier of fact.

The only purpose of s. 320.32(6) is to eliminate a significant (and constitutionally mandated) safeguard against wrongful convictions, solely for the purpose of expediency.

> **Recommendation 8: Expediency should never be a justification to potentially compromise the reliability of the ultimate verdict in a criminal case. Given the subjective nature of DRE evaluations and the constant evolution of scientific knowledge, the admission of an evaluating officer's expert testimony should continue to be decided by the trial judge. Section 320.32(6) should be removed from the Bill.**

8. Admissibility of statutorily compelled statement

320.32 **(10)** A statement made by a person to a peace officer, including a statement compelled under a provincial Act, indicating that they operated a conveyance that was involved in an accident is admissible in evidence only for the purpose of justifying a demand made under section 320.27 or 320.29.

An individual involved in a motor vehicle accident is statutorily compelled to provide a report to the police officer. Section 320.32(10) would statutorily permit these compelled statements to be used for grounds to make a breath demand.

This was the case in *R. v. Soules*, 2011 ONCA 429. In that case, the accused told a police officer who was investigating a multi-vehicle accident that he was the driver of one of the vehicles and that he had been drinking the previous evening. The officer made an ASD demand based on those statements. When the accused registered a "fail", the officer made a demand for breath samples. The accused was ultimately charged with driving over 80.

The accused was acquitted at trial after the court ruled that any use of the compelled statements violated s. 7 of the *Charter*. The Ontario Court of Appeal granted leave for the Crown to appeal but found that the appeal is completely answered by the Supreme Court of Canada's decision in *R. v. White*, [1999] 2 S.C.R. 417. The Crown argued that compelled statements are useable as grounds for a breath demand, and if there was any *Charter* non-compliance, the use of compelled statements would represent a reasonable limit under s. 1. The Court of

appeal explicitly rejected this argument, finding that any use of compelled statements violates s. 7 of the *Charter* and would not be saved under s.1.

> **Recommendation 9: The Courts have already ruled on s. 320.32(10) of Bill C-226. It is clearly unconstitutional and should be removed from the Bill.**

VI. Summary of Recommendations

Recommendation 1: The amendments proposed by Bill C-226 are overbroad and unconstitutional. Provision 320.14(1)(b) should be amended to capture the offence of operating (or being in care and control of) a conveyance with a BAC over 80 mg of alcohol in 100 mL of blood.

Recommendation 2a: Given the impacts on trial fairness, the best evidence principle, and the 'as soon as practicable' requirement, s. 320.32(1) should be amended to require the first breath sample be taken not later than two hours after a valid demand. The presumption of identity contained in s. 320.32(1) should not be further alleviated by s. 320.32(5). Section 320.32(5) should be removed from the Bill.

Recommendation 2b: Section 320.29(1) should be amended to require a breath demand 'as soon as practicable' and to require a reasonable belief of operation of a conveyance in a prescribed time period.

Recommendation 2c: Section 320.32(1) should be amended to reflect the current deeming provisions in s. 258(1).

Recommendation 3: The Supreme Court has described reasonable grounds to suspect as a robust standard. Some of the presumptions contained in s. 320.27(2) do not met that standard. Considering the current case law (including findings that alcohol on the breath is sufficient to provide reasonable suspicion) the presumptions in s. 320.27(2) should be removed from the Bill.

Recommendation 4: Provisions 320.27(3) should be removed from the Bill. In the less desirable alternative, if this Committee determines that it would like to proceed with random breath testing, this expanded police power should be limited to fixed roadside stops such as the RIDE program. These powers, if introduced, should initially be implemented as part of a pilot project and subjected to independent monitoring and evaluation to determine its efficacy and whether there is any impact on the frequency of impaired driving, as well as whether there is any differential impact on particular groups based on race, age, or other protected grounds.

Recommendation 5: The implementation of random breath testing, without providing a right to counsel, will result in the needless criminalization of individuals who have not been drinking, but who mistakenly believe they are asserting their rights in refusing to provide a sample. Provision 320.15(2) should be amended to remove reference to s. 320.27. Police should be authorized to detain individuals who refuse to provide a roadside breath sample for mandatory testing under s. 320.29.

Recommendation 6: Mandatory minimum sentences and fines lead to unjust punishments and do not contribute to public safety. Provisions 320.19, 320.2, and 320.21 should be removed from the Bill.

Recommendation 7: The mandatory imposition of consecutive sentences and driving prohibitions in ss. 320.24(7) and 320.22(2) should be removed from the Bill.

Recommendation 8: Expediency should never be a justification to potentially compromise the reliability of the ultimate verdict in a criminal case. Given the subjective nature of DRE evaluations and the constant evolution of scientific knowledge, the admission of an evaluating officer's expert testimony should continue to be decided by the trial judge. Section 320.32(6) should be removed from the Bill.

Recommendation 9: The Courts have already ruled on the substance of s. 320.32(10). It is clearly unconstitutional and should be removed from the Bill.