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Submission to the House of Commons Standing  
Committee on Justice and Human Rights

*Bill C-46: 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*

## **Canadian Civil Liberties Association**

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## **Canadian Civil Liberties Association (CCLA)**

The CCLA fights for the civil liberties, human rights, and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national, non-profit, non-governmental organization, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the rights and freedoms cherished by Canadians and entrenched in our Constitution.

### **Executive Summary**

The Canadian Civil Liberties Association (CCLA) strongly supports the overarching goal of Bill C-46, which aims to address the tragic and unnecessary injuries and deaths that take place as a result of impaired driving. We are concerned, however, about a number of the provisions proposed by the Bill and whether they will be effective in achieving the government's goals while also upholding constitutional rights of all. A list of our specific recommendations is provided at the end of this brief.

First, this brief raises significant concerns about the likely impact and constitutionality of mandatory alcohol screening, i.e., random breath testing ("RBT"). The scheme proposed allows for random roving police stops followed by a requirement to submit to a breath test. RBT certainly engages the *Charter* rights of individuals, including the right to be free from unreasonable search and seizure and the right to be free from arbitrary detention. As such, the evidence used to justify RBT should meet an exacting burden. Yet, the international experiences with RBT that are used to justify its adoption do not provide reliable comparisons for Canada, which has had a less invasive and increasingly effective roadside testing regime in place for decades.

Moreover, there is nothing truly random about police stops. Since some individuals will often be pulled over "randomly" five, ten, a dozen times in a few months, for no obvious reason other than their age, the colour of their skin, or the neighbourhood they were driving in, RBT will often be humiliating and degrading to individuals who are subject to search. While procedures facilitating actual randomization can alleviate some of these concerns, even random stops can nevertheless be experienced as non-random and degrading in communities that have historically faced discrimination by police forces and other state actors. This factual background informs our conclusion that RBT is an unjustifiable violation of the *Charter* and should not be included in this Bill.

Second, the CCLA urges this Committee to remove the provisions increasing mandatory minimum fines and maximum penalties from Bill C-46. Mandatory minimum fines and harsh maximum prison sentences do not and will not prevent impaired driving. Moreover, mandatory minimum fines have the perverse effect of disproportionately punishing those who live in poverty. Criminal justice punishments that are both ineffective and fundamentally unjust have no place in Canadian law.

Finally, we raise concerns about the evidentiary presumptions of drug-impaired driving. The underlying tests that these provisions rely upon – bodily fluids results and DRE evaluations – are fallible and the science to support the use of these tests is still developing. The reverse onus provisions that these presumptions create serve to undermine the most fundamental presumption of all – the presumption of

innocence. In our view, further study is required before considering whether the equipment and methods are consistent and accurate enough to support such presumptions.

## **I. Introduction**

The Canadian Civil Liberties Association (CCLA) strongly supports the overarching goal of Bill C-46, which aims to address the tragic and unnecessary injuries and deaths that take place as a result of impaired driving. We recognize that impaired driving has been and continues to be a leading cause of injuries and deaths on Canada's roadways,<sup>1</sup> and that the government has a strong role to play in addressing this persistent social problem. We are concerned, however, about a number of the measures proposed in this Bill. In our view, some of the suggested changes are a continuation of previous ill-advised, and at times unconstitutional, government 'tough on crime' criminal justice reforms that would do little or nothing to combat impaired driving. Other changes are proposed without a solid scientific basis, opening the door to unjustifiable *Charter* violations and wrongful convictions. This brief will highlight a number of the provisions that the CCLA finds concerning from a civil liberties perspective. A summary of our recommendations can be found at the end of this brief.

## **II. Specific areas of concern**

### **a. Mandatory Alcohol Screening, i.e., Random breath testing**

The most troubling proposal contained in Bill C-46 is set out in proposed s. 320.27(2) which would institute mandatory alcohol screening, or random roadside breath testing ("RBT").<sup>2</sup> This section would eliminate the requirements for reasonable suspicion, authorizing a police officer to demand a breath sample from any driver, at any time, regardless of whether or not there is any basis to suspect impairment or even whether driver's vehicle was in motion.

Currently, police officers in Canada are authorized to stop a vehicle to check vehicle fitness, license, 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 and seizure. As recently as 2015, a majority of the Supreme Court of Canada described a roadside breath demand as the nonconsensual use of an individual's body to obtain information by which the state "invades an area of

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<sup>1</sup> See Jim Coyle, "Canada tops list of developed countries for rate of impaired-driving fatalities", *The Toronto Star* (23 July 2016) online: Toronto Star <<https://www.thestar.com/news/canada/2016/07/23/canada-tops-list-of-developed-countries-for-rate-of-impaired-driving-fatalities.html>> (in Canada, alcohol impairment is involved in 33.6 per cent of road fatalities). While the study highlights the continued problem of impaired driving on Canada's roads, Canada's rate of impaired-driving fatalities (33.6%) was comparable to analogous countries in the study, namely the United States (31%), Australia (30%), and New Zealand (31%). Unlike Canada and the United States, the latter two countries employ random breath testing.

<sup>2</sup> See Bill C-46, *An Act to amend the Criminal Code (offences in relation to conveyances) and the Criminal Records Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2015–2016–2017, (Second reading and referral to committee) [*Impaired Driving Act*], s. 320.27(2).

personal privacy essential to the maintenance of [the individual's] human dignity.”<sup>3</sup> Because a “roadside breath demand constitutes a seizure that infringes on an individual's reasonable expectation of privacy,” it engages Section 8 of the *Charter*.<sup>4</sup> As such, currently police may only demand a roadside breath sample 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”). Proposed s. 320.27(2) marks a fundamental change in our law that places significant limits on *Charter*-protected rights and freedoms.

In order to withstand constitutional scrutiny, it must be both reasonable and demonstrably justified. The Supreme Court has established a four-part test to determine whether a limit on a *Charter* right is justifiable.<sup>5</sup> 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.

It is CCLA's position that RBT does not meet these criteria.

As outlined below, we are not optimistic 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 on individuals who are racial 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*. These difficulties are particularly acute when viewed through the lens of the *Charter* right to equality and the disparate impact mandatory police searches and detentions will have on racial minorities and on communities that have been subject to historical patterns of discrimination.

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, the international examples and the bulk of the available research do not demonstrate – and were not designed to demonstrate – that RBT is better than SBT. Rather, they demonstrate 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

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<sup>3</sup> *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 65 (citing *R v Dyment*, 1988 CanLII 10 (SCC), [1988] 2 SCR 417).

<sup>4</sup> *Ibid* at 51.

<sup>5</sup> *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No. 7.

Canada's current SBT regime.<sup>6</sup> The real contribution of RBT and SBT programs, however, comes not from catching individual drivers, but from specific and general deterrence. And SBT is equally capable of accomplishing the aims of both specific and general deterrence. 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. Furthermore, 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. By contrast, enforcement levels would need to be extraordinarily – and unrealistically – high in order to directly detect a significant number of drunk drivers.

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 Australia, New Zealand, Ireland and other countries, all of which have documented significant success deterring impaired driving after the implementation of RBT.<sup>7</sup> Unfortunately, as summarized below, the evidence does not support the conclusion that replacing SBT with RBT in Canada would have a meaningful impact on deterring more drivers.

There are several reasons that the existing studies showing dramatic decreases in drinking and driving after the implementation of RBT are not useful precedents for Canada. First, most studies are not able to directly assess the impact of RBT as compared with selective breath testing (SBT), the regime that Canada has had in place for many years.<sup>8</sup> The vast majority of jurisdictions that implemented RBT did so

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

<sup>7</sup> 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](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>>

<sup>8</sup> 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.

decades ago, in what researchers have described as a “revolutionary” act at the time.<sup>9</sup> RBT was often a part of the first major legislative efforts to reduce drinking and driving in these countries.<sup>10</sup>

While it is true that many jurisdictions that implemented RBT experienced dramatic declines in accident rates, Canada also underwent its own “revolutionary” period of legal, educational and enforcement reform in this area, and has experienced a similarly dramatic decline in the alcohol-related traffic deaths in the past thirty years. In 1981, 62% of drivers killed in road crashes in Canada tested positive for alcohol; by 1999, the percentage of driver fatalities involving alcohol had decreased to 33%.<sup>11</sup> Since that time, alcohol-involved traffic deaths have remained under the 35% mark, with recent data close to or under the 30% mark.<sup>12</sup>

Given the significant legal, cultural and educational shifts that have occurred in this area over the past decades, 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.<sup>13</sup> Indeed, for RBT to deter drinking and driving effectively, it has been recommended that

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<sup>9</sup> 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](https://infrastructure.gov.au/roads/safety/publications/1997/pdf/alc_random.pdf)>.

<sup>10</sup> For example, RBT was introduced in 1976 in Victoria, Australia; in 1983 in Tasmania, Australia; in 1988 in Queensland, Australia; and in 1993 in New Zealand. See Department of Justice Canada, *Modernizing the Transportation Provisions of the Criminal Code - Discussion Paper* (2010) at Annex 1, online: Government of Canada <<http://www.justice.gc.ca/eng/cons/mtpcc-mdccmt/7.html#ann1>> [*Modernizing the Transportation Provisions*].

<sup>11</sup> 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.

<sup>12</sup> In a recent research report produced by the Traffic Injury Research Foundation of Canada (TIRF) the authors found 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.” 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](http://www.ccmta.ca/images/publications/pdf/2012_Alcohol_Drug_Crash_Problem_Report_ENG.pdf)>. In a monitoring report published in 2016, TIRF found that this general trend continued through at least 2013, when the percentage of alcohol-related fatalities in Canada (excluding British Columbia) decreased to a new low of 28.0%.<sup>12</sup> See SW Brown, MM Hing, WGM Vanlaar & RD Robertson, “Road Safety Monitor 2016: Drinking and Driving in Canada” (Ottawa: Traffic Injury Research Foundation of Canada, 2016), at 2, online: Traffic Injury Research Foundation of Canada <<http://tirf.ca/wp-content/uploads/2017/01/RSM-Drinking-and-Driving-in-Canada-2016-4.pdf>>. The authors clarify that the decline has been standardized and is not attributable to the lack of B.C. reporting data during the time period: “Data from BC were not available at the time that the 2016 [report] was prepared; all fatality data from 1995 to 2013 have been recalculated consistently to enable accurate comparisons over time.” *Ibid.*

<sup>13</sup> 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

enforcement increase so that each license holder is tested once a year.<sup>14</sup> It is very difficult 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 balanced review of the evidence does not show that implementing RBT will have a significantly greater impact on drinking and driving than Canada's current SBT system, particularly if any increased enforcement efforts associated with adopting a new protocol are instead redirected towards enforcing and publicizing SBT. 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).

One particular study that provides some information regarding the effectiveness of RBT versus SBT comes from Australia where sobriety checkpoints were used before introducing RBT. This one study concludes that RBT is more effective than SBT but also reports that the quality of data about enforcement levels was sometimes questionable and this means that the observed difference in effectiveness between SBT and RBT could also be explained by different levels of enforcement (Henstridge et al. 1997).

To summarize, the available evidence supports both SBT and RBT and suggests that what really matters is the balance between enforcement levels that are sufficiently high and publicity about the enforcement to establish the required general deterrent effect.<sup>15</sup>

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

<sup>14</sup> 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 vi, online: Department of Infrastructure and Regional Development [AU] <[https://infrastructure.gov.au/roads/safety/publications/1997/pdf/alc\\_random.pdf](https://infrastructure.gov.au/roads/safety/publications/1997/pdf/alc_random.pdf)>.

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.<sup>16</sup> In the absence of extremely high levels of enforcement, however – a practice that would undermine the claim that RBT would be minimally impairing of individuals' rights to be free from unreasonable search and seizure and free from arbitrary detention – it is unlikely that the general public will be aware of any increased likelihood of detection, thereby undermining any potential deterrent effect. The research simply does not provide convincing evidence that replacing SBT with RBT in Canada would have a measurable impact on impaired driving.

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 that government justify its forced intrusion into a particular individual's private life is a fundamental premise of a free and democratic society. It reflects a moral and constitutional commitment to demarcating the appropriate relationship between civilians and the police. Indeed, policing that reflects, and is sensitive to, this foundational commitment is all the more likely to be effective. 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. The need for, and promise of, such an approach is particularly pronounced in communities that have been subject to historical patterns of discrimination.

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 policing expectations in democracies. It also represents a departure from constitutional norms, as discussed below.

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<sup>15</sup> 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.

<sup>16</sup> See Robert Solomon et al, "The Case for Comprehensive Random Breath Testing Programs In Canada: Reviewing The Evidence and Challenges" (2011) 49:1 Alta L Rev 37 at 45–48. See also Evelyn Vingilis & Violet Vingilis, "The Importance of Roadside Screening for Impaired Drivers in Canada" (1987) 29:1 Can J Crim 17 at 22–25; E Vingilis, EM Adlaf & L Chung, "Comparison of Age and Sex Characteristics of Police-Suspected Impaired Drivers and Roadside-Surveyed Impaired Drivers" (1982) 14:6 Accident Analysis & Prevention 425 at 429; Joann K Wells et al, "Drinking Drivers Missed at Sobriety Checkpoints" (1997) 58:5 Journal of Studies on Alcohol 513 at 516.



Where standard expectations would dictate that an individual is susceptible to arrest only when officers reasonably believe or, at a minimum, 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 transforms the police-citizen interaction in symbol and effect: the presumption of innocence is replaced with a presumption of guilt. This is a dangerous road to embark upon.

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 racial minorities. There is no shortage of social science research documenting this phenomenon.<sup>17</sup> In a recent study, researchers found that black youth in Toronto were 4.1 times more likely to be stopped and questioned for traffic reasons than their white counterparts, in spite of evidence suggesting no sound basis for stopping black youth at a rate higher than white youth.<sup>18</sup> As the Ontario Court of Appeal has expressly recognized, the social science establishes that racialized characteristics of black people provoke police suspicion in Toronto, and black people are more likely than others to experience the unwelcome intrusion of being stopped by the police.<sup>19</sup> Similarly, by analyzing data from Montreal’s Police Services regarding arrests and detentions on the island of Montreal, researchers found that while black individuals were 2.5 times more likely to be arrested than white individuals, they were 4.2 times more likely to be stopped.<sup>20</sup> Doug Beirness, a policy expert with the Canadian Centre on Substance Abuse, stated in testimony on impaired driving before the House of Commons Standing Committee on Justice and Human Rights: “there is nothing truly random about random breath testing. The term random is used in place of more accurate and contentious descriptors, such as arbitrary or capricious.”<sup>21</sup>

Given the existence of racial profiling in various jurisdictions across Canada, it is reasonable to assume that increased police powers to “randomly” stop drivers and conduct breath tests may create opportunities and incentives for officers to conduct vehicular stops with greater frequency. Even if the frequency of stops does not increase, the reality of racial profiling and the increased invasiveness that attends a mandatory alcohol screening means that the practice will adversely impact those disproportionately targeted by police for vehicular stops, in particular African-Canadian, indigenous, and other racial minorities. Unfortunately, legislative and policy-based efforts to curtail racial profiling, including the new regulation promulgated in Ontario to address racial profiling and police stops,<sup>22</sup> may not be of any

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<sup>17</sup> See, e.g., David M Tanovich, “E-Racing Racial Profiling” (2004) 41:4 Alta L Rev 905.

<sup>18</sup> Yingliang Meng, Sulaimon Giwa, and Uzo Anucha, *Canadian Journal of Family and Youth*, 7(1), 2015, pp 115-148, at 128, 134.

<sup>19</sup> *R v Brown* (2003), 64 O.R. (3d) 161 (Ont. C.A.) at paras 8-9; see also *Elmardy v. Toronto (City) Police Services Board* 2017 ONSC 2074 at paras 14 – 15.

<sup>20</sup> Léonel Bernard Bernard and Christopher McAll (2010). «Jeunes Noirs et système de justice : La mauvaise conseillère», *Revue du CREMIS*, vol. 3(1), p.7-14.

<sup>21</sup> *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>>.

<sup>22</sup> O Reg 58/16.

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 potentially 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 they will also be required to provide a breath sample – at times by exiting the vehicle and standing on the roadway.<sup>23</sup> 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, a dozen times in a few months, 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 existing problems of racial profiling at a time when police services are struggling to address relationships with racial minorities.

- 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*.<sup>24</sup> 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 of the likely operation of RBT in Canada. Our own analysis is that the implementation of RBT would raise significant constitutional issues, and is an unjustifiable violation of ss. 8 and 9 of the *Charter*.<sup>25</sup>

As elaborated upon below, numerous judicial precedents make it abundantly clear that the proposed provision would limit individuals’ ss. 8 and 9 Charter rights. Thus, the key question is whether these limits are demonstrably justifiable in a free and democratic society.

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<sup>23</sup> 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.

<sup>24</sup> See e.g. Opinion of Peter W Hogg to Wayne Kauffeldt, Chair of the Board of Governors, MADD Canada (4 August 2010), online: [www.stevenblaney.ca <http://www.stevenblaney.ca/wp-content/uploads/2016/04/Random-Breath-Testing-Opinion-P-Hogg.pdf>](http://www.stevenblaney.ca/wp-content/uploads/2016/04/Random-Breath-Testing-Opinion-P-Hogg.pdf).

<sup>25</sup> While the proposed amendment also raises s 10(b) concerns, CCLA has chosen to focus our analysis on the ss 8 and 9 issues.

### *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.<sup>26</sup> Only a narrow 5-4 majority allowed these stops. A powerful dissent described one of the serious implications of the power:

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 nor is 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.'<sup>27</sup>

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*.”<sup>28</sup> 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.”<sup>29</sup>

The implementation of a mandatory breathalyzer test would extend the already-existing police power of roadside detention and clearly constitute an arbitrary detention. The impact of this detention is heightened by the recognition that certain racial minorities 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*.

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. The crux of the matter, however, is that the current, less intrusive Canadian regime of SBT has been very successful in curbing drinking and driving over the past thirty years. This success raises significant questions as to whether the proposed law is minimally impairing, particularly insofar as SBT can be further advanced through increased enforcement efforts and through increased publicity for the SBT program.

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. S. 320.15(1) would make it an offence to fail or refuse to comply with a mandatory screening demand, and it is doubtless that many otherwise innocent individuals will be charged and found guilty for refusing to comply with a mandatory screening demand, refusals that will often take the form of

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<sup>26</sup> *R v Ladouceur*, [1990] 1 SCR 1257, [1990] SCJ No 53 [*Ladouceur* cited to SCR].

<sup>27</sup> *R v Ladouceur*, [1990] 1 SCR 1257, [1990] SCJ No 53 [*Ladouceur* cited to SCR] at 12.

<sup>28</sup> *R v Ladouceur*, [1990] 1 SCR 1257, [1990] SCJ No 53 [*Ladouceur* cited to SCR] at 10

<sup>29</sup> *R v Ladouceur*, [1990] 1 SCR 1257, [1990] SCJ No 53 [*Ladouceur* cited to SCR] at 32-33.

mistaken but good intentioned attempts to assert individual rights. Contrary to some factual assumptions underlying other analyses, there is evidence to suggest that some individuals would have to leave their cars in order to provide the breath sample,<sup>30</sup> significantly extending the length and changing the nature of the detention.<sup>31</sup> 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.<sup>32</sup> 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.”<sup>33</sup>

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.”<sup>34</sup> The result in that case – finding that British Columbia's provincial scheme to automatically suspend a driver's licence if they registered a

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<sup>30</sup> 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 .

<sup>31</sup> For instance, individuals are often compelled to take the approved screening device test in the back of a police vehicle due to safety concerns. See, e.g., *R v Schwab*, 2015 ABPC 180. *R. v. Parkar*, 2016 ABPC 169.

<sup>32</sup> 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.

<sup>33</sup> 2013 SCC 34, [2013] 2 SCR 458 at para 50.

<sup>34</sup> 2015 SCC 46, [2015] 3 SCR 250 at para 65.

“fail” reading on a roadside approved screening device 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 significantly contribute to road safety in the Canadian context beyond what is achievable via the less rights-impairing SBT. 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.<sup>35</sup> 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 implementation of random breath testing in Canada would constitute an unreasonable search and seizure in violation of s. 8 of the *Charter*.

**Recommendation 1: Provision 320.27(2) 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 both prior to and after deployment to determine whether or not there is any impact on the frequency of impaired driving, detection rates, the number of stops and searches, as well as whether there is any differential impact on particular groups based on race, age, or other protected grounds.**

**b. Mandatory minimum fines and increased maximum penalties**

Bill C-46 contains provisions that would add or increase mandatory minimum fines and would add maximum penalties; the CCLA strongly urges this Committee to strike these increases.<sup>36</sup>

Decades of research has clearly shown that harsher penalties do not deter crime. As summarized by preeminent Canadian criminologists Anthony N. Doob, Cheryl Marie Webster and Rosemary Gartner:

...we 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.<sup>37</sup>

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<sup>35</sup> See *R v Hufsky* [1988] 1 SCR 621 at 638, 40 CCC (3d) 398.

<sup>36</sup> See *Impaired Driving Act*, ss 320.19, 320.2, 230.21,

Doob, Webster, and Gartner have explained the general, if sometimes unintuitive, research consensus that “harsher sentences do not deter more than less harsh sentences” by noting the several flaws that attend our intuition that harsher penalties should lead to more deterrence. First, offenders are often unaware of changes in penalty structures; second, offenders often do not believe they will receive the harshest penalty, either because they believe they will never be caught or because they believe that they will not, if convicted, receive the harshest penalty available; and, finally, there is no reason to believe that there exists a substantial number of individuals who would commit the crime if they thought they would get the lower penalty, but who would refrain if the penalty were higher.<sup>38</sup>

For these reasons, the suggested changes to mandatory minimum fines and maximum allowable penalties – which are a continuation of previous ill-advised ‘tough on crime’ criminal justice reforms – would do little or nothing to combat impaired driving.

Bill C-46 would increase mandatory minimum fines for first offenders with a high Blood Alcohol Content and would introduce a higher mandatory fine to refuse to comply with a demand, including a demand for a random breath test. CCLA has long opposed the adoption of mandatory minimum penalties in Canadian law and mandatory minimum fines are no exception. The decision to sanction an individual with a criminal fine is one of the most serious punishments sanctioned by our society. As such, fines must be proportionate and carefully tailored to both the offence and the offender.<sup>39</sup>

Mandatory minimum penalties fundamentally undermine this proportionality, imposing an inflexible restriction on judicial discretion and creating a significant risk that, in a particular set of circumstances, the mandated punishment will be unjust. While such injustice is not the intention of mandatory minimum fines, it becomes an unavoidable byproduct of their rigidity. Simply put, mandatory minimum penalties are not capable of anticipating and responding to the range of situations that human reality creates. By predetermining the penalty for a particular act or omission and precluding any consideration of the offender’s circumstances and moral blameworthiness, they fail to account for unforeseen factors that might render a particular sentence inappropriate or excessive.

Mandatory fines also push individuals to fight every charge to the fullest, regardless of the merits of the case. As one defence counsel with significant experience in impaired driving cases explained several years ago:

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<sup>37</sup> 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/DWG-GeneralDeterrenceHighlights14Feb2013.pdf>>.

<sup>38</sup> 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-8 <<http://criminology.utoronto.ca/wp-content/uploads/2013/09/DWG-GeneralDeterrenceHighlights14Feb2013.pdf>>.

<sup>39</sup> See *Criminal Code*, RSC 1985, c C-46 ss 718.1, 718.2.

Impaired driving is unique in criminal law as being the only charge in the *Criminal Code* in which it is legally impossible to motivate an accused to plead guilty. In every other case, the Crown always has at their disposal the option of offering some form of reduced sentence in exchange for an early guilty plea that strongly encourages an admitted offender to make his peace with Her Majesty. Conversely, in the typical impaired driving case ..., I routinely must advise my clients that they have nothing to lose by going to trial and nothing to gain by entering a guilty plea. This is a function of the draconian mandatory minimum penalties now imposed. No matter what the circumstances of the offender, a first-time impaired driver who is found guilty cannot do better than a \$1000 fine and a one-year licence suspension. With the mandatory minimum being so severe, I also advise my clients that it would be virtually unheard of for them to be sentenced to anything more than the minimum should they take their case to trial and lose. Thus, a protracted trial is virtually guaranteed.<sup>40</sup>

Moreover, striking only the new mandatory minimum fines would leave untouched the mandatory minimum sentences that currently exist in the *Criminal Code* – including a series of mandatory minimum sentences that were harshened in 2008 under a previous government.<sup>41</sup> Mandatory minimum sentences are a failed experiment in public safety, and should be removed from this Bill entirely. Criminal justice punishments that are both fundamentally unjust and ineffective have no place in Canadian law.

It is of no solace that Bill C-46 refrains from increasing mandatory minimum prison terms and instead supports increasing mandatory minimum fines. The logic that demonstrates the inefficacy of mandatory minimum prison sentences extends to the case of mandatory fines: given that harsh mandatory jail terms do not deter individuals from driving while impaired, there is no reason to believe that increasing minimum fines would result in meaningful change.

Furthermore, although fines are generally seen as less punitive than prison sentences, we should be careful not to lose sight of the seriousness of fines. Fines are, by definition, criminal convictions, and therefore carry with them significant post-sentence barriers to employment, education and general reintegration.

Indeed, there is an important way in which mandatory minimum fines are especially severed from the dictate that the punishment fit the crime. The sting of having to pay a financial penalty is relative to our ability to pay it. As such, an inflexible monetary penalty is inherently discriminatory: it effects a harsher and more severe punishment on the poorest among us. A mandatory fine of \$2000 will not be a significant hardship for many or even most Canadians. Yet a mandatory fine of \$2000 can nevertheless be financially and personally devastating for impoverished individuals and their families, including for

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<sup>40</sup> Edward Prutschi, "Tackling Impaired Driving ... By Decriminalizing It", *Slaw* (25 March 2010) online: <http://www.slaw.ca/2010/03/25/tackling-impaired-driving-by-decriminalizing-it/>.

<sup>41</sup> See *Safe Streets and Communities Act*, SC 2012, c 1.

instance, those receiving disability or social assistance payments.<sup>42</sup> Individuals who cannot pay must live with the legislative threat of jail time. The increase in proposed mandatory minimum fines will certainly disproportionately punish those who are already living in poverty and should be removed from the Bill.

Finally, the elevated mandatory minimum fine for a refusal to comply with a breath demand requires special comment. The fact that individuals do not have the ability to consult with a lawyer before being required to submit to a roadside breath test raises serious issues with imposing a mandatory minimum fine for the offence of refusal. 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.

Bill C-46 would also increase the maximum penalty of incarceration for several offences, including by increasing the maximum penalty for all transportation offences from 18 months to two years less a day on summary conviction and from 5 years to 10 years on indictment. The 10 year maximum would carry with it the possibility to make an application that the offender is a Dangerous Offender or a Long Term Offender. Several transportation offences would be added the list of offences that could be designated as dangerous offender and long term offender offences.

The proposed increases in maximum penalties have not been adequately justified, would not serve as a deterrent and do not contribute to public safety. They should be removed from the Bill.

**Recommendation 2: Mandatory minimum fines lead to unjust punishments and do not contribute to public safety. The provisions increasing mandatory minimum fines, provisions s. 320.19(3) and s. 320.19(4), should be removed from the Bill. The existing mandatory minimum sentences at s. 320.19(1)(a) should be converted into sentencing guidelines by inserting the word “presumptive” into the provision so that it reads “presumptive minimum punishment.”**

**Recommendation 3: Harsh maximum penalties of incarceration do not serve the aim of deterrence and do not contribute to public safety. The provisions increasing maximum prison sentences should be amended to reflect the current maximum allowable penalties in the Criminal Code. Clause 25, the provision adding transportation offences to the list of designated offences in s. 752, should be removed.**

**c. Statutory presumption for drug analyses**

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<sup>42</sup> For example, \$2000 constitutes over two months of the maximum shelter and basic needs financial support provided by Ontario Works for a single individual. See City of Toronto, *Ontario Works Assistance, Help with food, rent and other costs*, online: Toronto.ca <https://www1.toronto.ca/wps/portal/contentonly?vgnextoid=e34655f1403b6510VgnVCM10000071d60f89RCRD>.



Bill C-46 establishes a statutory presumption regarding the reliability of evidence of drug impairment. The proposed s. 254(3.5) – to be later amended to s. 320.31(5) – states that an evaluating officer’s opinion regarding a person’s impairment from a drug they have identified is admissible without qualifying that officer as an expert witness. An evaluating officer would be defined in s. 320.11 as “a peace officer who has the qualifications prescribed by regulation that are required in order to act as an evaluating officer.”

This provision works in tandem with s. 254(3.6) (to be later amended to s. 320.31(6)) which would create an evidentiary presumption regarding the link between a drug found in a person’s body and the signs of impairment observed by the evaluating officer. Under these provisions, when an evaluating officer conducts a DRE and identifies a type of drug as causing impairment, and when that type of drug is then found in a sample of saliva, urine or blood, it will be presumed that the drug was present at the time of the offence and that the drug was the cause of impairment. This presumption can only be rebutted by the accused if they can adduce evidence that raises a reasonable doubt that the signs of impairment had an alternative cause.

These provisions appear designed to mirror the existing statutory scheme establishing a variety of evidentiary presumptions regarding the admissibility and reliability of breath tests for alcohol. However, the state of scientific knowledge and reliability in drug recognition evaluation (“DRE”) and drug testing is considerably less developed than alcohol tests.

The issue of certified drug evaluation officers providing expert opinion evidence was the subject of a recent Supreme Court of Canada decision, *R. v. Bingley*.<sup>43</sup> In that case a majority of the Court held that an evaluating officer could testify as an expert without a *voir dire* to determine the admissibility of their opinion.<sup>44</sup> Notwithstanding the majority’s conclusion, however, CCLA is troubled by the decision to codify this “expert” status. The majority in *Bingley* cautioned that their decision was “not ‘an unqualified endorsement of the underlying science’ of the 12-step drug evaluations.”<sup>45</sup> Instead, the majority merely recognized Parliament’s prior establishment that the drug recognition evaluation “is sufficiently reliable for the purpose of a DRE’s determination of impairment,” thus allowing for a DRE to be qualified as an expert opinion witness without a *voir dire*.<sup>46</sup>

It bears emphasis that DRE evaluations do, in fact, have inherent limitations that undermine their ability to prove drug-impaired driving, and this is in no way insulated by the decision in *Bingley*. One study evaluating DRE assessments in Canada found that, while evaluating officers correctly predicted the

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<sup>43</sup> *R. v. Bingley*, 2017 SCC 12.

<sup>44</sup> A *voir dire* would be used in this case to determine the admissibility of expert opinion by proceeding in two stages. First, canvassing the four factors articulated in *R. v. Mohan*, [1994] 2 S.C.R. 9, namely (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) special expertise. Second, the trial judge weighs the potential risks against the benefits of admitting the evidence. Significantly, in *Bingley* the appellant had conceded that three of the four *Mohan* factors were met on the facts of the case, and did not argue that the evidence was inadmissible under the second stage.

<sup>45</sup> *R v Bingley*, 2017 SCC 12, at 26.

<sup>46</sup> *Ibid.*

presence of drugs in the vast majority of cases (95.3%), the tests were less reliable when predicting what category of drugs the person had consumed. More importantly, however, there was a 20% likelihood that individuals who actually had not consumed any drugs would be falsely accused of being impaired.<sup>47</sup> One in five innocent individuals who undergoes a DRE test will initially be identified as being drug-impaired.

Moreover, the studies themselves are a work in progress. As Akwasi Owusu-Bempah notes in his comprehensive review of Drug Evaluation and Classification programs, “[t]here are some key flaws in the accepted methods of evaluating the DEC program.”<sup>48</sup> Laboratory tests and studies are not able to reflect the realities of the field and generally will involve testing subjects with significantly less drugs in their system than would be the case in a field setting. At the same time, field testing is unable to control for certain variables and thus also has important limitations. Despite these concerns, the statutory presumptions place significant stock in these evaluations. While effectively addressing the ongoing, tragic incidences of impaired driving is a laudable policy goal, we are concerned that the available science does not support the presumptions.

Testing bodily fluids for drug impairment is also considerably more complex than alcohol screening. As summarized by one review article, “not all drugs necessarily or consistently cause impairment” and “the nonactive metabolites of some drugs stay in a driver’s system long after their impairing effects have worn off.”<sup>49</sup> These two limitations mean that, first, there is no necessary connection between recent drug use and impaired driving, and second those who have taken drugs many days, weeks or even months previously may receive a ‘positive’ drug test. There are also substantial differences between the conclusions that can be reached from saliva, urine and blood tests of different drugs, and as a result, the lack of specificity regarding the precise type of test that will be performed and employed in applying the presumption is concerning. Without expert evidence to interpret the results of a particular drug test, it simply is not possible to conclude that a test is strong proof of drug impairment at the time of driving.

The difficulty of connecting test results to actual impairment has been noted by the courts. In 2010, for example, Justice Fuerth summarized the Crown’s difficulties as follows:

60. Certainly, the certificate of analysis was unhelpful. It did confirm the presence of a drug that in Constable Baillargeon’s opinion was the cause of the impairment that he found assessed. The urinalysis left many important questions unanswered. How much of the drug was found? What was the absorption rate of the drug, and what might influence the rate of absorption? What was the elimination rate of the drug from the bodies system? Was the state of the science of drug testing such that the results could be reliably related back to the time of the alleged offence? Was the state of the scientific investigation such that the presence of the drug in any quantity, or an

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<sup>47</sup> Douglas J Beirness, Erin Beasley & Jacques Lecavalier, “The Accuracy of Evaluations by Drug Recognition Experts in Canada” (2013) 42:1 Canadian Society of Forensic Science Journal 75 at 78.

<sup>48</sup> Akwasi Owusu-Bempah, “Cannabis Impaired Driving: An Evaluation of Current Modes of Detection” (2014) Canadian Journal of Criminology and Criminal Justice 219 at 233.

<sup>49</sup> Robert Solomon & Erika Chamberlain, “Canada’s New Drug-Impaired Driving Law: the Need to Consider Other Approaches” (2014)15 Traffic Injury Prevention 685 at 689.

ascertainable quantity, would lead one to the inescapable conclusion that the defendant's ability to drive at the time he was found in the car to have been impaired by the drug?

61. The hurdle for the Crown in these cases is to relate back the findings of the evaluation, and the subsequent chemical analysis, to the time of the driving. In alcohol impairment cases, we frequently see the use of the breath tests mandated by the Code for which there are the statutory presumptions of accuracy and identity. The enactment of these presumptions by Parliament was based upon careful consideration of the science of breath alcohol testing, and of absorption and elimination rates as it relates to alcohol. In the case of drugs, the Crown does not have the benefit of the statutory presumptions, and must by cogent evidence relate back the findings of its expert evidence, and the consequent analysis, to the time of driving. ...<sup>50</sup>

Parliament is presumably attempting to facilitate exactly this step, by enacting a statutory presumption for drug-impaired driving. As noted by Justice Feurth, however, "The enactment of [the statutory breath testing] presumptions by Parliament was based upon careful consideration of the science of breath alcohol testing, and of absorption and elimination rates as it relates to alcohol." Unfortunately, the same cannot be said of the statutory presumptions currently under consideration.

In sum, each of the underlying tests – bodily fluids analysis and DRE evaluations – are unreliable in different ways. Given the current state of the science, only specific expert testimony as to the nature of the particular drug and the results of appropriate forensic tests can reliably determine whether a person was impaired by drugs at the time they were driving. Simply piling the results of one unreliable test on top of another to create a presumption of guilt is a violation of the presumption of innocence and ultimately risks wrongful convictions.<sup>51</sup>

**Recommendation 4: The statutory presumptions in ss. 254(5), 310.31(5), 254(6) and 320.31(6) are not sufficiently grounded in strong and credible scientific testing. These provisions should be removed.**

### **III. Summary of Recommendations**

**Recommendation 1: Provision 320.27(2) 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 both prior to and**

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<sup>50</sup> *R v Jansen*, 2010 ONCJ 74 at para 6061, [2010] OJ No 959.

<sup>51</sup> As explained by the Supreme Court, "if evidence whose reliability cannot really be tested is admitted and relied upon simply because it is consistent with other admissible evidence, the danger is that a web of consistent but unreliable evidence will lead to a (potentially wrongful) conviction." *R v Trochym*, [2001] 1 SCR 239 at paras 31-32, 276 DLR (4th) 257.

**after deployment to determine whether or not there is any impact on the frequency of impaired driving, detection rates, the number of stops and searches, as well as whether there is any differential impact on particular groups based on race, age, or other protected grounds.**

**Recommendation 2: Mandatory minimum fines lead to unjust punishments and do not contribute to public safety. The provisions increasing mandatory minimum fines, provisions s. 320.19(3) and s. 320.19(4), should be removed from the Bill. The existing mandatory minimum sentences at s. 320.19(1)(a) should be converted into sentencing guidelines by inserting the word “presumptive” into the provision so that it reads “presumptive minimum punishment.”**

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