CANADIAN CIVIL LIBERTIES ASSOCIATION

ASSOCIATION CANADIENNE DES LIBERTES CIVILES

Submission to the House of Commons Standing Committee on Public Safety and National Security

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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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) supports the overarching goal of Bill C-226, 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. A list of our specific recommendations is provided at the end of this brief.

First, the CCLA urges this Committee to remove the mandatory minimum sentences and fines from Bill C-226. Mandatory minimum sentences expose individuals to disproportionate punishment and do not prevent impaired driving. Criminal justice punishments that are both fundamentally unjust and ineffective should have no place in Canadian law. Mandatory minimum fines similarly do not contribute to public safety. We should not trade reliance on mandatory minimum sentences, which have the potential to impose unjust punishment on any member of society, with mandatory minimum fines, which will certainly disproportionately punish those living in poverty.

Similarly, CCLA recommends that this Committee delete ss. 320.22(2) and 320.24(7), which require some sentences and prohibition orders to be served consecutively. Section 320.22(2) in particular is an unjustifiable violation of the right to be free from cruel and unusual punishment.

The brief also raises significant concerns about the likely impact and constitutionality of random breath testing ("RBT"). The vast majority of international experiences with RBT does not provide reliable comparisons for Canada, which has had a less invasive but effective roadside testing regime in place for decades. Moreover, there is nothing truly random about police stops. For those individuals who are pulled over "randomly" five, ten, a dozen times, for no obvious reason other than their age, the colour of their skin, or the neighbourhood they were driving in, being required to leave their car and submit to a breathalyzer will frequently be experienced as humiliating, degrading and offensive. This factual background informs our conclusion that RBT is likely an unjustifiable violation of the *Charter*.

Finally, we recommend removing s. 320.32(6), which eliminates the need to qualify evaluating officers as expert witnesses, as well as the evidentiary presumption related to drug-impaired driving in s. 320.32(7). DRE procedures are inherently subjective and the reliability of particular officers' expertise should be dealt with on a case-by-case basis. With regard to s. 320.32(7), each of the underlying tests that the provision relies upon – bodily fluids analyses and DRE evaluations – is imperfect. For example, according to one Canadian study one in five individuals who had not taken drugs was wrongly identified as being drug-impaired by the DRE. Simply piling the results of one unreliable test on top of another to create a presumption of guilt is unconstitutional and will result in wrongful convictions.

I. Introduction

The Canadian Civil Liberties Association (CCLA) supports the overarching goal of Bill C-226, 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,[1] 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 for wrongful convictions and unjustifiable *Charter* violations. This brief will highlight a number of the provisions that the CCLA finds concerning from a civil liberties perspective. We have also had the benefit of reviewing a draft of the submissions of the Criminal Lawyers' Association, and echo many of the additional concerns they have raised. A summary of our recommendations can be found at the end of this brief.

II. Specific areas of concern

a. Mandatory minimum sentences and fines

Bill C-226 is replete with mandatory minimum sentences and fines; the CCLA strongly urges this Committee to strike all these provisions.[2]

CCLA has long opposed the adoption of mandatory minimum sentences in Canadian law. The decision to deprive a person of their liberty is one of the most serious rights deprivations sanctioned by our society. As such, sentences involving incarceration must be proportionate and carefully tailored to both the offence and the offender, with all available sanctions other than imprisonment being considered wherever appropriate.[3]

Mandatory minimums fundamentally undermine this careful 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 sentences, it becomes an unavoidable byproduct of their rigidity. Simply put, mandatory minimum

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[1] 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).

[2] See 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*, 1st Sess, 42nd Parl, 2015–2016, ss 320.19, 320.2, 320.21 (Second reading and referral to committee) [*Impaired Driving Act*].

[3] See *Criminal Code*, RSC 1985, c C-46 ss 718.1, 718.2.

sentences are not capable of anticipating and responding to the range of situations that human reality creates. By predetermining the punishment for a particular act or omission and preventing the 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.

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.
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> … crime is not deterred, generally, by harsher sentences.[4]

Criminal justice punishments that are both fundamentally unjust and ineffective should have no place in Canadian law.

With this background, it will come as no surprise that CCLA welcomed Mr. Bill Blair's statement before the House of Commons affirming that higher mandatory minimum penalties are "inadvisable" and urging this Committee to strike all new mandatory minimum penalties of imprisonment.[5] In our view, however, this commitment does not go far enough. Striking only the new mandatory minimum penalties 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.[6] Mandatory minimum sentences are a failed experiment in public safety and should be removed from this Bill entirely.

Mr. Blair, in his statement to the House of Commons, also declared that the government was "prepared to support" the Bill's proposed increases to existing mandatory minimum fines. It is unclear why one would reject an increased reliance on mandatory minimum sentences yet support increased mandatory fines. The logic that demonstrates the inefficacy of mandatory minimum sentencing performs the same work in 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. Moreover, although fines are generally seen as less punitive than prison sentences, we should be careful

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[4] 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>.

[5] *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>.

[6] See *Safe Streets and Communities Act*, SC 2012, c 1.

not to lose sight of how serious this outcome is. Fines are, by definition, criminal convictions, and therefore carry with them significant post-sentence barriers to employment, education and general reintegration. Inflexible monetary penalties are also inherently discriminatory: a mandatory fine of $1500 will not be a hardship for wealthy Canadians, but could be financially and personally devastating for those families receiving disability or social assistance payments.[7] Individuals who cannot pay must live with the legislative threat of jail time. We should not trade reliance on mandatory minimum sentences, which have the potential to impose unjust punishment on any member of society, with mandatory minimum fines, which will certainly disproportionately punish those who are already living in poverty.

> **Recommendation 1: Mandatory minimum sentences and fines lead to unjust punishments and do not contribute to public safety; all mandatory minimums should be removed from the Bill. At a minimum, the existing mandatory minimum sentences and fines should be converted into sentencing guidelines by inserting the word "presumptively" into each provision.**

b. Mandatory requirements to serve prohibition orders and sentences consecutively

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."[8] 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

[7] For example, $1500 constitutes over two months of the maximum shelter and basic needs financial support provided by Ontario Works. See City of Toronto, Ontario Works, *Help with food, rent and other costs*, online: Toronto.ca <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=2179707b1a280410VgnVCM10000071d60f89RCRD&vgnextchannel=36b2d08099380410VgnVCM10000071d60f89RCRD#a>.

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

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.[9]

The mandatory imposition of consecutive sentences becomes unconstitutional if the global sentence imposed on an individual is grossly disproportionate.[10] 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 2: The mandatory imposition of consecutive sentences and driving prohibitions in ss. 320.24(7) and 320.22(2) should be removed.

c. Random breath testing

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

[9] *Ibid* at para 42.
[10] *Ibid*.

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.[11] The real contribution of RBT and SBT programs, however, comes not from catching individual drivers, but from general and specific deterrence. Enforcement levels would need to be extraordinarily – and unrealistically – high in order to directly detect a significant number of impaired drivers. On the other hand, if individuals can be convinced that there is a good chance they will be caught if they drink and drive, a significant portion of the population will choose not to engage in this behaviour. The deterrent effect of well-publicized, random sobriety checkpoints can multiply enforcement efforts well beyond the specific drivers who are caught on any given night. A number of articles have cited other jurisdictions' success in combatting alcohol-impaired driving after the implementation of random breath testing, pointing to the experiences in other countries which have documented significant success deterring impaired driving after the implementation of RBT.[12] 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.[13] The vast majority of jurisdictions that implemented RBT did so decades ago, in what researchers have described as a "revolutionary" act at the time.[14] RBT was often a part of the

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[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 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.

[12] 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>

[13] 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.

[14] 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>.

first major legislative efforts to reduce drinking and driving in these countries.[15] 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%.[16] 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."[17] 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.[18] 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.[19] Even for those few select countries that did implement RBT after SBT, this legal change was accompanied by a host of other measures. It is not possible to separate the impacts of RBT from these other factors, all of which have been identified as contributing to the reduction of drinking and driving.

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

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[15] 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*].

[16] 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.

[17] 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>..

[18] 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").

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

> …existing research does not provide evidence that RBT is more effective than SBT. A systematic review of 23 studies on the effectiveness of RBT and SBT concluded that there was no evidence to suggest that the levels of effectiveness of both strategies differed. Of equal importance, the review revealed that no available studies have been designed to directly compare the effectiveness of RBT and SBT (Shults et al. 2001). Another systematic review also concluded that evaluation studies of RBT and sobriety checkpoints showed a comparable range of outcomes. Of interest, there was limited evidence to suggest that RBT may be slightly more effective than SBT, and that administering a breath test to all stopped drivers with RBT may indeed lead to a stronger perception of being caught than the more selective approach with sobriety checkpoints. However, this study also attests that the evidence is not conclusive and points to the possible confounding effect of more intensive enforcement levels that have typically been used with RBT in Australia compared to those of SBT as an explanation for the difference in effectiveness (Fell et al. 2004).
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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.[20]

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.[21] 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

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[20] 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.

[21] 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.

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 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."[22] 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,[23] 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,[24] may not be of any

[22] *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>.

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

[24] 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 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.[25] 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 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*.[26] While we have great respect for the opinions of those authors, CCLA's view is

[25] 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.

[26] 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>.

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*.[27]

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.[28] While a narrow 5-4 majority allowed these stops, a powerful dissent surveyed the serious implications of such a 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 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.[29]

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*."[30] 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."[31]

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.[32] 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.

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[27] While the proposed amendment also raises s 10(b) concerns, CCLA has chosen to focus our analysis on the ss 8 and 9 issues.
[28] *R v Ladouceur*, [1990] 1 SCR 1257, [1990] SCJ No 53 [*Ladouceur* cited to SCR].
[29] *Ibid* at 12.
[30] *Ibid* at 10
[31] *Ibid* at 32-33.
[32] *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No. 7.

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 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,[33] 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.[34] 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."[35]

[33] 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.
[34] 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.
[35] 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."[36] 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.[37] 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*.

Recommendation 3: Provision 320.27(3) should be amended to require an officer have reasonable grounds to suspect a driver is impaired by alcohol.

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.

Recommendation 4: 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 mistakenly believe they are asserting their rights. Provision 320.15(2) should be amended to remove reference to section 320.27. Police should be authorized to detain individuals who refuse to provide a roadside breath sample for mandatory testing under s. 320.29.

[36] 2015 SCC 46, [2015] 3 SCR 250 at para 65.

[37] See *R v Hufsky* [1988] 1 SCR 621 at 638, 40 CCC (3d) 398.

d. Statutory presumptions for evaluating officers and drug analyses

Bill C-226 establishes several statutory presumptions regarding the reliability of evidence of drug impairment. Specifically:

- s. 320.12 recognizes and declares that "evaluating officers are qualified to evaluate whether a person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug";
- s. 320.32(6) 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; and
- s. 320.32(7) states that if analyses of saliva, urine or blood samples show that a person had a particular drug in their body that the evaluating officer has identified as impairing a person's ability to drive, that drug is presumed, in the absence of evidence to the contrary, to have been the drug present in the person's body while they were driving and, on proof of their impairment, to have been the cause of the impairment.

An evaluating officer is defined in s. 320.11 as "a peace officer who has the qualifications prescribed by regulation that are required in order to be an evaluating officer."

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. As will be discussed in further detail below, the state of scientific knowledge and reliability in drug testing and drug recognition evaluation ("DRE") is considerably less developed than alcohol tests. Indeed, the evaluation 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."[38] 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 proposed statutory presumptions. As a result, we have significant concerns that these provisions imperil the presumption of innocence and the right to a fair trial.

i. Exemptions from *Mohan* test

Sections 320.12 and 320.32(6) would exempt an evaluating officer from having to be qualified as an expert witness pursuant to the *Mohan* test. In general, witnesses are required to testify only to their direct observations – what they saw, heard, smelt, etc.; it is up to the trier of fact to determine what, if any, conclusions should be drawn from the established facts as a whole. Expert witnesses, including evaluating officers, are an exception to this basic rule of evidence. It is recognized that some individuals – technical experts, doctors, engineers, etc. – possess particular expertise that allow them to draw specialized conclusions and inferences from facts that the court would not otherwise be able to reach.

[38] Akwasi Owusu-Bempah, "Cannabis Impaired Driving: An Evaluation of Current Modes of Detection" (2014) Canadian Journal of Criminology and Criminal Justice 219 at 233.

Expert witnesses are essential to our justice system. The admission of this testimony, however, comes with serious risks. As explained by Justice Sopinka,

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.[39]

Canada's litany of wrongful convictions gives ample evidence of what can go wrong when irrelevant or unreliable science is placed before the courts.[40] The *Mohan* test is designed to ensure that expert evidence is both relevant and sufficiently probative to justify its admission.[41] It requires judges to perform a "gatekeeper" function, inquiring into the reliability of the evidence by examining its subject matter, the methodology used, the expert's expertise and his or her impartiality and objectivity.[42] It is, therefore, an essential bulwark against wrongful convictions.

The subjective nature of DRE evidence makes it particularly important to maintain the protections of the *Mohan* test. Unlike qualified breath technicians who are trained to operate and read devices measuring blood-alcohol levels, the twelve-step DRE procedure is inherently subjective. There is no machine to calibrate, no readings to confirm, no maintenance log that can be provided. Evaluating officers must draw their conclusions based on their personal observations of the accused through a lengthy interview. The expertise, experience and impartiality of the particular officer conducting the test are central to determining the reliability of the expert evidence. Without a *Mohan voir dire*, there is a real risk that unqualified or biased 'experts' will be giving their opinion on the issue at the very heart of the trial – whether or not the accused was in fact impaired by drugs.

Entrenching the reliability of the DRE procedure and evaluating officers in a statute also creates an inflexible rule that experience suggests will eventually result in our courts being forced to admit key evidence that is at odds with scientific knowledge. As the Supreme Court explained in *R v Trochym*:

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[39] *R v Mohan*, [1994] 2 SCR 9 at 21, 114 DLR (4th) 419.

[40] One of the most notorious examples of the danger of faulty science employed by expert witnesses is that of Charles Smith, considered in the 1990s to be the leading expert in Canada on criminally suspicious pediatric deaths. Over time, Smith's work was increasingly questioned, until eventually it was discovered that his conclusions were mistaken in at least 20 of 45 autopsies he conducted in the early 1990s. By October 2007, a Professor of Forensic Science reviewing Smith's work concluded that Smith's finding of asphyxia in one particular case was "illogical and completely against scientific evidence-based reasoning." See Innocence Canada, "Tammy Marquardt" online: Innocence Canada <https://www.aidwyc.org/cases/historical/tammy-marquardt/>; Colin Perkel, "Dr. Charles Smith, Ex-Forensic Pathologist, Left Trail Of Wrongful Convictions" *The Huffington Post* (29 February 2016) online: Huffington Post <http://www.huffingtonpost.ca/2016/02/29/like-a-god-dr-charles-smith-left-poisoned-trail-behind-him_n_9350124.html>. .

[41] *R v Mohan*, [1994] 2 SCR 9.

[42] *R v Abbey,* 2009 ONCA 624 at para 87, 97 OR (3d) 330.

> ...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...[43]

If a new study is produced showing that one step of the DRE procedure, or even the entire test itself, gives inaccurate results, our courts would nonetheless be required to admit "expert" testimony based on a discredited process. Moreover, because the body currently charged with accrediting drug recognition experts is the International Association of Chiefs of Police, a US-based law enforcement association, there is no independent, scientific Canadian organization with a legal mandate to ensure that training takes into account the most recent scientific understandings.

> **Recommendation 5: 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 on a case-by-case basis. Section 320.32(6) should be removed.**

ii. Evidentiary presumption

Bill C-226 creates a new evidentiary presumption: if bodily fluids test positive for the drug that was identified by the evaluating officer and it can be proven that the person was impaired, it is presumed, in the absence of evidence to the contrary, that the drug was present in their system at the time they were driving and was the cause of their impairment. Each of the underlying tests – bodily fluids analysis and DRE evaluations – is unreliable in different ways. 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 will result in wrongful convictions.[44]

DRE evaluations have inherent limitations that undermine their ability to prove drug-impaired driving. One study evaluating DRE assessments in Canada found that, while evaluating officers correctly predicted the presence of drugs in the vast majority of cases (95.3%), the tests were much less reliable when predicting what category of drugs the person had consumed. More importantly for our purposes, however, there was a 20% likelihood that individuals who actually had not consumed any drugs would be

[43] *R v Trochym*, [2001] 1 SCR 239 at paras 31-32, 276 DLR (4th) 257.

[44] 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.

falsely accused of being impaired.[45] One in five innocent individuals who undergoes a DRE test will be identified as being drug-impaired.

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."[46] These two limitations mean that, first, there is no necessary connection between recent drug use test 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 is particularly 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 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. …[47]

[45] 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.
[46] 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.
[47] *R v Jansen*, 2010 ONCJ 74 at para 6061, [2010] OJ No 959.

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 presumption currently under consideration.

Statutory presumptions designed to facilitate the prosecution of a case can imperil the presumption of innocence. As explained by the Supreme Court:

> "A statutory presumption violates the right to be presumed innocent if its effect is that an accused person can be convicted even though the trier of fact has a reasonable doubt …. What is important for the purpose of determining whether the right to be presumed innocent is violated is not whether the statutory presumption relates to an essential element of the offence, but whether it exempts the prosecution from establishing the guilt of the accused beyond a reasonable doubt before the accused must respond."[48]

This particular statutory presumption, which is not based on scientific evidence regarding drugs and impairment, contravenes this basic standard. As in *R. v. St Onge Lamoureux*[49] where the Supreme Court narrowed a reverse onus provision related to alcohol-impaired driving, there is a real risk that the results of these tests will not actually show that a person was impaired by a given drug. Moreover, while some reverse onus provisions have been found to be justifiable rights infringements, the fact that an accused will frequently, if not always, need to have access to particular technical advice and expertise in order to contextualize the laboratory results places an unreasonable burden on the accused to prove his or her innocence.

> **Recommendation 6: The statutory presumption related to drug impairment in s. 320.32(7) does not have a sufficient scientific basis and raises a real risk of wrongful convictions. The reverse onus violates the right to be presumed innocent and should be removed.**

III. Summary of Recommendations

Recommendation 1: Mandatory minimum sentences and fines lead to unjust punishments and do not contribute to public safety; all mandatory minimums should be removed from the Bill. At a minimum, the existing mandatory minimum sentences and fines should be converted made into sentencing guidelines by inserting the word "presumptively" into each provision.

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

[48] *R v St-Onge Lamoureux*, 2012 SCC 57 at para 24 (citations omitted), [2012] 3 SCR 187.
[49] *Ibid*.

Recommendation 3: Provisions 320.27(3) should be amended to require an officer have reasonable grounds to suspect a driver is impaired by alcohol.

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.

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