

Standing Committee on Public Safety and National Security

Submission of Mothers Against Drunk Driving (MADD) Canada
Re: 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)

October 26, 2016

Robert Solomon,
Distinguished University Professor,
Faculty of Law, Western University, and
National Director of Legal Policy, MADD Canada

Dr. Erika Chamberlain,
Associate Dean (Academic),
and Associate Professor,
Faculty of Law, Western University

Preface

MADD Canada is a grassroots victim support, public awareness and traffic safety organization that began operating in 1990. Its mission is to assist victims, and minimize impaired driving and related deaths and injuries. Its Chapters are led largely by victim volunteers, while the National Board has representation from both victims and from the legal, traffic research, injury prevention, business, and police communities.

MADD Canada is a registered charity that does not receive government funds or accept alcohol/hospitality industry donations. On an annual basis, it has approximately 1 million donors, 5,000 active volunteers, 20,000 users of its victim support services, and 1.7 million hits on its website. MADD Canada operates on a local, provincial and federal level, and has 102 Chapters and Community Leaders coming from all 10 provinces and 2 territories.

Impaired driving is a non-partisan issue, and MADD Canada has worked directly with successive federal, provincial and territorial governments for almost two decades. MADD Canada staff have frequently appeared before House of Commons and Senate Committees, briefed federal and provincial Ministers and leading Parliamentarians from all parties, and provided research and support to hundreds of government officials across Canada. MADD Canada has also been granted standing in several appellate and Supreme Court of Canada cases.

MADD Canada has had an ongoing relationship with a team of criminal, constitutional and traffic safety researchers at the Faculty of Law at Western University for almost 20 years, and more recently established a five-year research program with a leading traffic safety scholar in the Faculty of Medicine at Dalhousie University. In addition, MADD Canada has worked closely for many years with pre-eminent American and Australian traffic safety and injury prevention scholars.

Introduction

In addition to numerous evidentiary and procedural measures, Bill C-226¹ would increase the mandatory minimum sentences for various impaired driving offences. If enacted, these measures would address some of the technical concerns with the existing law, questionable court decisions and other obstacles to effectively enforcing and prosecuting impaired driving. Fewer impaired drivers would evade criminal responsibility due to factors unrelated to their criminal conduct, and those convicted would be subject to more onerous sanctions.

Even if all of these measures are upheld under *The Canadian Charter of Rights and Freedoms* (*Charter*),² they would not have a major impact on impaired driving and related crashes, injuries and deaths. While MADD Canada considers many of these amendments to be long overdue, they address narrow evidentiary, procedural and sentencing concerns that will not significantly reduce rates of impaired driving and related crashes, injuries and deaths.

In terms of traffic safety, by far the most important provision in Bill C-226 is the proposed introduction of random breath testing (RBT). As will be discussed, RBT is widely recognized by the world's leading traffic experts and reputable injury prevention organizations as one of the most effective impaired driving countermeasures. Research over the past 40 years in Australia, New Zealand, Ireland, Sweden, Denmark, Finland, The Netherlands, and numerous other countries has established that implementing comprehensive RBT programs results in dramatic and sustained reductions in alcohol-related crashes, injuries and deaths. Given the importance of RBT, and the false and misleading claims that some witnesses have made about it, MADD Canada's submission will be limited to this issue.

Before proceeding it is necessary to address some misconceptions about RBT. The term RBT appears to have been first used by the Australian research and traffic enforcement community, which were and remain the leading authorities in the field.³ Although the term RBT has now been widely adopted, it is somewhat of a misnomer. There is nothing random in selecting drivers that are waived into an RBT checkpoint. Rather, RBT best practice mandates that all vehicles approaching an RBT checkpoint are waived in unless a backup has developed. Nor is there anything random about which drivers are required to submit to a screening test, because all drivers stopped must provide a breath sample. Even during mobile RBT patrols, best practice requires every stopped driver to be tested.⁴ The

¹ 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, 2016.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. For example, unless the Supreme Court of Canada completely reverses itself, the five-year mandatory minimum sentence of imprisonment for impaired driving causing death will be struck down under section 12 of the *Charter*. See R. Solomon & M. Clarizio, *Impaired Driving Causing Death, Mandatory Minimum Sentences, Deterrence, and the Charter* (Oakville: MADD Canada, 2015) at 10-12.

³ New Zealand uses the term "compulsory breath testing" or "CBT" to describe its sobriety checkpoint program. While the term CBT is more accurate, it has not come into common use.

⁴ Email from Dr. Ross Homel, Foundation Professor of Criminology and Criminal Justice, Griffith Criminology Institute, Griffith University, Brisbane to R. Solomon (24 October, 2016).

only sense in which the process is random is that the police do not require individualized suspicion of alcohol consumption or impairment, but rather demand that all drivers take a roadside screening test.

Thus, RBT operates in exactly the same way as the mandatory screening process at airports, Parliament Hill, courts, and many other government buildings. As will be discussed, these widely used and publicly accepted mandatory screening processes are typically far more intrusive and inconvenient than spending two minutes sitting in one's car going through an RBT checkpoint.

Some witnesses have claimed that RBT will open the door to police harassment and discrimination, and the targeting of visible minorities. With respect, exactly the opposite is true. Roughly four to eight million drivers are stopped each year in Canada at sobriety checkpoints, and millions more are stopped during routine police traffic and patrol activities. Currently, the police may demand documentation, question the driver about whether he or she has been drinking, attempt to detect the odour of alcohol on the driver's breath, or otherwise attempt to determine if there are sufficient grounds to demand a roadside screening test. The processing and assessment of drivers at sobriety checkpoints or when stopped by the police in other circumstances is based on the subjective judgment of the individual officer using his or her own unaided senses. Since every passing vehicle is stopped and every stopped driver is tested at RBT checkpoints, the potential for the police to target minorities or otherwise misuse their power is far less than is currently the case.

While, it is always possible for the police (like defence lawyers, prosecutors, judges, Members of the House of Commons, Senators, and researchers) to misuse their authority, those abuses should be thoroughly investigated and appropriately sanctioned when they occur. Raising hypothetical and wholly unrealistic concerns about potential police misuse of their powers in conducting RBT is simply fear mongering. We have found no such concerns about police impropriety in the RBT research literature.

We acknowledge that our submission is long and detailed. However, we want to make available to the Committee all of the statistical and research evidence it needs to assess for itself how RBT is implemented, and its effectiveness, impact on driver inconvenience and constitutionality. MADD Canada researchers have published several articles on RBT in traffic safety and Canadian law journals, and would be pleased to provide them at the Committee's request.⁵

Section 1: Canada's Impaired Driving Record

Some witnesses have claimed that the current federal impaired driving law is working well and that the introduction of RBT is unnecessary. Progress has been made since the record high levels of alcohol-related crash deaths and injuries of the early 1980s. Nevertheless, in 2012, more than 1,000 Canadians

⁵ R. Solomon *et al.*, "Random Breath Testing: A Canadian Perspective" (2011) 12 *Traffic Injury Prevention* 111; R. Solomon *et al.*, "The Case for Comprehensive Random Breath Testing Programs in Canada: A Review of the Evidence and Challenges" (July 2011) 49(1) *Alberta Law Review* 37 [The Case for Comprehensive RBT]; and R. Solomon *et al.*, "Predicting the Impact of Random Breath Testing on the Social Costs of Crashes, Police Resources, and Driver Inconvenience in Canada" (2011) 57(4) *Criminal Law Quarterly* 438 [Predicting the Impact].

were killed and more than 58,800 were injured in impairment-related crashes.⁶ These crashes remain the number one criminal cause of death in Canada, claiming almost twice as many lives per year as all categories of homicide combined (546).⁷ Moreover, impaired driving takes a disproportionate toll on young people. In 2012, those between the ages of 16-25 constituted approximately 13% of the population,⁸ but 32% of the alcohol-related crash deaths.⁹ From a public health perspective, crash deaths among youth represent a major cause of preventable years of life lost, given that victims typically die 50 to 60 years prematurely.

On July 8, 2016, the American Centers for Disease Control and Prevention released a report indicating that Canada had the highest percentage of alcohol-related crash deaths (33.6%) among 20 high-income countries (median 19.1%).¹⁰ While the Canadian media and public appeared to have been shocked, this finding should not have come as a surprise. Canada has long had, and continues to have, one of the worst impaired driving records among comparable developed countries. An international review of 15 countries published in 2000 reported that Canada had the second-highest rate of alcohol involvement in fatal crashes.¹¹ Similarly, a 2001 Transport Canada study found that Canada had the highest rate of impairment among fatally-injured drivers of 8 OECD countries.¹²

Canada also had the highest rate of alcohol-related traffic fatalities as a percentage of total traffic deaths among 13 comparable countries in 2008, despite having one of the lowest rates of per capita alcohol consumption. Canada's record was also very poor in terms of its per capita rate of alcohol-related crash deaths, which was second only to the United States. It is particularly disconcerting that

⁶ R. Solomon, M. Clarizio & B. Fudge, *Impairment-Related Crash Deaths, and Associated Charges and Convictions: Canada* (Oakville: MADD Canada, 2016) at 1; and R. Solomon, M. Clarizio & B. Fudge, *Impairment-Related Crash Injuries, and Associated Charges and Convictions: Canada* (Oakville: MADD Canada, 2016) at 1.

⁷ Statistics Canada, *CANSIM Table 253-0001, Homicide survey, number and rates (per 100,000 population) of homicide victims, Canada, provinces and territories, annual* (Ottawa: Statistics Canada, 2016), online: <<http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2530001>>.

⁸ Statistics Canada, *CANSIM Table 051-0001, Estimates of population, by age group and sex for July 1, Canada, provinces and territories, annual (persons unless otherwise noted)* (Ottawa: Statistics Canada, 2016), online: <<http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=510001>>.

⁹ Canadian Council of Motor Transport Administrators (CCMTA), *Alcohol and Drug-Crash Problem in Canada: 2012 Report* (Ottawa: CCMTA, 2015) at 14 and 44, online: <https://www.google.ca/?gfe_rd=cr&ei=GRSGU-rVK-OM8Qe87YGYBA#q=Alcohol+and+Drug+-+Crash+Problem+in+Canada:+2012+Report+>>.

¹⁰ E. Sauber-Schatz *et al.*, "Vital Signs: Motor Vehicle Injury Prevention — United States and 19 Comparison Countries" (2016) 65(27) *Morbidity and Mortality Weekly Report* 672 at 675.

¹¹ K. Stewart *et al.*, "International Comparison of Laws and Alcohol Crash Rates: Lessons Learned" in H. Laurell & F. Schlyter, eds., *Proceedings of the 15th International Conference on Alcohol, Drugs and Traffic Safety, 2000*, CD-ROM (Stockholm: International Council on Alcohol, Drugs and Traffic Safety (ICADTS), 2000).

¹² Transport Canada, *Road Safety Forum: Beyond 2001*, CD-ROM (Ottawa: Minister of Public Works and Government Services, 2001).

alcohol-related crash deaths claimed more than five times as many lives per capita in Canada than in Germany, a country that consumed 46% more alcohol per capita.¹³

We recognize that comparative data must be used with caution. Moreover, it is unrealistic to expect Canada to match the rate of impaired driving death of far smaller countries, which have well-developed public transportation systems, lower rates of private vehicle ownership, and higher minimum driving ages. Nevertheless, the international research clearly establishes that there are legal measures that Canada could adopt to significantly reduce impaired driving deaths and injuries. Canadians drink considerably less than residents of other countries and yet are much more likely to be killed in an alcohol-related traffic crash.¹⁴ With the exception of the United States, the laws in those countries are doing a far better job of separating drinking from driving. Not coincidentally, almost all of those countries have comprehensive RBT programs.

The picture would likely be far bleaker, but for the progressive measures that most of the provinces have enacted in the last 15 years.¹⁵ In contrast, the federal impaired driving amendments have focused on narrow prosecutorial, enforcement and punishment issues. The 1999, 2000 and 2007 *Criminal Code* amendments were largely limited to increasing minimum and maximum penalties, and eliminating conditional sentences for impaired driving causing death or bodily harm.¹⁶ The 2008 *Criminal Code* amendments were far more substantive, addressing some long-standing gaps in the law, narrowing two questionable defences, and giving the police limited authority to collect evidence of drug-impaired driving.¹⁷ However, these four federal amendments did not streamline the cumbersome and time-consuming process of apprehending and prosecuting impaired driving offenders. Nor did they significantly increase the perceived or actual rates of apprehension, which are the key factors in deterrence.¹⁸ To date, successive federal governments have largely ignored traffic safety concerns in

¹³ E. Chamberlain & R. Solomon, *The 2012 Federal Legislative Review* (Oakville: MADD Canada, 2012) at 5-8.

¹⁴ *Ibid.* at 6.

¹⁵ R. Solomon *et al.*, *The 2012 Provincial and Territorial Legislative Review* (Oakville: MADD Canada, 2012). The effective measures include: comprehensive graduated licensing programs; a zero blood-alcohol concentration (BAC) limit for all drivers who are under the age of 21 or who have less than 5 years of driving experience; comprehensive roadside administrative licence suspensions and vehicle impoundments for drivers with a BAC of 0.05% or higher; and mandatory alcohol interlock orders for all federal alcohol-impaired driving offenders.

¹⁶ See respectively, Bill C-82, *An Act to amend the Criminal Code (impaired driving and related matters)*, 1st Sess, 36th Parl, 1999; Bill C-18, *An Act to amend the Criminal Code (impaired driving causing death and other matters)*, 2nd Sess, 36th Parl, 1999; and Bill C-9, *An Act to amend the Criminal Code (conditional sentence of imprisonment)*, 1st Sess, 39th Parl, 2006.

¹⁷ *An Act to amend the Criminal Code and to make consequential amendments to other Acts*, Bill C-2, 2nd Sess, 39th Parl, ss. 18-26. For a review see R. Solomon, E. Chamberlain & C. Lynch, "Canada's New Impaired Driving Legislation: Modest Gains and Missed Opportunities" (2010) 56 *Criminal Law Quarterly* 51 at 56-72.

¹⁸ For a discussion of the pivotal role that the perceived and actual rates of apprehension play in deterring impaired driving, see H. Ross, *Deterring the Drinking Driver* (Lexington, Mass.: Lexington Books, 1982) at 109-10; R. Homel, "Drivers Who Drink and Rational Choice: Random Breath Testing and the Process of Deterrence" in R. Clark & M. Felson, eds., *Routine Activity and Rational Choice: Advances in Criminological Theory* (New Brunswick, NJ: Transaction, 1993) vol. 5 at 59; R. Tay, "General and Specific Deterrent Effects of Traffic Enforcement: Do we have to Catch Offenders to Reduce Crashes?" (2005) 39(2) *Journal of Transport Economics*

favour of punishment and prosecutorial issues.

Section 2: Canada’s Existing System of Impaired Driving Enforcement

The enactment of RBT legislation would change only one aspect of Canada’s impaired driving enforcement process, namely the basis for demanding a breath sample on an “approved screening device” (ASD).¹⁹ Canadian police currently have a common law power²⁰ and, in most provinces, express statutory authority²¹ to stop vehicles at random to inspect the licence, ownership and insurance documents of the driver, and to question them about their vehicle, driving and sobriety. As is currently the case, the results of ASD testing based on RBT would not be admissible in criminal proceedings but rather would be used solely to screen drivers to determine if evidentiary breath testing is warranted. Drivers who test above a predetermined blood-alcohol concentration (BAC) (typically 0.10% in Canada) on an ASD would be required to accompany the officer to the police station to provide breath samples on an “approved instrument”²² and would be afforded the right to legal counsel and all the procedural and evidentiary safeguards that such testing entails. Drivers who register a “pass” on the ASD test at an RBT checkpoint would be free to go, and no record would be kept.

The current system establishes what is referred to as a “selective breath testing” (SBT) program, because only drivers reasonably suspected of drinking can be tested. There are two main concerns with SBT checkpoints as they operate in Canada.

First, the police rely on their own unaided senses in forming a “reasonable suspicion” that the driver has alcohol in his or her body. Unlike in some American states, police in Canada do not use passive alcohol sensors (PASs) or similar technology at sobriety checkpoints. Rather, Canadian police rely on behavioural and sensory observations, including: the manner of driving; the odour of alcohol on the driver’s breath; a flushed face; a lack of co-ordination; bloodshot eyes; slurred or indistinct speech; and inappropriate responses to questions. These signs may be difficult to detect in the brief time that motorists are stopped at checkpoints. In addition, alcoholic beverages vary in the nature and intensity of

and Policy 209 [Tay]; B. Watson & J. Freeman, “Perceptions and Experiences of Random Breath Testing in Queensland and the Self-Reported Deterrent Impact on Drunk Driving” (2007) 8(1) *Traffic Injury Prevention* 11 [Perceptions and Experiences]; K. Beck, J. Fell & A. Yan, “A Comparison of Drivers with High Versus Low Perceived Risk of Being Caught and Arrested for Driving Under the Influence of Alcohol” (2009) 10(4) *Traffic Injury Prevention* 312; S. Ferguson, “Alcohol-Impaired Driving in the United States: Contributors to the Problem and Effective Countermeasures” (2012) 13(5) *Traffic Injury Prevention* 427; J. Ferris, “Random breath testing in Queensland and Western Australia: Examination of how the random breath testing rate influences alcohol related traffic crash rates” (2013) 60 *Accident Analysis and Prevention* 181; and J. Yao, M. Johnson & K. Beck, “Predicting DUI Decisions in Different Legal Environments: Investigating Deterrence With a Conjoint Experiment” (2014) 15(3) *Traffic Injury Prevention* 213.

¹⁹ *Criminal Code*, R.S.C. 1985, c. C-46, s. 254(2)(b).

²⁰ *R. v. Dedman*, [1985] 2 S.C.R. 2 at 32-36; and *R. v. Orbanski*, [2005] 2 S.C.R. 3 at para. 41.

²¹ See for example, the Ontario *Highway Traffic Act*, R.S.O. 1990, c. H-8, ss. 216(1), 33(1), 33(3), and 48(1); and the British Columbia *Motor Vehicle Act*, R.S.B.C. 1996, c. 318, ss. 73(1) and (2), and 71.

²² *Criminal Code*, *supra* note 19 at s. 254(3)(a)(i) and (b).

their aroma, and police officers differ in their abilities to detect alcohol. Moreover, experienced drinkers may be able to conceal signs of intoxication or avoid raising police suspicions, and those who do not fit the impaired driver stereotype are less likely to be identified as being impaired.²³

Researchers have questioned the deterrent impact of SBT checkpoints that rely exclusively on the officer's subjective judgment as to whether breath testing is warranted.²⁴ Dr. Ross Homel, one of the world's leading experts on SBT and RBT, has written that:

[M]any drivers ... play 'breathalyzer roulette,' perceiving [that] the odds of apprehension are slight and that they can conceal their drinking successfully. Consequently, any method of enforcement that relies on subjective judgments of impairment ... is unlikely to work over the long term simply because the perceived probability of apprehension cannot be maintained at a high level.²⁵

He noted that even during a period of intensified SBT enforcement in Queensland, fewer than 1% of the drivers who were stopped were tested.²⁶

Research indicates that the police, relying on their unaided senses, detect only a small percentage of drinking drivers at SBT sobriety checkpoints. For example, a 1997 American study reported that the police missed almost 90% of drivers with BACs between 0.05% and 0.079%, and over 60% of drivers with BACs above 0.08%.²⁷ In another American study, the police failed to detect almost 75% of drivers with BACs between 0.05% and 0.099%, and approximately 45% of drivers with BACs of 0.10% or more.²⁸

A 1982 Canadian study reported that approximately 95% of drivers with BACs above 0.08% went undetected at an urban sobriety checkpoint program.²⁹ This is consistent with an earlier study in Alberta, which found that the police only detected about 8% of the drivers with BACs above 0.08% whom they

²³ For example, studies have reported that women are routinely missed more often than men, young drivers are missed more often than older drivers, and drivers without passengers are missed more often than drivers with passengers. E. Vingilis, E. Adlaf & L. Chung, "Comparison of Age and Sex Characteristics of Police-Suspected Impaired Drivers and Roadside-Surveyed Impaired Drivers" (1982) 14(6) *Accident Analysis and Prevention* 425 at 429 [Vingilis, 1982]; and J. Wells *et al.*, "Drinking Drivers Missed at Sobriety Checkpoints" (1997) 58(5) *Journal of Studies on Alcohol* 513 at 516 (Wells, 1997).

²⁴ For a review of the early studies on SBT detection rates, see E. Vingilis & V. Vingilis, "The Importance of Roadside Screening for Impaired Drivers in Canada" (1987) 29 *Canadian Journal of Criminology* 17 at 22-25.

²⁵ R. Homel, "Random Breath Testing The Australian Way: A Model for the United States?" (1990) 14(1) *Alcohol Health and Research World* 70 at 72 [The Australian Way].

²⁶ *Ibid.*

²⁷ Wells, 1997, *supra* note 23.

²⁸ S. Ferguson, J. Wells & A. Lund, "The Role of Passive Alcohol Sensors in Detecting Alcohol-Impaired Drivers at Sobriety Checkpoints" (1995) 11(1) *Alcohol, Drugs and Driving* 23. An earlier American study reported that the police failed to detect 55% of drivers with BACs of 0.10% or more at sobriety checkpoints. I. Jones & A. Lund, "Detection of Alcohol-Impaired Drivers Using a Passive Alcohol Sensor" (1986) 14(2) *Journal of Police Science and Administration* 153 at 157.

²⁹ Vingilis, 1982, *supra* note 23 at 427.

had stopped and checked.³⁰ The impaired driving detection rates have likely increased somewhat since the 1980s. Nevertheless, in its 2009 report, the House of Commons Standing Committee on Justice and Human Rights stated that, “the current methods of enforcing the law lead police officers to apprehend only a small percentage of impaired drivers, even at roadside traffic stops designed to detect impaired driving. This also does not speak well for the [deterrent] effect of Canada’s impaired driving laws.”³¹

There are no national data on the number of drivers stopped at stationary (organized) SBT checkpoints. Extrapolations based on partial police data from Alberta and Ontario suggest that approximately four to eight million drivers were processed at stationary SBT checkpoints in 2009 nationwide. Clearly, millions of drivers are stopped at stationary SBT checkpoints each year in Canada, and millions more are subject to SBT processing during routine police traffic and patrol activities.³² However, very few drinking drivers are detected, required to take an ASD or evidentiary breath test, or subsequently charged.

The second major problem with the current Canadian law is that, even if detected, many impaired drivers escape criminal liability. Police must convince a court that their subjective assessment at roadside provided a reasonable factual basis for demanding an ASD test. It is common practice for defence counsel to aggressively challenge the officer’s basis for demanding these tests.³³ Moreover, some judges have applied an unduly rigorous standard for making the demand. Unless the driver admits to drinking, police generally require clear visible signs that the driver had consumed alcohol or was driving in an impaired manner to demand an ASD test. If the court finds that there were insufficient grounds to demand the ASD test, the results of the subsequent evidentiary breath test will be excluded from evidence, and the driver will most likely be acquitted.³⁴

The enforcement challenges related to demands for ASD tests have contributed to the growing reluctance of police to lay *Criminal Code* impaired driving charges. In a national survey, 30% of the officers reported that impaired drivers are sometimes or frequently let off with a short-term provincial licence suspension, rather than being charged criminally. Twenty-nine percent of the officers reported that they sometimes or frequently took no legal action against impaired drivers. Instead, the officers arranged for the impaired driver to be taken home by taxi or a sober licensed passenger, or took other similar steps to safeguard them.³⁵ Similarly, a police survey in British Columbia indicated that almost

³⁰ W. Picton, “Legislation to Allow the Safe Release of Potentially Unsafe Drinking Drivers” (1978) 40 *Criminal Reports* 30 at 35.

³¹ House of Commons, Standing Committee on Justice and Human Rights, *Ending Alcohol-Impaired Driving: A Common Approach* (June 2009) at 13 (Chair: E. Fast).

³² Predicting the Impact, *supra* note 5 at 457.

³³ R. Robertson, W. Vanlaar and H. Simpson, *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* (Ottawa: Traffic Injury Research Foundation (TIRF), 2009) at 68.

³⁴ R. Solomon & E. Dumschat, “Passive Alcohol Sensors: A Second Best Impaired-Driving Countermeasure” (2016) 20(2) *Canadian Criminal Law Review* 229 at 234-36.

³⁵ B. Jonah *et al.*, “Front-line Police Officers’ Practices, Perceptions and Attitudes About the Enforcement of Impaired Driving Laws in Canada” (1999) 31(5) *Accident Prevention and Analysis* 421 at 426.

half of the officers refused to lay *Criminal Code* charges, even if they concluded that the driver was legally impaired.³⁶ This *de facto* decriminalization helps to explain why Canada's 2013 charge rate for federal impaired driving offences per 100,000 licensed drivers was less than 40% of the American rate.³⁷

The difficulties in detecting and prosecuting impaired drivers in Canada have greatly reduced the perceived risk of apprehension and, in turn, the law's deterrent impact. As indicated earlier, the perceived risk of apprehension is the key factor in deterring impaired driving.³⁸ Millions of Canadians continue to drink and drive, with little fear of being stopped – let alone charged and convicted. Survey data and criminal justice statistics indicate that, on average, a person can drive impaired once a week for more than three years before being charged with an impaired driving offence and for more than six years before being convicted.³⁹ Another study using national survey data indicated that even these figures greatly overestimated Canada's charge and conviction rate.⁴⁰

A member of the Standing Committee on Public Safety and National Security stated in a meeting on Bill C-226 that the conviction rate for impaired driving in 2011 was 84%, suggesting that the current federal impaired driving law was working well.⁴¹ With respect, this figure refers to the percentage of

³⁶ Police Services Division, *Safe Roads, Safe Communities* (Victoria: Ministry of the Attorney General, Public Safety and Regulatory Branch, 2000) at B-4.

³⁷ US Department of Justice, Federal Bureau of Investigation (FBI), *Crime in the United States 2013* (November 2014), online: FBI <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls>; US Department of Transportation, Office of Highway Policy Information, *Highway Statistics 2013* (Washington, DC: US Department of Transportation, 2015) at DL-1C; Statistics Canada, *CANSIM Table 252-0051: Incident-based crime statistics, by detailed violations annual (number)* (Ottawa: Statistics Canada, 2015) [CANSIM Table 252-0051]; and Transport Canada, *Canadian Motor Vehicle Traffic Collision Statistics: 2013* (Ottawa: Transport Canada, 2015) at 5.

³⁸ The research on the perceived risk of apprehension in deterring impaired driving is consistent and compelling. See *supra* note 18.

³⁹ Based on survey data, it was estimated that 10.2 million impaired driving trips were made in 2006. W. Vanlaar *et al.*, *The Road Safety Monitor 2006: Drinking and Driving* (Ottawa: TIRF, 2006) at 7. Statistics Canada reported that 60,978 individuals were charged with an impaired driving offence in 2006 and that 32,547 were convicted in 2006/07. Thus, only 1 in 167 alcohol-impaired driving trips resulted in an impaired driving charge, and only 1 in 313 such trips resulted in a conviction. Unfortunately, charge data are reported by calendar year, whereas conviction data are reported by fiscal year basis. Although the charge and conviction data relate to slightly different timeframes, they can be used to provide a reasonable estimate of the charge and conviction rates. Statistics Canada, *CANSIM Table 252-0051*, *supra* note 37; Statistics Canada, *CANSIM Table 252-0053, Adult criminal courts, number of cases and charges by decision annual (number)* (Ottawa: Statistics Canada, 2016) [Table 252-0053]; and Statistics Canada, *CANSIM Table 252-0064, Youth courts, number of cases and charges by type of decision* (Ottawa: Statistics Canada, 2016).

⁴⁰ See D. Beirness & C. Davis, "Driving After Drinking in Canada: Findings from the Canadian Addiction Survey" (2007) 98 *Canadian Journal of Public Health* 476 at 477, who estimated that Canadians had made more than 20 million trips in the past 12 months within 1 hour of consuming 2 or more drinks.

⁴¹ Mr. N. Eriskine-Smith, MP Beaches-East York, *Proceedings of the Standing Committee on Public Safety and National Security*, 1st Sess, 42nd Parl, 2016, Tuesday, September 27, 2016, online: <<http://www.parl.gc.ca/content/hoc/Committee/421/SECU/Evidence/EV8445573/SECUEV25-E.PDF>>.

impaired driving cases that were completed in adult courts that resulted in a guilty disposition.⁴² This figure does not reflect the conviction rate in terms of the impaired driving incidents known to the police or the conviction rate among those charged with an impaired driving offence. The most recent Statistics Canada data indicate that in 2013/14 only 38.8% of the impaired driving incidents known to the police resulted in a conviction. Similarly, only 55.6% of drivers charged with an impaired driving offence are convicted.⁴³ We view these latter two figures as providing a more meaningful understanding of Canada's conviction rates in impaired driving cases.

RBT would significantly reduce these existing enforcement problems. RBT legislation would authorize the police to demand a breath sample for ASD testing from any driver and would remove the current requirement of reasonable suspicion. If every driver stopped were subject to ASD testing, the problem of missed impaired drivers would be effectively eliminated. Further, police would not be required to prove in court that they had reasonable grounds to demand the test, so the accused would not be able to challenge the admission of evidentiary breath test results on this basis. Thus, by simply changing the grounds on which ASD testing can be conducted, two major enforcement issues would be eliminated. Moreover, RBT would greatly increase the perceived and actual risk of apprehension and conviction, dramatically increasing the deterrent impact of the impaired driving law.

As in Australia, New Zealand, and other countries, most RBT in Canada would be conducted at what are called "stationary," "organized" or "fixed" sobriety checkpoints, where every passing driver is stopped for testing, unless it is necessary to wave drivers through to prevent undue delays. However, police should also be authorized to conduct RBT during routine traffic and patrol activities, often referred to as "mobile" RBT. This is particularly important in rural areas, late at night, or in other situations in which low traffic volumes would not merit establishing a stationary RBT checkpoint. Moreover, as many researchers have emphasized, mobile RBT deters drivers who would otherwise believe that they could evade RBT checkpoints.⁴⁴ Given that impaired driving rates are generally higher in rural Canada, failing to authorize mobile RBT would increase this constituency's overrepresentation in impaired driving crashes, deaths and injuries.

⁴² S. Perreault, *Impaired Driving in Canada, 2011* (Ottawa: Statistics Canada, 2013), Juristat, Statistics Canada Catalogue no. 85-002-X at 16. See however, *Table 252-0053, supra* note 39, which reported that 82% of the completed adult impaired driving cases in 2010/11 resulted in a guilty disposition (40,482 guilty dispositions in the 49,521 cases completed in adult court).

⁴³ The 30,092 persons found guilty of an impaired driving offence in the 2013/14 fiscal year represented only 38.8% of the 77,558 impaired driving incidents known to the police and 55.6% of the 54,107 persons charged with an impaired driving offence in the 2013 calendar year. See *Table 252-0053, ibid.* for persons found guilty and *Table 252-0051, supra* note 37 for driving incidents and persons charged.

⁴⁴ For a discussion of the critical role played by mobile RBT in deterring impaired driving, see *The Australian Way, supra* note 25 at 74; D. Zaal, *Traffic Law Enforcement: A Review of the Literature* (Clayton, Australia: Monash University Accident Research Centre, 1994) at 40-42 [Zaal]. Mobile RBT also contributes to the unpredictability of apprehension. Daniel Nagin states that the behavioural concept of "ambiguity aversion" explains why unpredictability is a key component of deterrence. D. Nagin, "Criminal Deterrence Research at the Outset of the Twenty-First Century" (1998) 23 *Crime and Justice* 1 at 9-12. On a broader level, mobile RBT promotes the ubiquity of testing and allows RBT to be integrated into the "core business" of police, rather than being considered an add-on. Letter from Professor Barry Watson, Director, Centre for Accident Research and Road Safety — Queensland, Queensland University of Technology, to Robert Solomon (28 June 2011).

Section 3: The International Experience with RBT

(a) Introduction:

The persistence of impaired driving is not a problem that is unique to Canada. However, most developed and developing countries responded by enacting comprehensive RBT programs. Finland, Sweden and France introduced RBT in the late 1970s, followed by most Australian jurisdictions in the 1980s.⁴⁵ Most other European countries and New Zealand enacted RBT legislation in the 1990s.⁴⁶ In 2003, the European Commission recommended that all member states in the European Union introduce comprehensive RBT legislation.⁴⁷ Ireland, the most recent European Union country to do so, initiated its RBT program in 2006.⁴⁸

Reported Random Breath Testing in Selected Countries

With RBT			Without RBT
Argentina	Germany	New Zealand	Canada
Austria	Greece	Norway	Dominican Republic
Australia	Guatemala	Peru	Ecuador
Belgium	Honduras	Poland	El Salvador
Brazil	Hungary	Portugal	Panama
Bulgaria	Iceland	South Korea	South Africa
Chile	Ireland	Romania	United Kingdom
China	Italy	Russia	United States
Colombia	Japan	Slovakia	Venezuela
Costa Rica	Latvia	Slovenia	
Cyprus	Lithuania	Spain	
Czech Republic	Luxembourg	Sweden	
Denmark	Malta	Switzerland	
Estonia	Mexico	Turkey	
Finland	Moldova	Ukraine	
France	The Netherlands		

⁴⁵ R. Homel, “Random Breath Testing and Random Stopping Programs in Australia” in R. Wilson & R. Mann, eds., *Drinking and Driving: Advances in Research and Prevention* (New York: Guilford Press, 1990) 159 at 170 [Homel]; E. Townsend, F. Achterberg & T. Janitzek, *Traffic Law Enforcement Across the EU: An Overview* (Brussels: European Transport Safety Council, 2006), online: European Transport Safety Council <<http://www.etsc.eu/documents/ETS%20May%202006.pdf>> [*EU Traffic Law*]; Worldwide Brewing Alliance (WBA), *2008 Drinking and Driving Report*, 8th Edition (London: WBA, 2009) at 13 [Worldwide Brewing]; and World Health Organization (WHO) Regional Office for Europe, *European Status Report on Alcohol and Health 2010* (Geneva: WHO, 2010) at 44-45 [WHO Report].

⁴⁶ WHO Report, *ibid.* at 74; and *EU Traffic Law, ibid.*

⁴⁷ European Commission, Press Release, IP/03/1436, “Commission calls for better enforcement of road safety rules” (22 October 2003).

⁴⁸ T. Janitzek & E. Townsend, *Traffic Law Enforcement Across the EU: Time for a Directive* (Brussels: European Transport Safety Council, 2006) at 15.

As the preceding table illustrates, 47 of 56 countries (84%) had established an RBT program by 2009⁴⁹ and the number of countries adopting RBT appears to have increased significantly in recent years.⁵⁰ In its *Global Status Report on Road Safety 2015*, the World Health Organization (WHO) stated that 121 countries had RBT programs.

(b) Random Breath Testing in Australia

The Australian RBT programs are the best documented and most thoroughly studied, with RBT having first been introduced in Victoria in 1976.⁵¹ By the end of the 1980s, RBT was used throughout Australia, and comprehensive RBT programs had become the country's "central countermeasure against drinking and driving."⁵² The early research provided compelling evidence that RBT programs could dramatically reduce road crashes. For example, the introduction of RBT in New South Wales was reported to have caused "an immediate 90 percent decline in road deaths, which soon stabilized at a rate approximately 22 percent lower than the average for the previous six years."⁵³ A 1997 review of this early data concluded that the number of fatal road crashes fell by 48% during the first year.⁵⁴ Another author noted that in the 20 weeks following the introduction of RBT in December 1982 there were some 200 fewer road fatalities and thousands fewer crash-related hospital admissions than in the comparable 1981-1982 time period.⁵⁵

RBT generated significant, albeit less spectacular declines in crashes in other Australian states and territories. For example, Tasmania's RBT program was credited with reducing all serious crashes by 24% in its first year.⁵⁶ Substantial reductions were also achieved in jurisdictions where RBT replaced existing SBT programs, as would be the case in Canada. For example, Queensland's RBT program resulted in a 35% reduction in fatal crashes, whereas the introduction of the previous SBT program had generated only a 15% reduction.⁵⁷ Similarly, in a three-month period shortly after RBT replaced the

⁴⁹ This table is based on K. Stewart, *On DWI Laws in Other Countries* (Washington, DC: National Highway Traffic Safety Administration (NHTSA), 2000) at 40-48; *EU Traffic Law*, *supra* note 45; and Worldwide Brewing, *supra* note 45 at 13.

⁵⁰ WHO, *Global Status Report on Road Safety 2015* (Geneva: WHO, 2015) at 32.

⁵¹ Homel, *supra* note 45.

⁵² Zaal, *supra* note 44 at 38 citing J. Dunbar, "Drinking and Driving: Global Perspectives: United Kingdom" in *Effective Strategies to Combat Drinking and Driving: An Edited Collection of Papers Presented at the International Congress on Drinking and Driving, Edmonton, Alberta, Canada, March 28-30, 1990* (Edmonton: Alberta Solicitor General, 1990) 25 at 27.

⁵³ The Australian Way, *supra* note 25 at 70.

⁵⁴ J. Henstridge, R. Homel & P. Mackay, *The Long-Term Effects of Random Breath Testing in Four Australian States: A Time Series Analysis* (Canberra: Federal Office of Road Safety, 1997) at 104 [Henstridge]. The authors also estimated that the New South Wales RBT program prevented 204 fatal and 522 serious and 686 single-vehicle nighttime collisions in the first year. *Ibid.*

⁵⁵ G. Paciullo, "Random breath testing in New South Wales" (1983) 1(1) *Medical Journal of Australia* 620 at 620.

⁵⁶ Henstridge, *supra* note 54 at 104.

⁵⁷ *Ibid.* at 102.

existing SBT program in Western Australia, it achieved a 23% decrease in nighttime traffic deaths and injuries compared to the same period the previous year. This significant reduction was achieved even though the police only tested about 50% of the drivers who were stopped under the RBT program.⁵⁸

The less intensive RBT programs were not as effective as the comprehensive programs, and the impact of some initially strong programs tended to wane over time unless enforcement and publicity levels were maintained.⁵⁹ Several jurisdictions increased enforcement and publicity levels in an attempt to replicate the successes of New South Wales and Tasmania. For example, Victoria dramatically intensified its RBT program, conducting almost 1.8 million random breath tests between July 1989 and June 1991.⁶⁰ This initiative was credited with reducing fatal crashes in Melbourne during “high alcohol hours” by 19% to 24% in 1990.⁶¹ A leading expert attributed these reductions to increased enforcement, greater publicity, the use of both mobile and stationary RBT, and sustaining the program year round.⁶² A comprehensive study in Queensland several years later reached similar conclusions on the key elements of effective RBT programs.⁶³

The most comprehensive review of the Australian RBT programs was a time series analysis of the long-term effects of RBT in four jurisdictions published in 1997.⁶⁴ In conducting the study and calculating the effectiveness of RBT, the authors controlled for various potentially confounding factors, including seasonal effects, daily weather patterns, indices of economic and road use activity, alcohol consumption, and the day of the week. They also considered the impact of other impaired driving countermeasures, such as lowering the legal BAC limit to 0.05% and the prior use of intensive SBT programs.⁶⁵

Consistent with earlier research, the 1997 study identified four essential elements of successful RBT programs. First, maximizing RBT’s deterrent impact requires high levels of testing. The equivalent of at least one-third of licensed drivers must be tested each year, but higher testing levels are preferable.⁶⁶ Second, the program should be extensively publicized, focusing specifically on the risk of apprehension. Third, enforcement should include both mobile RBT and high-visibility stationary RBT checkpoints. Fourth, to sustain the deterrent impact of an RBT program, enforcement and publicity levels must be

⁵⁸ Homel, *supra* note 45 at 187.

⁵⁹ The Australian Way, *supra* note 25 at 73; and Zaal, *supra* note 44 at 67.

⁶⁰ G. Sullivan, A. Cavallo & A. Drummond, *An Overview of Random Breath Testing Operations in Victoria 1989-1991* (Melbourne: Transport Accident Commission, 1992) at 1.

⁶¹ A. Cavallo & M. Cameron, *Evaluation of a Random Breath Testing Initiative in Victoria 1990 & 1991, Summary Report* (Melbourne: Transport Accident Commission, 1992) at 24.

⁶² The Australian Way, *supra* note 25 at 74.

⁶³ B. Watson, G. Fraine & L. Mitchell, “Enhancing the effectiveness of RBT in Queensland” in *Prevention of Alcohol Related Road Crashes: Social and Legal Approaches Conference* (Brisbane: Griffith University, 1994) 31 at 34-38.

⁶⁴ Henstridge, *supra* note 54.

⁶⁵ *Ibid.* at 11-30.

⁶⁶ Specifically, the authors recommended that “all states should increase highly visible stationary RBT to a level equivalent to one test per licence holder per year.” *Ibid.* at 115.

maintained.⁶⁷ The New South Wales RBT program included these elements from the outset and is regarded as the most successful program and a model for effective RBT implementation.⁶⁸

RBT research in Australia continued, but with a narrower focus on specific issues, such as enhancing deterrence,⁶⁹ maximizing police resources,⁷⁰ and assessing the impact of RBT on public attitudes towards drinking and driving.⁷¹ Meanwhile, broader reviews of impaired driving countermeasures have noted the success of the Australian RBT programs. For example, a 2005 study stated that the Australian RBT programs resulted in “as much as a 24% reduction in nighttime crashes, especially in metropolitan areas.”⁷² A 2009 review reported that RBT reduced total crashes in Australia by 22%.⁷³ Similarly, the authors of a comprehensive 2015 review of Australia’s RBT programs stated that “Australia is deemed to have the most successful RBT program internationally, measured in terms of alcohol-related crash... reductions.”⁷⁴

In summary, the Australian experience, especially in New South Wales, provides compelling evidence of RBT’s benefits, and insights on how to maximize its effectiveness.

(c) Random Breath Testing in Other Jurisdictions

Similarly positive results have been reported in other jurisdictions. For example, RBT was largely credited with reducing the percentage of Dutch drivers with BACs over 0.05% from 15% in 1970 to

⁶⁷ *Ibid.* at 114-15.

⁶⁸ G. Casey, “Random Breath Testing – A Successful Policy Recipe” (2006) 7(4) *Journal of Australasian College of Road Safety* 29 at 30.

⁶⁹ Tay, *supra* note 18; Perceptions and Experiences, *supra* note 18; and J. Ferris *et al.*, *A national examination of random breath testing and alcohol-related traffic crash rates* (Canberra: Foundation for Alcohol Research and Education, 2015) [Ferris].

⁷⁰ S. Hart, B. Watson & R. Tay, “Barriers and Facilitators to the Effective Operation of RBT in Queensland” in *Proceedings of the 2003 Road Safety Research, Policing and Education Conference: From Research to Action* (Sydney: New South Wales Roads and Traffic Authority, 2003) at 137; and B. Watson, J. Freeman & S. Hart, “A Survey of Operational Police Involved in the Delivery of Random Breath Testing (RBT) in Queensland, Australia” in P. Logan, ed., *Proceedings of the 18th International Conference on Alcohol, Drugs and Traffic Safety, 2007*, CD-ROM: (Seattle: ICADTS, 2007).

⁷¹ See for example, T. Prabhakar, S. Lee & R. Job, *Factors Involved in the Long Term Benefits of Random Breath Testing in NSW* (Sydney: University of Sydney, 1993). In the authors’ words: “[t]he drink-driver has been viewed increasingly as irresponsible, a criminal and even a potential murderer. The social environment also seems to be changing such that while the social pressure to drink may still exist as part of the Australian ethos, RBT is accepted as a legitimate reason for abstinence.” *Ibid.* at 2.

⁷² J. Grube, “Preventing Alcohol-Related Problems: Public Policy Strategies” in Transportation Research Board, *Implementing Impaired Driving Countermeasures: Putting Research into Action* (Washington, DC: Transportation Research Board, 2005) 93 at 104, online: Transportation Research Board <<http://onlinepubs.trb.org/onlinepubs/circulars/ec072.pdf>>.

⁷³ A. Erke, C. Goldenbeld & T. Vaa, “The Effects of Drink-Driving Checkpoints on Crashes—A Meta-Analysis” (2009) 41 *Accident Analysis & Prevention* 914 at 919 (Table 2) [Erke].

⁷⁴ Ferris, *supra* note 69 at 6.

4.5% in 2000.⁷⁵ Moreover, each doubling of the number of RBT tests since 1986 was accompanied by a 25% decrease in the number of impaired driving offenders.⁷⁶ The Finnish RBT program was found to have reduced the number of drinking drivers on the road by 58% between 1979 and 1985. During this same period, impaired driving deaths and injuries decreased appreciably, while alcohol consumption, car ownership, the number of licensed drivers, and traffic volumes increased slightly.⁷⁷ Beginning in 2003, Denmark required all drivers stopped for speeding, seat-belt checks and other routine patrol purposes to submit to RBT. Within two years, alcohol-related crashes in Denmark fell by more than 25%.⁷⁸

Canada may not necessarily achieve the dramatic reductions seen in Australia and other countries that introduced RBT years ago when alcohol-related crash deaths were far higher. Nevertheless, recent experience with RBT in New Zealand, Ireland and other jurisdictions has also been extremely positive.

New Zealand replaced its SBT program with RBT, known as “Compulsory Breath Testing” (CBT) in April 1993. A related media campaign was launched in January 1996, and “booze buses” were introduced in October 1996. Booze buses are large, specially-equipped vehicles used for onsite evidentiary breath testing, which are typically brightly colored to attract the attention of all nearby road users and thereby increase the perceived risk of apprehension.⁷⁹ A detailed 2004 study estimated that New Zealand’s fully implemented CBT program resulted in a 54.1% decrease in total serious and fatal nighttime crashes⁸⁰ and saved society more than \$1 billion in 1997.⁸¹ The authors concluded that:

...sustained high-visibility CBT is the best proven defence against drunk-driving. In both New Zealand and at least one Australian state, intensive CBT appears to have halved the alcohol-related crash death toll relative to a time without random breath testing. From government’s perspective, although expensive, CBT more than pays for itself.⁸²

In Ireland, the enactment of RBT in July 2006 was credited with saving 92 lives in the first 12 months, and reducing all traffic-related hospital admissions by 10% in the first 6 months compared to the corresponding period in the previous year.⁸³ Moreover, as the following table illustrates, total traffic

⁷⁵ M. Mathijssen, “Drink-Driving Policy and Road Safety in the Netherlands: A Retrospective Analysis” (2005) 41 *Transportation Research Part E: Logistics and Transportation Review* 395 at 395.

⁷⁶ S. Cave & D. McKibbin, Research and Information Service, *Bill Paper re Road Traffic (Amendment) Bill* (Belfast: Northern Ireland Assembly, 2014) at 16, online: Northern Ireland Assembly <<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/general/7214.pdf>> [Cave].

⁷⁷ J. Dunbar, A. Penttila & J. Pikkarainen, “Drinking and Driving Success of Random Breath Testing in Finland” (1987) 295(6590) *British Medical Journal (Clinical Research Edition)* 101 at 102 [Testing in Finland].

⁷⁸ Cave, *supra* note 76 at 16.

⁷⁹ T. Miller, M. Blewden & J. Zhang, “Cost savings from a sustained compulsory breath testing and media campaign in New Zealand (2004) 36 *Accident Analysis and Prevention* 783 [Cost Savings].

⁸⁰ *Ibid.* at 790.

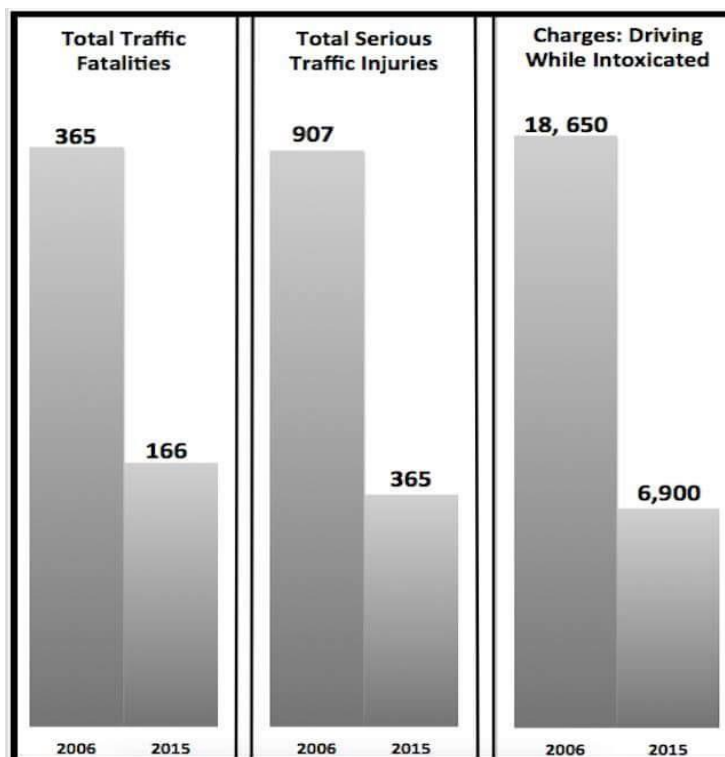
⁸¹ *Ibid.* at 791.

⁸² *Ibid.* at 794.

⁸³ Alcohol Action Ireland, *Alcohol and Driving*, online: Alcohol Action Ireland <<http://alcoholireland.ie/policy/policy-documents-2/>>.

fatalities and serious traffic injuries have continued to fall since the introduction of RBT. Total traffic deaths fell 54.5% and serious injuries fell by 59.8% by the end of 2015.⁸⁴ Rather than taxing criminal justice resources, RBT also dramatically reduced impaired driving charges. As of the end of 2015, impaired driving charges had fallen by 63.0%.⁸⁵

Changes in Total Traffic Deaths, Serious Injuries and Driving While Intoxicated Charges Following Ireland's Shift from SBT to RBT: 2006-2015



It is worth noting as well that the percentage of alcohol-related fatal crashes in the three years prior to the enactment of RBT in Ireland (31.0%) was very similar to the latest reported percentage of alcohol-related crash deaths in Canada (34.7%).⁸⁶ If Ireland is any example, the introduction of RBT in Canada should result in dramatic and sustained reductions in total traffic fatalities, injuries and impaired driving charges. However, the impact of enacting RBT in Canada is likely to be slightly less dramatic than was

⁸⁴ An Garda Síochána, *Annual Report 2011*, online: An Garda Síochána <<http://www.garda.ie/Documents/User/Annual%20Report%202011%20English.pdf>> at 17; An Garda Síochána, *Annual Report 2013*, online: An Garda Síochána <<http://www.garda.ie/Documents/User/Annual%20Report%202013%20-%20English.pdf>> at 15; An Garda Síochána, *Annual Report 2014*, online: An Garda Síochána <<http://www.garda.ie/Documents/User/Annual%20Report%202014%20English%20Dec%202015.pdf>> at 12; and An Garda Síochána, *Annual Report 2011*, online: <<http://www.garda.ie/Documents/User/Annual%20Report%20English.pdf>> at 23.

⁸⁵ Cave, *supra* note 76 at 17.

⁸⁶ See respectively, D. Bedford *et al.*, *Alcohol in Fatal Road Crashes in Ireland 2003 to 2005* (Naas, Ireland: Population Health Directorate, Health Service Executive, 2008) at 8; and R. Solomon & M. Clarizio, *Alcohol and/or Drugs Among All Categories of Crash Victims Dying Within 12 Months, By Jurisdiction: Canada, 2012* (Oakville: MADD Canada, 2016) at 4.

the case in Ireland, given that Ireland introduced some other progressive traffic safety measures in October 2011.⁸⁷ The most important of these measures was the lowering of the permissible BAC limit from 0.08% to 0.05% and the enactment of a 0.02% BAC limit for novice and professional drivers. Nevertheless, from 2006 until the end of 2011, traffic deaths, serious traffic injuries and impaired driving charges in Ireland had already fallen by 49.0%, 48.7% and 51.4%, respectively.⁸⁸ These impressive results have been attributed almost exclusively to the RBT program alone. No doubt, the RBT program also contributed to the additional decreases in traffic deaths, serious traffic injuries and impaired driving charges that were achieved from the beginning of 2012 to the end of 2015.

The limited use of RBT in the United States has also been effective. While there are no RBT programs for the general driving population, the 1995 federal alcohol-testing program enacted for interstate commercial truck and bus drivers includes mandatory testing of randomly-selected employees before, during or immediately after their driving shift. A review reported that by 2006 the program was “associated with a 23% reduction in alcohol involvement in fatal crashes” by commercial drivers.⁸⁹

A recent Hong Kong study indicated that RBT had a major deterrent impact even in the face of dramatic increases in alcohol consumption.⁹⁰ Hong Kong reduced and then eliminated its excise tax on wine and beer in 2008, enacted RBT legislation in 2009 and increased its drinking and driving penalties in 2010. Although off-trade alcohol sales increased more than 400% (*i.e.* by 3.2 million litres of pure ethanol) between 2008 and 2010, alcohol-related crashes fell by 73.2% from 2008 to 2011 (1.49% to 0.4%).⁹¹ Similarly, reported past-year drinking and driving decreased 51.1% among male past-year drivers (9.0% to 4.4%).⁹² The authors noted that “nearly all drivers in our study reported random breath testing as having been an actual deterrent for drink driving.”⁹³

(d) Summary

Contrary to what some witnesses appearing before this Committee have suggested, the international experience provides compelling proof of the effectiveness of RBT. While some studies were conducted decades ago, the ongoing Australian research, the research in New Zealand and Ireland, and the recent studies in the Netherlands, Denmark, other European countries, and Hong Kong are directly relevant and can hardly be considered dated. Nor is there any rational basis for suggesting that the international research is not applicable to Canada. As indicated, New Zealand, Ireland, Queensland, and Western Australia shifted from SBT to RBT – namely, exactly what would occur if the RBT provisions in Bill C-

⁸⁷ *Supra* note 84.

⁸⁸ *Supra* notes 85 and 86.

⁸⁹ J. Brady *et al.*, “Effectiveness of Mandatory Alcohol Testing Programs in Reducing Alcohol Involvement in Fatal Motor Carrier Crashes” (2009) 170(6) *American Journal of Epidemiology* 775 at 778

⁹⁰ J. Kim *et al.*, “Drink-Driving in Hong Kong: the competing effects of random breath testing and alcohol tax reductions” (2013) 108 *Addiction* 1,217.

⁹¹ *Ibid.* at 1,222.

⁹² *Ibid.* at 1,217.

⁹³ *Ibid.* at 1,225.

226 were enacted. The legal systems and the general nature of the impaired driving problem in these other jurisdictions are similar to those existing in Canada.

Despite claims to the contrary, many of the RBT studies, including the most comprehensive study of the Australian RBT programs,⁹⁴ controlled for various potentially confounding factors, such as other changes in the impaired driving law and levels of enforcement. Many of the other authors expressly took these factors into account in reaching their conclusions about the effectiveness of RBT. Finally, the statement that there is no direct evidence that RBT is more effective than SBT is simply false. As explained above, the sharp decreases in impaired driving and related crashes, deaths and injuries were achieved when Queensland, Western Australia, New Zealand, and Ireland shifted from SBT to RBT checkpoints and mobile patrol.

Section 4: Other Considerations Regarding RBT

(a) The Likely Impact of Replacing Canada's SBT program with RBT

The evidence indicates that RBT is more effective in reducing impaired driving deaths and injuries than SBT, particularly in jurisdictions like Canada where the police must rely on their own unaided senses in assessing a driver's sobriety. As noted, Queensland's RBT program resulted in a 35% reduction in fatal crashes, whereas the previous SBT program, which operated similarly to Canada's current SBT programs, had resulted in only a 15% reduction.⁹⁵ Thus, RBT was more than twice as effective as SBT in reducing crashes. In Western Australia, during a 3-month period shortly after RBT replaced SBT, nighttime traffic deaths and injuries fell 23% compared to the same period the previous year.⁹⁶ The sharp decreases in traffic deaths and injuries that occurred in New Zealand and Ireland when they replaced their SBT program with RBT are at least as compelling.

In commenting on the shift from SBT to RBT, Dr. Ross Homel, who as noted is one of the world's leading scholars on deterring impaired driving, stated, "Nothing in the Australian experience encourages the belief that, without the use of full random testing, roadblock or sobriety checkpoints are capable of delivering a substantial and sustained reduction in alcohol-related casualty crashes."⁹⁷ Dr. Homel's concerns about the limited deterrent impact of SBT help to explain Canada's poor impaired driving record.

Despite the positive results of moving from SBT to RBT, some American researchers have reported little difference in the effectiveness of RBT and SBT.⁹⁸ However, as the authors of two of the reviews

⁹⁴ Henstridge, *supra* note 54 at 11-31.

⁹⁵ *Ibid.* at 102.

⁹⁶ Homel, *supra* note 45 at 187.

⁹⁷ The Australian Way, *supra* note 25 at 74.

⁹⁸ C. Peek-Asa, "The Effect of Random Alcohol Screening in Reducing Motor Vehicle Crash Injuries" (1999) 16(1S) American Journal of Preventive Medicine 57 at 65; R. Shults *et al.*, "Reviews of Evidence Regarding Interventions to Reduce Alcohol-Impaired Driving" (2001) 21(4S) American Journal of Preventive Medicine 66 at 76 [Shults]; and R. Elder *et al.*, "Effectiveness of Sobriety Checkpoints for Reducing Alcohol-Involved Crashes" (2002) 3(4)

noted, their results must be viewed with caution because they assessed single programs and did not directly compare RBT and SBT checkpoints.⁹⁹ Nor did they consider the additional traffic safety benefits achieved when jurisdictions like Queensland, Western Australia, New Zealand, and Ireland replaced their SBT programs with RBT programs. The best data on the likely impact of enacting RBT in Canada come from these latter jurisdictions that changed from SBT to RBT programs, as would be the case in Canada.

Perhaps more importantly, the studies equating the results of SBT with RBT failed to distinguish between different types of SBT programs, and consequently tended to overestimate their effectiveness. For instance, the studies included reference to several American SBT programs where police officers used passive alcohol sensors (PASs), including the famously successful “Checkpoint Tennessee.” PAS devices are small, hand-held devices that are used to detect alcohol in the ambient air around a driver’s mouth. PAS devices can improve the detection of impaired drivers by 50% or more.¹⁰⁰ It is inappropriate to equate the effectiveness of such programs with Canadian SBT programs, where officers do not use PAS devices, but rather must rely on their unaided senses to detect drinking drivers. Indeed, a recent American study showed that a three-year SBT program in Maryland that did not use PAS devices had no impact whatsoever on alcohol-related crashes and injuries.¹⁰¹

Moreover, “Checkpoint Tennessee” and some of the other American SBT programs measured the traffic safety benefits of moving from an enforcement model that relied almost exclusively on routine patrol activities to high-visibility, heavily-publicized, intensive SBT. For example, in the Tennessee study, the number of checkpoints increased from 15 in the preceding year to 900 in the program year.¹⁰²

Traffic Injury Prevention 266 [Elder].

We would also question how the author of the first article classified the Australian RBT and American SBT programs. The author divided the “random screening programs” into “Random Breath Testing” and “Sobriety Checkpoints.” *Ibid.* at 58. With respect, the vast majority of RBT in Australia, New Zealand and other countries occurs at stationary “sobriety checkpoints.” Moreover, the use of the term “random screening” in reference to the American sobriety checkpoint programs is troubling. As the author noted, the stopping of the vehicles is random in the sense that individualized suspicion is not required. However, since demands for a breath sample in the American sobriety checkpoint programs require probable cause, characterizing these programs as a form of random screening is problematic. While it could be argued that the police forces that use passive alcohol sensors are conducting a form of “random screening,” this term can be readily misconstrued. Finally, the author presents four figures labelled in terms of reductions in traffic fatalities and injuries “following random breath testing.” However, the figures include not only the Australian RBT programs, but also the American SBT programs that clearly do not conduct random breath testing.

⁹⁹ Shults, *ibid.* at 76; and Elder, *ibid.* at 270.

¹⁰⁰ I. Jones & A. Lund, “Detection of Alcohol-Impaired Drivers Using a Passive Alcohol Sensor” (1986) 14(2) *Journal of Police Science and Administration* 153 at 157. See also R. Voas, “A New Look at NHTSA’s Evaluation of the 1984 Charlottesville Sobriety Checkpoint Program: Implications for Current Checkpoint Issues” (2008) 9(1) *Traffic Injury Prevention* 22 at 25, which reported that the introduction of PAS devices in Virginia’s SBT checkpoints increased arrests threefold.

¹⁰¹ K. Beck, “Lessons learned from evaluating Maryland’s anti-drunk driving campaign: assessing the evidence for cognitive, behavioral, and public health impact” (2009) 10 *Health Promotion Practice* 370 at 375.

¹⁰² J. Lacey, R. Jones & R. Smith, *Evaluation of Checkpoint Tennessee: Tennessee’s Statewide Sobriety Checkpoint Program* (Washington, DC: National Highway Traffic Safety Administration, 1999), Executive Summary.

The accompanying mass media campaign included thousands of television and radio public service announcements, print media, mobile billboards, “earned” (independent) media coverage, and public information brochures.¹⁰³ The relevance of these studies to Canada is questionable, given our current widespread use of moderately intensive SBT programs. While strengthening Canada’s SBT programs would have some traffic safety benefits, these would only be modest. Unlike in Tennessee, it is inconceivable that Canada would increase the current number of sobriety checkpoints sixtyfold,¹⁰⁴ or massively increase the already significant media campaigns against impaired driving.

As indicated, the Criminal Lawyers’ Association adopted the position of the Canadian Civil Liberties Association (CCLA) on RBT.¹⁰⁵ In turn, the CCLA argued that SBT was as effective as RBT, based largely on the studies of the American SBT programs.¹⁰⁶ However, the CCLA did not address the limitations in the studies upon which it relied. Presumably, the CCLA was aware of these shortcomings, because the authors of most of the studies specifically advised caution in interpreting the results. In any event, the CCLA specifically referred to several of our published articles on RBT, which set out these limitations in detail. Nor did the CCLA consider the published research on the effectiveness of RBT in New Zealand and Ireland.

Despite Canada’s existing SBT programs, the deterrent impact of the federal impaired driving law remains limited. The international experience over the past 40 years indicates that comprehensive RBT programs increase the perceived risk of apprehension, and thereby significantly reduce alcohol-related crashes, injuries and deaths.

(b) The Cost-Effectiveness of RBT

RBT is widely considered to be one of the most cost-effective impaired driving countermeasures.¹⁰⁷ In 1990, the estimated annual cost of the New South Wales RBT program, including media, was \$3.5 million. At that time, the program was conservatively estimated to save 200 lives per year, with attendant savings of at least \$140 million. Based on these figures, the program had a cost-benefit ratio of 1:40.¹⁰⁸ Most of the savings were in the area of health care and resulted from the reduction in fatalities and serious injuries. A 2003 European Union study concluded that increasing RBT testing levels to one

¹⁰³ *Ibid.*, chapter 2.

¹⁰⁴ As indicated, approximately four to eight million drivers were stopped at SBT checkpoints in 2009. Although the number of drivers stopped at SBT checkpoints could foreseeably be increased three to fivefold, it is very doubtful that substantially greater increases would ever be made.

¹⁰⁵ The Criminal Lawyers’ Association, *Submissions to the Standing Committee on Public Safety and National Security (SECU)*, 1st Sess, 42nd Parl, Meeting No. 26, Thursday, September 29, 2016 at 9 [Criminal Lawyers’ Submission].

¹⁰⁶ *Ibid.* at 10-16.

¹⁰⁷ For a discussion of the likely impact of implementing RBT on the social costs of crashes in Canada, see Predicting the Impact, *supra* note 5.

¹⁰⁸ The Australian Way, *supra* note 25 at 70.

test per 16 inhabitants would save between 2,000 and 2,500 lives, and result in a cost-benefit ratio of 1:36 or 1:55, depending on the costing model used.¹⁰⁹

Similarly, a 2004 New Zealand study reported a cost-benefit ratio of 1:14 for RBT alone, 1:19 for RBT coupled with a media campaign, and 1:26 for RBT in conjunction with both a media campaign and “booze buses.”¹¹⁰ As indicated earlier, the authors concluded that New Zealand’s fully implemented RBT program saved society more than a billion dollars in its first year of operation.¹¹¹ A 2004 WHO study reported that each dollar spent on RBT resulted in an overall cost savings of 19 dollars.¹¹²

Although it is difficult to predict the cost savings that would result if RBT were introduced in Canada, a relatively recent study conservatively estimated that RBT would generate total social cost savings of over \$4.3 billion.¹¹³ A large portion of these costs reflect the human consequences of crashes, including health-related expenditures and lost productivity. The same study estimated that, while RBT would increase some police costs, these would largely be offset by significant reductions in the police resources devoted to attending and following up on impairment-related crashes.¹¹⁴

(c) The Impact of RBT on Criminal Justice Resources

Notwithstanding these impressive results, concerns have been expressed that implementing RBT would drastically increase impaired driving charges and prosecutions, overburden the courts and greatly escalate criminal justice costs. However, discussions of this possibility are notably absent from the research literature, strongly suggesting that this has not been a significant concern in the more than 100 countries that have enacted RBT during the last 40 years.

With the implementation of RBT, the police will detect virtually all of the impaired drivers that they stop. However, this will be offset by the fact that RBT significantly reduces impaired driving and related crashes, injuries and deaths. Thus, it does not follow that introducing RBT will impose an undue burden on the criminal justice system. The international research indicates that RBT has not led to sustained increases in impaired driving charges, prosecutions and cases. In fact, the opposite appears to be the case. For example, the introduction of RBT in Ireland led to a 7% increase in impaired driving charges the following year, but dramatic decreases thereafter. As previously indicated, charges in Ireland fell 63% from 2006 (18,650) to 2015 (6,900).

Moreover, introducing RBT in Canada would greatly streamline the investigation and prosecution of all impaired driving cases. In order to demand a breath test on an ASD, the police must have reasonable

¹⁰⁹ M. Mackay *et al.*, *Cost Effective EU Transport Safety Measures* (Brussels: European Transport Safety Council, 2003) at 27.

¹¹⁰ Cost Savings, *supra* note 79 at 788. Thus, the additional costs of publicizing and increasing the visibility of RBT programs were greatly outweighed by the savings in health care and other expenses.

¹¹¹ *Ibid.* at 791.

¹¹² M. Peden *et al.*, eds., *World Report on Road Traffic Injury Prevention* (Geneva: WHO, 2004) at 130.

¹¹³ Predicting the Impact, *supra* note 5 at 451.

¹¹⁴ *Ibid.* at 452-59.

grounds to suspect that a driver has alcohol and/or drugs in his or her body.¹¹⁵ Although this threshold for demanding an ASD test is not particularly high, the police often have difficulty convincing a court that their subjective roadside assessment of a driver met the requisite standard. As a result, the police must carefully question drivers, closely observe them for visible signs of impairment, scrutinize their documents, and attempt to detect the odour of alcohol on their breath.¹¹⁶ The parallel process in Australia prior to the introduction of RBT was described as requiring the police “to perform an elaborate charade involving licenses and equipment, all the time ‘sniffing the air’ for signs of alcohol.”¹¹⁷ As noted, RBT eliminates the need for any preliminary questioning, careful observations, document inspection, or detailed note-taking. Rather, drivers stopped at an RBT checkpoint are processed in an assembly line fashion.¹¹⁸

The discussion of RBT in Canada should, as in the rest of the world, focus on its traffic safety benefits and not on whether it might possibly increase demands on the criminal justice system. If there are major problems in the existing processing of impaired driving charges and cases, these should be dealt with directly. It is doubtful that anyone would dare suggest that proven measures to reduce sexual assaults should not be enacted because they might increase the burden on the criminal justice system. Nor should such specious considerations preclude the enactment of comprehensive RBT programs in Canada.

(d) Public Support for RBT

International experience indicates that RBT enjoys broad public support. In 2002, 98.2% of Queensland drivers supported RBT.¹¹⁹ Similarly, in a 2006 Irish survey, 87% of the participants strongly endorsed RBT.¹²⁰ Moreover, public support appears to increase significantly after RBT is enacted. Prior to the introduction of RBT in New South Wales, public support stood at 63.8%. By mid-1983, six

¹¹⁵ *Criminal Code*, *supra* note 19 at s. 254(2)(b).

¹¹⁶ For a review of these issues, see R. Solomon & E. Dumschat, “Passive Alcohol Sensors: A Second Best Impaired Driving Countermeasure” 20 *Canadian Criminal Law Review* 229 at 234-37.

¹¹⁷ Homel, *supra* note 45 at 186.

¹¹⁸ Furthermore, RBT would eliminate a major ground for contesting the admissibility of the evidentiary breath tests. Currently, it is common practice for defence counsel to aggressively challenge the officer’s basis for demanding the ASD test. These challenges appear to figure prominently in acquittals. R. Robertson, W. Vanlaar & H. Simpson, *National Survey of Crown Prosecutors and Defence Counsel on Impaired Driving* (Ottawa: TIRF, 2009) at 68.

With the introduction of RBT legislation, police would no longer be required to prove in court that they had reasonable grounds to suspect that a driver had consumed alcohol and/or drugs. Therefore, even in the unlikely event that the number of charges increased, there would be a higher percentage of guilty pleas, fewer legal challenges to the admissibility of the evidentiary breath tests, and shorter, less complicated trials. These streamlined procedures would reduce whatever increased burden that RBT might impose on prosecutors and the courts.

¹¹⁹ Perceptions and Experiences, *supra* note 16 at 14.

¹²⁰ Alcohol Action Ireland, *Alcohol in Ireland: time for action. A survey of Irish attitudes* (Dublin: Alcohol Action Ireland, 2006) at 14.

months after RBT was introduced, support had increased to 85.3%, and by 1987, it stood at 97%.¹²¹ In 1974, two years before RBT was introduced in Victoria, less than 50% of those surveyed agreed with it. By 1985, support had grown to 75%.¹²²

There is already broad public support for RBT in Canada and it appears to be rising. In a 2007 survey, 66% of Canadians supported legislation authorizing the police to conduct RBT.¹²³ Surveys in the following two years reported virtually identical levels of support.¹²⁴ However, an Ipsos Reid survey conducted in 2010 found that 77% of Canadians either “strongly” (46%) or “somewhat” (31%) supported the introduction of RBT. When informed of RBT’s potential to reduce impaired driving deaths, 79% agreed that RBT is a “reasonable intrusion on drivers.” Seventy-five percent also agreed that the police should be allowed to “randomly require all drivers to give a breath sample to help detect impaired driving.”¹²⁵ These high levels of support for RBT reflect the public’s concerns about impaired driving. Ninety-eight percent of respondents considered impaired driving to be a “very important” (81%) or “somewhat important” (17%) public safety issue, and 87% thought that more could be done to address the problem.¹²⁶

(e) Driver Inconvenience

The cost-efficiency of RBT derives in part from its ability to process large numbers of drivers in a short period of time. Once stopped, drivers are typically asked to provide a breath sample without any preliminary discussion, observation or review of the driver’s documents. The driver remains seated in the car and the breath test itself takes approximately 30 seconds. For example, a Finnish study reported that drivers undergoing RBT were detained on average for just seconds, and that a team of 10 officers could test 500 drivers in half an hour.¹²⁷ Similarly, a 2004 New Zealand study indicated that drivers were usually waved through when line-ups developed, resulting in a total delay of two minutes or less for most drivers who do not require evidentiary breath testing.¹²⁸

¹²¹ Kearns *et al.*, “An Overview of the Random Breath Testing Trial in New South Wales (1987) 86 *Alcohol, Drugs and Traffic Safety* 429 at 430; and Homel, *supra* note 45 at 177.

¹²² W. Harrison *et al.*, *Drink-Driving Enforcement: Issues in Developing Best Practice* (Sydney: Austroads, 2003) at 5-6. Other Australian surveys yielded similar results. See M. Armour *et al.*, “Random Breath Testing in Victoria” (1987) 86 *Alcohol, Drugs and Traffic Safety* 433 at 438; and The Australian Way, *supra* note 25 at 75.

¹²³ Ekos Research Associates Inc., *Impaired Driving Survey for Transport Canada/MADD Canada: Final Report* (Ottawa: Transport Canada, 2007) at 23.

¹²⁴ TIRF, *The Road Safety Monitor 2008: Drinking and Driving – National* (Ottawa: TIRF, 2008) at 4; and W. Vanlaar, K. Marcoux & R. Robertson, *The Road Safety Monitor 2009: Drinking and Driving in Canada* (Ottawa: TIRF, 2009) at 5.

¹²⁵ Ipsos Reid, *Canadian Attitudes Toward Random Breath Testing (RBT)* (Oakville: MADD Canada, 2010) at 11, 16 and 17 [Ipsos Reid].

¹²⁶ *Ibid.* at 8 and 9, respectively.

¹²⁷ Testing in Finland, *supra* note 77 at 101.

¹²⁸ Cost Savings, *supra* note 79 at 783. The authors also indicated that drivers subjected to evidentiary breath testing were delayed an average of only five minutes, including waiting time, RBT and driver/vehicle checks. Although

Thus, on average, RBT will result in detentions of about the same, or perhaps even shorter, duration as the detentions that currently result from the random stops involved in Canadian SBT programs. If officers at SBT checkpoints merely ask drivers a simple question, such as, “Where are you coming from?” or “Have you had anything to drink?” before waving them on, then the SBT stops will likely be somewhat shorter or about the same duration as a typical RBT check. However, if officers at SBT checkpoints ask drivers for their licence and other documents, attempt to scrutinize them for signs of alcohol consumption or closely question them, then the SBT stop would take much longer than a typical RBT check.

The Criminal Lawyers’ Association, quoting the CCLA, stated that “there is evidence to suggest that individuals would have to leave their cars in order to provide the breath sample, significantly extending and changing the nature of the detention.”¹²⁹ Obviously, adopting this approach would effectively undermine any RBT program. The reference cited as the source for this statement suggest that existing safety protocols and the requirements of the Canadian Labour Code would preclude officers from standing beside a car on the road while dealing with a driver sitting at the wheel. The authors do not provide any legal analysis, nor explain why officers staffing a RBT sobriety checkpoint would be at an undue risk relative to officers who currently stop millions of Canadian drivers each year at SBT checkpoints. The concerns these authors expressed about RBT are not shared by the Canadian Association of Chiefs of Police, which unanimously supported the enactment of RBT in 2009 and 2013.¹³⁰

A great deal of work has been done in Australia alone on where and how to establish RBT checkpoints in a manner that maximizes officer safety. The senior traffic officers that we met in Australia had decades of experience in running hundreds of RBT checkpoints. We have not been able to find any reference in the research literature to any unique or undue risks associated with RBT. Presumably, Canadian police would draw on their own very considerable expertise in running SBT checkpoints and could always consult with their international traffic safety counterparts. It is difficult to imagine why Canada would ignore the experience in Australia, New Zealand, Ireland, Western Europe, and approximately one hundred other countries, and adopt a uniquely inefficient and ineffective approach to RBT.

evidentiary testing could be speeded up in Canada if conducted at roadside in specially-equipped vans, Canadian processing times will, for various reasons, never approximate those in New Zealand, Australia or most European Union countries. For example, section 258(1)(c)(ii) of the *Criminal Code* requires that two evidentiary breath tests be conducted and that there be an interval of at least 15 minutes between them. Moreover, under section 10(b) of the *Charter*, the suspect must be given a reasonable opportunity to contact and consult with legal counsel prior to evidentiary testing.

¹²⁹ Criminal Lawyers’ Submission, supra note 105 at 18. The reference cited as the source for this statement is R. Robertson & W. Vanlaar, *Canada’s Impaired Driving Framework: The Way Forward: Proceedings of the Drinking and Driving Symposium* (Ottawa: TIRF, 2013) at 17.

¹³⁰ Letter from L. Beechey, Deputy Commissioner Ontario Provincial Police, Chair of the Canadian Association of Chiefs of Police (CACP) Traffic Committee, and Chief of the CACP, to A. Murie, CEO MADD Canada (22 April 2013).

Section 12: RBT and the *Canadian Charter of Rights and Freedoms*

As with many changes to police enforcement powers, RBT will invariably be challenged under the *Charter*. While it will likely be argued that RBT violates section 9 (the right to be free from arbitrary detention or imprisonment) and section 10(b) (the right to counsel upon arrest or detention), the most rigorous challenge will be brought pursuant to section 8 (the right to be free from unreasonable search or seizure). We have previously published a detailed analysis of the relevant *Charter* issues in the *Alberta Law Review*.¹³¹ Given Canada's very poor impaired driving record under the current SBT legislation and RBT's purpose, proven effectiveness and minimally intrusive nature, we concluded that RBT should be found to be consistent with the *Charter*. Rather than repeat the substance of our *Charter* analysis, we will address only two issues in this submission.

Dr. Peter Hogg, Canada's foremost constitutional law scholar, graciously agreed to review our *Alberta Law Review* article. Dr. Hogg is a former Dean of Osgoode Hall Law School, Scholar in Residence at Blake, Cassels & Graydon, LLP, a leading constitutional litigator, and the author of the pre-eminent treatises on Canadian constitutional law. Consequently, it was gratifying that Dr. Hogg concurred with our *Charter* analysis. More importantly, Dr. Hogg independently concluded in the formal written legal opinion he sent to MADD Canada that RBT would not violate the *Charter*.¹³²

As indicated, The Criminal Lawyers' Association adopted the CCLA's position on RBT. While stating that it had "great respect" for authors, like Dr. Hogg, who have suggested that RBT would not violate the *Charter*, the CCLA contended that these authors based their analysis on "an incomplete view of the evidence and likely operation of RBT in Canada."¹³³ There is considerable irony in the CCLA's claims about Dr. Hogg's *Charter* analysis. In addition to Dr. Hogg's 40-year record of constitutional scholarship, it is worth noting that he is originally from New Zealand and did his doctoral research in Australia. In light of the CCLA's incomplete, muddled and dated analysis of SBT and RBT, we would suggest with "great respect" that it is the CCLA's *Charter* analysis that is questionable, and not that of Dr. Hogg. We would strongly encourage the Committee to call Dr. Hogg as a witness so that it can hear from him directly.

In assessing whether RBT violates section 8 of the *Charter*, it is essential to put RBT in the context of the accepted screening procedures routinely used at Canadian airports, courts and many other government facilities, where every passenger or entrant is required to pass through a metal detector and have his or her baggage and person searched. In 2015, an estimated 131 million passengers "enplaned and deplaned" at Canada's airports,¹³⁴ at which it is not uncommon for them to: have to take off their shoes, belt and jewellery; have their carry-on belongings swabbed for explosive residue; be scanned for

¹³¹ The Case for Comprehensive RBT, *supra* note 5 at 60-77.

¹³² Letter from P. Hogg, Blake Cassels & Graydon, LLP, to W. Kauffeldt, Chair, Board of Directors, MADD Canada (4 August 2011).

¹³³ Criminal Lawyers' Submission, *supra* note 105 at 18.

¹³⁴ Transport Canada, *Transportation in Canada: 2015, Overview Report* (Ottawa: Transport Canada, 2016) at 14.

weapons under their clothes; empty their pockets into a tray; and submit to a thorough pat-down search (which involves being touched on the neck, legs, arms, chest, hips, and buttocks through their clothes). Nor is it uncommon to stand in line for 10 or 15 minutes waiting to be subject to these screening and search procedures. Nevertheless, as Dr. Hogg noted, “The concerns about safety that prompt these procedures are well understood by travellers, and so far as I know they have never been challenged.”¹³⁵

We would venture to say that, for many people, it is a greater intrusion on privacy to have one’s purse, briefcase and luggage publicly searched, and more humiliating to be patted down in public or strip-searched in private at a busy airport, than to provide a breath sample while sitting in one’s car for two minutes at the roadside like every other driver passing through an RBT checkpoint. As indicated above, nearly 80% of Canadians surveyed responded that RBT is a reasonable intrusion on drivers.¹³⁶

The roughly 91 million returning Canadians and international visitors crossing into the country each year may be subject to similar screening and search procedures.¹³⁷ In *R. v. Simmons*, the Supreme Court of Canada stated in regard to routine inspections of baggage and pat-down searches at border crossings, “No stigma is attached to being one of the thousands of travellers who are daily routinely checked in that manner upon entry to Canada and no constitutional issues are raised.”¹³⁸ The Court explained that given the state’s security interests and the diminished expectation of privacy at border crossings, such routine inspections neither violated section 8, nor constituted a detention within the meaning of the *Charter*.

The Canadian courts have never held such screening procedures or those routinely imposed on anyone entering their courtrooms to violate the *Charter*. For example, in upholding mandatory screening of all court entrants who do not have prior security clearance, the Court of Appeal in *R. v. Campanella* quoted approvingly from *R. v. Lindsay*:

In summary I find the law to be reasonable. The legislation addresses a legitimate concern — the safety of all those in the court complex; experience both here and in other jurisdictions has shown that weapons are being brought into the courthouses and it is desirable that they be detected and prohibited. The Manitoba authorities could have chosen to rely upon the pre-existing security regime but that was not sufficient to discover all of the many varied types of weapons or potential weapons that were being brought into the court complex. The current system makes for a safer and more reassuring environment. The means chosen are non-intrusive and bear no stigma. A requirement for prior authorization based on reasonable and probable grounds would not be feasible. The law is neither vague nor over-reaching. It is constitutional.¹³⁹

¹³⁵ P. Hogg, *Constitutional Law of Canada*, 5th Edition Supplemental, vol. 2 (Toronto: Thomson Reuters, 2007) (loose-leaf 2015-release1), ch. 48-40.

¹³⁶ Ipsos Reid, *supra* note 125 at 11.

¹³⁷ Canada Border Services Agency (CBSA), *CBSA National Statistics: Trade and Traveller Statistics* (Ottawa: CBSA, 2010), online: CBSA <<http://www.cbsa-asfc.gc.ca/agency-agence/stats/trade-echange-eng.html>>.

¹³⁸ [1988], 2 S.C.R. 495 at para. 27.

¹³⁹ (2005), 75 O.R. (3d) 342 at para. 26, citing *R. v. Lindsay* (2001), 158 Man. R. (2d) 176 (Q.B.) at para. 58; *aff’d* (2004), 187 Man. R. (2d) 236 (C.A.) at para. 18.

The Court of Appeal did not cite any specific incidents, statistics or studies, but simply commented, “It is notorious that, unfortunately, there have been serious incidents of violence in the courthouses of this province by the use of weapons that have been brought into the courthouse.”¹⁴⁰ The Court’s failure to demand any evidence to justify searching all court entrants when acting to protect its own safety stands in sharp contrast to what is demanded of the police when acting to safeguard Canadian road users.

The Court of Appeal’s arguments with respect to courtroom screening can be made with far greater force in regard to RBT. The state has a legitimate and substantial interest in traffic safety, and the risks posed by impaired drivers are much greater and better documented than the risks posed by the relatively small number of potentially violent courtroom entrants. The current SBT process has not prevented millions of Canadians from continuing to drink and drive, nor prevented impairment-related crashes from claiming almost twice as many lives per year as all categories of homicide combined. Since all drivers passing an RBT checkpoint will be stopped and all stopped drivers will be subject to RBT, there can be no allegations of discrimination. The purpose of RBT is to deter impaired driving, and the results of these tests are not admissible in criminal proceedings. Moreover, all drivers, passengers and pedestrians will benefit from RBT because it will significantly reduce impaired driving and related crashes, deaths and injuries.

Put bluntly, far more Canadians are killed in alcohol-related crashes every year than by attacks on airplanes, travellers at the border or entrants to the courts. Like airport, customs and court screening procedures, RBT is consistent with the *Charter*.

Conclusion

Research indicates that implementing comprehensive RBT programs in Canada would likely save hundreds of lives, prevent tens of thousands of injuries, and reduce the social costs of impaired driving by billions of dollars each year. These benefits could be achieved without overburdening the police and courts, or unduly inconveniencing the driving public. Over the past 40 years, this same calculus has led an estimated 121 countries to enact RBT legislation.

In light of the compelling evidence, MADD Canada has been advocating for federal RBT legislation since 2000. To this end, MADD Canada representatives have repeatedly met with leading members of Parliament from all parties, briefed every federal Attorney General appointed during this period, and prepared detailed submissions prior to appearing before various House of Commons and Senate committees. While MADD Canada has appreciated the opportunity to be heard over the last 16 years, successive federal governments have failed to enact RBT and other meaningful legislation.

Year in and year out, alcohol-related crashes continue to kill approximately 1,000 Canadians, injure 60,000 more and generate billions of dollars in total social costs. Consequently, it is difficult to see how anyone can credibly claim that the current SBT system is working well or claim that there is no need to implement RBT. Given these numbers, MADD Canada can take little solace in the fact that Canada’s

¹⁴⁰ *R. v. Campanella, ibid.* at para.18.

impaired driving is not as deplorable as it once was. The simple fact is that Canada has long had, and continues to have, one of the worst impaired driving records of comparable developed countries. Unlike Canada, these countries have decided to take impaired driving seriously and enact effective preventive measures.

This is not an area in which the major problem is a lack of research; rather it is a lack of political will. MADD Canada would urge the current Parliament to show leadership and enact the RBT provisions in Bill C-226. Frankly, it's about time.