

**By e-mail**

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Impaired driving consultation  
Criminal Law Policy Section, Department of Justice  
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The Canadian Civil Liberties Association (CCLA) is grateful for the invitation to comment on the Department of Justice's Discussion Paper, "Modernizing the Transportation Provisions of the *Criminal Code*." Our submission will present our interest and expertise in the issues raised by the Discussion Paper and addresses the following points:

Random Breath Testing (RBT)

- A. The proposed introduction of RBT misdiagnoses the problem with drinking and driving
- B. The proposed introduction of RBT would alter the dynamics of the relationship between the police and the citizen
- C. The proposed introduction of RBT presents serious implementation issues:
  - a. The proposal does not deal with the problem of profiling
  - b. The proposal does not deal with the possibility of abuse

Disclosure Requests

- D. The relevance of information which is the subject of disclosure requests is best assessed on a case-by-case basis



## **The Canadian Civil Liberties Association**

The Canadian Civil Liberties Association (CCLA) is a national organization with the paid support of thousands of individuals from all walks of life and affiliated chapters across the country. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. The CCLA's major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority, and the protection of procedural fairness. For over 40 years, the CCLA has worked to advance these goals.

The CCLA believes that efforts to confront the problem with drinking and driving must be mindful of the potential impact on the liberty of people in Canada. While the criminal law is one of many tools that can be used to address unsafe behaviour – including drinking and driving – such legislation must be developed with cautious attention to, and respect for, our constitutionally protected rights and freedoms. It is to this end that the CCLA offers the following submissions.

### **Random Breath Testing (RBT)**

#### **A. The proposal to introduce RBT misdiagnoses the problem of drinking and driving**

Under our present system, police officers are permitted to pull over drivers in order to check the vehicle's condition, ensure proper licensing and insurance, and assess sobriety. Where aspects of driving, answers to routine questions or the smell of alcohol lead police to form a reasonable suspicion that an individual in control of a vehicle may be over the legal limit for blood alcohol content (BAC), Canada's *Criminal Code* allows officers to request a roadside breath test using an approved screening device.

Random Breath Testing removes the requirement that police develop a reasonable suspicion of illegal BAC before demanding that a particular driver submit to a breath

test. Police are given the power to pull over any vehicle any time in any place, not only to verify vehicle fitness and conformity with laws on licensing and insurance, but also to enforce criminal law provisions. Police officers are empowered to demand a roadside breath test without any indication that the driver was in violation of any law. RBT is designed to help deter and apprehend drivers whose behaviour or driving would not otherwise indicate insobriety.

The introduction of RBT in Canada would be justified on the basis of reported successes with this measure in countries such as Australia. In order to measure the possible benefits of RBT in comparison with the drawbacks outlined below, however, it is important to understand the current Canadian situation and distinguish it from the situation in other countries.

While the Discussion Paper provides references to literature supporting the effectiveness of RBT, conflicting research suggests that the related benefits are yet in doubt. Much of the research has failed to properly isolate the effects of RBT from the introduction of other measures. As one meta-analysis observed, “Most of the communities introducing random screening also introduced other measures to reduce drunk driving crash events, and few of the analyses controlled for these other efforts.”<sup>1</sup> Researchers have also observed that the significant effects of RBT in Australia, for example, may be associated with relatively high rates of drinking and driving prior to the measure’s introduction. Australia’s proportion of drivers with illegal BAC levels who were involved in fatal crashes was 44 per cent in 1981 and 29 percent in 1992, compared with 36 per cent and 17 per cent for the United Kingdom, and 30 per cent and 22 per cent for the United States<sup>2</sup> (the UK did not introduce RBT until 2003, while the US has never introduced this measure). As a result of these uncertainties, a study published in 2002, which reviewed 23 papers covering the previous two decades of research, discovered “no evidence that [RBT’s]

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<sup>1</sup> Peek-Asa, Corianne, “The Effect of Random of Alcohol Screening in Reducing Motor Vehicle Crash Injuries,” *Am. J. Prev. Med.* 1999, 16 (1S) at 66.

<sup>2</sup> Alena Erke, Charles Goldenbeld, and Truls Vaa, “The effects of drink-driving checkpoints on crashes—a meta-analysis” *Acc. Anal. & Prev.* (2009) 41 at 921.

effectiveness for reducing alcohol-related crashes differed” from other checkpoint programs, including those presently employed by police in Canada.<sup>3</sup>

Researchers have also described the introduction of RBT in several situations as a “revolutionary” act.<sup>4</sup> When RBT was initially implemented in the Australian state of New South Wales (NSW) in 1982, for example, it was the first significant step in addressing drinking and driving in that jurisdiction.<sup>5</sup> Combined with other measures, it helped reduce the damage associated with drinking and driving and shift the local culture towards a greater awareness of the problem. Canada, in contrast, has long since achieved this cultural shift through the introduction of less intrusive but similarly effective measures.

Canada’s current system has combined increased public education, legislative changes and policing efforts to significantly reduce the toll that drinking and driving takes. Research by the Traffic Injury Research Foundation (TIRF) found that between 1995 and 1997, Canada had an annual average of approximately 1,154 motor vehicle deaths involving a drinking driver.<sup>6</sup> Between 2005 and 2007, that yearly average had fallen to just under 874 deaths.<sup>7</sup> At the same time, the number of licensed drivers in Canada increased from 19.3 million in 1995, to 21.7 million in 2004 (the last year for which data is available).<sup>8</sup> In Canada, the percentage of motor vehicle deaths involving a driver who was over the legal limit continues to fall relative to the total number of licensed drivers.

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<sup>3</sup> Elder RW et al., “Effectiveness of sobriety checkpoints for reducing alcohol-involved crashes,” *Traffic Injury Prevention* 2002;3:266-74, cited in Gatehouse, Jonathon, “Curbing drunk drivers is harder than you think,” *Maclean’s* (8 December 2009).

<sup>4</sup> J. Henstridge, R. Homel, and P. Mackay, “The Long-Term Effect of Random Breath Testing in Four Australian States: A Time Series Analysis,” *Department of Transport and Regional Development: The Federal Office of Road Safety*, April 1997, vi.

<sup>5</sup> *Ibid.*

<sup>6</sup> Traffic Injury Research Foundation (TIRF), “Alcohol-Crash Problem in Canada: 2007,” CCMTA Road Safety Report Series (Ottawa: March 2010); online at: [http://tirf.ca/publications/publications\\_show.php?pub\\_id=243](http://tirf.ca/publications/publications_show.php?pub_id=243).

<sup>7</sup> *Ibid.*

<sup>8</sup> Transport Canada, “Licensed Drivers and Motor Vehicle Registrations by Type of Vehicle 1985-2004,” *Canada Motor Vehicle Traffic Collision Statistics: 2004* (Ottawa: December 2005); online at: <http://www.tc.gc.ca/eng/roadsafety/tp-tp3322-2004-page12-703.htm>.

And while the Canadian approach has not eliminated drinking and driving – with “hard core” offenders proving an intractable lot<sup>9</sup> – neither has the use of RBT brought Australia close to such an outcome. On the 25<sup>th</sup> anniversary of RBT’s introduction in NSW, police there lamented the ongoing issues with impaired driving and the fact that many drivers continue to ‘flout’ DUI laws.<sup>10</sup> Indeed, a 2009 report found that 33 per cent of Australian drivers admitted to driving when they believed they were over that country’s legal limit for BAC (.05%).<sup>11</sup> In comparison, a 2009 study of Canadian drivers found that just 5.6 per cent admitted to driving while they believed they were over Canada’s BAC limit (.08%).<sup>12</sup> The sustained application of Canada’s current system and laws—which, again, only require that police have a reasonable suspicion before demanding a breath test—has successfully shifted our culture and decreased the damage associated with drinking and driving.

If Canada were to embrace the nebulous effectiveness of such a power, the introduction of RBT would undermine the rights of a vast majority of innocent Canadians based on the possibility that it might help deter or apprehend an elusive five per cent of drivers.

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<sup>9</sup> See, for example, TIRF, “DWI System Improvements - improving the efficiency and effectiveness of the DWI system for dealing with hard core drinking drivers”; online at: [http://tirf.ca/publications/project\\_show.php?pid=7](http://tirf.ca/publications/project_show.php?pid=7).

<sup>10</sup> Julian Drape, “RBT turns 25 but people still go DUI,” *Australian Associated Press* (16 December 2007); online at: <http://www.drive.com.au/Editorial/ArticleDetail.aspx?ArticleID=46517&vf=1>.

<sup>11</sup> AAMI, “Crash Index: Annual road safety index,” August 2009; online at <http://www.aami.com.au/company-information/news-centre/special-reports.aspx>.

<sup>12</sup> TIRF, “The Road Safety Monitor 2009: Drinking and Driving in Canada,” (Ottawa: December 2009; online at: [http://tirf.ca/media/news\\_show.php?nid\\_id=35&lid=1](http://tirf.ca/media/news_show.php?nid_id=35&lid=1). This figure is up from 2008, when 5.2% of Canadians admitted to driving while they believed themselves over the limit, but down from the 8.6% who admitted as much in 2007, and down still further from the 9.1% of Canadians who made that admission in 1998.

B. The proposed introduction of RBT would alter the dynamics of the relationship between police and citizens

The legal rights set out in the *Charter* are not a mere luxury, insulating individuals against the cold hand of state action. Rather, they set out a framework that guides fair conduct and helps ensure a healthy relationship between civilians and police. When police operate with an appreciation for the rights and freedoms of those they serve and protect, citizens instinctively respond with a commensurate level of respect and cooperation. This, in turn, enhances the ability of the police to play their role.

RBT, however, undoes this understanding, authorizing a transformation of the relationship to one where a citizen can now be stopped and randomly tested by the police, irrespective of his or her behaviour. Such an exercise of state power strikes at the very core of the *Charter* protection against arbitrary detention. In 2008, Doug Beirness, a policy expert with the Canadian Centre on Substance Abuse, stated in testimony on impaired driving before the House of Commons Standing Committee on Justice and Human Rights, “there is nothing truly random about random breath testing. The term random is used in place of more accurate and contentious descriptors, such as arbitrary or capricious.”<sup>13</sup>

With its 1990 decision in *R. v. Ladouceur*<sup>14</sup>, in which the police pulled over a suspended licensee who appeared to be acting lawfully, the Supreme Court of Canada wrestled with the issue of roving random stops of civilian vehicles by police. While a narrow 5-4 majority allowed these stops, a powerful dissent surveyed the serious implications of such a power: “The decision may be based on any whim. Individual officers will have different reasons. Some may tend to stop younger drivers, others older cars, and so on... racial considerations may be a factor too... If,

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<sup>13</sup> Testimony of Dr. Douglas Beirness (Manager, Research and Policy, Canadian Centre on Substance Abuse), 39<sup>th</sup> Parliament, 2<sup>nd</sup> Session – Standing Committee on Justice and Human Rights – Evidence (28 February 2008); online at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3314580&Language=E&Mode=1&Parl=39&Ses=2>.

<sup>14</sup> *R. v. Ladouceur*, [1990] 1 S.C.R. 1257.

however, no reason need be given nor is necessary, how will we ever know? The officer need only say, 'I stopped the vehicle because I have the right to stop it for no reason'.<sup>15</sup> The minority stated further that this unlimited power to disturb individual liberty and privacy means for motorists, "the total negation of the freedom from arbitrary detention guaranteed by s. 9 of the *Charter*."<sup>16</sup> And while the majority decided that the violation of section 9 could be justified in a free and democratic society, it also stated that "more intrusive procedures could only be undertaken based upon reasonable and probable grounds."<sup>17</sup>

RBT is indeed more intrusive, adding to arbitrary detention an unreasonable search. It is therefore unlikely that the limitation on rights associated with RBT would withstand constitutional scrutiny.

The introduction of RBT would signal further a radical departure in terms of the policing expectations of citizens: from being susceptible to arrest only when officers reasonably suspect that an individual has done something wrong, to a position in which one must now prove that he or she has done nothing wrong. This shift is symbolically important: *the presumption of innocence is replaced with a presumption of guilt*. This is the hallmark of a police state, and free and democratic societies must exercise supreme caution when any such shift may result.

C. The proposed introduction of RBT presents serious implementation issues

RBT will inevitably provoke ire among innocents. Writing for the minority in *R. v. Dedman*(4-3), Chief Justice Dickson observed, "The objectionable nature of a random stop is chiefly that it is made on a purely arbitrary basis, without any grounds for suspicion or belief that a particular driver has committed or is

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<sup>15</sup> *Supra* note 14. at 12.

<sup>16</sup> *Ibid.* at 10.

<sup>17</sup> *Supra* note 14 at 32-33.

committing an offence. It is this aspect of the random stop that makes it capable of producing unpleasant psychological effects for the innocent driver.”<sup>18</sup>

The possible introduction of RBT begs the question: how many innocents will be arbitrarily detained and unreasonably searched in order to catch one driver who is over the limit? What if the same innocent driver is randomly ordered to stop his or her car and submit to a breath test ten times in a month? How many people could honestly state that they would not react to such a situation with frustration, disgust and resistance, possibly leading to charges wholly unrelated to drinking and driving?

In short, RBT presents very real and very serious implementation issues, particularly when problems with profiling and the potential for abuse are considered.

a. The proposal does not deal with the problem of profiling

Conceptualizing RBT as a purely random police tactic ignores the reality of ongoing issues with profiling. While more research on the Canadian problem is yet required,<sup>19</sup> the limited data collection and study that has been undertaken supports the view that racial profiling is indeed an issue within Canada. Based on statistics collected by police in Kingston, Ontario, the first study of racial profiling found that officers were 3.7 times more likely to stop a black person than a white person, and 1.4 times more likely to stop an aboriginal than a white person.<sup>20</sup> A more recent analysis has similarly revealed that black people in Toronto are three times more

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<sup>18</sup> *R. v. Dedman*, [1985] 2 S.C.R. 2 at para. 69.

<sup>19</sup> Wortley, Scot and Julian Tanner. 2004. "Racial Profiling in Canada: Survey Evidence from Toronto." *The Canadian Review of Policing Research* 1 (1): 24-36.

<sup>20</sup> Wortley, Scot and Marshall, Lysandra, *Race and Police Stops in Kingston, Ontario: Results of a Pilot Project Kingston*, ON: Kingston Police Services Board; reported in *CBC News*, "Police stop more blacks, Ont. study finds" (27 May 2005); online at: <http://www.cbc.ca/canada/story/2005/05/26/race050526.html>.

likely to be stopped by police than are white people.<sup>21</sup> Though limited, such research has nonetheless led the Ontario Human Rights Commission to conclude that racial profiling does occur and has significant consequences for Canadian society.<sup>22</sup>

Introducing RBT can only exacerbate these existing issues. Individuals from certain ethnic groups, the young, the drivers of particular types of cars—all might be exposed to disparities in the administration of an RBT program.

b. The proposal does not deal with the potential for abuse

Other issues with police conduct and accountability must also be resolved before any new power – and particularly a discretionary power – is authorized. It would be unsavoury to hastily adopt RBT when several reports have suggested that the accountability regime for Canada’s national police force is inadequate.<sup>23</sup>

The CCLA believes that the introduction of RBT need not – and *should not* – go ahead. If nevertheless implemented, however, the use of RBT should be accompanied by specific and extensive restrictions:

- i) Its introduction should not precede the implementation of the proposed new accountability regime for the RCMP<sup>24</sup>;
- ii) It should function in a manner similar to the Irish example cited in the Discussion Paper: Random Breath Testing should be permitted in the context of organized checkpoints only. Allowing police to demand breath tests from a pre-set sampling of vehicles (every 5<sup>th</sup> car, every 10<sup>th</sup> car, etc.) at organized roadblocks is the only way to remove the appearance of

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<sup>21</sup> Rankin, Jim, “Race Matters: When good people are swept up with the bad,” *The Star* (06 February 2010); online at <http://www.thestar.com/news/gta/article/761551--when-good-people-are-swept-up-with-the-bad>.

<sup>22</sup> Ontario Human Rights Commission, “Racial Profiling Inquiry – Major Themes”; online at <http://www.ohrc.on.ca/en/resources/factsheets/themes/view>.

<sup>23</sup> Kennedy, Paul, “Police Investigating Police – Final Public Report” Commission for Public Complaints Against the RCMP (Ottawa: 11 August 2009); online at: <http://www.cpc-cpp.gc.ca/prr/rep/rev/chair-pre/pipR/index-eng.aspx>.

<sup>24</sup> *Ibid.*

bias, arbitrariness and unfairness which would undermine the credibility of the system.

Potential problems with RBT are simply too significant to justify its unlimited introduction.

### **Disclosure Requests**

D. The relevance of information which is the subject of disclosure requests is best assessed on a case-by-case basis

The Discussion Paper contemplates legislated limits on what may be disclosed to defence counsel regarding the proper functioning of the Approved Instrument (AI) that was used to conclude that an accused was over the legal limit for BAC.

It is impossible, however, to predict for every case how relevant a piece of information may be to an accused's ability to make full answer and defence. It is therefore inappropriate to decide issues of relevance in advance. A judge is best situated to determine the potential relevance of information which is the subject of a request for disclosure on a case-by-case basis.

The CCLA again thanks the Department of Justice for the opportunity to contribute our perspective on the Discussion Paper.