MPs Put Random Breath Testing to Charter Test

The House of Commons Standing Committee on Justice and Human Rights is calling for the implementation of roadside random breath testing (RBT) to crack down on drunk drivers in Canada. They presented their report, *Ending Alcohol-Impaired Driving: A Common Approach*, on June 18, 2009. The report recommends a series of measures to curb the prevalence of drinking and driving, including implementing RBT.

Noting that detecting alcohol-impaired drivers is a difficult task for police officers, the committee offers RBT as a solution:

> *[RBT] would allow police officers to request a breath sample at any time in the absence of reasonable suspicion or reasonable and probable grounds. This would serve to recognize that driving on Canadian roads is a privilege and not a right. [RBT] would, therefore, introduce a significant deterrence for people who might otherwise choose to take the chance and drive while impaired.[1]*

The report concedes that RBT appears "to be an 'unreasonable' search and 'arbitrary' detention." The randomness of the testing "indicates that it is not based on the reasonable suspicion that a driver has consumed alcohol."[2] Canadians are protected against unreasonable search and seizure and arbitrary detention by sections 8 and 9 of the *Canadian Charter of Rights and Freedoms*.

However, the committee argues that RBT can be upheld under section 1 of the *Charter*. The *Oakes test* is used to determine whether *Charter* infringements are "reasonable limits prescribed by law" that can be "demonstrably justified in a free and democratic society." The government must prove the law's objective is "pressing and substantial" and that the means chosen are "proportional."

The committee insists that the objective is pressing and substantial, citing "abundant evidence showing that impaired driving is a significant health, social and economic problem."[3] Moreover, while data suggests that the number of fatalities from accidents involving drunk drivers has decreased since 1995, the trend has stalled and the number of fatalities may be increasing.[4] The Supreme Court of Canada has said: "There is no question that reducing the carnage caused by impaired driving continues to be a compelling and worthwhile government objective."[5]

Concerning the proportionality of RBT and its infringement of Canadians' rights,

the committee argues that RBT is "rationally connected" to the objective of "reducing alcohol-related road collisions."[6] The report highlights the success of RBT in foreign jurisdictions, particularly Australia, where RBT is partially credited with reducing the number of fatal alcohol-related accidents by 36 percent in New South Wales.[7]

The committee contends that *Charter* rights are "minimally impaired" because "the stop and request for breath is brief and non-invasive."[8] Moreover, Canadian drivers are already subject to random stops and searches under provincial laws. In *R. v. Ladouceur*, a 5-4 majority of the Supreme Court upheld random stops as a reasonable limit under section 1. A strong dissent, however, said random stops allow "any individual officer to stop any vehicle, at any time, at any place. The decision may be based on a whim. Individual officers will have different reasons."[9]

Finally, the committee report submits that the infringement is "proportional" under the *Oakes* test because "the goal of reducing many types of damage related to impaired drivers is significant and the effort required by drivers to contribute to a solution is minimal."[10]

While the committee believes RBT implementation would survive a *Charter* challenge, their report acknowledges that "there can be no guarantee when it comes to Charter litigation."[11]

Mothers Against Drunk Driving applauded the recommendation to implement RBT. However, they expressed disappointment that the report recommends keeping the *Criminal Code* blood-alcohol content (BAC) level at .08 percent. MADD has long advocated for the BAC level to be set at .05 percent.[12]

Drivers in Alberta can have their license suspended for 24 hours if their BAC is more than .08 percent.[13]The Alberta law is relatively relaxed compared to other provinces, particularly Ontario where drivers can have their licenses suspended for three to thirty days if their BAC is over .05 percent.[14]

A spokesman for federal Justice Minister Rob Nicholson says the minister is looking forward to reviewing the report.[15]

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[1]Standing Committee on Justice and Human Rights, "Ending Alcohol-Impaired Driving: A Common Approach" *House of Commons* (June 2009) at 13.
[2] *Ibid*. at 15.

[3] *Ibid*.
[4] *Ibid*. at 5; "The Road Safety Monitor 2008: Drinking and Driving National" *Traffic Injury Research Foundation* (undated).
[5] *R. v. Orbanski; R. v. Elias*, 2005 SCC 37 at para. 55.
[6] *Supra* note 1 at 16.
[7] *Ibid*. at 14.
[8] *Ibid*. at 16.
[9] [1990] 1 S.C.R. 1257 at 12.
[10] *Supra* note 1 at 16.
[11] *Ibid*. at 15.
[12] "MADD Canada Responds to Federal Justice Committee Report" *MADD Canada* (18 June 2009).
[13] *Supra* note 1 at 19; *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 89.
[14] *Ibid*. at 21; *Highway Traffic Act*, R.S.O. 1990, c. H-8, s. 48.
[15] Andrew Mayeda, "Let police demand random breath samples, say MPs" *Canada.com* (19 June 2009).