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THE CONSTITUTIONALITY OF MANDATORY ALCOHOL SCREENING IN CANADA

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Abstract

In 2018, random mandatory alcohol screening became a reality of the Canadian justice system. Before the law had even come into effect, it was being welcomed with open arms by some, and immediately castigated as unconstitutional by others. Compelling arguments for both sides have emerged in the wake of debate. Where *Bill C-46* has enacted laws which have adversely affected the rights of drivers, an analysis of the new laws written within the *Canadian Criminal Code,* warrant an audit of their alignment with the *Canadian Charter of Rights and Freedoms.* This thesis challenges the constitutionality of section 320.27 (2) of the *Canadian Criminal Code* against sections 7 and 1 of the *Canadian Charter of Rights and Freedoms.* In drawing on the public's perception of the law, an array of precedent provided by the *Supreme Court of Canada*, and an analysis of both sections 7 and 1 of the *Canadian Charter*, an argument can be made which corroborates the notion that section 320.27 (2) of the *Canadian Criminal Code* is unconstitutional.

Table of Contents

INTRODUCTION 5
METHODOLOGY 6
THE LAW 7
SECTIONS 254 (2) – 254 (6) 7
BILL C-46..... 11
PUBLIC PERCEPTIONS 12
INTRODUCTION TO SECTION 7 OF THE CHARTER 13
"LIFE"..... 14
"LIBERTY"..... 15
"SECURTIY" 24
"THE PRINCIPLES OF FUNDAMENTAL JUSTICE" 28
THE LAW AND SECTION 7 32
APPLYING LIFE, LIBERTY, AND SECURITY 32
RANDOMNESS 37
THE PRINCIPLES OF FUNDAMENTAL JUSTICE AND THE LAW 38
THE OAKES TEST 40
R V OAKES 41
THE LAW AND SECTION 1 46
SUFFICIENT IMPORTANCE TEST 46
RATIONAL CONNECTION..... 50
MINIMALLY IMPAIRING 53
DISCUSSION 57
CONCLUSION 58
REFERENCES 60

Random mandatory alcohol screening in the context of conveyances and its introduction into Canadian society have, in the last year or so, been a hot topic of debate. Although the enactment of such laws may be accompanied by the purist of intentions backing them, people's civil liberties are at stake and the debate's focus surrounds this dilemma, exactly. Some are not fazed by Parliament's requirement that the public relinquish their civil liberties in the name of collective insurance. Meanwhile, others castigate the newly passed laws as unquestionably unconstitutional and claim that the laws deny Canadians a right in which they should not have to give up.

The *Canadian Charter of Rights and Freedoms* in section 7, grants Canadians the right to life, liberty, and security of the person… except in accordance with the principles of fundamental justice. The contention that this right is being infringed on is not a defective argument, rather it is backed by years of precedent, a magnitude of research, and an array of endorsed appraisal of the law and its implementation. It will prove as useful to analyze the new mandatory alcohol screening law(s) up against section 7 of the Charter. By understanding the modifications made to the law as enabled by *Bill C-46,* the law's overall objectives, and the public's perception of the law, an examination of the basic facts surrounding section 7 of the Charter in conjunction with the new mandatory alcohol screening laws can be made. This analysis will seek to discern as to whether or not the new random mandatory alcohol screening law infringes on section 7 of the *Canadian Charter of Rights and Freedoms*. If this is found to be true, is the law a "reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" as stipulated by section 1 of the Charter?

Within section 7 of the Charter, the rights to life, liberty, security, and the concept of principles of fundamental justice are all explored separately. Furthermore, an argument is established where section 1 of the Charter is put into motion as a potential challenge to the right and freedoms granted by the Charter. An exploration of the facts surrounding *R v Oakes* [1986] and the Oakes Test work to aid the overall analysis of the new law in the context of the Charter.

Methodology

In order to draw an educated inference about whether the new random mandatory alcohol screening law is constitutional, it will prove as effective to adhere as closely as possible to the discourse that the Supreme Court of Canada (SCC) has maintained which is associated with section 7 and 1 issues relating to the Charter. Because the SCC's methods of reaching a decision are binding in Canadian law, an attempt to analyze the potential infringements will coincide as closely as possible with the approaches that the SCC would apply in reaching a decision. However, the thesis does not read like a SCC decision because concepts are broken down and examined in great detail in order to demonstrate their relevance to the overall question. Section 7 and section 1 tests for Charter analysis are utilized based upon case law precedent. Meanwhile, relevant secondary sources are used to corroborate any presuppositions made relating to the potential infringements. SCC jurisprudence relating to section 7 and 1 of the Charter were retrieved through databases such as CanLii and the Supreme Court of Canada's website Lexum. Secondary sources which were used to authenticate conclusions made about the potential infringements included journal articles, books, governmental reports, blogs produced by legal practitioners, and news articles. These were retrieved from databases such as ProQuest, Sage Journals, JSTOR, Google Scholar, Statistics Canada, The Canadian Department of Justice, and

CanLii Docs. The conclusions in this thesis are based on the pool of data available within these sources and databases. The argument presented in this thesis is not absolute but is posed as a potential reasoning to back the contention that random mandatory alcohol screening may be unconstitutional.

The Law

December 18th, 2018 marked the day police officers Canada-wide stopped forgetting their screening devices at the station before getting into their cruisers. In June of that year, the Canadian Parliament passed legislation (*Bill C-46*) providing law enforcement officers with considerably more discretionary privileges when it came to motor vehicle offences and investigation matters relating to the operation of conveyances while under the influence of alcohol and drugs. With respects to learning as to whether or not the new laws are unconstitutional there are a few concepts which need to be analyzed and understood about the law. Firstly, the contrasts between the 2017 version of the law and the most recent amendment which now comprise the newly enforced sections 320.27 (1) and 320.27 (2); secondly the reasons why the law was amended to provide these new, pervasive powers to law enforcement officers; and thirdly, the public's attitude concerning the new law (i.e. is it a legitimate use of force in the eyes of an organized society?).

Sections 254 (2) – 254 (6)

The December 2017 version of the Canadian Criminal Code (C.C.C.) would be the last version (for some time at least) to offer "reasonable grounds" as a precondition for requesting a mandatory breathe sample from Canadian drivers. This "reasonable grounds" is in essence the pivotal principle in wording which has mightily altered the discourse of police influence and

arguably even, police obtrusiveness. To contemplate the significance of two words, just two words, on the impact of the entire law and how it is practiced is profoundly thought-provoking. The archived sections that play as compatible with the newer C.C.C. sections which are being contemplated as constitutional, are as follows:

> 254 (2) – If a peace officer has reasonable grounds to suspect that a person has alcohol or a drug in their body and that the person has, within the preceding three hours, operated a motor vehicle or vessel, operated or assisted in the operation of an aircraft or railway equipment or had the care or control of a motor vehicle, a vessel, an aircraft or railway equipment, whether it was in motion or not, the peace officer may, by demand, require the person to comply with paragraph (a), in the case of a drug, or with either or both of paragraphs (a) and (b), in the case of alcohol:
>
> (a) to perform forthwith physical coordination tests prescribed by regulation to enable the peace officer to determine whether a demand may be made under subsection (3) or (3.1) and, if necessary, to accompany the peace officer for that purpose; and
>
> (b) to provide forthwith a sample of breath that, in the peace officer's opinion, will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose; and
>
> 254 (3) If a peace officer has reasonable grounds to believe that a person is committing, or at any time within the preceding three hours has committed, an offence under section 253 as a result of the consumption of alcohol, the peace officer may, by demand made as soon as practicable, require the person

(a) to provide, as soon as practicable,

(i) samples of breath that, in a qualified technician's opinion, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood, or

(ii) if the peace officer has reasonable grounds to believe that, because of their physical condition, the person may be incapable of providing a sample of breath or it would be impracticable to obtain a sample of breath, samples of blood that, in the opinion of the qualified medical practitioner or qualified technician taking the samples, will enable a proper analysis to be made to determine the concentration, if any, of alcohol in the person's blood; and

(b) if necessary, to accompany the peace officer for that purpose. (*Canadian Criminal Code,* 1985).

Section 254 (2)'s most recent amendments (which are now found under section 320.27 of the C.C.C.) include changing terms such as "motor vehicle, vessel, railway equipment, or aircraft" to the overarching term "conveyances," which by definition, as noted in section 320.11 of the C.C.C., "means a motor vehicle, a vessel, an aircraft or railway equipment" (*Canadian Criminal Code,* 1985). To remark as to whether or not the conveyance is in motion or not, is now an obsolete notion because of the three-hour grace time provided to police officers to perform any of the detection methods as granted by section 320.28 (1) (*Canadian Criminal Code,* 1985). More importantly, the decriminalization of marijuana, as likely being the most gravitational catalyst for amending these laws, has for that sake, given peace officers the right to demand samples of bodily substances, which in the previous version, was not a characteristic of the law.

The former section 254(3) bare some faint changes – again relating to the substituting term "conveyances" and a few other discrete terminology changes. However, the real modification to the law, which has become the impetus for controversy and debate surrounding the topic is the newly developed section 320.27 (2). This section provides an unhampered authority to peace officers to administer mandatory alcohol screening tests as they please.

> 320.27 (2) If a peace officer has in his or her possession an approved screening device, the peace officer may, in the course of the lawful exercise of powers under an Act of Parliament or an Act of a provincial legislature or arising at common law, by demand, require the person who is operating a motor vehicle to immediately provide the samples of breath that, in the peace officer's opinion, are necessary to enable a proper analysis to be made by means of that device and to accompany the peace officer for that purpose (*Canadian Criminal Code*, 1985).

A pervasive misconception in Canadian law is that a police officer needs reasonable grounds to pull you over in the first place. This is in fact not true. Since 1990, in *R v Ladouceur*, [1990] the SCC decided that stopping vehicles randomly, was constitutional. Peace officers have long had the right to pull a vehicle over at random to check for proper documentation, mechanical soundness, etc. The SCC essentially concluded that to drive a motor vehicle is not a right but, a privilege and for the purpose of ensuring everyone's safety on the roads, peace officers are given a fair bit of authority on the roads in comparison to other police endeavours. *R v Ladouceur*, [1990] is broken down further in the discussion as to whether or not section 320.27 (2) infringes section 7 of the Charter. Section 320.27 (2) marks a significant change in police

conduct. The question at your driver-side window now becomes "can I see your licence, registration, proof of insurance? Oh… and blow into this."

Bill C-46

Bill C-46 became the legal authority for section 320.27 (2). The legislation succinctly defends its purpose and provides a number of reasons as to why the law changed. There is value in defining some of these reasons because when deciding the constitutionality of a law, we need to equip ourselves with an understanding of the law's connection to its intended function and moreover, we need to gain insight as to whether or not the law is arbitrary, disproportionate, vague, etc. which ties in later to the principles of fundamental justice. There are a multitude of reasons as to why the law was passed, and Parliament shares some of these in the preamble of the Bill. (1) To save lives and reduce injury; (2) to deter the public from driving under the influence of alcohol or drugs; and (3) to leverage detection opportunity of impaired driving through better equipping law enforcement officers (*Bill C-46*, 2018).

Methods to deter unsafe behaviours (such as impaired driving) and for the purpose of public protection, are reasons which are usually safe to justify when passing a law. As long as the law truly works to corroborate those reasons, the law has a fair chance of holding-up in court. Equipping peace officers with more power and simplifying the law aren't necessarily guarded goals of a law (principles of fundamental justice). The preamble in *Bill C-46* does establish that the law gives police more flexibility in screening and investigative powers. However, the legislation asserts that these new authorities are consistent with Charter. This is undoubtably the one question that needs to be answered in this piece and is related to this reason as supplemented by Parliament. Do the interests of society related to individual autonomy, privacy and protection,

and inherently personal choices balance with the state's goals related to controlling disorder and the regulation of conduct by means of implementing this law? To kick-start this discussion, it will be of value to gauge public perception in light of the changes to the law.

Public Perceptions

It would be fair to say, that Canadians are likely split down the middle in terms of their support for the law. One quick Google search of "mandatory breathalysing" presents an abundance of search results, mainly news stories, either condoning the change, or disputing it. Proponents of the law can often be those negatively affected by the calamities of which impaired driving can result in. These groups of people find a sense of reconciliation in the new law. As either an agent of vindictive attitudes towards those who drive impaired or as promise for a futuristic reduction in catastrophes, the law has many in support of its overall goals and functions. For example, Mothers Against Drunk Driving Canada (MADD) have been vocal enthusiasts of the law. With assertions that "it's a new enforcement tool [which will] prevent crashes, deaths, and injuries" and claims that it will "save thousands of lives each year," MADD Canada has shown a great amount of support for the law (MADD Canada, n.d., para. 2).

In opposition to this attitude, a similar number of people have expressed their reservations about the new law. The privileges it gives peace officers, alarm some civil rights activists who have expressed that the new law infringes on people's constitutional rights as granted by the Charter. Many of these activists are lawyers who assert that the change in law is invasive and permit peace officers to go on "fishing expeditions" (CBC News, 2018, para. 7). To some this might be an overstatement, however, the premise of the argument on behalf of civil rights activists is not found to be faulty. 'Poaching' has no doubt become a habitual practice for

law enforcement officers with their new concession. And this should raise some flags – to search and seek out people who are in no way conspicuously defying the law make's many individuals feel violated and uncomfortable. These are the perceptions we need to consider when analyzing the integrity of the law.

Introduction to Section 7 of the Charter

Section 7 of the *Canadian Charter of Rights and Freedoms* reads as follows:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Upon first glance, this section comes off as a daunting interpretation exercise. It's immensely ambiguous because in some fashion, we're looking at three individual rights provided by one colossal section. There are four key terms that need to be pulled out of the section and analyzed in conjunction with the Supreme Court of Canada's understanding and interpretation of them. "Life, liberty, and security" are undoubtedly three integral pieces of the whole. Moreover, the phrase "principles of fundamental justice" is equally weighted in importance and must also be understood.

We can safely assume that one's "life" is not necessarily threatened by the enforcement of Section 320.27 (2). If anything, the law enforced by this section is mechanism by which parliament seeks to protect "life." Although, the "life" component of this Charter section bares little significance in the context of learning as to whether or not Section 320.27 (2) infringes on Section 7 of the Charter, each element within the provision apprises the overall purpose of the section.

"Life"

The Supreme Court of Canada (SCC) establishes that "life" is the "right not to die" (*Carter v Canada,* 2015 SCC 5 at para 61). The SCC provides a fairly unequivocal characterization of when this Charter section is relevant. Referenced in the *Chaoulli v. Quebec's,* [2005] Supreme Court case, the SCC recognized in *Carter v Canada,* [2015] that the right to life is discounted when an individual's life is taken or otherwise threatened by a circumstance in which the governmental body has direct control over curbing that particular circumstance from occurring in the first place (para. 62). In other words, "the case law suggests that the right to life is engaged, where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly" (*Carter v Canada,* 2015 SCC 5 at para 62).

Examples of how this section apply are that of the cases aforementioned. *Chauolli v Quebec,* [2005] which preceded *Carter v Canada,* [2015] and also ended up substantiating *Carter v Canada,* [2015] spurred by an argument galvanized by Dr. Chauolli whom felt that laws in Quebec, associated with the *Health Insurance Act* (*HEIA*) and the *Hospital Insurance Act* (*HOIA*) were unconstitutional because the current legislation denied practioners the right to set up private practices which consequently affected an individual's ability to obtain private health insurance. Essentially, the takeaway from this case is that the three judges who did concede there was an infringement on Dr. Chaoulli's patients' section 7 rights contended that prohibition of access to private health care while the public sector is failing to provide timely care, threatens one's life because the initial impetus for accessing health care is very likely to worsen while care is halted during wait times.

The SCC judges in *Carter v Canada,* [2015] recognized within the Chaoulli case that section 7 is engaged, in the context of preserving or protecting life, when there is a threat to life. They

took this interpretation further by applying it to the very controversial topic of assisted suicide in *Carter v Canada,* [2015]. Carter argued that laws in the Canadian Criminal Code which prohibited assisted suicide and consensual death infringed her section 7 rights. The irony in someone exercising their right to "life" while simultaneously castigating laws which prohibit assisted suicide and consensual death is perplexing. However, the argument was underhanded and alleged that when there is no available option to carry out an assisted suicide, those who are terminally ill are at a higher risk of "prematurely" committing suicide while they are still capable, and not inhibited by their disease, disability, etc. once they get to an intolerable phase in living out their illness. The SSC notes that the right to live should not be confused with a "duty to live" (*Carter v Canada,* 2015 SCC 5 at para 63).

"Liberty"

The concept of "liberty" is informed by a wide variety of precedent. "Liberty" is such an overarching and subjective term it demands a more encompassing criterion in order to solve its ambiguity. To attempt to abridge the means by which the SCC finally arrived at some sort of interpretation of the term "liberty" is difficult but, essentially, there are two "sub-rights" being protected by the right to live liberally. One is that of the protection against physical restraint such as imprisonment. The other is that of the protection against the impediment on personal autonomy and the "enjoy[ment of] individual dignity and independence" (*Godbout v Longueuil*, 1997 SCR 844 at para 66).

The former is often contemplated by the courts as striking a balance between the punishment fitting the crime (a societal value) and liberties which shouldn't arbitrarily be stripped (an individual value). A fair amount of this precedent has arisen from not criminally

responsible cases (NCR). For example, in *R v Demers*, [2004] the issue at point, was that of Criminal Code Sections 672.33, 672.54, and 672.81(1). Combined, these sections made it so that when an accused was deemed unfit to stand trial, there was no option for an absolute discharge. This was argued to impede on one's liberties because being unfit to stand trial is not necessarily indicative of one being any danger to society. Essentially, one has to wait until they become fit to stand trial or until the Crown fails to build a *prima facie* case against them. The accused is not eligible for an absolute discharge until they go before a review board where the number of times which one is subject to go before a review board is indefinite. What it came down to for the SCC was that because review boards do not determine innocence, guilt, or dangerousness with respects to NCR accused, an accused who has not been tried cannot be deemed guilty and dangerous by a tribunal who has no such scope to decide that. Because of these notions, Demers's liberties were considered to be infringed upon.

Other decisive cases in which the SCC recognized a section 7 infringement were that of *R v Heywood*, [1994] and *May v Ferndale Institution*, [2005]. Heywood challenged the constitutionality of Section 179 (1) of the C.C.C., which prohibited vagrancy only in consequence to committing acts which revolved mainly around pedophilia and child abuse. The old law read:

> [Everyone] commits vagrancy who having at any time been convicted of an offence under section 151, 152 or 153, subsection 160(3) or 173(2) or section 271, 272 or 273, or of an offence under a provision referred to in paragraph (b) of the definition serious personal injury offence in section 687 of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read before January 4,

> 1983, is found loitering in or near a school ground, playground, public park or bathing area. (*Canadian Criminal Code,* 1985)

The SCC agreed that the law was overly broad. In the context of Section 7, the law's objectives did infringe on one's liberties more so than required in order to meet the underlying purpose of the law. By this, the Court meant that the law could be amended to meet its intended objective without extending as far as to impede so heavily on one's rights. The SCC also found it unconstitutional, for the law permitted no such review in order to re-evaluate the necessity of the law through a case by case analysis.

In *May v Ferndale Institution* [2005], a new law was enacted which required that inmates whom were serving a lifetime sentence in a minimum-security prison and hadn't completed their "violent offender programming" were to be re-evaluated in terms of security classifications. A group of offenders who were serving their life sentences in a minimum-security prison were transferred to a medium-security prison as a result of the changed law and were not at all transferred on the basis they had committed any kind of misconduct which might have triggered a transfer anyways. The group appealed on the grounds that this law infringed on their section 7 Charter rights and the SCC concurred (to some extent). On the question of whether or not the new law was arbitrary, the SCC disagreed, stating that if the court found Corrections Canada in violation of section 7 for applying a new law, new laws would never hold. Nonetheless, the Court did find an infringement whereby Corrections Canada refused to share their scoring matrix with the inmates. The scoring matrix was the tool used to inform the decision as to whether or not Corrections Canada was going to transfer the inmates. This was considered in infringement on their liberty because it was noted that if one is unaware of what the scoring matrix entails, they are unfairly withheld the opportunity to attempt to meet those standards.

Winko v British Columbia [1999], is another NCR case and is an excellent example of how personal liberties can only go as far as to satisfy public safety and societal values. This case also dealt with Section 672.54 of the CCC. The appellant claimed that this section was unconstitutional but, the SCC was not convinced. They ruled that the law was well-equipped with a reasonable balance to instruct those applying the law to consider "the least onerous and restrictive" sanction on behalf of the accused while considering public safety. The appeal was therefore dismissed.

Cunningham v Canada [1993], undertakes a similar legal issue. Cunningham was sentenced to 12 years imprisonment for committing manslaughter but, was to serve two-thirds of his sentence in prison and the other third was to be served in the community under mandatory supervision. During his prison sentence, the *Parole Act* was amended and permitted the Commissioner of Corrections, where they have reason to believe, on the basis of information obtained within six months leading up to the presumptive release date, that the inmate is likely, prior to the expiration of his sentence, to commit an offence causing death or serious harm. The inmate may, therefore, be sent before a Parole Board where the Parole board may decide to deny the inmate his or her release.

Cunningham, claiming that the amended *Parole Act* infringed on his section 7 rights, appealed to the SSC. His appeal was dismissed for similar reasons discussed in the *Winko v British Columbia,* [1999] case. Basically, the SCC concluded that the law again compromised on appreciating the offender's rights, but only so as far as to not threaten the safety of the general public. Additionally, with its implementation, the law provided safeguards to the offender such as hearings, the right to be represented throughout those hearings, and the opportunity for future reviews on the case.

When it comes down to understanding "liberty" in the context of physical restraint, the Court has emphasized, especially in regard to the cases above, that "the [interest in exercising one's right to liberty,] is limited only to the extent that this is shown to be necessary for the protection of the public" (*Cunningham v Canada,* 1993 2 SCR 143). It should be noted, that this principle is not abandoned in the context of "liberty" as a protectant of personal autonomy which, becomes apparent below.

Possibly, our most underrated right is that of "liberty," but in the context of personal autonomy. Many of us are cognizant of the fact that a peace officer (the state) can't physically restrain us unless warranted. Despite that, we don't often exercise that facet of the right to liberty. But, when we make decisions that our personal to us, such as whether or not we want to obtain an abortion; we want to go to school; we want to vaccinate our children; we want to sell our house; we want to open a business; we want to live here; and then move there, we are exercising our right liberty. Personal autonomy is at the core of humanness and is arguably, more so than others, a right that people are eminently attached to. Like stated above, the SCC must attain equilibrium in the quest to define liberty. Within the context of personal autonomy, we again notice that this is not an unfettered right. It has its bounds in the name of protecting society as a hole. This concept again, becomes something the courts deeply emphasize.

The case of *Godbout v Longueuil,* [1997] encapsulates what it means to practice personal autonomy in an "organized society" (para. 66). Longueuil, a city in Quebec, made it unlawful for permeant city employees to reside outside of the city's borders. Godbout, the appellant, worked with the local police as a radio operator. Godbout moved out of the city while still employed with the police and was subsequently terminated without notice (as contractually outlined upon her employment) after she refused to relocate back within the city limits. The SCC, in

referencing especially *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] and a couple of United States Supreme Court decisions, explicitly established that personal autonomy, like the right against personal restraint is protected under the "liberty" provision of the section 7 right. *R v Big M Drug Mart* introduced this notion with its accorded definition of the term "freedom" which goes on to state that "liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance" (*R v Big M Drug Mart,* 1985 1 SCR 295). The SCC, in *Godbout v Longueuil,* [1997] employed this definition to assemble an understanding of what the right to personal autonomy is, and the extent in which it can be exercised before it impedes on the "principles of fundamental justice" or disrupts the protections of the common good in an organized society. The right to choose a private residency, as contended by the Court, is not an inherently private choice which would cause grave societal turmoil or in that effect, really impact at all, the continuance of the enjoyment of an organized society for all. In any fashion, the choice to decide where to live, likely bolsters the enjoyment of life. As stated in *Godbout v Longueuil,* [1997],

> choosing where to live is a fundamentally personal endeavour, implicating the very essence of what each individual values in ordering his or her private affairs; that is, the kinds of considerations [one contemplates when choosing a residency] serve to highlight the inherently private character of deciding where to maintain one's home. In my view, the state ought not to be permitted to interfere in this private decision-making process, absent compelling reasons for doing so. Moreover, not only is the choice of residence often informed by intimately personal considerations, but that choice may also have a determinative effect on

> the very quality of one's private life[…] [r]esidence determines the human and social environment in which an individual and his or her family evolve: the type of neighbourhood, the school the children attend, the living environment, services, etc. In this sense, therefore, residence affects the individual's entire life and development. (para. 68)

Although the conclusions and interpretations drawn in *Godbout v Longueuil,* [1997] might give off the impression that with the right lawyer one might be able to get away with almost anything, there are an array of limits which exist to exercising your right to "liberty" in the context of personal autonomy. For example, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] parental autonomy was argued to be out of the scope of "liberty." While, *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] in its first read, is somewhat convoluted for the fact that it contemplates the potential infringement of three Charter sections (sections 1, 2, and 7), for the purpose of this specific discussion, it is particularly meaningful to know the outcomes in relation to section 7. The appellants in this case, a couple, were practicing Jehovah Witnesses. Their child was born prematurely and underwent numerous medical procedures and endured a number of health conditions which according to doctors demanded a blood transfusion for the infant's continued survival. As practicing Jehovah Witnesses, it went against their religion to permit doctors to administer a blood transfusion to their infant. The Provincial Court granted the Children's Aid Society a 72-hour wardship to perform the procedure. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995], the SCC concluded that there is a sphere of protected parental autonomy including choices about a child's health, education, etc. Nonetheless, the state can intervene where parental decision making threatens a child's autonomy or health. For those reasons, the appeal was dismissed.

Legalization or criminalization of an act can, in effect, alter the outcomes of SCC decisions relating to any Charter right. In the context of "liberty" (in section 7), the legalization of marijuana helped the criminal justice system learn about the flexibilities in decision making when an act is legal compared to when it is criminalized. For example, in *R. v. Malmo-Levine; R. v. Caine,* [2003] it was established that lifestyle choices such as the use of illegal substances are not protected by section 7. Malmo-Levine and Caine both whom of which were charged with either trafficking marijuana or the possession of marijuana (remember, marijuana was illegal in 2003) argued that (a) marijuana was central to Malmo-Levine's lifestyle (as a marijuana/freedom activist); and (b) according to Caine's defense, the choice to smoke marijuana is synonymous with the choice for example, to eat fatty foods on occasion – a fundamentally unhealthy choice but one that doesn't cause irreversible, immediate, devastating impacts to one's overall health and safety. The SCC determined that if a criminal law is shown to be arbitrary or irrational, it can infringe on section 7. Nonetheless, it was decided that section 3(1) (possession) and 4(2) (trafficking) of the Narcotics Control Act were neither of these criteria (*R. v. Malmo-Levine; R. v. Caine,* 2003, para. 136). The law was considered reasonable because the consequences associated with individual use can become collateral damage aimed at the public – a public protection too vital to discount. The general concerns the court had related to conveyances under the influence, were using complex machinery under the influence, the consequences of chronic use, or the accessibility to vulnerable groups such as youth or pregnant women.

This argument serves as foundational to any argument that possession of any illegal drug infringes on someone's Charter right. If one were to advance the same argument but in the context of possession of methamphetamine, this case would likely be pulled as precedent in order to demonstrate why there is no infringement against section 7 specifically. What becomes

interesting is the adaptability of the Charter as a purposive document so to become relevant for instances in which, for example, marijuana in legalized.

In *R v Smith,* [2015], the Court was able to identify reasons as to why the partial decriminalization of recreational marijuana use was unconstitutional for it put users in a conflicting spot. In 2015, only the possession of limited amounts of dried marijuana for medical purposes had been decriminalized. Accordingly, at the time, non-dried marijuana derivatives, were still illegal and Smith was charged for possession with purpose of trafficking cannabis topical ointments and edibles (non-dried marijuana products); a product he produced privately in which he didn't use personally but, sold. Smith argued that this was an infringement on his section 7 rights, specifically his right to liberty because the system was "foreclosing reasonable medical choices [via the threat of criminal prosecution as well as,] by forcing [individuals] to choose between a legal but[,] inadequate treatment or an illegal more effective [treatment]" (*R v Smith,* 2015 SCC 34). The SCC concurred there was an infringement against section 7. By specifying the harmful health impacts (e.g. bronchitis or lung cancer) dried cannabis can have on a human compared to that of non-dried cannabis treatments, the SCC it was unreasonable to force users to decide between a blatantly better alternative to dried cannabis which was illegal and a legal but ineffective option.

When considering both of these cases, it is possible to dissect the somewhat timeless qualities of the Charter. In the former case, we read a decision that although, is outdated in the sense it's protecting a since then, decriminalized act, it's relevant for its contributions to further understanding section 7. Additionally, it sets precedent by demonstrating why the lifestyle choice to engage in drug use is not an infringement of one's section 7 rights. Moreover, we recognize an adaptive and evolving application of the Charter in the latter case. For when more information

became available and Parliament made the decision to legalize marijuana, the choice was guided by an array of research suggesting that the criminalization of marijuana was obsolete. For example, it was later learned that prosecutions for possession of marijuana tended to clog the internal organs of criminal justice system, marijuana itself had minimal impacts on human health in comparison to other drug and alcohol consumption, it proved to be a method of relief for chronic pain and health conditions making its use widely endorsed by the medical community, etc. The underlying point here, is that with this information, the SCC was able to arrive at a more progressive decision in *R v Smith,* [2015] revolving around the use of marijuana without terribly contradicting itself in their *R. v. Malmo-Levine; R. v. Caine,* [2003] decision.

"Security"

The concept of allowing people a more effective, but illegal alternative to a certain condition or phenomenon discussed in *R v Smith,* [2015] also ties into "security" of the person. Broadly speaking, the right to "security" encompasses security of the person in a physical and psychological sense and the right to protect the security of one's bodily and mental integrity. In a physical sense whereby, state action puts the person's health at risk or otherwise impairs it, this is a classified section 7 matter (*R v Monney,* 1999 1 SCR 652). For example, one should never be subject to baseless medical procedures where consent is absent (*R v Morgentaler,* 1988 1 SCR 30) or be subject to suffering, physical punishment, etc. (*Singh v Minister of Employment and Immigration,* 1958 1 SCR 177). Furthermore, security of the person not only encircles personal autonomy and control of one's integrity but, "the provision of necessaries for its support" (*Singh v Minister of Employment and Immigration,* 1958 1 SCR 177). There is really no case that pointedly declares "this is what security of the person is and this is what it is not." Neither does

the precedent related to “life” and “liberty” provide such lucidity. In order to give the right of security of the person some meaning, it’s important to analyze the use of the right as implemented at trial.

R v Morgentaler, [1988] is a landmark case relevant to section 7 of the Charter. The 1985 version of the C.C.C. contained a law (sec. 251) that prohibited abortion and the procurement of abortion except where life or the health of a woman were endangered. With the conviction that the abortion laws at the time were amiss, the appellants (three duly qualified doctors) set up their own private practice in which they would provide abortions to women whom were seeking an abortion without a certificate from a therapeutic abortion committee of an accredited hospital or clinic, an act criminalized under section 251(4) of the C.C.C. at the time. When brought to trial, one of the questions became whether or not section 251 and 251(4) infringed section 7 of the Charter. The SCC did determine that section 251 was indeed an infringement of section 7 rights. Mainly in the context of security of the person because an undesired pregnancy and the subsequent inability to receive a timely abortion put women in a precarious physical psychological state whereby, they may seek illegitimate and unsafe methods of performing an abortion. Additionally, the psychological stress which is state imposed as a result of untimely board approvals for an abortion and non-obligatory existence of boards to go before in the first place, etc. Mental anguish as an aspect of the right to “security” was a new idea at the time.

R v Rodriguez [1993], is also a landmark case and one that received a significant amount of attention. Rodriguez was terminally ill with a degenerative neurological disease and would slowly start losing control of almost all bodily functions including walking, eating, and breathing on her own. She was only expected to live for another 2-14 months. Rodriguez wanted to enjoy her life as long as physically possible but, when it got to a point she could no longer enjoy her

life, she wanted a physician to set-up the means by which she could take her own life, on her own time, while still physically capable. She argued that section 241 of the C.C.C., which prohibited physician-assisted suicide, was an infringement on her section 7 rights. With a 5-4 judgement, the SCC was split right down the middle. The majority held that there was an infringement on section 7 because the physical and psychological state in which Rodriguez was doomed for would absolutely offend her section 7 Charter right but, the law was found to be in accordance with the principles of fundamental justice which will be discussed below.

The dissenting opinion in this case is argued by many legal experts to be far more rational and logically founded. The dissenting opinion posited that like, the majority, there was an infringement of section 7 which was unjustified under section 1 (*Oakes*, also discussed below). The dissent argued that the principles of fundamental justice being protected by section 241 were not sufficient to override the appellants rights and that there were many safeguards available in the C.C.C. to meet the concerns regarding the decriminalization of the law.

> The Code provisions, supplemented, by way of remedy, by a stipulation requiring a court order to permit the assistance of suicide in a particular case only when the judge is satisfied that the consent is freely given, will ensure that only those who truly desire to bring their lives to an end obtain assistance. (*Rodriguez v British Columbia (Attorney General),* 1993 3 SCR 519)

R v. Monney [1999], strikes a different balance demonstrating that self-induced physical/psychological harm must be identified and made distinct from state-imposed harm. Monney swallowed heroin tablets before arriving by commercial flight at Toronto Pearson International Airport. His hastily purchased plane ticket combined with his known stop in Switzerland (a known narcotic-transit country) out of Ghana (a known narcotic-sourcing

country) raised red flags for Customs officers. Monney couldn't get his story straight when interrogated by officers and these factors gave the officer sufficient grounds to detain the traveller. In detention he was requested to provide a urine test or provide a stool sample – after of which he could be released if he was cleared. Initially Monney refused to provide the samples but after corresponding with his lawyer, Monney later provided a urine sample which tested positive for heroin. Monney was arrested and confessed to ingesting heroin tablets. Instead of bringing Monney to a medical facility, the officers kept him detained with intention of getting him medical attention only if he requested it or appeared to be in physical distress which correlated with proper policy/protocol. The officers diligently checked-in on Monney and regularly asked him if he'd like to seek medical assistance. He declined every time. Upon appeal he argued that his section 7 rights were infringed, for the officers didn't provide him constant medical supervision during his detention. The SCC dismissed this argument, explaining that the self-induced nature of the medical circumstances as well as the proper protocol practiced by the officers in which they regularly offered the services of medical aid, did not constitute a section 7 Charter infringement (*R v Monney*, 1999 1 SCR 652).

Similar in principle to the case above, the SCC has determined that sufficient casual connections must exist in order to prove that an impediment on security of the person is state-imposed. For example, in *Blencoe v British Columbia (High Rights Commission)*, Blencoe, a serving British Columbia (BC) minister, was accused of sexual harassment by one of his assistants. He was subsequently removed by the incumbent premier from both the provincial cabinet and NDP caucus. Following his dismissal, two more accusations were made against the ex-minister for another two counts of sexual harassment. The media attention dedicated to the story inhibited his "employable" status, nor did he re-run for office, and he suffered from severe

depression. At trial, Blencoe argued that his section 7 rights had been infringed because the delay in proceedings at Blencoe's expense and as insitgated by BC, were argued to cause serious psychological damage to Blencoe. The courts dismissed this claim on the basis that there was no sufficient causal connection between the delay in proceedings employed by BC and his depression.

"The principles of fundamental justice"

The last component of section 7 are the "principles of fundamental justice." Everyone is entitled to the rights of life, liberty, and security except in accordance with these principles. In other words, where a deprivation of one of the three rights allotted by the section is proven, counsel must also prove that the deprivation is contrary to these principles (Evans, 1991, p. 55). For a rule to be considered a principle of fundamental justice, it must be (1) a legal principle; (2) found to carry social consensus about the way in which society need to function candidly; and (3) sufficiently specific and unambiguous to enable proper application (*R. v. Malmo-Levine; R. v. Caine,* 2003, para. 113). Bowles (2019), explains that these principles bear an array of definitions and that they have been applied in various manners, which has created difficulty for the courts in acuminating a precise and fixed interpretation of the principles (p. 10). Both substantive and procedural fundamental principles exist under the section. Substantive principles essentially deal with societal vs individual interest and how a socially backed sentiment will likely trump an individual's belief that the socially backed sentiment directly infringes their right life, liberty, and/or security. Procedural principles are facets of how the justice system has been or ought to be functioning or "the common law duty of procedural fairness" (Procedural…, 2019). Both substantive and procedural principles are shaped by the cases and traditions that

have long been a valued feature of Canadian law and society (*Canadian Foundation for Children, Youth and the Law v. Canada,* 2004, para. 8). It has been argued that the SCC has been hesitant to provide definitive interpretations of the principles of fundamental justice because this will allow for a broad and timeless interpretation of the principles moving forward (Bowles, 2019, p. 46)

There are a considerable number of principles of fundamental justice which have to date, been recognized by the SCC. It is out of this thesis's scope to provide a detailed analysis of where these principles are derived from and how the courts attempt to apply them. However, to give some insight into the principles, an exhaustive list of the principles will be provided and then two case studies will be explored. One demonstrates the application of a substantive principle, and the other demonstrates the application of a procedural principle. Additionally, when applying section 320.17 (2) to section 7 below, the principles of fundamental justice will of course be examined.

Substantive principles of justice include arbitrariness; gross disproportionality (see above *R. v. Malmo-Levine; R. v. Caine*); moral blameworthiness; overbreadth (see above *R v Heywood* or *R v Demers)*; and vagueness. Procedural principles of justice include best evidence rules; presumption of innocence; right of silence; right to full answer and defense; and right to full disclosure. Some of the principles are no doubt utilized more often than others but, each and every one of the principles have been considered by the SCC in at least one case.

In *R v. Clay* [2003], the accused had been charged with possession with the purpose of trafficking marijuana. He owned an Ontario-based marijuana 'accessories' shop, but also sold cannabis seedlings. Clay sold the seedlings and a plant clipping to an undercover police officer and was subsequently arrested and charged. Clay's defense was that where the prohibition of

marijuana can result in a prison sentence, his section 7 rights were evoked and the law, as argued by Clay, was overly broad. In this case, the course to arrive at a decision, was very linear (i.e. the SCC's logic and reasoning are easy to follow). The SCC contended that while a possession charge does threaten a person's liberty by possibly accompanying a prison sentence, the deprivation of such is in accordance with the principles of fundamental justice. No narrower prohibition would be as effective as the current possession and trafficking laws. The law was not considered by the SCC to exhibit any degree of overbreadth or gross disproportionality. The SCC referenced *R v. Heywood* [1994] (as discussed earlier) to rationalize their decision, stating if the logic in *Clay's* defense were upheld by the courts, policymakers would have very little room to legislate; this precedent would become a serious obstacle for Parliament. Overbreadth fits within the domain of Oakes Test where the question of "minimal impairment" is appraised.

R. v. Seaboyer; R. v. Gayme [1991], is an excellent showcase of how the right to a full answer and defense can be argued in the context of fundamental justice's principles. Seaboyer had been charged with sexual assault. At the trial, the defense was refused the opportunity to cross-examine the complainant. Seaboyer on appeal argued that this was unjust, and he wasn't permitted an opportunity to uncover whether or not the injuries (bruises, marks, etc.) in which the complainant brought into evidence were as the result of other sexual encounters the woman could have engaged in, in the recent past. Gayme on the other hand, who was 18 at the time of the offense, had been charged with sexual assault where he had engaged in sexual relations with a 15-year-old and was under the honest assumption that it was a consensual encounter. Gayme contended that the complainant was the aggressor and Gayme's counsel intended on cross-examining the girl to attempt to prove sexual aggression in past relationships. Section 276 and 277 (the Rape Shield Law) prevented the two appellants from cross-examining the complainants

in their trials. Both accused appealed to the SCC on the ground they were deprived the right to a full answer and defense and that sections 276 and 277 infringed their section 7 and 11 rights.

The appeal was dismissed but the SCC concurred that section 276 violated sections 7 and 11 of the Charter. In was determined that section 277 required evidence relating to the complainant's credibility be excluded and the SCC did not see that as inconsistent with the constitution. Nevertheless, section 276 proclaimed certain evidence which could potentially be of value to a full defense, as inadmissible. The main issue for the Court, as noted by the SSC in these instances, is that they must weigh the "value of evidence against its potential prejudice" (*R. v. Seaboyer; R. v. Gayme,* 1991, p. 580). This becomes difficult because it is critical that all pertinent evidence makes it into a trial so that there is transparency surrounding the facts and the innocent are not being wrongfully convicted. Essentially, the SCC contended that although the law sought to "abolish outmoded, sexist-based use of sexual conduct evidence," it exceeded its target objective by having the potential to exclude evidence that could be critical to an honest defense. In the opinion of the court, the law could not be saved under section 1 of the Charter.

The takeaway from *R. v. Seaboyer; R. v. Gayme,* [1991] is that laws which constrain attempts to admit evidence are likely going to be constitutionally challenged. Where a section 7 breach exists, this can be addressed in the "principles of fundamental justice" argument. Where life, liberty, or security are not being threatened, but one's right to fair trial is being infringed on, section 11 of the Charter will be relevant. For reasons that become apparent below, the right to a full answer and defense are brought into disrepute with the enforcement of section 320.27 (2) of the C.C.C. in the context of the principles of fundamental justice within section 7 of the Charter.

The Law and Section 7

Does section 320.17 (2) of the *Canadian Criminal Code* infringe on section 7 of the *Canadian Charter of Rights and Freedoms?*

In order to understand what freedoms section 320.27 (2) might infringe on, we need a grasp on what actions are explicitly being prohibited by the law. It has been established that the new law is an agent to deter impaired driving. The intended outcome of this law is theoretically achieved because the reasonable person opts not to drive when impaired because the odds of him or her getting screened for impaired driving have dramatically increased. The differentiation is made whereby the odds of being pulled-over are probably about the same as before but, the odds of being screened for alcohol are likely much closer to every time you get pulled over. Impaired driving has for a long time been prohibited by the law but, what the law has inherently done here is influenced the public's perception of their risk of being caught. Therefore, no act is really being prohibited by the law relative to the last version of it. Nonetheless, an act is being supported, an act carried out by law enforcement, and this notion becomes pivotal to the point.

Applying Life, Liberty, & Security

A well-articulated discernment ought to be made to resolve the true differences in the legislation as opposed to its predeceasing law. A distinct modification has been initiated by Parliament where the ways in which the public interact with law enforcement on the roads have drastically changed. *R v Ladouceur* [1990] and *R v Hufsky* [1988] have settled disputes referencing random roving stops and random check stops; both have been legally justified by the SCC. However, how these random stops materialize as a result of the new law's application has changed significantly.

Where a random stop lawfully occurred during the old law's era, an officer would only be able to act based on what he could infer to be true as informed by his senses: sight, smell and hearing. For example, someone who were pulled over by an officer would be obliged, without warrant to produce their licence, registration, and insurance because these documents imply that the driver has met the requirements backed by law, which require that one prove their ability to operate a conveyance safely (*R v Hufsky,* 1988, para. 23). Moreover, if an officer were to, for example, observe a broken break light or a smashed windshield (whatever the apparent mechanical issues might be), whether it be prior to being pulled over or during the commission of a roadside stop, the officer would be permitted to investigate this and potentially issue a fine (*R v Ladouceur,* 1991, p. 1280). The officer cannot begin opening your vehicle's hood or crawling under your vehicle to inspect it for issues, but for the most part whatever the officer can discern from a face-value engagement may be followed through on. Although these acts have been acknowledged to engage certain sections of the Charter, it has been determined that driving is a privilege and that the public can afford to relinquish to some extent, their civil liberties for the protection of the collective.

Nevertheless, in the past people could be pulled over for these reasons (documentation, mechanical issues, etc.) and if there was evidence that another offence had occurred or was in progress, an officer could act accordingly. For example, the smell of marijuana wafting out of a vehicle would give the officer reasonable grounds to suspect that the driver (or passengers) were smoking marijuana (see above *R v Malmo-Levine; R v Caine,* 2003). Or like established in *Deadman v The Queen* [1985], the detection of the smell of alcohol coming off someone's breath would also provide reasonable grounds to administer a breathalyzer test to attempt to corroborate the suspicion. This exact point sets up the quandary regarding enforced random mandatory

alcohol screening. The act of driving impaired can be criminally prosecuted and where the step of collecting evidence is removed from the investigatory measures, serious implications surrounding someone's rights arise.

The decision to prosecute someone and charge them criminally is a significant and weighty pursuit. It must demand the upmost care and demonstrated responsibility because the repercussions of a successful conviction can be severely life-altering. Where at stake is a criminal record or a life-long prison sentence, every outcome could possibly be seriously detrimental to the accused and their enjoyment of life. When the new law didn't exist, outcomes were pretty straightforward. For example, you might get randomly pulled over and where documentation/ mechanical soundness checked out, you'd be on your way as long as you had given the officer no reason to believe something else illegal was ensuing. However, if for example we assume that documentation or the mechanical fitness of your vehicle did not check out, these are not criminal offenses in Canada. Serious consequences can arise out of not abiding by these laws, but a criminal record is not at stake.

Contrast to this, driving under the influence of alcohol or drugs is indeed a criminal offense. Section 320.27 (2) has introduced the possibility of being convicted of such an offense without any sort of investigation supporting the contention that someone is guilty of such. The safety net which required a law enforcement officer to establish reasonable grounds in order to investigate as to whether or not the operator of a vehicle was impaired has been eliminated entirely. Essentially, random mandatory alcohol screening can be attributed to three possible outcomes, (1) best case scenario, the individual in question blows under the legal limit and is permitted to drive off-site; (2) the individual blows over the legal limit and is subsequently arrested under section 320.14 (1) of the Code and are then subject to a punishment ranging from

a minimum fine of $1000 to a maximum sentence of 10 years in prison, as established in section 320.19 (1) of the C.C.C.; or (3) the individual in question opts not to comply and is therefore charged under section 320.19(4) (*Canadian Criminal Code*, 1985). It may be very confusing for an individual who is being pulled over and is thereafter demanded to provide a breath sample. Especially when the opportunity has arisen for which he or she might be criminally charged and no protections are provided to that individual when placed in that very precarious situation, including the right to consult counsel (CBC News, 2018, para. 10). For example, someone who hasn't been drinking and is under the impression they don't have to provide a breath test because there is no reason for the police to investigate the 'facts' of such a crime, which hasn't even been committed, will be subject to a criminal charge. Wherein every other Canadian criminal pursuit, reasonable grounds is a condition of investigation, Canadians have regretfully been stripped of their right to this due process.

Reasonable grounds is largely associated with section 8 of the Charter where individuals are protected against unreasonable search and seizure. It could very well be argued that section 8 of the Charter is violated by section 320.27 (2) of the law (CBC News, 2019, para. 13). However, this would undoubtedly be a challenge, for it would require that it be proven breath is a matter which can be searched and/or seized. Other Charter sections would most likely afford an increased probability of success in proving the law unconstitutional. Nonetheless, the skipped step in the investigatory measures as permitted by section 320.27 (2) opens the gate for a section 7 infringement.

Wayne MacKay who is a law professor at Dalhousie University in Halifax, Canada and a Charter expert claims "in a strictly charter sense it is a greater limit on one's liberty under section 7 and it does put greater limits on one's freedom of movement, freedom of one's ability to say no

or not to be invaded in some way by the state" (Rankin, 2019, para. 3). Earlier, some examples were provided that demonstrated the implementation of section 7 in the context of liberty. As a refresher, there are in essence two rights that are protected by this right, the right against being physically restrained or the threat of physical restraint and the right to make inherently private choices without state interference which represents a right to personal autonomy. Relevant to this argument, in *R. v. Vaillancourt* [1987], the SCC expressed that, where an offense accompanies the possibility of imprisonment, corollary to a conviction, a section 7 matter is activated, and the court will then entertain the issue of principles of fundamental justice (para. 26). It is not difficult to prove that someone's right to life, liberty, or security is being violated. However, that the violation is in accordance with the principles of fundamental justice will be more burdensome to prove.

As aforementioned, there are two outcomes derivative of section 320.27 (2) that pose a threat to someone's' liberties. Opting not to comply or blowing over the legal limit are both possibilities that can arise out of the application of the new law. In both of those instances, imprisonment is realistically, a consequence as provisioned under sections 320.15 (1) and 320.19 (1) (*Criminal Code,* 1985). Furthermore, *R v Saul* [2015], which was a case tried by the British Columbia Court of Appeal, poses an interesting question in contemplating the issue of impaired driving. In *R v Saul* [2015], it's established that the act of bolus: "the consumption of a large amount of alcohol within 30 minutes of the alleged driving offence," with little to no doubt renders the assumption that this act is "reckless and morally culpable." There exists an almost indisputable intent to drive intoxicated. However, where someone blows just over the legal limit or close to, difficulty can arise in determining *mens rea* which is a pillar of conviction in Canada. "If someone truly is not impaired[,] due to the absence of an elevated BAC and the incomplete

absorption of alcohol, then how is the conduct morally culpable? A person is now impugned as a criminal on the basis of drinking in such a manner that renders them not impaired and not over the limit" (Lee, n.d. 6).

Randomness

Also, worth mentioning and relevant to section 320.27 (2) of the C.C.C. is the concept of "randomness." The SCC has discussed the notion of "randomness" in the context of traffic stops and has adjudged that random stops/check stops are not a violation of the constitution as discussed earlier. However, there is a legitimate concern that the new law abets stops that are in no way random. *R v Ladouceur* [1990] compares the potential intrusiveness of both roving stops and check stops (p. 1267). The SCC contended that the unlimited power to conduct a stop wherever an officer feels so inclined, is ultimately more intrusive than a check stop (*R v Ladouceur*, 1990, p. 1267). For example, law enforcement officers who are capturing speeders via photo radar will likely be strategic in where they park to ensure lucrative results. Or other officers may lurk in areas where U-turns are common. There is really no limit to how, in the commencement of roving stops, officers will be strategic in detection. Nevertheless, this was condoned by the SCC.

Section 320.27 (2) has the potential to escalate the strategic placement of officers for the purpose of attempting to apprehend as many violators of a law as possible. There is very little doubt surrounding the notion that law enforcement officers will flock to bars, restaurants, pubs, etc. Essentially, any place where it is known that the public congregates to drink, officers may position themselves in a manner to which they can witness patrons of the establishment leaving and getting into their cars. Arguably, the officer is "poaching" people as they leave areas which

have a reputation for increasing the odds that the driver is impaired. This is different from waiting for someone to conduct a U-turn, run a red light or speed because the intention to visit such an establishment should not be confused with the intent to drink and drive. This makes those who frequent these types of businesses, more susceptible to coming into contact with a law enforcement officer and this is in no way random. It is not to say that those who frequent these types of establishments are vulnerable people and require protection. Nonetheless, "randomness" should distribute the probability of being pulled over and engaging with an officer equally amongst all of the public. Sopinka, J. rationalizes an approval for random roving stops in stating that for example, 1 in 37 drivers in Ontario are said to be driving without a valid driver's licence (*R v Ladouceur,* 1990, p. 1267). From there the SCC infers that where an officer is conducting random stops, every 37th driver will likely not bear a valid driver's licence. This logic would insinuate that random stops occur whereby every single driver has the same opportunity of being pulled over. The freedoms awarded to law enforcement officers in order to administer random mandatory breathalyzer tests without reasonable grounds will absolutely invite officers to lurk outside of the appropriate businesses or areas and target a very specific group of people.

The Principles of Fundamental Justice and the Law

Where it has been established that one's right to liberty has been infringed on, the impugned law must be proven to coincide with the principles of fundamental justice. In order for an officer to administer a screening device, they must have one on them. Alcohol screening devices (ASD) and their now mandated administration offer a number of issues. Firstly, by omitting reasonable grounds as a precondition to administering a random mandatory breath test, admissibility of ADS results have basically become guaranteed. Although proof must be

admitted demonstrating that the ASD was calibrated, there is almost no opportunity allotted by the law to dispute the ASD's reading. The new law "gives an officer unassailable grounds to demand a breath sample. Thus, the Charter-compliance of the breath demand will also no longer be in issue, meaning that the breath samples will be presumptively admissible and not subject to challenge" (Leamon & Lee, n.d., p. 5). This should raise concern especially where the option to deny a breathalyzer test and request an alternative means of testing has been eliminated.

Moreover, those with disabilities or compromised lung capacity, and who will not be able to produce a viable sample are subject to criminal charges for failing to satisfy the officers requirements as mandated by section 320.27 (2). The argument raised by Leamon and Lee (n.d.) which was established by the SCC in *R v Alex*, [2017], make a strong point contending that between the absence of disclosure rights which would otherwise enable someone to challenge a breath test reading, the arbitrary lowering of the standard for which one can blow (at or above standard), a new found inability to argue intervening consumption, increased sentences, mandatory minimums, and mandatory alcohol screening all work together to practically guarantee a conviction (p. 5). Without any opportunity to dispute the ways in which the altercation arose, how the test was administered, what the test read; combine that with the stripped right to obtain a different means of demonstrating blood alcohol content (BAC), the individual is deprived of the opportunity to provide the courts with a full answer and defense.

Even more concerning, this is then exacerbated whereby section 320.27 (1) removes any type of intervening consumption defense and the onus is then put on the individual being charged to prove that they did not consume prior to a drive, but rather after they arrived at their destination (Flanagan, 2019, para. 8). This, as will become apparent below in discussing Oakes, infringes on one's right to being presumed innocent until proven guilty (as granted by section

11(d) of the Charter). Criminal defense lawyer Michael Spratt also makes a startling allegation: When the onus is on you to prove contrary to what the Crown claims, you absorb the costs associated with bringing in a qualified toxicologist to speak to the facts of the case (Flanagan, 2019, para. 9). Virtually, every opportunity to provide a full answer and defense have been confiscated by lawmakers. There is practically no way to dispute an allegation if the individual blows over the legal limit as prescribed by law.

Overbreadth would likely be proposed by a true litigation team as an accordant principle of fundamental justice. However, for the purpose of submitting an all-encompassing argument, the question of the Oakes Test is discussed below and the analyses contemplates the notion of "minimally impairing" as a facet of Oakes. Overbreadth is noted in that context instead of within the principles of fundamental justice. However, it should be distinguished that the principles of fundamental justice are entirely separate from the Oakes Test and warrant separate reasoning for both questions. In addition to this, the SCC has also stated that after a section 7 infringement has been established, saving the law under Oakes is to a great degree, difficult (Section 1 considerations…, 2019).

The Oakes Test

Where it has been established that a Charter infringement has ensued, a party may raise Oakes, or in other words, the section 1 Charter test. In the law community, the Oakes Test has the reputation for stopping a good Charter defense right in its tracks. Many strong Charter defenses meet their match when the Oakes Test is applied. Nonetheless, the Oakes Test and section 1 of the Charter are not to be undervalued. Section 1 of the Charter is fundamental to what the Charter seeks to protect, for it is the mechanism that favours and protects society as a

whole in contrast to the Charter's claimed purpose which, in essence, protects individual rights from unreasonable state action (*Hunter et al. v Southam Inc. 1984)*. Section 1 demands that these individual rights guaranteed by the Charter are balanced against the need to safeguard society (as discussed above). Although the Charter is designed to protect a broad range of rights, each and every one of these rights yield to section 1 of the Charter. The Oakes Test is the agent by which an infringement is forced up against the pre-eminence of section 1. Section 1 of the *Canadian Charter of Rights and Freedoms* reads as follows:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Oakes Test is applied in stages and was born out of the Supreme Court Case *R v Oakes* [1986].

R v Oakes

David Oakes was found by police to have in his possession, $150 worth of marijuana and over $600 in cash. Oakes was subsequently charged with unlawful possession for the purpose of trafficking as prohibited by section 4(2) of the *Narcotics Control Act.* Section 8 of the former *Narcotics Control Act* permitted courts, where it had been established that the offender was in possession of a narcotic, the power to try an offender for possession for the purpose of trafficking. In order for this charge to not become heightened to such, the accused was burdened with the onus of proving that he/she had no intention of trafficking the narcotic but, that they were only in possession of the narcotic for reasons related to themselves.

By the time the Oakes case reached the SCC, two legal questions were being asked: (1) "Does section 8 of the *Narcotics Control Act* violate section 11(d) of the Charter? [And] (2) is section 8 of the *Narcotic Control Act* a reasonable and demonstrably justified limit pursuant to section 1 of the Charter?" Oakes argued that section 8 was in direct violation of section 11(d) of the Charter that the law failed to honour the preconceived notion that one is innocent until proven guilty and that a facet of this right, requires that the Crown prove this guilt rather than have the accused prove their innocence. Counter to this, the Crown contended that section 8 of the *Narcotics Control Act* was a reasonable limit as prescribed by law which triggered the inclusion of section 1 of the Charter.

The SCC took to the questions separately and broke down their contemplations with regards to each analysis at hand. Writing on behalf of the SCC, Chief Justice Dickson establish that section 8 includes a "reverse onus provision" meaning that the burden of proof rests on the defendant. Dickson substantiates this by utilizing Malaysian jurisprudence (*Public Prosecutor v. Yuvaraj* [1970]) which discusses where the burden of proof resides in criminal cases. The judge in that case ascertains that the burden of proof should in general never fall on the defendant and that where no proof or a lack of proof exists, this is cause for acquittal. Where the prosecutor provides enough proof to convince a court of culpability, the respondent is not obligated to disprove anything but, where he/she refrains from disproving anything, the respondent risks conviction (*Public Prosecutor v Yuvaraj,* 1970, p. 4).

Chief Justice Dickson went on to explain why section 8 violates section 11(d) of the Charter. With an understanding that section 11(d) is integral to the protection of section 7 of the Charter (life, liberty, and security), the SCC determined that the presumption of innocence as a staple of common law is not a unique provision in the global text. In other words, it's a widely

valued right that is inherently crucial to the principle of human rights advocacy and democracy. The SCC in *R v Oakes* [1986], explained that section 11(d) requires that the respondent (a) must be proven guilty beyond a reasonable doubt; (b) the state bears the burden of proof; and (c) prosecutions must be carried out in accordance with lawful procedures and fairness" (*R v Oakes,* 1986, para. 32). In considering different international statutes and jurisprudence, the SCC deemed section 8 of the Act to be an infringement on section 11(d) of the Charter because the reverse onus provision of section 8 requires a respondent to prove on a balance of probabilities that he or she in fact not guilty of an offense. This strips accused of the right to be presumed innocent. Rather they are presumed guilty of the offense until they prove them self to be innocent. This is directly imbalanced with the inherent principles of common law and democracy which coincide with values relating to human dignity and liberty.

Finally, and what is most relevant to the purpose of this piece, is the question the SCC raises regarding section 1 of the Charter. The SCC sought to determine whether "s. 8 of the *Narcotic Control Act* [was] a reasonable and demonstrably justified limit pursuant to section 1 of the Charter" (*R v Oakes,* 1986, para. 62). Chief Justice Dickson explained that section 1 is only exercised where it has been concluded that one of the rights set out in the Charter has been violated. This point is essential in resolving whether or not section 320.27 (2) is a reasonable limit as prescribed by law, to Canadians' rights as granted by section 7 of the Charter. It's established above that there is possibly an argument for defending section 7 against that of section 320.27 (2) of the C.C.C. However, the procedures founded in *R v Oakes* which becomes the Oakes Test will aid in assessing the constitutionality of section 320.27 (2).

As aforementioned, section 1 of the Charter is the gatekeeper for collective goals. It protects societal interest against special interest which is key to being part of a cooperative

civilization. Dickson recognized that there are two functions of section 1, the first being a guarantee of the rights and freedoms accorded by the Charter and the second being that these rights are not absolute as long as justified in a free and democratic society – "free and democratic society" being the key primary interpretation element. "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified" (*R v Oakes,* 1986, para. 64).

A reasonable limit is to be proven by the party whom of which raises the section 1 question. The SCC determined that this must be proven by a preponderance of probabilities as opposed to beyond a reasonable doubt which is, as determined above, the principal unit for triggering a conviction in criminal law. Dickson et al. contend that the term "demonstrably justified" supports the proposition that a preponderance of probability analysis should be used to determine the success of implementation for section 1 questions. Preponderance of probability is also somewhat subjective in this context for there may be different degrees of probability within the standard itself which can fluctuate based on the nature of the case at hand. It should be made clear to the court the consequences of imposing or not imposing the limit as well as alternatives to the current law or policy in conflict with the Charter should be presented.

In settling the question as to whether or not a Charter infringement is reasonable or not, a number of criteria must be met as indicated in *R v Oakes,* [1986]. Firstly, as illustrated in section 1 of the Charter, the claimed infringement must be "prescribed by law." Secondly, the potentially overriding law, must be of "sufficient importance." In other words, "there [must be] a substantive and pressing need for the law" (King, 2018). Thirdly, the law must contend with what the SCC refers to as a "proportionality test" (*R v Oakes,* 1986, para. 70).

The SCC describes three components of the "proportionality test." The first component of the test proclaims that there must be a rational connection between the law's objectives and the measures/means adopted in the policy to reinforce the law's objectives. Secondly, if it is imperative that the law prevail, it must minimally impair the individual's Charter rights. The final part of the "proportionality test" requires "a favourable balance between [the] beneficial [and] harmful effects of the law." King, (2018) explains "even [where the] law is minimal[ly] impair[ing], the benefits of the law must exceed its negative effects on individuals or groups." The SCC realized that at face value, the third step comes off as redundant when compared to that of step one and step two. Nonetheless, the SCC stressed that although a law may be rationally connected to its purpose and is minimally impairing, the deleterious effects of the law must never outweigh the law's importance. Where the deleterious effects of law are increasingly uncompromising, the importance of the law must relatively exceed this effect (*R v Oakes*, 1986, para. 72).

In the opinion of the SCC, section 8 of the *Narcotic Control Act* passed the first step of the newfound section1 test (i.e. the Oakes Test). Dickson recognized that by passing the law, Parliament was attempting to tackle a compelling and vital issue. As a method of deterrence, Parliament intended to "curb" drug trafficking by ensuring that these kinds of acts were met punitively, and the SCC saw this as a meaningful approach in combatting the corruptive effect the drug trade had and still has on society. In deciding whether or not there was a rational connection between heightening a drug charge from possession to trafficking to that of protecting society from the serious impacts of drug crimes, the court Could not draw this conclusion. It was explained that for there to be a rational connection between that of the law itself and the purpose of the law, the law must be rationally connected in, and of, itself. Can it

always be inferred when someone is found to be in possession of a narcotic, that they are in possession with intent to traffic? The SCC didn't find this relation to be sound. Chief Justice Dickson explained that where someone is found with a very small negligible amount of narcotic on their person, drawing to the conclusion that they possess that drug to traffic is far reaching. Moreover, the Court concluded that it is utterly undemocratic to convict someone of a charge for a law in which they may have never broken and additionally, never felt as though they had the capacity to defend themselves against in the first place (*R v Oakes,* 1986, para. 78).

The Law and Section 1

Is the infringement of section 320.27 (2) of the *Canadian Criminal Code* on section 7 of the *Canadian Charter of Rights and Freedoms,* reasonable and demonstrably justifiable in a free and democratic society?

Step One of Oakes: Sufficient Importance Test

Earlier, it was discussed briefly about what the new conveyance law seeks to achieve. At face-value, the law is intended to be a mode of deterrence. Its focus is to both aid detection efforts dedicated to combatting impaired driving and it is a mode of deterrence through by fostering an overall public perception that detection is more likely than the pre-law era. However, in the most basic sense the law is meant to curb the very real issue of impaired driving in Canada. In order to establish whether or not there is a substantive and pressing need for the law, the SCC has prescribed a number of matters which need to be defended.

Firstly, and as acknowledged in *Figueroa v. Canada (Attorney General)* [2003], the purpose of the law must be of proven as paramount in a "free and democratic society" (para. 59).

In order to gauge the purposes of a law, the preamble of the associated bill usually serves as convenient when trying to dissect the motives behind legislating such a law. *Bill C-46's* preamble makes some of the following points:

> Whereas dangerous driving and impaired driving injure or kill thousands of people in Canada every year;
>
> Whereas dangerous driving and impaired driving are unacceptable at all times and in all circumstances;
>
> Whereas it is important to deter persons from driving while impaired by alcohol or drugs;
>
> Whereas it is important that law enforcement officers be better equipped to detect instances of alcohol-impaired or drug-impaired driving and exercise investigative powers in a manner that is consistent with the Canadian Charter of Rights and Freedoms;
>
> Whereas it is important to protect the public from the dangers posed by consuming large quantities of alcohol immediately before driving;

The preamble implies that there are three distinct objectives of the law: (1) to save lives and reduce injury; (2) to deter the public from driving under the influence of alcohol or drugs; and (3) to leverage detection opportunity of impaired driving through better equipping law enforcement officers.

Disputing these rationales would be difficult and for good reason. Even critics of the law would be unlikely to disagree that these are important issues. It is truly in the best interest of everyone that driving is a safe undertaking. Where people make choices to compromise the safety of everyone on the roads, this is absolutely unacceptable in a free and democratic society.

The privilege associated with driving bares a considerable amount of risk. Governmental involvement in mitigating the chance of loss, injury, or death on the roads is to a great degree, essential. It has long been established that impairment behind the wheel as a result of alcohol consumption can severely increase the probability that an accident on the roads could occur. Where this can result in serious loss to property, cause injury, and in many cases, death; it is in the collective interest to lessen the chance of these outcomes. Impaired driving is the number one cause of accidents in Canada. Between 2000 and 2014, 12,000 people in Canada died as a result of impaired driving in that 15-year time span (2 people a day) (Impaired Driving…, 2019, p.1). Moreover, in 2014, 1 in 20 people reported driving impaired on at least one occasion over the course of that year (Clermont, 2018, p. 3). However, the majority of impaired drivers are known to chronically offend (Clermont, 2018, p. 4) Managing these risks are absolutely imperative in society. No one should die as a result of someone else's careless and avoidable actions.

Alliance du personnel professionel et technique de la santé et des services sociaux v. Quebec [2018] reminds courts that where they are determining that an objective of a measure is pressing and substantive, the purpose of the law must be the objective of the measure and that this may differ from the wholistic objective of the legislation (para. 46). The aforementioned preambles are not an exhaustive list of the preambles provided in *Bill C-46* but were rather the objectives most clearly associated with the measure in question (section 320.27 (2). In this case, the infringement or the purpose of the law is a heighted opportunity at being criminally convicted as a result of relatively more obtrusive enforcement efforts. Broadening the window for detection is correlated with the infringement's objective which insinuates that driving under the influence will now incite a higher likelihood of prosecution and subsequently a higher

likelihood of deterrence in the community. In this instance, the infringement matches the objective of the law.

In addition to this, the purpose of the law must be specific, it cannot be too broad or overly encompassing. (*Sauvé v. Canada*, 2002, para. 20). In *Sauvé v. Canada* [2002], section 51(e) of the *Canada Elections Act* denied inmates serving correctional sentences of 2 years or more the right to vote. It was decided by the SCC that this section violated section 3 of the Charter. However, section 1 of the Charter was raised as an issue. When determining whether or not the law was pressing and substantive, the SCC expressed skepticism directed at Parliament's overly broad objectives dedicated at the measure, which more or less confiscated the right to vote from prisoners. The SCC explained that objectives such as (1) enhancing civic responsibility; and (2) to provide additional punishment targeted at convicts, are imprecise and vague objectives. The subjectivity that undergirds these objectives does not permit deliberation because no one would disagree that these virtues of the measure aren't important. Of course, civil liberty and punitiveness are essential to the law. When objectives are too vague, the justification analysis in the courts becomes considerably more difficult.

In regards to section 320.27(2) and the objectives related to its enforcement, the overall intentions to (1) save lives and reduce injury; (2) deter the public from driving under the influence of alcohol or drugs; and (3) leverage detection opportunity of impaired driving through better equipping law enforcement officers, are not overly broad. Saving lives is most definitely a vague and overarching objective. However, because it is accompanied by goals relating to deterring the public from consuming alcohol before getting into a vehicle and enabling law enforcement to uphold this mandate, the purposes of the law can be dissected and deliberated. For example, Parliament could have asserted that the objective of this measure was to "protect

society from the risks associated with dangerous driving" This would have been far too expansive and disreputable. Protecting drivers from the risks associated with dangerous driving are, of course, a meaningful attribute of the law but, nonetheless make it hard to determine whether the law is pressing or substantive because there is no certainty surrounding what exactly the law is attempting to protect.

Furthermore, the purpose of the law must be the true objectives of the measures (*Tetreault-Gadoury v. Canada*, 1991, p. 42). This is to say that the party who brings forth the section 1 issue cannot deviate from the articulated objectives which Parliament set out to protect (i.e. the party cannot be inventive in proposing possible objectives of the law but should adhere closely to the reasons why Parliament instigated the law). This would then be a falsely derived motive for upholding the law. If it were not clear to politicians as to why they were creating the law, its place in Canadian legislation can hardly be substantive or pressing. This question is not relevant here because the objectives mentioned here are a reflection of the preamble which Parliament conceived. All of the aforementioned considerations especially, wherein people lose their lives to the act in which Parliament is attempting to dissuade, contribute to an overall conclusion that the law is of sufficient importance in supporting its objectives.

Step Two of Oakes: Rational Connection

The first step of the proportionality assessment requires that the courts establish that the measures mandated within the law are rationally connected to the objectives of the law (i.e. is the law linear in upholding its purpose). In this instance we are assessing whether or not the act of enforcing random mandatory alcohol screening, directly corresponds with the aforementioned objectives being (1) saving lives and reducing injury; (2) deterring the public

from driving under the influence of alcohol or drugs; and (3) leveraging detection opportunities of impaired driving through better equipping law enforcement officers. The SSC has established, whenever possible, the rational connection should be corroborated by scientific evidence (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013, para. 133). When it is not possible to consider the impugned measure empirically, "that a precise causal link for certain societal harms ought not to be required" rather, experiential inferences, reason, or logic may be established (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013, para. 132). Additionally, the rational connection need not be totally comprehensive. The measure doesn't have to perfectly fulfill the objectives of the law but, a logical presupposition about how the measure, to a degree, advances the objectives of the law will abet in proving a rational connection (*Trociuk v. British Columbia*, 2003, para. 34). Supreme Court Justice Iacobucci in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000], explained that the "test is not particularly onerous" (para. 228).

Canada is somewhat fortunate for the fact that this type of law has been in effect in 40 different states worldwide and empirical evidence exists related to random mandatory alcohol screening and its effects on combatting the issue. In Australia, random mandatory alcohol screening has been a facet of traffic law since the 1980's (Legislative Background, 2019, para. 1). Most of the research dedicated to learning about the effectiveness of the law has come out of Australia. However, Ireland which has enforced random mandatory alcohol screening since 2006 has also disseminated findings about the law and its impacts. In determining whether or not a rational connection can be made between the measures and the objectives of the law, both Australian and Irish findings will be analyzed.

In Australia, random mandatory alcohol screening has been around for decades and has simply been a casual aspect of traffic law enforcement. In Australia, mandatory alcohol screening is referred to as Random Breath Testing (RBT). In Queensland, Australia it is reported that after about a decade of enforcing the new (at the time) law, the Queensland Police Service observed an 18% decrease in "alcohol-related driving fatalities" (Hart, Watson, & Tay, 2003, p. 137). During that same initial decade, it was reported that the Queensland Police Service was administering one breath test a year for every licensed driver in the state (Hart, Watson, & Tay, 2003, p. 137). Demonstrating serious agility in administering tests to the public. Other figures relating to the country's overall numbers suggest that Australia has seen anywhere from a 22-42% decrease in fatal crashes as a result of impaired driving (Watson & Freeman, 2007, p. 12). In Ireland, mandatory alcohol testing (MAT) has been enforced since 2006 (Solomon & Chamberlain, 2018, p. 27). During the first year of the law's mandate in Ireland, fatalities resulting from a traffic incident decreased by 23% (Legislative Background…, 2019, para. 5). In 2015, after 9 years of applying the law, Ireland saw a 55% drop in traffic deaths and a 60% drop in traffic-related injuries (Solomon & Chamberlain, 2018, p. 27).

However, because inciting deterrence is a main objective of the law in question, it is worth understanding Australian public perception of detection. In a study conducted by Watson & Freeman (2007), 257 out of 711 respondents reported drunk driving in the 6 months prior to the commencement of the survey (p. 14). Within that same group of respondents, 75.3% of respondents had reported seeing police conducting RBTs in the last six-months. Additionally, 41.4% of respondents had themselves, been tested in the last six-months (Watson & Freeman, 2007, p. 14). When respondents were asked about their perceived risk of apprehension, 40%

expressed that they weren't sure what the likelihood was while 26% expressed that there was an unlikely to extremely unlikely chance of them being apprehended (Watson & Freeman, 2007, p. 14).

Where it has been established that this law and its implementation have been demonstrably successful in other democracies, a rational connection between the measures and the law's objectives can be comfortably made. In both Australia and Ireland, it has been found that random mandatory alcohol testing has worked to reduce numbers related to accidents resulting in death or injury. Although the majority of people in Australia are not certain about the likelihood of detection, 75% of people reported witnessing the law being enforced and it would be safe to infer that those who have observed the law being actively enforced are more likely to be weary of detection and will act accordingly and avoid driving impaired. There is little doubt surrounding the notion that the law would not playout in very similar ways in Canada. Mandatory alcohol screening would likely (1) save lives and reduce injury; (2) deter the public from driving under the influence of alcohol or drugs; and (3) leverage detection opportunities of impaired driving through better equipping law enforcement officers in Canadian society.

Step Three of Oakes: Minimal Impairment

The second component of the proportionality test requires the law be proven to minimally impair the individuals Charter rights. The law must be as minimally impairing on an individual's Charter rights as possible and where alternatives that are less invasive are available, the law cannot be found to be constitutional. In this instance, it must be determined whether the enforcement of random mandatory alcohol screening and the infringement whereby a heightened

threat of imprisonment is minimally impairing. *Canada (Attorney General) v. JTI-Macdonald Corp.* [2007] clarifies that Parliament is not required to implement a less effective alternative to the law (para. 137). Nevertheless, *Alberta v. Hutterian Brethren of Wilson Colony* [2009], explains that the minimal impairment test is not to ensure that the objective is met to the same degree or to the same extent as the currently legislated law, but rather that in considering the range of alternatives to the law, a "less drastic means of achieving the objective in a real and substantial manner" is not available (para. 55).

On the issue of whether the infringement is minimally impairing, the escalation of potential for being criminally charged and whereby the consequence in some instances is imprisonment, this infringement is severely impairing. Potential outcomes which range from a criminal record to 10 years in prison are in no way insignificant. It can be safely inferred that the consequences as a result of a conviction of this nature, are severe. A solid argument demonstrating the overbreadth of section 320.27 (2) can quite likely be convincingly conceived. There are two very plausible alternatives to the law that would most definitely impair civil liberties to a lesser extent while meeting the objectives of the law in a real and substantial manner.

The first being a reversion to the old law. The entirety of this thesis has practically been dedicated to the argument contending the old law was less invasive than the provisions *Bill C-46* now enables. Where reasonable grounds are reintroduced as a precondition to investigate an impaired driving violation, the public is protected from unnecessary and unwarranted state intrusion. The predeceasing law, for two reasons, had considerable impact on apprehending and reducing impaired driving incidents and therefore, were meeting the objectives of *Bill C-46* in a real and substantial manner. For one, impaired driving rates have been on a steep decline since the mid 1980's (Clermont, 2018, p. 6). This demonstrates mentionable and significant progress

in combatting the issue of impaired driving, on law enforcement's behalf. A notable decline can be observed from the year 2011 where incidents of drunk driving have been rapidly declining (Clermont, 2018, p. 6). Furthermore, police officers are totally equipped to administer breathalyser tests where they have established reasonable grounds to investigate the suspicion. Extensive training provides law enforcement with the tools and skills to identify impaired or compromised behaviour on the roads and with the right to conduct roving stops anyways, there is little need for the law to mandate breathalyzing. Moreover, the standard for establishing reasonable grounds is exceedingly low (Leamon & Lee, n.d. p. 4). It is also significant to point out that Australia for example, who has reported success in reducing impaired driving rates does not bear a Charter equivalent (Leamon & Lee, n.d. p. 4).

Additionally, inhibiting impaired driving to the greatest degree humanely possible, is not going to by any means occur immediately. It will require years of education and improvement to abet the measures society takes to achieve the greatest possible outcome even despite the new law. To believe that impaired driving will be completely wiped out at some point seems to be a markedly naïve assumption. There will always be members who oppose the law and lives will regrettably be taken by senseless acts of those who refuse to abide by the law. This is apparent in the context of any law which the C.C.C., has criminalized. It is not the state's job to transform by some miracle, the number of these offences to zero. An aid in reduction is of course endorsed by society to a point that their civil liberties are not being drastically impeded on. However, we must cope with the notion that harmful and sometimes preventable events do transpire and the odds of any of us becoming victim to someone's poor decision making is virtually the same.

A second alternative to the law which would arguably infringe on individual rights to a lesser degree, would be to instead enforce a legal limit of 50 mg of alcohol in 100mL of blood.

To accompany their random mandatory alcohol screening laws, both Australia and Ireland (the case studies discussed above) enforce a legal limit of 50 mg of alcohol in 100mL of blood (Solomon & Chamberlain, 2018, p. 22). The fact alone causes difficulties in distinguishing whether or not the reported reductions in impaired driving numbers are as a result of implementing random mandatory alcohol screening or the remarkably lower legal limit which is enforced in both states. For example, in many provinces in Canada, they already enforce a minimum BAC of 50 mg of alcohol in 100 mL of blood. The administrative minimum is not a criminal offense but mechanisms of deterrence are enforced such as a licence suspension and the towing of one's vehicle. In British Columbia, this administrative cap was said to reduce fatal accidents by 21%, injuries requiring medical attention by 8%, and ambulance dispatchment by 7.2% (Fell, 2016, para. 9). If these maximums were to be criminally enforced, there is no doubt that impaired driving numbers would to a considerable extent, decrease.

The two alternative measures which arguably have the potential to produce relatively proportionate outcomes to the one's *Bill C-46* is striving to achieve, but are significantly superior in protecting people's liberties, actively demonstrate that section 320.27 (2) is not minimally impairing on the public's rights. Where two alternatives have been recommended (the former being the least intrusive) and arguments have been supplemented to support the contention that these alternatives can still target the objectives set out by the law in a meaningful and significant manner, the impugned measure is found to be unconstitutional.

A court would not require, where a Charter infringement has been found to be unreasonable, for the Oakes Test to proceed. Oakes Test is set up in a way for which every step of the test informs whether or not the following step would have the potential to be defended. Where it has been established the law is not minimally impairing, it would be obsolete to

continue defending whether or not the benefits outweigh the harmful effects of the law since this has been determined inadvertently.

Discussion

First and foremost, a necessary disclaimer ought to be made. The evaluation conducted in this piece is not precise. The formulated argument simply sets an example whereby potential challenges could be made in reference to section 7 and section 1 of the Charter. The findings in this thesis are based on an amalgamation of information including precedence derived from jurisprudence, research findings, and informed opinions relayed by lawyers, law professors, and other affluent practioners in the field. There are hundreds of plausible arguments that can be pursued on the basis of this law. Leamon & Lee (n.d.) suggest that there are 6 offending sections as a result of *Bill C-46's* passing in the legislature, including sections 320.27 (2), 320.34, 320.14, 320.19, 320.2, and 320.21 (p. 1). And all of these sections combined potentially infringe on an array of Charter sections including 7, 8, 9, 10(a), 10(b), 11(b), and 11(d) (Leamon & Lee, n.d., p. 1). The focus of this paper was to consider specifically section 320.27 (2) in the context of section 7 of the Charter. Nevertheless, within the thesis, arguments are presented that would likely not be constituted as a violation of section 7, but rather one of the other Charter sections listed above. The point at hand, is that section 320.27 (2) is unconstitutional (disregarding Oakes) and the mandates provided by section 320.27 (2) are the impetus for the other sections being written or reformulated within the C.C.C. Where a strong defense team could prove section 7 in accordance with the principles of fundamental justice, the likelihood of Oakes being raised is slim in a section 7 context; nonetheless, possible.

Certainly, this challenge will be dissected, probed, and examined within the walls of the SCC. Born to be a landmark case, a decision surrounding the constitutionality of random mandatory alcohol screening will prove to be controversial and riveting. For those who garner an appreciation for the Charter and the role it has played in Canadian law, rationale for an eventual decision could not come soon enough. However, and maybe more importantly, for the general public, its outcome will suffice so as long as people know it was tried appropriately. Lower courts in Canada have begun to see challenges to the new law siphoning in, but it will be some time before the assumptions made within this thesis are validated or are refuted. Nonetheless, a glimpse into a potential outcome will serve us who are yearning for a decision, with some peace of mind.

Conclusion

It is paramount that where legislators exist, judges and courts exist counter to them in order to ensure the public's protection. Lawmakers are proficient in their own field of expertise and the humanness of the system allows for mistakes to happen. The courts offer checks and balances to lawmakers in order to guarantee laws align with the values entrenched in democracy. Like how lawyers and judges are typically not excellent lawmakers, lawmakers are sometimes not excellent judges. Having somewhat of a grasp on why section 320.27 (2) of the C.C.C. is potentially unconstitutional is important to ensure the public is secure from the sometimes-overbearing qualities of government. Whether directly or indirectly, every single person within Canada has a stake in the outcome of all court decisions. The way the law is written, practiced, and sometimes disputed effects each and every single one of us.

The findings in this thesis suggest that there is a real possibility that some of the adjustments to the law as prompted by *Bill C-46* will be found to be unconstitutional. Whether or not section 7 or section 1 of the Charter are raised as challenges, the practical dilemmas that arise out of the law's practice should raise red flags. Issues such as the threat of a criminal record or even more startling, the threat of imprisonment, are profound civil conundrums. Furthermore, the possibility of having almost no defense in cases where someone blows over the legal limit is alarming. Or, the fear that going to the bar for one drink might have serious implications on the way you live the rest of your life, are all serious burdens on people's civil liberties. And in the simplest of terms are all unfair consequences aimed beyond the scope of those who break the law.

Areas of future study relating to the other sections besides 320.27 (2) as introduced by *Bill C-46* and their constitutionality will be invaluable. An analysis of potential section 8 through 11 challenges will be vital areas of study. The more information accumulated and disseminated now, the better set up the SCC, lower courts, and lawyers will be for adjudicating this issue as accurately as possible. Random mandatory alcohol screening whether perceived as a legitimate practice or not is a reality of our system today. The contemporary and pressing nature of the issue which is working to wager the public's freedom, deserves both study in the field and judicial consideration.

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