BCCLA Submission on Bill C-16 (Roadside Drug Testing)

The BCCLA

The British Columbia Civil Liberties Association (BCCLA) is the oldest and most active civil liberties association in Canada. We regularly make submissions to governments, and intervene in the courts, on issues impacting civil liberties in Canada. For more information on the BCCLA, see our website at www.bccla.org. One of our key areas of concern is privacy rights. Another is due process. Roadside drug testing implicates both of these concerns, among others. Accordingly, we thank you for the opportunity to submit our position, which we think reflects that of many Canadians.

Our Position

The BCCLA opposes driving while impaired for any reason. Moreover, even in the absence of a demonstrable link between drug use and driving impairment, the BCCLA opposes the use of any potentially impairing drugs in close temporal proximity to driving. However, the provisions contained with Bill C-16 could significantly impact the liberty of Canadians, with little corresponding value added to the tools that police already have.

Police currently have a range of laws that allow them to deal with the problem of impaired driving. In British Columbia, for example, police can issue administrative suspensions that immediately remove unsafe drivers from the road. Police are trained to recognize behavioral symptoms of impairment and, ultimately, can charge a driver based on these observations. Finally, police can seek a warrant to obtain blood samples (or other bodily fluids) where reasonable and probable grounds for issuing the warrant exist. These existing mechanisms are both more effective and less costly than the scheme set forth in Bill C-16.

As more fully described below, Bill C-16 provides for the use of a non-validated procedure that significantly impacts civil liberties. Problematically, the public is provided no information as to the range of drugs that drivers are tested for, and swept aside is the important issue of whether the tests employed can demonstrate actual impairment. What is clear is that the legislative scheme set out poses significant problems related to civil liberties.

Bill C-16

The government proposes to implement a multi-stage process that would allow police to demand that motorists take part in roadside, and, ultimately, police station testing for drug impairment. This testing would include the requirement that drivers provide saliva, urine and/or blood samples for analysis.

The process outlined in Bill C-16 consists of several stages. The first stage is triggered when police suspect someone of driving while impaired, typically as a result of poor or erratic driving. Police then observe the driver and ask questions, in an attempt to determine impairment. Field sobriety tests are performed and the driver is required to take a breath test. This breath test either indicates alcohol is present, or rules alcohol out as the cause of any potential impairment.

The next step is a roadside test for the presence of drugs, involving either a saliva or urine sample. Based on the results, the driver would be taken into custody. In custody, the driver would be subjected to further testing, in the form of having a blood sample drawn. Ultimately, the driver would either be charged with driving while impaired, charged with another motor vehicle offence, or released.

The BCCLA objects to the implementation of the scheme proposed in Bill C-16. As described, the proposed legislation poses several civil liberties problems. It is unduly invasive of privacy and will lead to an increase in the number of arrests and detentions of drivers without reliable evidence that the drivers

are, in fact, impaired. DRE (Drug Recognition Expert) protocols are not infallible and, indeed, there is some evidence that the DRE examination process (including testing of bodily fluids) is susceptible to significant levels of false positive results. Given the inherent problems, more fully articulated below, that exist in the proposed legislative scheme the BCCLA believes that implementing the protocol described in Bill C-16 is a grave mistake.

Problems

The privacy problem

Drug testing is invasive of privacy. Urine tests, for example, require the driver to provide the specimen while being observed by police. This is a humiliating and often degrading experience. Blood tests are just as invasive, particularly because the proposed legislation could allow police to force an individual into providing a blood sample.

In addition, the results of the test have the potential to reveal much more than the presence of drugs in one's system. Personal medical information, such as genetic predispositions to disease and whether an individual is pregnant, for example, can be revealed by drug tests. Moreover, blood samples can reveal the DNA of the driver, and it is currently unclear just how much information can be learned from DNA. What is clear, however, is that whatever is learned is intensely personal and private.

Arrest and detention based on potentially faulty evidence gathering procedures

Bill C-16 envisions a scheme in which police could take motorists into custody for the purposes of conducting invasive tests, based solely on the results of the roadside encounter. In other words, drivers will be arrested and detained.

Any involuntary detention impacts the liberty of the citizen. It is, for many, an extremely stressful experience. It is also inconvenient. What of the driver with passengers in the car, or the driver who must miss an important appointment as a result of an accusation of drug impairment – an accusation that is not proved simply because drug testing indicates that drugs are present in one's system? As we discuss in the paragraphs that follow, the roadside determination, even by trained DREs, is not always accurate.

Bill C-16 contains a critical, but potentially faulty, assumption. The proposed legislation indicates that, in order to understand the proposed legislative scheme, one must be familiar with the protocols for drug-impaired driving investigations. According to the original consultation document in support of Bill C-16: "If conducted properly, the investigation by trained officers **will result in an accurate assessment** of the suspect's drug impairment…." (emphasis added). The assertion that testing will result in an accurate assessment is, at best, questionable but is presented as fact in the document. Indeed, it is far from certain that any drug impairment investigation, even by a trained officer, is able to accurately assess drug impairment.

The DRE process requires police officers to make determinations about impairment by borrowing from a range of scientific specialties: toxicology, psychology, pharmacology, ophthalmology, optometry, and the neurologic and physiologic sciences. It is far from certain that police officers, even after DRE training, are equipped to accurately assess drug impairment. Even the Canadian Association of Chiefs of Police in 2003 acknowledged the "complexity of demonstrating that an individual is under the influence of a drug in driving situations" (Boyd, 2003: 22). This report further states, "reliance has to be placed on the behavioural judgments of the arresting officers" (ibid: 23).

Currently, little evidence exists to suggest that the DRE protocol has been generally established as a scientifically reliable means of proving that an individual has ingested a particular class of illegal substance, which has then caused impairment. Court decisions in the Untied States reflect this lack of evidence. In the *United States v. Everett* [1997] the United States District Court in Nevada ruled that a

"DRE…cannot testify by way of scientific opinion." This sentiment was reiterated by the Supreme Court of Washington in *State v. Baity* [2000], when the Court ruled, "an officer may not testify in a fashion that casts an aura of scientific certainty to the testimony…[nor can] the DRE…testify by way of scientific opinion, that the conclusion is an established fact by reasonable scientific standards." Further, several lawsuits have been brought against the police in the United States for violating citizens' rights after a DRE incorrectly concluded that a driver was impaired[1].

In 2002 Smith *et al.* conducted a study to test whether DRE officers can render correct positive identification of drug intoxication without accessing "statements made by arresting officers, physical evidence (e.g. drugs or paraphernalia seized), and confessions" (p. 168)[2]. The study was conducted by selecting 70 cases where a driver had been determined to be under the influence of **one drug category**, have a blood alcohol content of 0.000%, and where toxicology confirmed the presence of that drug. The distribution of drug categories in the study was set to approximate the distribution of drug categories in the overall database for the State of Oregon. Written information on the direct observations of DRE officers along with the physiological and psychophysical test results were transcribed onto the forms generally used to record test results and sent to 40 officers, out of which 18 responded.

Each of the following five charts indicate the accuracy of the DRE officers in assessing the presence of the particular drug category out of the five that were utilized in the study: 1) cannabis, 2) stimulants, 3) depressants, 4) narcotic analgesics, and 5) no drug present[3].

1[1] *Foote v. Spiegel, 36 F Supp 2d 1320 (D. Utah 1999); Luzzi v. Mack, No. 95 Civ 9720, 1998 WL 150496 (SDNY 1998); Hughes v. Allen, 899 F2d 1225 (9th Circuit 1999).*

2[2] The argument for excluding such supporting evidence is, with the possible exception of the arresting officers' statements, that they are anecdotal evidence. A *scientific* endeavour should not require such evidence in order to reach a correct determination regarding one's intoxication.

3[3] Percentages may not necessarily add up to 100. This is due to rounding of the percentages for easier reading.
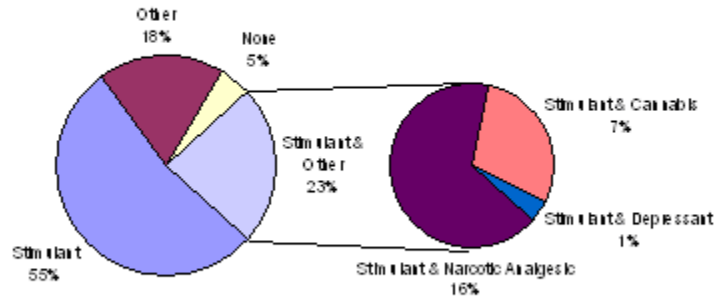
Chart 1: Identification of Cannabis
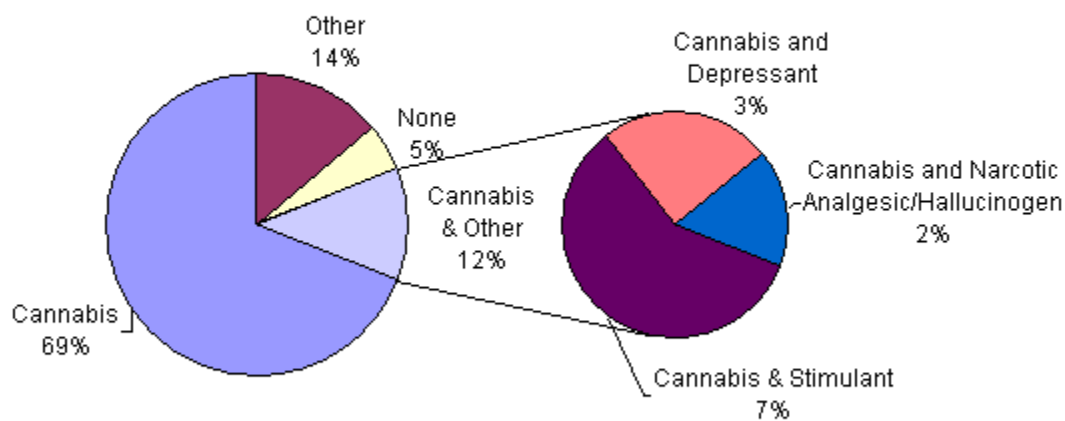
According to Smith et al., the overall accuracy for identifying cannabis was found to be 81%4[4]. DRE officers specified intoxication by a drug different than cannabis in 14% of the cases, while a further 5% indicated no intoxication.
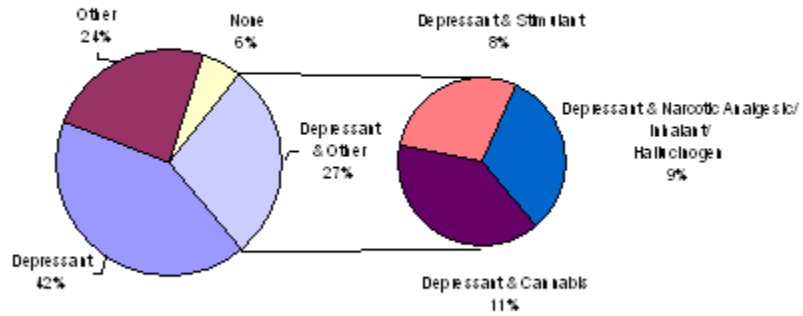

4[4] A "correct identification" in analyzing this study includes the section of each chart where the correct drug is included along with **1** incorrect substance. This is because the "IACP criteria…specifies that the officer has made a correct determination…if the officer specifies two drug categories and evidence of a drug from either…category] is confirmed by toxicology" (Smith *et al.*, 2002: 168). It causes one to wonder when 50% accuracy is considered "success.

Chart 2: Identification of Stimulants

Other 18%
None 5%
Stimulant & Cannabis 7%
Stimulant & Other 23%
Stimulant & Depressant 1%
Stimulant 55%
Stimulant & Narcotic Analgesic 16%

In relation to stimulants, the accuracy rate was found to be slightly lower, at 78%. In 18% of the identifications made in this category, officers indicated the subject was intoxicated from a drug category other than stimulants. Once again, 5% of the identifications were no intoxication.

Chart 3: Identification of Depressants

Other 24%
None 6%
Depressant & Stimulant 8%
Depressant & Narcotic Analgesic/ Inhalant/ Hallucinogen 9%
Depressant & Other 27%
Depressant 42%
Depressant & Cannabis 11%

Accurate assessment of the presence of depressants only occurred in 69% of the identifications made. In 24% of the identifications another drug category was indicated as causing impairment, while 6% indicated no drugs present.

Chart 4: Identification of Narcotic Analgesic
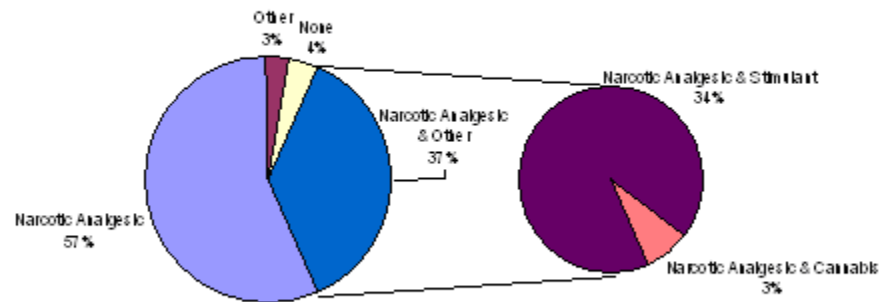
DRE officers were able to achieve the highest accuracy rate in identifying narcotic analgesics, with approximately 94% of the identifications made being correct. Thus 3% of the identifications resulted in an incorrect drug category being listed, and approximately 4% were labeled as having no drugs present.

Chart 5: Identification of Non-Impairment

Overall, 66% of DRE determinations as to 'no drug present' were found to have been assessed correctly; however, 34% of DRE judgments in this category assessed individuals as impaired when toxicology had not indicated the presence of drugs. We note that, in attempting to explain this failure rate, the researchers suggest that "it must also be considered that the suspects in this group might have been abnormal in some way to justify initially being stopped, arrested, and subjected to a DRE evaluation" (Smith et al. 2002: 171). Clearly, then, DRE evaluations are not based solely on scientifically proven procedures based on physiological data, but also incorporate moral or other judgment as to 'abnormality' – a clearly unacceptable standard in light of individuals' due process rights.

It can clearly be seen when looking at this data that there is a significant failure rate on the part of the DRE officers to 1) correctly identify the category of drugs within the subjects system—with an average error rate of 21%, and 2) to vindicate those who have no drugs present within their system—with a false positive rate of 34% of identifications where no drug was present. Clearly, one must conclude that the DRE protocol, as it currently stands, fails to satisfy the required level of accuracy sufficient to justify its use. The BCCLA does not oppose training officers to detect signs of impairment. Indeed, we support

removing impaired drivers from the road—whatever the cause of impairment5[5]. What we object to is legislation that authorizes police to detain citizens and require a sample of bodily fluids on the basis of DRE assessments that, to this point, lack sufficient indicia of accuracy.

A further important point: even if the non-bodily-fluid-testing portion of the DRE examination is able to provide a correlation to drug use (ie, the DRE's determination of drug impairment is supported by the presence of drugs in the suspect's system), the key question of impairment is not answered. In other words, that a DRE concludes that a driver has used cannabis, and later drug testing reveals cannabis in that driver's system, is not evidence that the driver was **impaired by** cannabis **at the time** he or she was driving.

Absent a reliable scientific link between drug use and actual impairment, invasive searches of one's bodily fluids (and the accompanying detention necessary to effectuate the tests) are inappropriate, particularly given that the police already have the ability to remove drivers from the road based on their actual driving activity. Ultimately, the only real basis for judging impairment from drugs is behavioral. The mere presence of drugs in one's system does not equate to impairment. At present, the indicia of impairment rests on behaviors; was the driver driving badly, do they demonstrate a lack of physical coordination, are they mentally cognizant of their surroundings, etc. Police, now and in the past, use their observational powers to assess the question of whether someone should be on the road and can (at least in BC, and likely in most jurisdictions) remove unsafe drivers immediately. The result of a drug test adds negligible value, at best, to the determination of impairment. Indeed, there is a real possibility that drug testing adds a veneer of scientific credibility to an officer's determination of impairment when, in fact, the test actually has little relevance to the ultimate question.

Conclusion

The BCCLA opposes driving while impaired for any reason. However, the scheme proposed within Bill C-16 contains provisions that could significantly impact the liberty of Canadians. Bill C-16 contains a legislative scheme that is extremely intrusive of privacy and will almost certainly result in the arrest and detention of drivers that have done nothing wrong. Given that, the onus should be on proponents of roadside drug testing to prove that it is accurate, relevant and that the potential for abuse is minimized. This case has not been made. The DRE protocol is susceptible to false positives at each step. Testing of bodily fluids does not provide evidence of when the drugs were used. Moreover, even if the process were 100% accurate at determining whether a driver had used recently used drugs, the proposed scheme fails to answer the critical question of whether the drug use actually caused impairment of the driver's ability to operate a motor vehicle. In other words, drivers will be subject to arrest, detention and forcible testing of bodily fluids but the ultimate question of impairment will not be proved by these procedures. For these reasons, the BCCLA strongly opposes the legislative scheme set forth in Bill C-16.

We further note that police already have the power to remove people believed to represent a danger to themselves and others from the road under provincial law. Thus, we are not convinced that enacting further legislation, particularly a scheme that contains faulty assumptions that might lead to arrest and detention of innocent people, is either warranted or necessary.

Finally, because of the very personal nature of the information obtainable from bodily fluids, the legislation must mandate that the samples be destroyed after their utility as evidence of driving while impaired is exhausted. The BCCLA recommends that, at a minimum, any legislation enacted make it an offence to retain bodily fluid samples after the resolution of any charge arising from the incident that gave rise to obtaining the sample.

5[5] For example, in BC the police can utilize provisions within the *Motor Vehicle Act* to temporarily remove drivers from the road by issuing a 24-hour ban, irrespective of whether they can substantiate drug and/or alcohol impairment sufficiently to obtain a conviction.

References

Boyd, Michael. (2003). *Drug Recognition Expert: Report on the National Training Course.* Prepared for the Canadian Association of Chiefs of Police.

Smith, John A., Charles E. Hayes, Robert L. Yolton, Dale A. Rutledge, and Karl Citek. (2002). "Drug Recognition Expert Evaluations Made Using Limited Data". *Forensic ScienceInternational.* 130: 167-173.

State v. Baity. [2000] 40 Wn.2d 1; P.2d 1151; 2000 Wash. LEXIS 81.

United States v. Everett. [1997] 972 F. Supp. 1313; 1997 U.S. Dist. LEXIS 17223.

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