

Lawyer to challenge breathalyser law

Tony Serka says he will launch a Charter challenge to the offence of refusing to blow into a roadside impaired screening device, saying the penalty is cruel and unusual punishment.

NEAL HALL
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A Vancouver lawyer plans to launch a Charter challenge of the criminal offence of refusing to blow into a roadside drunk-driving screening device, arguing the penalty is cruel and unusual punishment.

Tony Serka said Tuesday he plans to argue the case in Vancouver provincial court on March 27 involving a man who thought he had a right to consult a lawyer before complying

with a police demand for a breath sample.

"I can't think of another charge in the whole Criminal Code where you cannot consult a lawyer for advice," Serka said. "It's ridiculous.

"The punishment is not proportionate to the alleged crime."

He said he will challenge the charge under Section 12 and Section 7 of the Charter of Rights and Freedoms.

He declined to provide the

name of the accused, saying his client does not want public attention.

The man was arrested and charged after being stopped in a roadblock last July 9.

The Supreme Court of Canada has ruled a police demand for a breath sample using a roadside screening device to check for impaired drivers is a reasonable breach of Charter rights, so police do not have to advise a suspect of his right to contact a lawyer without delay.

The device only shows a pass/fail and the results cannot be used as evidence. But refusing to blow results in a criminal charge.

"A person who has had one beer and refuses to blow can be charged and face licence suspension, a fine and jail," Serka noted.

If a person fails the roadside screening test, an officer can take the impaired driving suspect to the police station for a formal breathalyser test.

What was said

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Before taking the breathalyser test, however, suspects must be warned by police they have the right to contact a lawyer for advice.

Usually a roadside test is ad-

ministered before an arrest. But in a recent Vancouver police case that ended in an acquittal for failing to blow, a judge ruled that police violated the Charter right of Giorgio Diruggiero to contact a lawyer before he refused to blow.

A Vancouver police officer detected a strong odour of alcohol before he arrested last March 22 and told him he had the right to contact a lawyer.

Diruggiero acknowledged he understood, but did not indicate if he wanted a lawyer or not.

He then refused to blow, resulting in the charge.

Michael Catliff found it was impermissible to extract incriminating evidence against Diruggiero until he had contacted a lawyer.

The judge allowed Diruggiero's appeal of his conviction in provincial court, set aside the previous verdict and entered an acquittal.