CHAPTER THIRTEEN: MOTOR VEHICLE LAW

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I. INTRODUCTION

When an individual is charged with a motor vehicle offence, it is important to determine whether the charge is under provincial or federal (criminal) legislation as the procedure and potential penalties vary. In appropriate circumstances, the Crown may stay the proceedings under federal (criminal) legislation if the accused is prepared to plead guilty to a corresponding or similar charge under provincial legislation. This is often in the accused's best interest if the Crown has a strong case as no criminal record will result upon conviction of a provincial offence.

A. LSLAP's Role

LSLAP does not provide representation for provincial offences and will seldom provide representation in criminal motor vehicle offences. LSLAP will not provide representation for indictable offences or offences involving drugs or alcohol. If the offence is serious (i.e. those listed below in **Sections VII: Offences After an Accident**, **VIII: Negligent, Dangerous or Careless Driving Offences**, **IX: Offences Related to Drugs and Alcohol**, or **X: Driving While Disqualified**), the client should be referred to a lawyer. The Legal Services Society (Legal Aid) may represent the accused if there is a risk of imprisonment upon conviction. An accused may also receive Legal Aid representation if he or she faces a loss of livelihood upon conviction, has a mental or physical disability that is a barrier to self-representation, or faces immigration complications that may result in deportation.

B. Governing Legislation, Regulations, and Resources

1. Provincial Driving Offences

The important provincial legislation governing motor vehicle offences are:

- *Motor Vehicle Act*, RSBC l996, c 318 [MVA];
- *Motor Vehicle Act Regulations*, BC Reg 26/58 [MVAR];
- *Offence Act*, RSBC 1996, c 338 [OA]; and
- *Violation Ticket Administration and Fines Regulation*, BC Reg 89/97 [VTAFR].

The MVA defines provincial motor vehicle offences while the OA explains the general procedure followed for all provincial offences. The MVAR and VTAFR both detail penalties for specific offences.

Motor vehicle law intersects with the *Insurance (Vehicle) Act*, RSBC 1996, c 231 and *Insurance (Vehicle) Regulation*, BC Reg 447/83. For more information, see **Chapter 12: Automobile Insurance**.

2. Federal (Criminal) Driving Offences

The principal source for criminal offences is the *Criminal Code*, RSC 1985, c C-46, as amended. Further information on criminal offences and procedures can be found in **Chapter 1: Criminal Law**.

C. Main Features

- Under MVA s 25(11), requirements, conditions, or restrictions on a driver's license that the Lieutenant Governor in Council prescribes apply even if the driver's license is issued before the regulation prescribing the requirements, conditions, or restrictions comes into force.

- An individual suspected of driving with a blood alcohol level over .08 or who refuses to provide a breath or blood sample will receive a 90-day prohibition from driving (MVA ss 94.1 and 94.2).

- Even if a driver's blood alcohol concentration is not over .08, the driver may still receive a 24-hour driving prohibition if it is over .05 (MVA s 215).

- Section 83.1 of the MVA introduces liability for the owner of a vehicle who has been given a violation ticket via photo radar.

- The Supreme Court of Canada has ruled that the combination of ss 99 and 102 of the MVA (which create an absolute liability offence for driving while the driver's license has been automatically suspended) is constitutional since there is little possibility of incarceration: *R v Pontes*, [1995] 3 SCR 44, 13 MVR (3d) 145.

- Drivers are prohibited from using electronic devices while driving under Part 3.1 of the MVA.

II. PROCEDURE AND PENALTIES

A. Provincial Driving Offences

1. Authority of Peace Officers

According to the Court in *R v Ladouceur*, [1990] 1 SCR 1257, 56 CCC (3d) 22, random checks by the police for motor vehicle fitness, possession of valid driver's license and proper insurance, as well as sobriety of driver violate s 9 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. However, these checks are considered reasonable limits under s 1 of the *Charter* so long as they are "truly random routine checks": *R v McGlashen*, [2004] OJ No 468, 115 CRR (2d) 359. The *Ladouceur* decision was affirmed in *R v Orbanski*, 2005 SCC 37, [2005] 2 SCR 3.

Pursuant to MVA s 79 a peace officer may arrest without warrant any person:

a) whom the officer finds driving a motor vehicle, and who the officer or constable has reasonable and probable grounds to believe was driving in contravention of MVA ss 95 or 102 (driving while prohibited)(s 79(a)); or

b) whom the officer has reasonable and probable grounds to believe is not insured or who is driving without a valid and subsisting motor vehicle liability insurance card or financial responsibility card (s 79(b)); or

c) whom the officer has reasonable and probable cause to believe has contravened MVA s 68 (leaving the scene of an accident) (s 70(c))

and may detain the person until he or she can be brought before a justice.

2. Procedure

NOTE: MVA s 124 gives municipalities authority to create motor vehicle bylaws on matters such as parking and to enforce them by fine or imprisonment under s 124(1)(u). Municipalities cannot use this authority with respect to speeding (s 124(2)). An individual charged with a bylaw offence will receive a bylaw infraction notice or a Municipal Ticket Information. While the following generally applies to these offences, special procedures may be imposed. **Follow the procedures outlined on the bylaw infraction notice or Municipal Ticket Information.**

An individual charged with a provincial offence will likely receive a violation ticket issued under s 14 of the OA. However, under s 11 of the OA, an Information can also be laid against the accused. This is for serious offences such as MVA ss 95 and 102 (driving while prohibited). Court attendance is compulsory when an Information is laid, but, in the case of a violation ticket, court attendance is only required if a violation ticket is disputed.

A special procedure for adjudicating violation tickets is set out in ss 14-18 of the OA. To dispute a violation ticket, one must either appear in person at any Motor License Office, Government Agent's Office, or Provincial Court Registry with a copy of the Violation Ticket or mail a copy of the Violation Ticket to: Ticket Dispute Processing, Bag #3510, Victoria, BC, V8W 3P7. The notice of dispute must contain the address of the accused and sufficient information to identify the violation ticket and the alleged contravention or fine disputed (OA s 15(3)).

A person has 30 days to make his or her intention to dispute known (OA s 15(1)). **Read the reverse side of violation tickets as these regulations and procedures may change from time to time.** If a client does not dispute the violation ticket within 30 days, he or she is deemed to have pled guilty under OA s 16. A person still has 14 days to appear before a justice, with an affidavit, to state why it was not his or her fault that the deadline was missed (OA s 16(2)).

A violation ticket dispute is heard in Provincial Court by a judge or justice of the peace who, after hearing the evidence, determines whether or not the violation took place. If an accused misses the Provincial Court hearing, he or she has 30 days to appear before a justice, with an affidavit, to explain why he or she missed the hearing (OA s 15(9.1)).

In challenging a ticket, it is important to:

- Appear at the appointed time. There is always the possibility the peace officer will not appear and the case will be dismissed due to lack of evidence.

- Read the relevant sections of the MVA to determine the elements of the offence and, if the Crown fails to lead evidence on any of these elements, motion for dismissal at the conclusion of the Crown's presentation. The evidence must include identification of the alleged offender by name and address as well as the time, date, and location of the offence.

- Pursuant to provisions in the OA, the Crown can easily amend most mistakes on Violation Tickets.

- If the offender can show economic hardship, the judge has the power to reduce the fine. Section 88 of the OA states that the fine can be reduced based on the offender's means and ability to pay, subject to minimum fines specified in the MVA.

- Consider whether the offence is strict or absolute liability. If the offence is strict liability, consider whether the accused may have the defence of due diligence. Generally, this

means that if the accused establishes, on a balance of probabilities, that he or she was not negligent (in roughly the same sense as the civil standard of negligence), the accused is entitled to an acquittal.

In some instances, Legal Aid is available to people charged with an offence under the MVA for which their livelihood would be in jeopardy upon conviction.

The decision of a Provincial Court judge or justice of the peace may be appealed to the Supreme Court of BC. A record of the finding is sent to the Superintendent of Motor Vehicles (hereinafter, the "Superintendent"). Any discretionary determination made by the Superintendent may, in certain circumstances, be subject to judicial review.

3. Penalties

To determine the penalties for a motor vehicle offence, read the relevant sections in the MVA describing the offence as some penalties are prescribed there. For some offences, the MVAR imposes penalty points and the VTAFR levies fines.

a) Penalty Points

Penalty points are imposed in accordance with the schedule set out in Division 28 of the MVAR. It is important to note that conviction for *Criminal Code* offences also results in the imposition of penalty points. See **Appendix A** for examples of offences and their corresponding penalty points.

The number of penalty points will be taken into account under MVA s 93 when the Superintendent suspends a license. **The Superintendent may suspend the license of a driver who accumulates 10 or more points in any three year period.** Alternatively, the Superintendent may require the person to take a defensive driving course or appear at a hearing to explain why his or her license should not be suspended.

b) Fines

The VTAFR prescribes fines for MVA offences. **Appendix A** lists some examples of fines.

c) License Suspension or Cancellation and Driving Prohibition

(1) Roadside Suspension or Prohibition Issued by a Peace Officer

These are explained in further detail in **Section IX: Offences Related to Drugs and Alcohol**. Police officers may issue suspensions of different lengths:

- If a person is served with a notice of driving prohibition under MVA s 215.41 in circumstances where an approved screening device registers a warn, the person is prohibited from driving for
    a) 3 days, in case of first prohibition,
    b) 7 days in case of second prohibition, or
    c) 30 days in case of subsequent prohibitions. (MVA s 215.43(1))

- A person served with a notice of driving prohibition under s 215.41 is prohibited from driving for 90 days in circumstances where
    a) An approved screening device registers a fail, or
    b) The person refuses or fails to comply with a demand as described in s 215.41(4) (MVA s 215.43(2.1))

(2) By Order of a Court

A court may, under MVA s 98(2), suspend a driver's license for a definite period of time for any conviction under the MVA or *Criminal Code* relating to the driving or operation of a motor vehicle. This power extends to out-of-province driver's licenses.

The judge should consider the driving record and the facts of each specific case. Conviction includes the possibility of an absolute or conditional discharge under MVA s 98(1). This section does not apply to an individual convicted of a vicarious liability offence (MVA s 98(3)).

(3) By Order of the Superintendent

MVA s 90(1) states that the Superintendent may suspend a license and number plates if there is:

- a failure to obtain automobile liability insurance;
- indebtedness to ICBC for reimbursement of money paid in respect of a claim; or
- indebtedness to the government for failure to pay fines.

Failure to pay a judgment in an action for damages involving bodily injury, death of another person, or damage to property in excess of $400 resulting from the use of a motor vehicle anywhere in Canada or the United States within 30 days may lead to a driving prohibition (MVA s 91(1)).

Failure to appear for or to pass a driver's examination may lead to a license being suspended or cancelled (MVA s 92).

The Superintendent has the discretion to prohibit a person from driving if it he or she considers it to be in the public interest and the person failed to comply with the MVA, the MVAR, or if the Superintendent considers the person's driving record to be "unsatisfactory" (MVA s 93(1)). This discretionary power may be exercised without a hearing. In addition, the Superintendent is given discretion in determining which evidence he or she will consider in making the decision. A suspension cannot be quashed solely on the basis that the Superintendent did not consider certain relevant evidence (MVA s 93(3)). The MVA appears to permit the Superintendent to limit the period during which a license is suspended to certain times of the day or days of the week (MVA s 25(12)(a)). An appeal of the suspension or cancellation to the Supreme Court must occur within 30 days (MVA s 94(1)).

(4) Automatic Prohibition

A driver convicted of a *Criminal Code* motor vehicle offence is automatically prohibited from driving for a period of one year (MVA s 99). The automatic prohibition also applies to some offences under the MVA, including:

a) s 95: driving while prohibited by order of peace officer or Superintendent;

b) s 102: driving while prohibited by operation of law;

c) s 224: impaired driving; or

d) s 226(1): refusing to give a blood sample.

Under MVA s 100(3), an individual who refuses to stop for a police officer will receive a two-year prohibition from driving if he or she is also convicted of one of the following *Criminal Code* offences:

a) s 220: criminal negligence causing death;

b) s 221: criminal negligence causing bodily injury;

c) s 236: manslaughter; or

d) s 249(1)(a), (3) or (4): dangerous operation of a motor vehicle.

d) Impoundment of a Motor Vehicle

Drivers risk having their motor vehicles impounded when:

(1) Driving Without a License

Drivers who are not exempt from holding a license risk having their vehicle impounded if:

a) the driver has not received a license because:

- the driver is in debt to ICBC for reimbursement of money paid in respect of a claim (MVA s 26(1)(b));

- the driver has not paid a fine owing due to a *Criminal Code* motor vehicle offence (MVA s 26(1)(c)(i)) or MVA offence (MVA s 26(1)(c)(ii)); or

b) the driver's license has been cancelled:

- for failure to pay a *Criminal Code* or MVA fine (MVA s 27(3));

- for current prohibition or suspension under the MVA, *Youth Justice Act*, SBC 2003, c 85 [YJA], *Youth Criminal Justice Act*, SC 2002, c 1, or *Criminal Code* (MVA 60(1)(c)); or

c) if he or she has been convicted of driving without a license since his or her last driver's license expired or was cancelled.

(2) Impoundment for Racing

If a peace officer has reasonable and probable grounds to believe that a person has operated a motor vehicle on a highway in a race and the peace officer intends to charge the person who operated the motor vehicle with a serious offence, the peace officer may cause the motor vehicle to be taken to and impounded for 48 hours at a place directed by the peace officer (MVA s 242(1)).

(3) Alcohol or Drug Induced Impairment

If a peace officer serves a person with a notice of a 3-day or 7-day driving prohibition under MVA s 215.41(3.1) and believes that impoundment of the vehicle that the person was operating at the time the notice was served is necessary to prevent the person from driving before the prohibition expires, the peace officer may cause the motor vehicle to be taken to and impounded at a place directed by the peace officer.

If a peace officer serves a person with a notice of a 30-day or 90-day driving prohibition under s 215.41(3.1), the peace officer must cause the motor vehicle that the person was operating at the time the notice was served to be taken and impounded at a place directed by the peace officer. (MVA s 215.46)

A peace officer may, at any time or place on a highway or industrial road if the peace officer has reasonable and probable grounds to believe that a driver's ability to drive a motor vehicle is affected by alcohol or drug and impoundment is necessary to prevent the driver from driving or operating the motor vehicle before the prohibition expires, immediately cause the motor vehicle that the driver was operating or of which the driver had care or control to be taken to a place directed by the peace officer and impounded there for a period of 24 hours. (MVA s 215.4)

See **Section IX: Offences Related to Drugs and Alcohol** below for more information.

e) Prison

Read the relevant sections of the MVA to determine if there is the possibility of imprisonment for a particular offence. The OA limits the likelihood of incarceration as s 6 states that there should be no imprisonment for absolute liability offences and s 82(1) states that there should be no imprisonment for non-payment of fines.

f) Breach of Insurance Conditions

Pursuant to s 55(8) of the *Insurance (Vehicle) Regulation*, offences under MVA ss 95 and 102 (driving while prohibited), s 224 (driving with a blood alcohol level over .08), and s 226 (refusal to provide a blood sample) are considered a breach of certain insurance conditions. It is also a breach of these conditions if alcohol or drugs have rendered the driver incapable of proper control of the vehicle.

B. Federal (Criminal) Driving Offences

1. Authority of Peace Officers

Pursuant to s 495(1) of the *Criminal Code*, a peace officer may arrest without warrant:

a) a person who has committed an indictable offence or who, on reasonable grounds, the peace officer believes has committed or is about to commit an indictable offence;

b) a person who the peace officer finds committing a criminal offence; or

c) a person of whom the peace officer has reasonable grounds to believe that a warrant of arrest or committal is in force.

Limitations are set out in s 495(2), allowing the peace officer to issue an appearance notice (s 496). An arrest is more likely when the offence involves impairment by alcohol or drugs as the peace officer may, acting under the authority of s 495(2), arrest if he or she forms the reasonable belief that it is necessary to prevent "the continuation or repetition of the offence or the commission of another offence".

In *R v Labine*, (1987), 49 MVR 24 (BC Co Ct), the Court held that the policy of the police officer to arrest all impaired driving suspects regardless of rights afforded to them by the *Criminal Code* offends the *Charter*. It specifically offends s 9 which protects against arbitrary detention. The police cannot deliberately adopt a policy to deprive the accused of the right not to be arbitrarily detained notwithstanding that the officer might be acting in the execution of their duties under *Criminal Code* s 495(3). Although the defence in *Labine* is still good law, its applicability has been greatly limited. The Court in *R v Faulkner*, (1988), 9 MVR (2d) 137 (BCCA) states that unlawful arrests are not necessarily arbitrary.

2. Procedure

Consult **Chapter 1: Criminal Law** for more information on LSLAP criminal procedure.

It is in the client's best interest to retain qualified legal counsel due to the potential for a criminal record and a severe penalty that may include incarceration. Complicated issues may also arise regarding insurance coverage. The Legal Services Society (Legal Aid) may represent an accused charged with an indictable offence or a summary conviction offence where there is a likelihood of imprisonment upon conviction. An accused who does not face the risk of imprisonment may receive legal representation if he or she faces a loss of livelihood upon conviction, has a mental or physical disability that is a barrier to self-representation, or faces immigration complications that may result in deportation. In all cases, the clinician should discuss the matter with the Supervising Lawyer prior to agreeing to act for the client or going on record as counsel.

LSLAP will usually **only** represent clients for *Criminal Code* offences where:

a) the client cannot afford a lawyer;

b) the client has been turned down by Legal Aid;

c) the offence does not involve drugs or alcohol;

d) in the case of a hybrid offence, the Crown indicates it intends to proceed summarily or where the offence is purely a summary conviction offence; and

e) in the opinion of the Supervising Lawyer, the possibility of imprisonment is not significant.

3. Penalties

a) Fines or Imprisonment

To determine possible penalties, it is usually necessary to find out if the Crown is proceeding summarily or by way of indictment. The relevant offence sections in the *Criminal Code* outline the range of possible punishments.

b) Penalty Points

The MVAR prescribes penalty points that are attached to specific motor vehicle offences. See **Appendix A: Examples of Penalty Points and Fines.**

c) Prohibition from Driving

An individual can be prohibited from driving under *Criminal Code* s 259. In addition, MVA s 99 imposes a one-year driving prohibition following conviction for a *Criminal Code* motor vehicle related offence.

d) Impoundment of a Motor Vehicle

Please see **Section II.A.3(d)** for impoundment with respect to provincial penalties.

e) Breach of Insurance Conditions

Pursuant to s 55(8) of the *Insurance (Vehicle) Regulation*, most *Criminal Code* motor vehicle offences are a breach of certain insurance conditions. It is also a breach of these conditions if alcohol or drugs have rendered the driver incapable of proper control of the vehicle. *Criminal Code* offences that breach insurance conditions are:

- s 220: criminal negligence causing death;
- s 221: criminal negligence causing bodily injury;
- s 249: dangerous operation;
- s 252: leaving the scene of an accident;

- s 253(a): driving with a blood alcohol level over .08;
- s 253(b): driving while impaired;
- ss 255(2) or (3): causing bodily harm or death while impaired;
- s 259(4): driving while disqualified; and
- s 254(5): refusing to provide a breath/blood sample.

If a conviction results from any of these offences, it may render the driver's or owner's insurance policy void and ICBC may legitimately deny any related claims (*Insurance (Vehicle) Regulation* s 55(9)).

III. LIMITATION PERIODS

A. Provincial Offences

Information must be laid within **12 months** from the date the alleged offence took place (MVA s 78).

B. Federal (Criminal) Offences

Section 786(2) of the *Criminal Code* states that, with respect to summary offences, "[n]o proceedings shall be instituted more than **six months** after the time when the subject-matter of the proceedings arose". In contrast, **there is no limitation period for indictable offences**.

IV. VICARIOUS LIABILITY FOR PROVINCIAL OFFENCES

A. General

Vicarious liability of a motor vehicle owner, lessor, or lessee is governed by MVA ss 83-86:

- An "owner" includes a person in possession of a motor vehicle under a contract by which he or she may become its owner on full compliance with the contract (s 83(1)).

- An "owner" is **not** a seller of vehicles under contracts of conditional sale nor a true lessee.

- A "lessor" includes a person who, under an agreement in writing and in the ordinary course of the person's business, leases or rents a motor vehicle to another person for any period of time or an assignee of the lease.

- A "lessee" is a person who leases or rents a motor vehicle from a lessor for any period of time.

In *Yeung v Au*, 2006 BCCA 217, 269 DLR (4th) 727, the Court of Appeal decided that a vehicle leased with an option to purchase is not a vehicle that "has been sold" under MVA s 86(3) and that unless and until the lessee should exercise the option to purchase, title remains in the lessor. The Court concluded that the lessor may be vicariously liable pursuant to s 86(1). The rule in *Yeung* has now been codified in MVA s 86(1.2).

B. For Damages

Although the driver of a motor vehicle is primarily liable for damage caused by that motor vehicle, under MVA s 86, the owner (or lessor or lessee) will also be vicariously liable for damages caused by that motor vehicle if the driver had the owner's express or implied consent to drive. If the driver lives with and is a member of the owner's (or lessee's) family, the driver is deemed to have the implied consent of the owner (or lessee).

NOTE: It has been argued that the vicarious liability provisions of the MVA create a contractual master-servant relationship between owner and driver, an implied term of which is to drive with reasonable care and to indemnify for losses arising from any breach. However, the courts have held that this does not give an owner a right of indemnity (compensation) against a negligent driver who drives with the owner's consent: *Labentsoff v Smith,* [1969] BCJ No 455, 71 WWR 304 (BC Co Ct). The owner and driver are held to be joint tortfeasors.

C. For Offences

Pursuant to MVA ss 83 and 88, the owner of a motor vehicle is liable for any violation of the MVA or MVAR unless he or she can prove that:

a) he or she did not entrust the motor vehicle to the person in possession or exercised reasonable care and diligence when doing so (MVA s 83(3));

b) although the registered owner, he or she is not the actual owner (MVA s 83(5)(b)); or

c) the person committing the offence was not the registered owner's employee, servant, agent or worker (MVA s 88(3)).

Under MVA s 83(4), if an owner is liable for an offence committed by the driver, a fine of not more than $2,000 may be imposed in place of the fine or term of imprisonment specified in the enactment.

Under s 83(7), no owner is liable if the driver was convicted under the MVA for:

a) driving without a license or without the appropriate class of license (s 24(1));

b) driving while prohibited by order of peace officer or Superintendent (s 95);

c) driving while prohibited by operation of law (s 102);

d) impaired driving (s 224); or

e) refusing to give a blood sample (s 226(1)).

Generally, where the driver of a motor vehicle has been convicted of an offence, financial liability rests on him and further relief cannot be sought against the owner of the vehicle.

D. Stolen Vehicles

If a motor vehicle is stolen, both ICBC and the police should be notified immediately. However, if the owner suspects or knows the identity of the person who allegedly stole the vehicle, the police may be reluctant to pursue the matter. The owner should insist that the matter be investigated.

V. PROVINCIAL VEHICLE STANDARDS

A. Equipment Standards in General

The general rule is that a "person must not drive or operate a motor vehicle or trailer on a highway or rent a motor vehicle or trailer unless it is equipped in all respects in compliance with this Act and of the regulations" (MVA s 219(1)). Section 219(2) permits a peace officer to require the inspection of a registered owner's motor vehicle and motor vehicles at a rental firm.

Under MVAR s 25.30, where a police officer has reasonable and probable grounds to believe that a vehicle is unsafe for use on a highway, regardless of whether or not the vehicle actually meets the standards prescribed under the MVA, the officer may:

1. order the vehicle removed from the highway until repairs as ordered by the officer are completed or the peace officer revokes the order; and/or

2. order the surrender of the vehicle license and/or number plates.

B. Seat Belt Assembly

Section 220 of the MVA requires that any motor vehicle manufactured after December 1, 1963 must be equipped with at least two front seat belt assemblies before it is sold or operated.

Section 220(4) requires that when the motor vehicle is operated, these assemblies must be properly fastened except as per s 220(5):

1. when driving in reverse;

2. in the case of a person with a certificate signed by a medical practitioner excusing that person from wearing the seat belt (s 220(5) outlines the criteria); or

3. in the case of a person engaged in work which requires frequent alighting and in which the maximum vehicle speed is 40 km per hour.

Courts have upheld the rules enforcing mandatory seat belt use as they are held not to be an infringement of an individual's *Charter* rights. The provisions are integral to the broad legislative scheme promoting highway safety and minimizing the overall human and economic cost of accidents. The alleged infringement of a person's right to free choice is so insignificant that it cannot be considered a measurable breach of *Charter* rights: *R v Kennedy*, [1987] BCJ No 2028, 18 BCLR (2d) 321 (CA).

C. Air Pollution Controls

Section 49(1) of the MVA empowers the Lieutenant Governor in Council to make regulations respecting the control of emissions from motor vehicles. These are set out in Division 29 of the MVAR.

Under s 50(1) of the MVA, the Superintendent has established "AirCare" as the certification program requiring compliance with motor vehicle standards set out in MVA s 49(1) and the MVAR. Under MVA s 48, the Superintendent may refuse to issue a license for a motor vehicle that has not been certified under s 50 within 12 months prior to the application of license renewal and which is not exempt from this requirement.

Under MVA s 50(3), the Superintendent may certify a motor vehicle even though the motor vehicle does not fully comply with the Regulations under MVA s 49 (i.e. fails AirCare), as long as the Superintendent is satisfied that the owner of the motor vehicle has made and will make all reasonable efforts to bring the motor vehicle into compliance and undue hardship would result to the owner if the motor vehicle is not certified under this section.

It is an offence to operate a motor vehicle that fails to meet the standards. The penalty can be a fine ranging from $50 to $500 (MVA s 47(3)).

VI. PROVINCIAL REQUIREMENTS

A. Stopping for a Peace Officer

It is an offence for a person driving or in charge of a motor vehicle on a highway to refuse or fail to stop when signalled or asked by a uniformed peace officer (MVA s 73(1)). If asked, the driver must:

a) provide his or her name and address as well as the name and address of the owner of the vehicle (MVA s 73(2));

b) produce or exhibit the motor vehicle license plate (MVA s 71); and

c) produce his or her driver's license and the motor vehicle liability insurance card or financial responsibility card (MVA s 33(1)).

Under MVA s 70(1)(b), it is an offence to refuse or fail to produce a driver's license, permit, certificate, or motor vehicle liability insurance card when asked by a peace officer or constable.

B. Driver's Licenses

It is an offence for an individual to drive or operate a motor vehicle without a valid and subsisting driver's license (MVA s 24(1)) or to drive or operate a motor vehicle of a category other than a category designated under the individual's license. The license may be subject to any restriction the Superintendent deems necessary for safety reasons (MVA s 25(12)). It is an offence to violate these restrictions (MVA s 25(15)). Failure to satisfy an examiner of competence to drive safely will lead to the suspension or cancellation of the driver's license by the Superintendent (MVA s 92).

If a driver's license is lost, a duplicate will be issued. The original, if found, must be surrendered (MVA s 33(3)). A driver must produce his or her license when so asked by a peace officer (MVA s 33). If a driver has a valid license, but is unable to produce it when asked, that person will receive two fines under Schedule 3 of the VTAFR:

a) failure to produce a driver's license – $81 (MVA s 33(1)); and

b) driving without a valid license – $276 (MVA s 24(1)).

The fine for driving without a valid license will be dropped if the driver proves he or she had a valid license at that time.

Under the MVA, it is an offence to make a false statement when applying for or renewing a driver's license (s 69(1)(a)), to give number plates to another person (s 69(1)(b)), or to give your driver's license to another person (s 69(1)(c)). Under MVA s 70(1)(a), it is an offence to use another's license or a fictitious or invalid driver's license. Under s 70(2), any person who commits an offence under s 70(1)(a) is liable for a fine between $100 and $2,000 and/or imprisonment for a period between seven days and six months.

C. Certificate of Insurance

Section 24(3)(a) of the MVA requires that all drivers be insured. The penalty is a fine up to $250 and/or up to three months incarceration (s 24(5)(a)). Section 24(3)(b) states that the motor vehicle must be insured. Failure to comply will result in a fine between $300 and $2,000 and/or imprisonment between seven days and six months (s 24(5)(b)). Furthermore, a driver must produce a valid certificate of insurance when asked by a peace officer (s 33). The penalty for failing to produce a valid insurance certificate is $81 (MVA s 33(1)).

It is an offence to make a false statement when applying for insurance (MVA s 69(1)(a)(iii)), to lend your certificate (s 69(1)(c)), or to use another's certificate or an invalid or fictitious certificate (s 70(1)(a)). Under MVA s 70(2), you are liable to a fine between $100 and $2,000 and/or imprisonment for a period between seven days and six months for a violation of s 70(1)(a).

MVA s 24(6) also creates offences regarding insurance. It is an offence to show a peace officer or the Superintendent:

a) a motor vehicle liability insurance card or a financial responsibility card which purports to show that there is a policy of insurance in force when there is not;

b) a financial responsibility card purporting to show that a person is, at that time, maintaining in effect proof of financial responsibility when he or she is not; or

c) a motor vehicle liability insurance card or a financial responsibility card that does not apply to the vehicle which the holder is driving.

Under s 24(6)(b) of the MVA, it is an offence to give or loan a motor vehicle liability insurance card or a financial responsibility card to a person not entitled to it. Section 24(6)(c) states that failure to deliver to the Superintendent a financial responsibility card for cancellation is an offence.

VII. OFFENCES AFTER AN ACCIDENT

A. General

This section examines offences related to the actions taken after a motor vehicle accident. It is appropriate to refer clients to a private lawyer or Legal Aid as some offences have penalties which may result in imprisonment. In addition, a civil claim for damages may be initiated though LSLAP does not handle any personal injury files. See **Chapter 12: Automobile Insurance** for information on claims regarding hit and run incidents as well as uninsured defendants.

B. Duty at the Scene Under the MVA

Pursuant to MVA s 68(1), the driver of a vehicle involved in an accident must:

a) remain at the scene or return immediately;

b) render all reasonable assistance; and

c) produce, in writing, her or his name and address, the registered owner's name and address, the vehicle license number, and particulars of insurance.

C. Failure to Remain at the Scene

1. Provincial Offence

It is an offence to omit to do the duties specified in MVA s 68(1). The reason or motive for leaving the scene is irrelevant. Since this is a strict liability offence, the defence of due diligence may be available to an accused.

2. Federal (Criminal) Offence

Under *Criminal Code* s 252(1), it is an offence for a driver involved in an accident with (a) a person, (b) a vehicle, vessel or aircraft, or (c) cattle in the charge of another person to fail to remain at the scene of an accident with the requisite intent of escaping civil or criminal liability. From s 252(2), "in the absence of any evidence to the contrary," the failure to stop raises a presumption of intent to escape civil or criminal liability. However, if a person charged with a criminal offence can show that he or she left the scene for some other purpose, even where that purpose was itself unlawful, that person is entitled to an acquittal. A person who is convicted for failing to remain at the scene of an accident is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction (s 252(1.1)).

D. Duty When There is Damage to Unattended Vehicle or Property

1. Damage to Unattended Vehicles

Under MVA s 68(2), the driver, operator, or any other person in charge of a motor vehicle that collides with an unattended vehicle must stop, locate, and notify, in writing, the owner of the unattended vehicle of the name and address of the driver, the operator, or any other person in charge of the motor vehicle as well as the registered owner's name and address and the vehicle license number. The information must be left in a conspicuous place on the damaged vehicle.

2. Damage to Other Forms of Property

In the event of damage to property other than another vehicle, the driver, operator, or any other person in charge of the motor vehicle must take reasonable steps to locate and notify the owner of the property, in writing (MVA s 68(3)). The driver must take reasonable steps to provide the following particulars to the owner of the property: the name and address of the driver, operator, or other person in charge of the vehicle as well as the license number of the vehicle and the name and address of the vehicle's registered owner.

E. Duty to Provide Information Under the MVA

If asked, the owner or driver of a motor vehicle a peace officer believes has been involved in an accident or a violation of the MVA must provide any information respecting the identity of the driver at the time of the accident (MVA s 84). The person has the right to remain silent until he or she speaks to a lawyer, which may be appropriate in certain circumstances.

F. Police Accident Reports

Although accident reports are not open to public inspection, other parties to the accident may obtain license numbers from the reports as well as names of drivers, registered owners, and witnesses (MVA s 249(2)).

VIII. NEGLIGENT, DANGEROUS OR CARELESS DRIVING OFFENCES

A. General

If an individual is charged with a negligent or dangerous driving offence that would result in imprisonment upon conviction, a referral to Legal Services Society (Legal Aid) for legal representation is appropriate. An accused who does not face the risk of imprisonment may receive legal representation

from Legal Aid if he or she faces a loss of livelihood upon conviction, has a mental or physical disability that is a barrier to self-representation, or faces immigration complications that may result in deportation.

B. Provincial Driving Offences

1. Careless Driving

Under s 144(1) of the MVA, it is an offence to drive:

a) without due care and attention;
b) without reasonable consideration for other persons using the highway; or
c) at a speed that is excessive given the road, traffic, visibility, or weather conditions.

A person who commits an offence under (a) or (b) is liable on conviction to a fine of not less than $100 (s 144(2)) and six points added to his or her driving record. Subject to the minimum fine, s 4 of the OA states that a fine must be less than $2,000. A person who commits an offence under (c) is liable on conviction to a fine of $173 and three penalty points as per the VTAFR and MVAR.

To convict a driver of any of these offences, the Crown must only prove inadvertent negligence: a lack of proper care or absence of thought. The standard of care is determined in relation to the circumstances and carelessness must be proved beyond a reasonable doubt: *R v Beauchamp*, [1952] OJ No 495, (1953)106 CCC 6 (Ont CA).

2. Road Racing

Part 7 of the MVA includes street racing provisions. This offence has recently become a major public issue and authorities treat it very seriously. Street racing will also be considered an aggravating factor for other offences including those in the *Criminal Code*. Clinicians should refer clients to a lawyer to seek advice with these problems.

"Race" includes circumstances in which, taking into account the condition of the road, traffic, visibility, and weather, the operator of a motor vehicle is operating the motor vehicle without reasonable consideration for other persons using the highway or in a manner that may cause harm to an individual, by doing any of the following:

a) outdistancing or attempting to outdistance one or more other motor vehicles;
b) preventing or attempting to prevent one or more other motor vehicles from passing; or
c) driving at excessive speed in order to arrive at or attempt to arrive at a given destination ahead of one or more other motor vehicles.

According to s 243, a peace officer may cause a motor vehicle to be taken to and impounded for 30 days at a place directed by the peace officer if the peace officer has reasonable and probable grounds to believe that:

a) a person has operated the motor vehicle on a highway in a race and the peace officer intends to charge the person who operated the motor vehicle with a serious offence; and;
b) the person who operated the motor vehicle had, within two years before the day of the impoundment, operated a motor vehicle that was impounded under s 242 and that impoundment was not withdrawn under s 242(11).

C. Federal (Criminal) Driving Offences

1. Dangerous Operation of a Motor Vehicle

Under the *Criminal Code*, it is an offence to operate a motor vehicle in a manner that is dangerous to the public having regard to the nature, condition, and use of a highway or other public place as well as the amount of traffic that at the time is, or might reasonably be expected to be, at that place (*Criminal Code* s 249(1)(a)).

In the absence of death or bodily harm, an offender under s 249(1)(a) is guilty of an indictable offence and is liable to imprisonment for up to five years or is guilty of an offence punishable on summary conviction (s 249(2)).

If the dangerous driving results in bodily harm, an indictable offence has been committed and the driver may be liable to imprisonment for up to 10 years (s 249(3)). If the dangerous driving results in death, an indictable offence has been committed and the driver may be liable to imprisonment for up to 14 years (s 249(4)).

Dangerous driving (s 249) is included in the offences created under *Criminal Code* ss 220 (causing death by criminal negligence), 221 (causing bodily harm by criminal negligence), and 236 (manslaughter). If there is not enough evidence to prove one of the three offences above, it is still possible to convict under s 249 (*Criminal Code* s 662.5).

2. Criminal Negligence

This section is not specifically aimed at motor vehicle operators, but is applicable in some circumstances. Under the *Criminal Code*, criminal negligence involves acts or omissions showing "wanton or reckless disregard for the lives or safety of other persons" (s 219). In Canada, the law surrounding the *mens rea* requirements for criminal negligence was clarified in *R v Creighton*, [1993], SCJ No 91. The standard is to be measured by a modified objective test: whether the accused's conduct constituted a marked departure from that of the reasonable person given all the circumstances. Characteristics personal to the accused will not be considered with the exception of accused's incapacity to appreciate the nature of the risks associated with his or her actions.

In *R v Beatty*, 2008 SCC 5, [2008] SCJ No 5, the Court addressed the issue of criminal negligence in the context of dangerous driving. Unlike *Creighton*, there is no substantive dissent, though five of the newer Supreme Court justices took a slightly different approach to the modified objective test. They noted that the actual (subjective) state of mind of the accused at the time of the accident is relevant in determining if there was a marked departure from the standard of the reasonable person. In *Beatty*, a momentary lapse of attention with no other evidence of dangerous driving was held **not** sufficient to warrant criminal sanction under s 249 (criminal negligence causing death).

If the negligence results in death, an indictable offence has been committed and the driver may be liable to life imprisonment (s 220). If the negligence results in bodily injury, an indictable offence has been committed and the driver may be liable to imprisonment for 10 years (s 221).

IX. OFFENCES RELATED TO DRUGS AND ALCOHOL

Current LSLAP policy is to refer **all** impaired driving offences to the professional bar.

A. Provincial Offences

1. Exceeding 80 Milligrams (.08)

MVA s 224 makes it an offence either to drive or to be in the care or control of a motor vehicle with a blood-alcohol reading in excess of 80 milligrams of alcohol per 100 millilitres of blood (.08). Care or control of a vehicle means occupying the driver's seat with access to the ignition key, even if the vehicle is parked.

a) Approved screening device (ASD) and Breathalyzer

The police may legally require a driver to immediately blow into a small machine called an approved screening device (ASD) if they reasonably suspect that there is alcohol in the driver's body. This is permitted for both drivers who are operating a motor vehicle or have care or control of it. This test is different than a breathalyzer test. If the police do not do this right away, they may not be able to use the results readings at trial.

Before requiring the driver to blow, the police do not have to inform that there is a *Charter* right, under s 10(b), to call a lawyer. At this time, the driver does not have the right to speak to a lawyer before deciding whether to blow or refuse: the driver must decide right away. If the driver refuses, they will likely be charged with refusing to provide a breath sample under the s 253(5) of the *Criminal Code*.

The ASD tests for alcohol in the body and it can show a "pass," "warn," or "fail." It shows a warn for blood-alcohol levels between 50 and 79 milligrams of alcohol in 100 millilitres of blood (.05), and a fail for levels of not less than 80 milligrams.

If the ASD shows a warn, the police may:

- immediately prohibit driving for three clear days (not including weekends); and
- immediately impound vehicle for three clear days (not including weekends).

If the ASD shows a fail or if the driver refuses to provide a breath sample, the police will:

- immediately prohibit driving for 90 days; and
- immediately impound vehicle for 30 days.

A breathalyzer measures alcohol in the breath to see if the driver's blood alcohol concentration is over the legal limit of .08. It is more accurate than the ASD and must be operated by a qualified technician. In practice, the breathalyser is no longer used, and the police rely solely on the ASD to measure blood-alcohol levels.

In summary, if police demand it, the driver must blow into the ASD and go with the police to provide breath or blood samples for further analysis. The driver is legally compelled to do these things unless there is a reasonable excuse not to do so. Refusing without a reasonable excuse constitutes a separate offence.

b) Penalties

If the driver's blood alcohol concentration on the ASD is over .08 or the driver refuses to provide a breath sample, the driver will:

- immediately lose their license for 90 days and have their vehicle impounded for 30 days;
- have to pay all related towing and storage fees (approximately $700); and
- have to pay a $500 administrative driving penalty as well as a $250 driver's license reinstatement fee.
- possibly be referred to remedial programs

To get their driver's license back, the driver may have to complete the Responsible Driver Program ($900) as well as use an ignition interlock device ($1,500) for a full year following the completion of the suspension. The total cost of failing an ASD or refusing to blow is about $4,000 before the driver can legally operate a motor vehicle in BC.

When breathalyzer test results are over .08, the driver may be charged with exceeding .08 or impaired driving. In addition, the driver will receive a 90-day administrative driving prohibition (ADP). To apply for a review, the driver must do so within seven days from the date he or she receives the Notice of Driving Prohibition.

S 224 of the MVA states that a fine between $100 and $2,000 and/or imprisonment between seven days and six months may be imposed for impaired drivers. There is also a mandatory one-year driving prohibition under s 99(2). In addition, 10 penalty points are recorded pursuant to the MVAR and the offence is a breach of certain conditions under s 55(8) of the *Insurance (Vehicle) Regulation*.

These provincial penalties are additional to the criminal charges a driver may face if their blood alcohol concentration exceeds .08 or they refuse to provide a breath or blood sample.

c) Challenging Roadside Prohibition (issued for 3, 7, 30 or 90 days)

A person may, within 7 days of being served with a notice of driving prohibition under section 215.41, apply to the superintendent for a review of the driving prohibition (MVA s 215.48(1)) by attending any driver licensing center, and complete and submit the form, "Immediate Roadside Prohibition – Application for Review – Section 215.48 Motor Vehicle Act". Fill in the blanks and check all boxes that indicate the 'grounds for review.' Please see below for a list of non-exhaustive grounds:

- Not the driver or in care or control of a motor vehicle;
- Not advised of right to a second test on an ASD;
- Requested second test, but the officer did not perform the test;
- Second test was not performed on a different ASD;
- Prohibition was not served on the basis of the lower ASD result;
- The result of the ASD was not reliable;

- The ASD, which formed the basis of the prohibition, did not register a WARN or FAIL reading;
- The ASD registered a WARN, but the blood alcohol content was less than .05;
- The ASD registered a FAIL, but the blood alcohol content was less than .08;
- Prohibition should be reduced because did not have any previous IRPs; or
- Did not refuse or fail to comply with a demand to provide a breath sample, or had a reasonable excuse for refusing or failing to comply with a demand.

The applicant may attach any statements or evidences for the superintendent's review. Please note that the filing of an application for review does not stay the driving prohibition. (MVA s 215.48)

When submitting the application, the following are required:
- Show proof of identity
- Provide copy of Notice of Driving Prohibitions issued by the police
- Attach any supporting documents

There are two types of reviews: written and oral. The superintendent is not required to hold an oral hearing unless the driving prohibitions is for 30 or 90 days, and the applicant requests an oral hearing the time of filing the application for review and pays the prescribed oral hearing fees. (MVA s 215.48 (5)) In a written review, all documents are reviewed by the adjudicator at the appointed time and location, but no conversations will take place. In an oral review, the adjudicator will call and ask for an explanation as to why the application was filed. If the call is missed, the hearing will automatically change to a written review system. The payment for a written review is $100 whereas the payment for an oral review is $200. The payment is non-refundable.

Possible review outcomes include:
- Driving prohibition revoked: will be advised to reapply for driver's license. The reinstatement fees and monetary penalties will be waived or refunded, however any outstanding debts owed to the province or ICBC must be paid.
- Driving prohibition varied: driving prohibition is reduced and monetary penalties may be altered. All outstanding debts owed to the province or ICBC must be paid.
- Driving prohibition confirmed: terms of driving prohibition will remain unchanged.

The administrative decision (review outcome) is final. If the application is unsuccessful, the only recourse is through a judicial review. The application for the judicial review must be filed within 30 days of receiving the decision, and is made by filing a notice of petition in Supreme Court. The filing fee is $200.

It is highly recommended that individuals applying for the adjudication and for the judicial review be represented by lawyers.

2. Exceeding 50 Milligrams (.05)

a) General

Even if the driver's blood alcohol concentration does not exceed .08, the driver may be prohibited from driving for 24 hours if the police must have reasonable and

probable grounds to believe that the driver's ability to drive a motor vehicle is affected by alcohol. The police may also impound the motor vehicle for 24 hours under s 215.4(1) of the MVA if the they believe that impoundment is necessary to prevent the driver from driving or operating the motor vehicle before the prohibition expires. If an ASD shows that the driver's blood alcohol concentration is not over .05, the police must end the prohibition. The appeal to the Superintendent follows the same procedure as what is outlined under "Challenging Roadside Conditions" (IX.A.1.c)

b) Penalties

If a person is served with a notice of driving prohibition for having a blood-alcohol concentration between .05 and .08, the following penalties apply:

- For a first time offence in a 5-year period, the driver is prohibited from driving for three days. The vehicle might be impounded for the three days. The driver has to pay the towing and storage fees of approximately $200. There will also be an additional $200 administrative driving penalty and a $250 driver's license reinstatement fee. The total cost of this first time offence is about $700.

- For a second time offence in a 5-year period, the driver is prohibited from driving for seven days and the administrative penalty increases to $300 plus the $250 reinstatement fee.

- For a third time offence in a 5-year period, the driver is prohibited from driving for 30 days and the administrative penalty increases to $400 plus the $250 reinstatement fee. To get the driver's license back, the driver must complete the Responsible Driver Program and use an ignition interlock device for a full year following the completion of the suspension. The total cost including penalties, towing, storage, the program, and the device is approximately $4,000.

These provincial penalties are additional to the criminal charges a driver may face if their blood alcohol concentration exceeds .08 or they refuse to provide a breath or blood sample.

3. Refusing to Provide a Blood Sample

Section 226(1) of the MVA makes it an offence to refuse (without a reasonable excuse) to provide a blood sample when asked by a police officer.

a) Penalties

These are the same as for MVA s 224.

4. Twelve and 24-Hour Suspensions and 90-Day Driving Prohibitions

Under MVA s 90.3, a peace officer may issue a 12-hour license suspension for an individual who has care or control of a motor vehicle with any amount of alcohol in his or her body, provided that there has been a previous condition imposed under MVA s 25(10.1) which prohibits that driver from driving after consuming alcohol (i.e. driving with a Class 7 or 7L). However, this suspension is terminated if the individual provides a medical certificate stating

that his or her blood alcohol level did not exceed .03 at the time (30 milligrams of alcohol in 100 millilitres of blood).

Under s 215(2)(c) of the MVA, a peace officer who has reasonable and probable grounds to believe that a driver's ability to drive the motor vehicle has been affected by alcohol may order the driver to surrender his or her license. The license is then suspended, even if it is not physically surrendered, for 24 hours or until the driver proves that he or she has a count of less than .05 (50 milligrams of alcohol in 100 millilitres of blood). Such proof may be obtained by means of a test or a doctor's certificate. It is important to note that this test is completely voluntary, but it is mandatory when a peace officer requests a test.

Under MVA s 215(3)(c), a police officer who has reasonable and probable grounds to believe that a driver's ability to drive the motor vehicle has been affected by a drug other than alcohol may order the surrender of the driver's license. The license will be suspended for 24 hours or until the driver proves he or she is not affected by drugs.

If the result of any voluntary test taken is adverse to the driver, it cannot be used as evidence against the driver. It will only be used to confirm or challenge the officer's decision to suspend the license.

While a suspension under MVA s 215 will be placed on the driver's record, this is a preferable alternative to a charge and conviction under the *Criminal Code*.

Under MVA s 94.1, if a peace officer has reasonable and probable grounds to believe that a person operated or had care and control of a motor vehicle while the concentration of alcohol in the blood exceeded .08 (80 milligrams of alcohol in 100 millilitres of blood) or that a person refused to provide a breath or blood sample (as required under *Criminal Code* s 254), the peace officer will likely issue a 90-day driving prohibition. The driver has seven days to apply to the Superintendent for review (MVA s 94.4(1)).

B. Federal (Criminal) Offences

1. Impaired Driving/Exceeding 80 Milligrams (.08)

Section 253(1)(a) of the *Criminal Code* makes it an offence either to operate or to be in care or control of a motor vehicle while alcohol or drugs impair one's ability to drive. Section 253(1)(b) makes it an offence to either operate or be in the care or control of a motor vehicle with a blood-alcohol concentration reading in excess of 80 milligrams of alcohol per 100 millilitres of blood. With a charge under s 253, the Crown must prove driving if driving is charged or prove care or control if care or control is charged. These are two separate and distinct offences and neither is included in the other: *R v Henryi*, (1971), 5 CCC (2d) 201 (BC Co Ct); *R v Jones* (1974), 17 CCC (2d) 221 (BCSC); and *R v Faer* (1975), 26 CCC (2d) 327 (Sask CA). Since it is difficult to conceive of a situation when driving is not also care or control, the Crown will almost always charge care or control.

The court in *R v Kienapple* [1974], 15 CCC (2d) 524 (SCC) held that an accused cannot have multiple convictions for the same act. Therefore, **an accused cannot be convicted of both impaired driving and having a blood alcohol concentration exceeding 80 milligrams**.

The Crown can establish acts of care or control in two ways:

a) Pursuant to *Criminal Code* s 258(1)(a), where a person is occupying the seat or position ordinarily occupied by the person who operates the motor vehicle, that person will be presumed to be in care or control unless he or she establishes that he or she did not occupy that seat or position for the purpose of setting the vehicle in motion; or

b) If the Crown is unable to rely on this presumption (i.e. the accused establishes that he or she did not enter the vehicle with the intent to set it in motion), the Crown must then prove acts of care or control which have been defined as any use of the vehicle or its fittings and equipment or some course of conduct associated with the vehicle which create the danger or risk of putting the vehicle in motion: *R v Toews* (1985), 21 CCC (3d) 24 (SCC).

A peace officer may demand a breath or blood sample pursuant to *Criminal Code* s 254(3) if the peace officer has reasonable and probable grounds to believe the individual is impaired or has a blood alcohol level over .08. Reasonable and probable grounds may include factors such as the physical condition of the person, if the person is incapable of providing a sample of his or her breath, or that it would be impracticable to obtain a breath sample (s 254(3)). Refusal to provide a sample is a criminal offence (s 254(5)).

For a charge under s 253(1)(b), the Crown may prove a blood alcohol reading in excess of .08 by producing a valid certificate of analysis or providing *vive voce* testimony at trial from a registered analyst or breathalyzer technician about the blood alcohol concentration at the time the accused provided a breath sample.

Once a certificate has been prepared or the Crown has tendered *vive voce* evidence of the blood alcohol concentration, the Crown can rely on the presumption commonly known as the "presumption back" set out in *Criminal Code* s 258(1)(c). Under this section, where samples of breath are taken within two hours from the time the offence is alleged to have been committed, the concentration of alcohol in the blood reflected by those samples will be assumed to have been the concentration of alcohol in the blood at the time of the offence unless the accused raises evidence to the contrary (i.e. that he or she consumed more alcohol between being stopped and the time the sample was taken). Please note that the "presumption back" applies only to samples demanded pursuant to s 254(3) and **not** s 254(2), which is for screening purposes (see **Section IX.2: Refusing to Provide a Breath or Blood Sample**). The "presumption back" also applies to a blood sample (s 258(1)(d)).

Note that this presumption pertaining to the evidence contained in the breathalyzer certificate does not offend s 11(d) of the *Charter* which protects the presumption of innocence: *R v Bateman,* [1987] BCJ No 253; 46 MVR 155 (BC Co Ct).

As stated above, a conviction requires the production of a valid certificate or *vive voce* testimony at trial from a registered analyst or a breathalyzer technician. However, the breathalyzer technician or registered analyst must have the requisite qualifications.

a) Penalties

Under *Criminal Code* s 255, impaired driving is a hybrid offence. The minimum fine for a first offence is $1,000. If convicted of an indictable offence under s 255, the accused may be liable for a maximum of 5 years' imprisonment. If convicted on summary conviction, the accused may be liable for up to 18 months' imprisonment. Imprisonment is mandatory for repeat offences: at least 30 days for the second offence and at least 120 days for each additional offence.

Under s 259(1), a person's driver's license may be suspended for a period between one and three years. If convicted a second time, the suspension will be between two and five years. On each subsequent offence, the suspension would be a minimum of three years. Section 259(1.1) gives the court discretion to authorise an offender to drive during the prohibition period if the offender registers in an alcohol ignition interlock device program. Such an authorisation will not come into effect until the expiry of an absolute prohibition period of at least three months for a first offence,

six months for a second offence, and one year for every subsequent offence (s 259(1.2)).

In addition, 10 penalty points are recorded pursuant to the MVAR and the offence may be a breach of certain conditions under s 55(8) of the *Insurance (Vehicle) Regulation*.

2. Refusing to Provide a Breath or Blood Sample

A peace officer can demand a breath sample if that officer reasonably suspects a driver has consumed alcohol (*Criminal Code* s 254(2)). This is for screening purposes only. An officer may also demand a breath or blood sample for later use as evidence in court under s 254(3) if that officer has reasonable and probable grounds to believe that the driver is impaired or has a blood alcohol concentration level over .08. Refusal to provide a sample in either circumstance is a criminal offence (s 254(5)). To demand the sample under s 254(3), the test is both subjective and objective. The peace officer must hold an honest belief and there must be reasonable grounds for this belief (based on *Criminal Code* s 254(3) and *Charter* s 8 (protection against unreasonable search and seizure) as interpreted in *R v Bernshaw* (1994), 95 CCC (3d) 193 (SCC)).

NOTE: Providing a breath sample is not a voluntary procedure: the peace officer demands the sample. The driver may refuse only if he or she has a "reasonable excuse".

In some cases, a reasonable excuse has been held to include the right to first consult with a lawyer in private. Where an accused chooses to exercise the right to retain counsel, the police officer must provide him or her with a reasonable opportunity to retain and instruct counsel: *R v Elgie* (1987), 48 MVR 103 (BCCA); *R v Manninen*, [1987] 1 SCR 1233. If the police officer does not inform the driver of his or her right to retain and instruct counsel (*Charter* s 10(b)), the breath or blood sample, if given, may be excluded from evidence if admitting it "would bring the administration of justice into disrepute" (*Charter* s 24(2)).

As with all *Charter* rights, the right to retain counsel is subject to reasonable limits prescribed by law and demonstrably justified in a free and democratic society: *R v Orbanski and Elias*, [2005] 2 SCR 3. The Court in *Thomsen v R* (1988) 63 C.R. (3d) 1 held that "[w]hile a demand for a breath sample into a screening device constitutes a detention under s 10 of the *Charter*, the suspension of the accused's ability to implement the right to retain and instruct counsel until arrival at the detachment for breath testing [under s 254(3)] is a reasonable limitation on the exercise of that right".

The length of time constituting a sufficient and reasonable opportunity for an accused to exercise the right to retain and instruct counsel will depend on the circumstances of each case. An otherwise short period of time may not be unreasonable due to the behaviour and attitude of the individual under investigation by the police. Police officers are always mindful of the fact that they must take a breath sample within two hours of the time the offence was allegedly committed (*R v Dupray*, (1987), 46 MVR (2d) 39 (BC Co Ct)).

Not only must the police officer provide a reasonable opportunity for the accused to retain and instruct counsel, but the officer must also refrain from attempting to elicit evidence until the detainee has been offered this opportunity.

Breach of *Charter* s 10(a) (failure to be informed of reason of arrest) may also result in exclusion of evidence under s 24(2) of the *Charter*.

X. DRIVING WHILE DISQUALIFIED

A. Provincial Offences

MVA s 95(1) makes it an offence for an individual to drive knowing that, by order of peace officer or Superintendent, he or she is prohibited or his or her license is suspended. The prohibition must have been made pursuant to the MVA:

- failure to satisfy a judgment (s 91);
- failure to pass a driver's exam (s 92);
- order of Superintendent (s 93);
- driving impaired or refused to provide a breath/blood sample (s 94.2); or
- 24-hour suspension (s 215).

The suspension must be pursuant to the driver's attendance for a driver's exam, funds are owed (s 90), or driving while prohibited by operation of law (s 102).

Under MVA s 102, it is an offence to drive while prohibited due to operation of law, namely MVA ss 98 (court ordered prohibition), 99 (automatic prohibition), 100 (failing to stop for a peace officer), or the YJA. Pursuant to YJA s 8(2)(f), when a young offender is convicted of an offence under the MVA, he or she can be prohibited from driving for a specific period of time. YJA s 8(3) states that a young offender who refuses to stop for a peace officer in violation of MVA s 100 will be prohibited from driving for two years.

See **Section II: Procedure and Penalties** for a further description of suspension, cancellation and prohibition.

For both offences (MVA ss 95(1) and 102), the first conviction will result in a fine of at least $500 but no more than $2,000 and/or imprisonment up to six months. Subsequent convictions under s 95(1) result in the same range of fines, but a prison term of between 14 days and one year. Subsequent convictions under s 102(1) result in a fine of at least $300 but no more than $2,000, and/or a prison term of between 14 days and one year.

While MVA s 102 creates an absolute liability offence (i.e. an individual could be automatically prohibited under s 99 and have no defences to s 102), there is little or no chance of incarceration. This is expressly prohibited by OA s 6 which states that there will be no imprisonment for an absolute liability offence. Also, OA s 82(1) states that an individual will not be jailed for non-payment of fines. For these reasons, the Supreme Court of Canada did not strike down the inclusion of MVA s 99 in MVA s 102(1): *R v Pontes* [1995], 13 MVR (3d) 145 (SCC).

A vehicle is also at risk of being impounded if the driver was prohibited from driving under MVA ss 93, 94.2, 98, 99, and 215. See **Section II: Procedure and Penalties** for further information on impoundment.

B. Federal (Criminal) Offence

Section 259(4) of the *Criminal Code* states that a person who operates a motor vehicle while disqualified under the *Criminal Code* or a provincial statute is guilty of an indictable offence and is liable to a maximum penalty of five years imprisonment or is guilty of an offence punishable on summary conviction.

A driver automatically loses the right to drive if convicted of a Criminal Code offence related to motor vehicle operation. For a first time offence of impaired driving, dangerous driving, or hit-and-run, the automatic driving prohibition is for 12 months. For a second conviction, the prohibition increases to three years. For a third conviction, the driver will be prohibited from driving indefinitely.

XI. USE OF ELECTRONIC DEVICES WHILE DRIVING

Part 3.1 of the MVA outlines offences related to the use of electronic devices while driving. Section 214.1 defines an "electronic device" as (a) a hand-held cellular phone, (b) a hand-held device capable of receiving email or text messages, or (c) any prescribed class or type of electronic device. Prescribed electronic devices are further defined in s 3 of the *Use of Electronic Devices While Driving Regulation*, BC Reg 308/2009 [EDWDR] as any of the following:

a) electronic devices that include a hands-free telephone function;

b) global positioning systems;

c) hand-held electronic devices, one of the purposes of which is to process or compute data;

d) hand-held audio players;

e) hand microphones; or

f) televisions.

Exceptions for hands-free use of electronic devices are permitted under s 7 of the EDWDR. Further exceptions for persons carrying out special powers, duties, or functions are allowed under s 5.

Use of an electronic device while driving will result in a ticket under s 25(15) of the MVA (driving contrary to a restriction) and result in a fine of $167 pursuant to Schedule 3 of the VTAFR.

XII. BICYCLES

A cyclist has the same rights and duties as a driver of a motor vehicle including the duties of safe operation, care, attention, and consideration of other highway users. In addition, the MVA provides that an individual commits an offence if he or she operates or is a passenger on a bicycle on a "highway" and is not wearing a helmet (s 184). A "highway" is defined as any road, street, or avenue that a vehicle can drive on. Almost every municipality, including the City of Vancouver, has followed this section of the MVA by passing bylaws requiring cyclists to wear bicycle helmets.

Furthermore, cyclists must ride on a designated bicycle path, if available, or if not, then in single file as near as practical to the right side of the road (s 183(2)). Lamps and reflectors are required for a cycle operated on a highway between one half-hour after sunset and one half-hour before sunrise (s 183(6)).

In the event of an accident, the cyclist must remain at the scene and lend assistance (s 183(9)). Cyclists are being considered increasingly responsible for accidents they are involved in. One particular area where cyclists are being held responsible is where they pass a driver on the right while the driver is also turning right at an intersection. If a cyclist is hit by a car turning right while the cyclist is passing on the right, it is possible the cyclist may be found at fault. This is indicative of a general trend of cyclists being treated like motor vehicles. If a cyclist is hit while breaking a traffic law, it is quite possible that the cyclist may be held at fault.

XIII. APPENDIX A: EXAMPLES OF PENALTY POINTS AND FINES

A comprehensive list of the penalty points from the MVAR and the fines from the VTAFR are available on the ICBC website at www.icbc.com/licensing/lic_fines_pen_fine_chart.asp (accessed 21 June 2011).

Some common offences and the corresponding points/fines are:

Description of Offence	**Points**	**Ticket**
No driver's licence/wrong class (MVA s 24(1))	3	$138
Driving without insurance (MVA s 24(3)(b))	0	$598
Drive contrary to restriction (e.g., not wearing corrective lenses)	3	$109
Fail to produce driver's licence or insurance (MVA s 33(1))	0	$81
Disobey traffic control device (MVA s 125)	2	$121
Drive without due care (MVA s 144(1)(a))	6	$368
Drive without consideration (MVA 144(1)(b))	6	$196
Speed relative to conditions (MVA 144(1)(c))	3	$167
Unsafe U-Turn (MVA s 168(a))	2	$121
Drive on sidewalk (MVA s 200)	2	$81
Fail to wear seatbelt (MVA s 220(4))	0	$167
Permit passenger without seatbelt (MVA s 220(6))	0	$167
Ride motorcycle without required helmet (MVA 221(1))	0	$138