

# CHAPTER 13: MOTOR VEHICLE LAW

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# CHAPTER 13: MOTOR VEHICLE LAW

## I. INTRODUCTION

Motor vehicle law is a relatively complex area of law. There is significant overlap between federal and provincial laws, as well as laws relating to insurance provided by the Insurance Corporation of British Columbia. While reading this chapter or doing any research on motor vehicle law, it is important to remember that more than one law may cover the same situation, and that this may result in complex interactions between the legal regimes applicable to driving. It is advisable to consult a lawyer knowledgeable in motor vehicle law issues for advice on more complex motor vehicle law questions, particularly where there is a risk of jail time, loss of driver's license, or other serious consequences upon conviction such as immigration consequences.

Please note that this chapter is directed towards a general motoring audience.

## II. GOVERNING LEGISLATION & RESOURCES

Motor vehicle law in BC is governed by several different pieces of legislation. This section briefly outlines these sections, and more information on the operation of this legislation is contained throughout the chapter.

### A. *Motor Vehicle Act*

The [Motor Vehicle Act, RSBC 1996, c 318](#), or “*Motor Vehicle Act*”, is the primary piece of provincial legislation (law) that creates offences related to operating a motor vehicle in British Columbia. The *Motor Vehicle Act* is a lengthy act, and it is not possible to provide a complete summary of all of its provisions in this chapter. This chapter endeavours to provide a summary of the most common *Motor Vehicle Act* issues, and to provide resources for further research.

### B. *Other Provincial Acts/ Regulations*

- The [Offence Act, RSBC 1996, c 338](#) provides a general procedure for handling all provincial offences.
- The [Motor Vehicle Act Regulations, BC Reg 26/58](#), and the [Violation Ticket Administration and Fines Regulation, BC Reg 89/97](#), 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**.

### C. *Criminal Code*

The [Canadian Criminal Code, RSC 1985, c C-46](#), is the federal legislation that sets out most of the criminal offences in Canada, in ss. 320.11 to 320.4. The *Criminal Code* sets out several criminal offences related to driving, details of which are set out later in this chapter. Further

information on criminal offences and procedures, in general, can be found in **Chapter 1: Criminal Law**.

It is worth noting, as discussed above, that there is significant overlap between the *Criminal Code* driving offences and the *Motor Vehicle Act*. 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.

## ***D. Resources***

### ***Online Resources***

#### ***a) BC Ministry of Transportation/ RoadSafetyBC Website***

<http://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling>

The Ministry, including its agency RoadSafetyBC, provides a wealth of online information on motor vehicle law, including information on the *Motor Vehicle Act*, driving prohibitions and suspensions

#### ***b) ICBC Website***

<http://www.icbc.com/driver-licensing/Pages/Default.aspx>

The ICBC website provides information on driver licensing.

#### ***c) University of Victoria Law Centre Guide to Defending Traffic Tickets***

<https://www.uvic.ca/law/about/centre/resources/defending%20traffic%20tickets.php>

Although out of date, the Law Centre's summary provides a useful overview of the process for disputing a Violation Ticket.

### ***Services***

#### ***d) Lawyer Referral Service***

604-687-3221/ 1-800-663-1919

<http://www.cbabc.org/For-the-Public/Lawyer-Referral-Service>

The Lawyer Referral Service, operated by the Canadian Bar Association BC Branch, can provide referrals to lawyers practising in the area of your issue. The first 30-minute consultation is free, with fees after that point agreed between the lawyer and the client.

Individuals with specific questions related to motor vehicle law, or who are concerned about the effect of a ticket or conviction on them, should consult with a lawyer practising in the area.

e) *Legal Services Society/ Legal Aid*

604-408-2172/ 1-866-577-2525

<http://www.legalaid.bc.ca>

Legal Aid is available to individuals who are faced with significant consequences after a criminal conviction. These include jail time or immigration complications that could lead to deportation. Legal Aid is also available where individuals have a physical or mental condition, illness, or disability that makes it impossible for an individual to represent themselves.

### III. AT THE ROADSIDE

Most motor vehicle law issues begin at the roadside, in an interaction with a police officer, or other peace officers. This section discusses common issues encountered at the roadside and provides an outline of your rights when you are stopped by a peace officer.

#### A. *Powers of Peace Officers*

Police officers have the power to stop drivers to check for the fitness of the motor vehicle, possession of a valid driver's license, proper insurance, and sobriety of the driver. Police officers do not need a warrant, or even reasonable and probable grounds to perform such stops. **The fact that you are driving on a public highway is enough to justify a vehicle stop.**

According to the Supreme Court of Canada 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 constitute arbitrary detention contrary to 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 *Motor Vehicle Act* 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 *Motor Vehicle Act* 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 *Motor Vehicle Act* s 68 (leaving the scene of an accident) (s 79(c))

and may detain the person until they can be brought before a justice.

#### B. *Your Obligations*

When stopped by a peace officer while *driving*, you must, upon request, provide your driver's license, vehicle registration, and proof of insurance. If these items are located in the glove compartment or other out-of-sight location, it may be advisable to ask the officer for

permission to retrieve them before reaching for them, so that the officer does not think that you are reaching for a weapon.

When a legal breath sample is demanded by a peace officer, a driver must forthwith provide a sample of breath to determine the concentration of alcohol in the driver's body. See s. 320.15(1) of the *Criminal Code*. More information on breath samples is available in section IX of this chapter.

Additionally, if a police officer has reasonable suspicion that a driver is impaired by a drug other than alcohol they must submit to a Standardized Field Sobriety Test ("SFST"). More information on SFST is available in section IX of this chapter.

You have specific obligations at the scene of a collision. They are outlined in the next section of this chapter: *Duties After a Collision*.

### **C. *The Right to Silence***

The right, under sections 7 and 11(c) of the *Charter of Rights and Freedoms*, to remain silent and not be required to make self-incriminating statements, generally applies in the motor vehicle context.

With the exception of providing license, registration, and insurance, providing a sample of breath, and providing a statement at the scene of a collision in which you were involved, you are not obligated to make a statement to the police, or to answer their questions.

If you are detained you have the right to contact a lawyer before you make any statement. In [R v Suberu, 2009 SCC 33](#), the Supreme Court of Canada found that the right to speak to a lawyer arises as soon as a person is detained, even though they have not been formally arrested yet. In [R v Grant, 2009 SCC 32](#), the court found that "detention" begins as soon as there is physical or psychological restraint imposed by the police that prevents a person from leaving.

In summary, your right to silence continues to operate when you are stopped in a vehicle by the police. If the response to you (politely) asking whether you are free to go is anything other than an unqualified "yes", you should assume you are being detained, and may wish to exercise your right to remain silent so as to avoid making statements that may incriminate you. Any admissions that you make at the roadside can be, and most likely will be, used against you in court. Remember that police officers are collecting evidence at the roadside. If you are arrested, you should ask to speak to a lawyer as soon as possible, and avoid making any statements or admissions until you have had an opportunity to speak to a lawyer.

### **D. *Vehicle Standards***

#### ***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" (*Motor Vehicle Act* 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 *Motor Vehicle Regulations* 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 *Motor Vehicle Act*, the officer may:

- a) 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
- b) order the surrender of the vehicle license and/or number plates.

Seat belt issues, discussed below, are the most common source of equipment standards issues, but for a complete list of required standards, please consult the *Motor Vehicle Act* and *Regulations*.

### ***Seat Belt Assembly***

Section 220 of the *Motor Vehicle Act* 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):

- a) when a person is driving in reverse, or;
- b) (Repealed)
- c) 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, or;
- d) the person is under the age of 16

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 \(CA\)](#).

## **IV. Duties After a Collision**

### **A. Remain at Scene**

#### ***Motor Vehicle Act Provisions***

Pursuant to *Motor Vehicle Act* 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, their name and address, the registered owner's name and address, the vehicle license number, and particulars of insurance.

It is an offence to omit to do the duties specified in *Motor Vehicle Act* 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.

#### ***Criminal Code Provisions***

Under *Criminal Code* s 320.16(1), "everyone commits an offence who operates a conveyance and who at the time of operating the conveyance knows that, or is reckless as to whether, the conveyance has been involved in an accident with a person or another conveyance and who fails, without reasonable excuse, to stop the conveyance, give their name and address and, if any person has been injured or appears to require assistance, offer assistance."

**B. *Provide information***

***Duty to Provide Information Under the Motor Vehicle Act***

If asked, the owner or a person in a motor vehicle that a peace officer believes has been involved in an accident or a violation of the *Motor Vehicle Act* must provide any information respecting the identity of the driver at the time of the accident (*Motor Vehicle Act* s 84). The person has the right to remain silent until they to a lawyer, which is advisable in most circumstances.

***Police Accident Reports***

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

**C. *Duties where damage to unattended vehicles or property***

***Damage to Unattended Vehicles***

Under the *Motor Vehicle Act* 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.

***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 (*Motor Vehicle Act* 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.

**V. *Violation Tickets***

**A. *General Information***

What is commonly referred to as a "speeding ticket" issued in accordance with the provisions of the *Offence Act* is known legally as a provincial "Violation Ticket". This section provides information on Violation Tickets, including how to dispute a Violation Ticket.

An individual charged under the *Motor Vehicle Act* will receive a Violation Ticket issued under s 14 of the *Offence Act*. However, under s 11 of the *Offence Act*, a person can also be charged criminally for a violation of the *Motor Vehicle Act*. This is for serious offences such as *Motor Vehicle Act* ss 95 and 102 (driving while prohibited). When charged for serious motor vehicle offences you will be issued a promise to appear and court attendance is compulsory if an Information is laid. For Violation Tickets, court attendance is only required if a Violation Ticket is disputed. If you fail to appear in court for a Violation Ticket, your non-attendance is a deemed not disputed and you will be found guilty of the offence.



## ***B. How to Dispute a Violation Ticket***

**These procedures may change from time to time. Refer to the information on the back of your Violation Ticket for the most up-to-date information.**

The special procedure for adjudicating Violation Tickets is set out in ss 14-18 of the *Offence Act*. To dispute a Violation Ticket, one must either go to an ICBC office or provincial court registry with the ticket, or mail a “Notice of Dispute Form PTR021”, as well as 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, a copy of the Violation Ticket, and if a copy of the Violation Ticket is not available, sufficient information to identify the Violation Ticket and the alleged contravention or fine disputed (*Offence Act* s 15(3)).

**You must file your notice of dispute within 30 days of the day on which the ticket was issued.**

*Motor Vehicle Act* 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.**

More information on disputing Violation Tickets is available on the BC Ministry of Justice website at <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/courthouse-services/disputing-paying-tickets/vt-brochure.pdf>

### ***What if you miss the 30-day time limit?***

If you do not file your dispute within 30 days, you must file an “Affidavit Form PTR020”, pursuant to s. 16(2) of the *Offence Act*, available at any court registry, explaining the reasons for your delay, along with the “Notice of Dispute Form PTR021” and a copy of the ticket. Extensions are not guaranteed and are at the judicial discretion of the justice of the peace considering your application. Be as detailed as possible and provide all evidence available in support.

### ***How Do I Prepare for Court for a Violation Ticket?***

In challenging a ticket, it is important to:

- Read the relevant sections of the *Motor Vehicle Act* 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 case can be made. The evidence must include identification of the alleged offender by name and address as well as the time, date, and location of the offence.
- Request for all relevant disclosure from the police detachment, this includes asking for police notes, all witness statements, and any information or training that the officer intends to rely on at trial.
- Pursuant to s 100 of the *Offence Act*, the Crown can apply to amend most mistakes on Violation Tickets, however, there is a one-year statutory limit to make amendments.

For more detailed information on disputing Violation Tickets, you may wish to consult the University of Victoria Law Centre's information on defending traffic tickets at <https://www.uvic.ca/law/about/centre/resources/defending%20traffic%20tickets.php>. (note that it may be outdated information)

### ***What happens in traffic court?***

When you attend traffic court, your case will generally be presided over by a Judicial Justice of the Peace (“the Justice”), and not a Judge. Justices of the Peace are addressed as “Your Worship”. The Justice will guide the hearing process. There is generally no Crown Prosecutor in traffic court; police officers prosecute the tickets.

Arrive at court at least 15 minutes before the scheduled court time. This provides you with the opportunity to speak to the officer before the courtroom opens. If you are intending to take the matter to trial, it is recommended that you send in a disclosure request to the police detachment requesting: the police notes; general occurrence report, witness statements; if a speeding ticket, any evidence relation to the calibration of the laser or radar gun. The police officer has a disclosure obligation pursuant to [R v Stinchcombe, \[1991\] 3 SCR 326](#).

Police officers can provide testimony in person, via video or teleconference, or by certificate. You cannot be convicted without the evidence of the officer who issued you the ticket. If the police officer who issued your ticket does not attend in person or electronically, and has not submitted a certificate, a different officer present cannot provide evidence to convict you.

If you plead guilty and are applying for a fine reduction, you must show economic hardship. In such cases, the justice of the peace has the power to reduce the fine. Section 88 of the *Offence Act* states that the fine can be reduced based on the offender's means and ability to pay, subject to minimum fines specified in the *Motor Vehicle Act*.

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.

The decision of a Provincial Court judge or justice of the peace may be appealed to the Supreme Court of BC. However, there is a strict 30-day appeal limit. Any individual looking to appeal a violation ticket should consult a lawyer.

### ***What happens if the Police Officer Does Not Show Up?***

The officer who issued the Violation Ticket must provide evidence beyond a reasonable doubt that you committed the offence in question. The officer must prove the offence beyond a reasonable doubt, and that the officer cannot prove the offence beyond a reasonable doubt if the officer who issued the ticket is not present. In such situations, you should plead “not guilty”. The presiding justice will most likely dismiss the ticket for “want of prosecution” and the ticket will be dismissed.

If you plead not guilty, the officer may attempt to adjourn the matter to another day when the other officer can attend. You should oppose this adjournment, and note that you were not given advance notice.

### ***What happens if I cannot make the court appearance?***

You can apply to a justice for an adjournment, by filing the “Application to Adjourn a Hearing PTR818” form. This form can be filed by mailing it to the Violation Ticket Centre address listed above or filing it at any court registry. All applications should be made within 2 weeks of the scheduled hearing date. In urgent circumstances, you can have a lawyer, friend or family member attend and make an application for an adjournment at the date and time of the scheduled hearing.

### ***What if you miss the court date?***

If you do not attend the hearing, the ticket will be deemed not disputed, the conviction will apply to your driving record, and the full fine amount will be immediately payable.

Within 30 days of missing the scheduled hearing date, you may file an “Affidavit Form PTR019” pursuant to s. 15(10) of the *Offence Act*, requesting a new hearing date at the registry of the provincial court where your ticket was set to be heard. After 30 days from the missed hearing date, you must file “Affidavit form PTR020”, pursuant to s. 16(2) of the *Offence Act*.

## **VI. Provincial Driving Offences**

### ***A. Common Offences***

#### ***Speeding***

The most common provincial offence committed in BC is speeding in violation of section 146 of the *Motor Vehicle Act*. Generally, drivers must not exceed 50km/h in a municipality or on treaty lands, 80km/h on other highways, and must not operate a motor vehicle at a rate of speed higher than that posted on a sign. S 148.2 of the Motor Vehicle Act lists a defence to speeding: if the sign stating the speed limit was obscured or impossible to read, the accused cannot be convicted. This is an affirmative defence and the burden is on the accused to prove that the sign was obscured or impossible to read.

#### ***Careless Driving***

Under s 144(1) of the *Motor Vehicle Act*, 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 their driving record. Subject to the minimum fine, s 4 of the Offence Act 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 *Motor Vehicle Act Regulations*.

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).

## ***Road Racing***

Part 9 of the *Motor Vehicle Act* 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*.

Per *Motor Vehicle Act* s 250, “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 *Motor Vehicle Act* s 251(1)(e), a peace officer may cause a motor vehicle to be taken to and impounded at a place directed by the peace officer if the peace officer has reasonable grounds to believe that a person has driven or operated a motor vehicle on a highway in a race or in a stunt and the peace officer intends to charge the person with a motor vehicle related Criminal Code offence or an offence under section 144 (1), 146 or 148 of this Act.

Per ss 253(2) and 3(a), the impoundment period for s 251(1)(e) is seven days, unless the owner of a motor vehicle has also had a motor vehicle impounded within the last two years before the present impoundment, in which case the vehicle will be impounded for thirty days.

## ***Use of Electronic devices***

Part 3.1 of the *Motor Vehicle Act* outlines offences related to the use of electronic devices while driving. Section 214.2 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:

- Electronic devices that include a hands-free telephone function;
- Global positioning systems;
- Hand-held electronic devices, one of the purposes of which is to process or compute data;
- Hand-held audio players;
- Hand microphones; or
- 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.

Fines for the use of an electronic device while driving have increased significantly as of June 1<sup>st</sup>, 2016, and now stand at \$368 per offence. As well, 4 penalty points are issued for a violation of this section.

“Use” of an electronic device is defined broadly. Per *Motor Vehicle Act* s 214.1 use means:

- (a) *holding the device in a position in which it may be used;*
- (b) *operating one or more of the device's functions;*
- (c) *communicating orally by means of the device with another person or another device;*
- (d) *taking another action that is set out in the regulations by means of, with or in relation to an electronic device.*

Additionally, EDWDR 2 adds watching the screen of an electronic device as use of an electronic device.

In [R v Bainbridge 2018, BCPC 101](#) the accused was found guilty of the offence for simply holding the device in his hand while driving. The court held that any number of functions of the accused's phone **could** have been used in the position in which he held his phone. In [R v Jabani, 2017 BCSC 745](#), the accused was found guilty of the offence for plugging his phone into the cord to charge the phone.

In [R v Tannhauser, 2018 BCPC 183](#), the accused was acquitted of the offence because his cell was programmed with a software that immobilized the phone when a vehicle that is in motion. **\*\*This case was appealed and BCCA ordered a new trial. The judge in the BCCA trial said that even though the cell phone could not immediately be used due to the software, it was still an electronic device held in a position in which it may be used, which is illegal (R. v. Tannhauser, 2020 BCCA 155).**

In [R v Partridge, 2019 BCSC](#), The accused was observed by a police officer looking downwards whilst driving and when stopped, a cell phone was found wedged between the folds of the passenger seat such that the screen was facing the driver. Accused was convicted. However, the accused was acquitted on appeal because the mere presence of a cell phone within sight of a driver is not enough to secure a conviction, leaving aside a situation where, for example, the screen is illuminated and so the driver may then be utilizing the cell phone in some fashion.

## ***B. Penalty Points***

Penalty points are imposed in accordance with the schedule set out in Division 28 of the Motor Vehicle Act Regulations. 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 Motor Vehicle Act s 93 when the Superintendent suspends a license. **The Superintendent may suspend the license of a class 5 driver who accumulates 15 or more points in any two year period.** For a class 7 driver or novice driver, the Superintendent may suspend the licence for receiving single a 3 point Violation Ticket. [More information can be obtained from the Driver Improvement Program Policies and Guidelines.](#)

As of December 2017, a class 5 drivers who incur two high-risk offences (Use of Electronic Device; Excessive Speed; and/or Drive Without Due Care or Attention) in a one year period risks losing their driver's licence for up to 5 months.

### ***ICBC Effects of Penalty Points***

Drivers who have received 4 or more driver penalty points will be required to pay a premium to ICBC, even if they do not own or insure a motor vehicle. In essence, these premiums are a surcharge on Violation Tickets that put a driver beyond 3 penalty points. For more information, see <http://www.icbc.com/driver-licensing/tickets/Pages/Driver-Penalty-Points.aspx>.

### ***C. Vicarious Liability for Provincial Motor Vehicle Offences***

Pursuant to *Motor Vehicle Act* ss 83 and 88, the owner of a motor vehicle is liable for any violation of the Motor Vehicle Act or Motor Vehicle Act Regulations unless they can prove that:

- a) they did not entrust the motor vehicle to the person in possession or exercised reasonable care and diligence when doing so (*Motor Vehicle Act* s 83(3));
- b) although the registered owner, they are not the actual owner (*Motor Vehicle Act* s 83(5)(b)); or
- c) the person committing the offence was not the registered owner's employee, servant, agent or worker (*Motor Vehicle Act* s 88(3)).

Under *Motor Vehicle Act* 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 Motor Vehicle Act 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 them and further relief cannot be sought against the owner of the vehicle.

### ***D. Limitation Period***

An information or Violation Ticket in relation to a *Motor Vehicle Act* offence must be laid or issued within **12 months** from the date the alleged offence took place (*Motor Vehicle Act* s 78).

### ***E. Fines***

The *Violation Ticket Administration and Fines Regulation* prescribes fines for *Motor Vehicle Act* offences. **Appendix A** of this chapter provides examples of fines.

## VII. Vehicle Impoundment

Your vehicle may be impounded for a variety of offences or reasons, including excessive speeding, driving while prohibited, or for alcohol-related offences. If your vehicle has been impounded, this section details procedures for disputing that impoundment. For information on offences that may result in vehicle impoundment, consult the sections on particular offences in this chapter.

### ***A. When can you dispute your vehicle impoundment***

3 and 7-day impoundments cannot be disputed. Impoundments over 7 days can be disputed. Impoundments must be disputed within 15 days of being issued: *Motor Vehicle Act* s 256(1).

The Vehicle Impoundment review process is governed by ss. 256 to 258 of the *Motor Vehicle Act*.

### ***B. How to dispute***

To dispute a vehicle impoundment, you must go to an ICBC vehicle driver licensing office with the notice of impoundment and apply for a review of the impoundment. For more information, you can consult the RoadSafetyBC website on impoundment at <https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/road-safety-rules-and-consequences/vehicle-impoundment?keyword=vehicle&keyword=impoundment>

## VIII. Superintendent of Motor Vehicles Prohibitions

### ***A. Reasons***

#### ***Driver Improvement Program – Class 5 license***

The driver improvement program is administered by the Superintendent of Motor Vehicles and allows the Superintendent to prohibit anyone whose driving record is not satisfactory to the Superintendent.

Drivers are first issued with a Notice of Intent to Prohibit, informing them that their record is not satisfactory. Such notices may be issued for reasons including:

- The Superintendent considers it in the public interest – for example, if you have a bad driving record
- If you incur nine or more active penalty points on your record in a two year period, that is generally sufficient to trigger a notice of probation.
- Your driver’s license was suspended in another province or state
- You haven’t provided the payment (referred to as damages) the court ordered you to pay for a vehicle accident in which you were the driver or vehicle owner
- You have not taken the medical exam required by the Superintendent

If any further offences are recorded during the probation period, or within six months afterwards, the superintendent will likely issue a “Notice of Prohibition”. Drivers may either accept the prohibition by signing and returning the Notice of Prohibition, in which case the prohibition starts immediately, or the driver may make a written submission giving reasons why they should not be prohibited from driving.

The Driver Improvement Program appeal process is detailed below.

If the written submissions are not accepted, or an individual does not respond to a notice of intent to prohibit, they will be issued with a notice of prohibition. They must immediately sign the notice, surrender their driver's license to ICBC, and not drive for the term of the prohibition.

For more information on the Driver Improvement Program, see <https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/driver-medical/improvement-programs-for-high-risk-drivers/administration-of-the-driver-improvement-program?keyword=driver&keyword=improvement&keyword=program>

### ***Driver Improvement Program – Class 7 license/ Novice Drivers***

Novice drivers, including those in the “L” or “N” categories, may be referred to the Driver Improvement Program with as little as 2 points on their record. As well, drivers in the graduated licensing program cannot exit the program (i.e. get a full, non-N, license) until 24 months after a prohibition.

The Driver Improvement Program appeal process is the same as detailed above.

### ***Other Reasons for Prohibitions***

The superintendent may prohibit you from driving for other reasons, including:

- 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.

## ***B. Appeals***

A person can apply for a review of a s 93(1)(a)(ii) driving prohibition under the Driver Improvement Program. The driver must within 21 days of receiving the notice of intent to prohibit, send in an application for review and written submissions as to why the driving prohibition should not be imposed or should be reduced. There is a \$100 review fee that must be paid by way of a money order or certified cheque, or at any ICBC driver licensing office.

For more information on the Driver Improvement Program and guidelines, see <https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/driver-medical/improvement-programs-for-high-risk-drivers/administration-of-the-driver-improvement-program?keyword=driver&keyword=improvement&keyword=program>

The Superintendent is given discretion in determining which evidence they will consider in making the decision. A suspension cannot be quashed solely on the basis that the Superintendent did not consider certain relevant evidence (*Motor Vehicle Act* s 93(3)). The *Motor Vehicle Act* 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 (*Motor Vehicle Act* s 25(12)(a)). An appeal of the Superintendent's decision to uphold the driving prohibition must be made in the BC Supreme Court and occur within 30 days of the *Decision* (*Motor Vehicle Act* s 94(1)).



### **C. *Automatic Prohibitions***

A driver convicted of a *Criminal Code* motor vehicle offence is automatically prohibited from driving for a period of one year (Motor Vehicle Act s 99). The automatic prohibition also applies to some offences under the Motor Vehicle Act, 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 Motor Vehicle Act s 100(3), an individual who refuses to stop for a police officer will receive a two-year prohibition from driving if they are 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 320.13(1), (2), or (3): dangerous operation of a motor vehicle.

## **IX. Alcohol and Drug Offences**

### **A. *Approved Screening Devices***

Pursuant to s 320.27(1) of the *Criminal Code*, a peace officer may demand a breath sample into an Approved Screening Device (ASD) from a driver if the officer reasonably suspects that there is alcohol in the driver's body and they have operated a motor vehicle within the proceeding 3 hours. This is permitted for both drivers who are operating a motor vehicle or have care or control of it. An ASD is different than a breathalyser device at the police station and it does not provide a numerical value for the readings of "warn" or "fail". If the police do not administer the ASD right away, they may not be able to use the results readings at trial.

Since the enactment of Bill C-46 in December 2018, police officers are also allowed to demand mandatory breath samples from a driver. This demand does *not* require the officer to have reasonable grounds to believe the driver is impaired—they can ask any driver to provide a mandatory sample. This type of demand only applies to roadside tests, not tests where the individual needs to be transported to the police station. The driver does not have a right to consult with counsel before providing a mandatory demand breath sample. There are some requirements for an officer to make a mandatory demand:

- A) the officer must have an ASD in their possession when they ask the driver to provide the sample
- B) the officer must ask for the sample when the driver is driving or in care and control of a motor vehicle (they can pull a driver over and ask for a sample, but they cannot make a mandatory demand after the driver stops driving, like after they get home).

Before requiring the driver to provide a roadside breath sample into an ASD, the peace officer does *not* have to inform the driver of their *Charter* right, under s 10(b), to consult 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 issued a refusal to provide a breath sample under s 215.41(4) of the *Motor Vehicle Act* or under s 320.15(1) of the *Criminal Code* or an Immediate Roadside Prohibition (IRP).

The ASD tests for alcohol in the body and it will show a numerical value for a blood alcohol content ("BAC") under 50 milligrams of alcohol in 100 millilitres of blood (.05), "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. No numerical values are given for a “warn” or a “fail” and it is impossible to determine the actual BAC of the driver.

In contrast, a breathalyser machine 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 form the basis of issuing the driving prohibition.

In summary, if the police demand a roadside breath sample, the driver must comply with the breath demand into the ASD. The driver is legally compelled to provide a breath sample unless there is a reasonable excuse not to do so. Refusing without a reasonable excuse constitutes a separate offence.

## ***B. Provincial Alcohol Offences (Immediate Roadside Prohibitions)***

The *Motor Vehicle Act* s 215.41 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; “fail”). There is also a separate offence for driving or being in car or control of a vehicle with a blood-alcohol reading in excess of 50 milligrams of alcohol per 100 millilitres of blood (.05; “warn”). Care or control of a vehicle means occupying the driver’s seat with access to the ignition key, even if the vehicle is parked.

Consequences for these offences depend on a number of circumstances, including a history of previous offences. For clarity, these consequences are listed below, along with an indication which offences they apply to.

Beyond the penalties noted below, receiving multiple penalties, or just one 90-day driving prohibition or *Criminal Code* penalty, can result in referral to the Responsible Driving Program (RDP), or the Ignition Interlock Program (IIP). The RDP is a course taken over 8 or 16 hours, whereas the IIP requires the installation of an interlock device in the driver’s vehicle. For more information, consult the RoadSafetyBC website at <https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/driver-medical/improvement-programs-for-high-risk-drivers/administration-of-the-remedial-programs>

### ***Immediate Roadside Prohibitions***

An officer can demand anyone in care and control of a motor vehicle to provide a roadside breath sample using an Approved Screening Device. You have the right to request a second sample be taken, and to have the lower reading prevail.

If you register in the WARN (.05) range, the police may, at their discretion:

- Seize your driver’s license
- Issue you a 'Notice of Prohibition' which will start immediately – removing your driving privileges – the length of which depends on prior IRP convictions (if any)
  - 3-day driving prohibition if it is the first time caught in the warn range
  - 7-day driving prohibition if it is the second time caught in the warn range within five years; or
  - 30-day driving prohibition if it is the third time caught in the warn range within five years.

If you register in the FAIL (.08) range or refuse to provide a sample, the police may, at their discretion:

- Seize your driver's license
- Issue you a 'Notice of Prohibition' which will start immediately – removing your driving privileges for 90 days

***As discussed above, your vehicle may be impounded if you are issued an Immediate Roadside Prohibition. This is discretionary for 3 and 7-day prohibitions, but mandatory for 30 and 90-day prohibition.***

### ***Challenging Immediate 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 RoadSafetyBC for a review of the driving prohibition (*Motor Vehicle Act* s 215.48(1)) by attending any driver licensing center and completing and submitting the form, “Immediate Roadside Prohibition – Application for Review – Section 215.48 *Motor Vehicle Act*”. Fill in the blanks and check all relevant boxes that indicate the ‘grounds for review.’

The grounds for review are:

- 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 evidence for the superintendent's review. Please note that the filing of an application for review does not stay the driving prohibition. (*Motor Vehicle Act* s 215.48(4))

To apply for a review of the Immediate Roadside Prohibition, the applicant must show proof of their identity, and provide a copy of the Notice of Driving Prohibition issued by the peace officer

There are two types of reviews: written and oral. The superintendent is not required to hold an oral hearing unless the driving prohibition is for 30 or 90 days, and the applicant requests an oral hearing at the time of filing the application for review and pays the prescribed oral hearing fees (*Motor Vehicle Act* s 215.48(5)). In a written review, all documents are reviewed by the adjudicator at the appointed time and location, but no oral submissions will take place. In an oral review, the adjudicator will listen to why the driving prohibition ought to be revoked. It is highly recommended that full written submissions are also provided. If the

oral hearing 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.

To submit supporting documents for the oral or written review they must be provided in advance of the hearing. This can be done by submitting the supporting documents in advance of the hearing at any ICBC driver's licensing office or by faxing them to RoadSafetyBC at 250-356-6544.

For both oral hearings and written reviews, all written information you wish to be considered in your review hearing should be provided to the Superintendent by 4:30 p.m., two days prior to the date and time of the scheduled review.

A decision will be rendered within 21 days from the date the driving prohibition is issued.

Possible review outcomes include:

- a) 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.
- b) Driving prohibition confirmed: terms of driving prohibition will remain unchanged.

It is highly recommended that individuals seeking to challenge an Immediate Roadside Prohibition be represented by a lawyer.

For more information on the monetary penalty and potential referral to remedial driving programs, see:

<https://www2.gov.bc.ca/assets/gov/driving-and-transportation/driving/publications/factsheet-immediate-roadside-prohibition.pdf>

### ***What Happens if you Lose the Hearing?***

The administrative decision (review decision) 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 6 months of receiving the decision and is made by filing a Petition in Supreme Court. It is highly recommended that individuals seeking to challenge the administrative decision by way of judicial review be represented by a lawyer.

### ***12 and 24-Hour Prohibitions***

24-Hour roadside prohibitions are issued by the police where they believe on reasonable and probable grounds that your ability to drive is affected by alcohol or drugs. The police do not need a breath sample to issue a 24-hour prohibition, but you have the right to request an ASD test. Note, however, if you take an ASD test and test in the WARN or FAIL ranges, more serious penalties will apply to you.

If you are issued a 24-hour prohibition, the police will take your license, and you will have to retrieve it at the police station after 24 hours have passed.

Similar to the Immediate Roadside Prohibition describe above, for individuals wishing to challenge a 24-hour prohibition for **alcohol**, there is an internal review process available through RoadSafetyBC pursuant to s. 215.1 of the *Motor Vehicle Act*. This must be done within 7 days.

There is no internal review process for challenging a 24-hour prohibition issued for **drugs**. Presently, the only way to challenge this is by way of judicial review in the BC Supreme Court: [\*Giorio v. Wilson\*, 2014 BCSC 786](#) at para 3.

24-hour prohibitions may also lead to a 24-hour impoundment, as discussed above.

12-hour suspensions apply only to drivers in the Graduated Licensing Program (“L” or “N” drivers) for violations of the GLP rules. They are in other respects similar to 24-hour prohibitions.

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

### **C. Drug Offences**

The BC government has passed legislation amending the *MVA* which received royal assent on May 17, 2018, and has come into force by regulation of the Lieutenant Governor in Council.

The new legislation includes a number of amendments. Section 25(10.101) allows the Lieutenant Governor in Council to impose a condition on driver’s licenses that those who hold the license must not operate a motor vehicle while having a prescribed drug in their body.

Section 90.3(2.1) allows a peace officer to demand a sample of a bodily substance from a driver who holds a driver’s licence on which a condition is imposed under section 25 (10.101) for analysis by means of approved drug screening equipment. If the analysis indicates the driver has a prescribed drug in their body, the peace officer may serve them with a notice of license suspension and request the driver to surrender their license. Section 90.3(3) allow the peace officer to apply the same consequence to a driver who declines to provide such a sample.

Similar amendments alter much of the *MVA* regulations for driving with alcohol in your system so that driving with a prescribed drug in your system can result in the same penalties. There is no blood drug concentration specified yet. It will be possible for a combination of drugs and alcohol to trigger penalties even if the blood concentration of each substance is less than the legal limit (section 94.1).

### **D. Federal Alcohol Offences**

The *Criminal Code* provides a number of federal criminal offences related to impaired driving. These are serious criminal offences, with significant possible penalties. Individuals facing *Criminal Code* charges are strongly encouraged to consult with a lawyer.

#### ***Impaired Driving/ Driving Over 80***

Section 320.14(1)(a) of the *Criminal Code* makes it an offence either to operate a motor vehicle while alcohol or drugs impair one’s ability to drive. Section 320.14(1)(b) makes it an offence to operate a motor vehicle with a blood-alcohol concentration equal to or exceeding 80 milligrams of alcohol per 100 millilitres of blood within 2 hours of driving. With a charge under s 320.14, the Crown must prove operation if operation 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 Henry*, (1971), 5 CCC (2d) 201 (BC Co Ct); [R v James \(1974\), 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. The *Criminal Code* s 320.15(4) also states that a person who is convicted of an offence under this section cannot be convicted of another offence in

this section for a single incident. 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 by proving any use of the vehicle or its fittings and equipment or some course of conduct associated with the vehicle which creates the danger or risk of putting the vehicle in motion: [R v Toens \[1985\] 2 S.C.R. 119](#).

A peace officer may demand a breath or blood sample pursuant to *Criminal Code* s 320.27 (1) if the peace officer has reasonable grounds to suspect the individual has alcohol or a drug in their body and they have operated a conveyance in the preceding 3 hours. Refusal to comply with a demand for a sample is a criminal offence (s 320.15(1)). Since Bill C-46 was passed in 2018, an officer no longer needs reasonable grounds to suspect an individual has drugs or alcohol in their body as long as the individual is operating a vehicle and the officer has an approved screening device in their possession (*Criminal Code* s 320.17 (2)).

For a charge under s 320.14, 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 breathalyser 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 320.31 (1). 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 they consumed more alcohol between being stopped and the time the sample was taken). S 320.31 (1) also sets out requirements for the operation of the testing device. If those requirements are met, then there is a presumption that the results of the test are accurate. The results of a blood sample are also presumed to be accurate unless there is evidence to the contrary (s 320.31 (2)).

Note that this presumption pertaining to the evidence contained in the breathalyser 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 breathalyser technician. However, the breathalyser technician or registered analyst must have the requisite qualifications.

### ***Refusing to Provide a Sample***

There are two ways that an officer can demand a sample: the first is a roadside mandatory demand, which requires that the officer have an approved screening device in their possession and does not require them to suspect the driver of having alcohol or drugs in their system (s 320.27(2)). The purpose of this test is for screening. An individual does not have the right to counsel before providing a roadside breath sample. The second type of under s 320.27(1) is both subjective and objective. The peace officer has reasonable grounds to suspect the driver has alcohol or a drug in their body and they operated a conveyance within the preceding 3 hours (based on *Criminal Code* s 320.27(1) and *Charter* s 8 (protection against unreasonable search and seizure) as interpreted in [R. v. Bernshaw, \[1995\] 1 S.C.R. 254](#)).

**NOTE:** **Providing a breath sample is not a voluntary procedure:** the peace officer demands the sample. The driver may refuse only if they have a “reasonable excuse”.

In some cases, a reasonable excuse has been held to include the right to first consult with a lawyer in private before providing the sample. This only applies when the driver is taken to the police station or medical facility for testing (not to roadside breathalyzer tests/mandatory demands). Where an accused chooses to exercise the right to retain counsel, the police officer must provide them with a reasonable opportunity to retain and instruct counsel, like offering them a phone to use: [R v Eljje \(1987\), 48 MVR 103 \(BCCA\)](#); [R v Manninen, \[1987\] 1 SCR 1233](#). The officer must refrain from attempting to elicit evidence until the detainee has been offered this opportunity. If the police officer does not inform the driver of their 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; R v Elias, \[2005\] 2 SCR 3](#). The Court in [R v Thomsen \[1988\] 1 S.C.R. 640](#) 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 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)*).

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*.

### ***Drug-Impaired Driving***

Bill C-46 received royal assent on June 21, 2018 and came into force and effect in 2018. The Bill makes significant changes to the *Criminal Code* and regulations.

The Bill creates the *Criminal Code* offences for driving while impaired by marijuana. The Bill proposes limits for the amount of THC, the main psychoactive ingredient in marijuana, that drivers can legally have in their system while driving. Note that these limits still apply if the driver has a prescription for marijuana.

The proposed amendments are to the Regulations, not the *Criminal Code*. The Regulations set out the per se limits.

- A driver who has 2 to 5 ng of THC per mL of blood risks a fine of up to \$1000 and a criminal conviction;
- A driver who has over 5 ng of THC per mL of blood is considered impaired and risks facing a criminal conviction, a \$1000 fine and a one-year driving prohibition; and
- A driver who has a combination of THC above 2.5 ng per mL of blood and a blood alcohol concentration of over 50 mg of alcohol per 100 mL is also considered impaired and risks facing a criminal conviction, a \$1000 fine and a one-year driving prohibition.



## Penalties

Under *Criminal Code* s 320.19(1), impaired driving is a hybrid offence. For both summary and indictment, the minimum punishments are the same:

- (i) for a first offence, a fine of \$1,000,
- (ii) for a second offence, a term of imprisonment for a term of 30 days, and
- (iii) for each subsequent offence, imprisonment for a term of 120 days.

The court does not have to impose the minimum sentence if the accused successfully completes a treatment program (s 320.23(2)). If convicted of an indictable offence under s 320.19(1), the accused may be liable to imprisonment for a maximum term of 10 years. If convicted on summary conviction, the accused may be liable for a fine of not more than \$5,000, imprisonment for a maximum term of 2 years less a day, or both.

There are higher minimum fines that apply if the driver's BAC is especially high (s 320.19(3)). For a BAC between 120-160mg per 100mL of blood, a minimum fine of \$1,500 applies (s 320.19(3)(a)). For a BAC higher than 160mg per 100mL of blood, a minimum fine of \$2,000 applies (s 320.19(3)(b)).

In addition to facing the risk of a criminal conviction, drivers who are charged under the *Criminal Code* are also issued a 90-day Administrative Driving Prohibition pursuant to s 94.1 of the *Motor Vehicle Act*.

### ***Provincial Driving Prohibitions for Criminal Convictions***

If you are convicted of a federal criminal impaired driving or refusal offence under ss 320.14(1) or 320.15(1) of the *Criminal Code*, you may be prohibited from driving as follows (s 320.24(1)):

- upon 1st Conviction — not less than 1 year and not more than 3 years, plus the entirety of the period of time that the offender is imprisoned
- upon 2nd Conviction — not less than 2 years and not more than 10 years, plus the entirety of the period of time that the offender is imprisoned
- upon 3rd Conviction and any subsequent convictions after that — not less than 3 years, plus the entirety of the period of time that the offender is imprisoned (there is no maximum period)

Note that these prohibitions are in addition to any other penalty that applies.

In addition, 10 penalty points are recorded pursuant to the *Motor Vehicle Act Regulations* and the offence may be a breach of certain conditions under s 55(8) of the *Insurance (Vehicle) Regulation* if convicted, meaning that insurance will not cover an accident that occurs within 2 hours before the offence was committed if the offender was operating the vehicle. This also applies if the offender was convicted under the Young Offenders Act or a similar act in the US.

### ***90 Day Administrative Driving Prohibitions***

Under BC's *Motor Vehicle Act* (s 94.1), a 90-Day Administrative Driving Prohibition (ADP) will be issued to any driver who is found to have a BAC over 0.08 or a blood drug concentration (BDC) that violates the *Motor Vehicle Act Regulations*. An ADP can also be issued if the driver refuses to provide a sample without a reasonable excuse or if a drug recognition expert determines that their ability to drive was impaired. This is in addition to federal criminal charges you may face. An ADP cannot be issued along with an Immediate Roadside Prohibition (IRP) (only one can be issued).



The difference between an ADP and an IRP is that an IRP is issued following a WARN or FAIL reading from an Approved Screening Device, or a refusal to provide an ASD sample. The length of time that a driver is prohibited from driving under an IRP also differ depending on whether they have received one before or not. An ADP is based on specific BAC (as opposed to WARN/FAIL), BDC, refusal to provide a sample, or a drug impairment determination. The prohibition period for an ADP is always 90 days.

The driver can apply for a review of the ADP within seven days of the date they receive the Notice of Driving Prohibition.

The Grounds of Review for challenging an ADP are more limited than challenging an IRP. The grounds of review are as follows:

- I did not operate or have care or control of a motor vehicle;
- The concentration of alcohol in my blood did not exceed 80 milligrams of alcohol in 100 millilitres of blood within three hours.
- I did not refuse or fail to comply with a demand under section 320.15 of the Criminal Code to supply a breath or blood sample.
- I had a reasonable excuse for failing or refusing to comply with a demand under section 320.15 of the Criminal Code to supply a breath or blood sample.

## **X. Federal Driving Offences**

### ***A. Dangerous Operation***

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 all of the circumstances (*Criminal Code* s 320.13 (1)). The consequences differ depending on whether or not the dangerous driving caused bodily harm or death.

Dangerous operation that does not cause bodily harm or death is a hybrid offence (s 320.13 (1)). The driver can be sentenced on summary conviction or indictment. If convicted on indictment, the maximum sentence is imprisonment for a term not exceeding 10 years (s 320.19 (5)).

Dangerous operation causing bodily harm (s 320.13 (2)) is also a hybrid offence. On indictment, the individual is liable to imprisonment for a term not more than 14 years (s 320.2 (a)) The minimum punishment is (s 320.2 (b)):

- (i) for a first offence, a fine of \$1,000,
- (ii) for a second offence, imprisonment for a term of 30 days,
- (iii) for each subsequent offence, imprisonment for a term of 120 days.

On summary conviction, the individual is liable to a fine of not more than \$5,000 or to a term of imprisonment no longer than 2 years less a day, or both. The minimum punishments for convictions on indictment also apply to summary convictions.

Dangerous operation causing death (s 320.13 (3)) is an indictable offence. The maximum penalty is imprisonment for life (s 320.21). The minimum sentences for convictions of Dangerous operation causing bodily harm also apply to Dangerous operation causing death.

Dangerous operation (s 320.13) 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 of dangerous operation s 320.13 (1) (*Criminal Code* s 662(5)).

## ***B. Operation While Prohibited***

Operation while prohibited is a Criminal Code offence under s 320.18.

The Criminal Code s 320.18(1) states that anyone who operates a conveyance while prohibited from doing so by an order under the Act or another legal restriction imposed by any other Act of Parliament is guilty of an offence. An exception to this is if the driver is registered in an alcohol ignition interlock device program and they are abiding by the conditions of that program (s 320.18[2]). This is a hybrid offence, so the Crown can choose to proceed summarily or by indictment depending on the severity of the alleged violation and other factors.

The possible punishments if found guilty of dangerous operation under s 320.18 are:

- a) if convicted on indictment, a term of imprisonment not exceeding 10 years
- b) on summary conviction, a term of imprisonment not exceeding 2 years less a day.

## ***C. 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, \[1993\] 3 S.C.R. 3](#). 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 their actions.

In [R v Beatty, \[2008\] 1 S.C.R. 49, 2008 SCC 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).

#### ***D. Limitation Period***

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.**

### **XI. Provincial Offence - Driving While Prohibited**

It is an offence under the *Motor Vehicle Act* s 95(1)(a) to drive a motor vehicle on a highway or industrial road knowing that they are prohibited from doing so under:

- ss 91 (prohibition issued by the Insurance Corporation of British Columbia for an unsatisfied court judgment),
- 92 (prohibition against driving relating to fitness or ability to drive),
- 93 (prohibition issued by Superintendent in the public interest),
- 94.2 (driving prohibition for driving while impaired by alcohol or refusing to provide a breath sample without reasonable excuse),
- 215 (24-hour impaired driving prohibition),
- 215.43 (immediate roadside driving prohibition), or
- 251(4) (prohibition for driving while failing to hold a license, or while an impoundment notice was issued on the license),

Then the person commits an offence and is liable:

- on a first conviction, to a fine of not less than \$500 and not more than \$2 000 or to imprisonment for not more than 6 months, or to both, and
- on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than \$500 and not more than \$2 000 and to imprisonment for not less than 14 days and not more than one year.
- The individuals driving record will also be blemished and they will receive a 10 point *Motor Vehicle Act* infraction on their record.

The term “knowingly” means that Crown must prove beyond a reasonable doubt that the person charged knew that they were prohibited from driving. However, service of a prohibition certificate by registered mail, per *Motor Vehicle Act* s 95(4)(a) constitutes constructive knowledge, even in cases where the accused never reads the driving prohibition: [R v Wall, 2010 BCPC 0316](#).

The prohibited driver’s vehicle will likely be impounded if caught driving while prohibited. For more information on vehicle impoundment, please see <https://www2.gov.bc.ca/gov/content/transportation/driving-and-cycling/driving-prohibitions-suspensions/prohibitions-and-suspensions/caught-driving-while-prohibited>.

It is advisable that individuals charged with Driving While Prohibited seek out legal advice from a lawyer. It is possible to work out a plea deal with the Crown Counsel to a lesser included offence of Driving Without a License pursuant to s. 24(1) of the *Motor Vehicle Act*. The benefits of this resolution are that:

- There is no statutory minimum driving prohibition;
- No minimum fine amount; and
- The individuals driving record will only be blemished with a 3 point *Motor Vehicle Act* infraction on their record.

## **XII. ICBC Breaches**

### **A. *Motor Vehicle Act/ Insurance (Vehicle) Act offences***

Some violations of the *Motor Vehicle Act* or *Criminal Code* may also be breaches of ICBC insurance conditions and serve to void your insurance. For more information, consult **Chapter 12 – Automobile Insurance (ICBC)**

## **XIII. Bicycles**

A cyclist has the same rights and duties as a driver of a motor vehicle including the duties of safe operation, care, attention, consideration, and provision of information at the scene of an accident, of other highway users. In addition, the *Motor Vehicle Act* provides that an individual commits an offence if they operate 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 *Motor Vehicle Act* 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.

## **XIV. LSLAP Program information**

**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, the client should be referred to a lawyer, particularly through the Lawyer Referral Service. 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 they face 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.

## XV. APPENDIX A: PENALTY POINTS AND FINES

This appendix lists fines and penalty points for some of the most common Motor Vehicle Act offences. As well, please note that many of these offences carry other penalties, discussed in this chapter. A comprehensive list of the penalty points from the Motor Vehicle Act Regulations and the fines from the VTAFR are available on the ICBC website at <http://www.icbc.com/driver-licensing/tickets/Pages/fines-points-offences.aspx>.

Offence	Fine	Points
No Drivers License or Wrong Class of License ( <i>MVA</i> s. 24(1))	\$276	3
Driving Without Insurance ( <i>MVA</i> s. 24(3)(b))	\$598	0
Failing to Produce a Driver's License or Insurance ( <i>MVA</i> s. 33(1))	\$81	0
Disobeying a Red Light at an Intersection ( <i>MVA</i> s. 129(1))	\$167	2
Driving without Due Care and Attention ( <i>MVA</i> s. 144(1)(a))	\$368	6
Speeding (including in and out of municipalities, and in violation of signs) ( <i>MVA</i> ss. 146(1),(3),(5),(7))	\$138-196	3
Speeding in a School or Playground Zone ( <i>MVA</i> ss. 147 (1) and (2))	\$196-253	3
Excessive Speeding ( <i>MVA</i> s. 148(1))	\$368-483	3
Failing to Keep Right ( <i>MVA</i> s. 150(1))	\$109	3
Failing to Signal a Turn ( <i>MVA</i> s. 170)	\$121	2
Using an Electronic Device While Driving/ Emailing or Texting While Driving ( <i>MVA</i> ss. 214.2(1) and (2))	\$368	4
Failing to Wear a Seatbelt or Permitting a Passenger Without a Seatbelt ( <i>MVA</i> ss. 220(4) and (6))	\$167	0
Illegible License Plate ( <i>MVAR</i> s. 3.03)	\$230	0
Failing to Display and "N" or "L" Sign ( <i>MVAR</i> ss. 30.10(2) and (4))	\$109	0
Failing to Slow Down or Move Over Near a Stopped Official Vehicle ( <i>MVA</i> s. 47.02)	\$173	3
Illegal Use or Possession of Permit or Insurance ( <i>MVA</i> s. 70(1)(a))	\$115-2,300	0
Illegal use or Possession of Identification Card or Driver's License ( <i>MVA</i> ss. 70(1.1)(a) or (b))	\$460-23,000	0
Motor Vehicle Related <i>Criminal Code</i> Offences	N/A (May be imposed by court)	10
Driving While Prohibited / Suspended ( <i>MVA</i> ss. 95(1) / 234(1))	\$575-2,300	10