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A GUIDE TO THE LAW IN ALBERTA REGARDING

IMPAIRED DRIVING

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IMPAIRED DRIVING, “OVER 80”, AND REFUSAL TO BLOW

1. What is the Law?

There are three main impaired driving related offences. They are:

1. impaired driving
2. “over 80”, and
3. refusal or failure to blow.

Section 253(a) of the Criminal Code defines the offence of “impaired driving”. It states that “Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of an aircraft or of railway equipment or has care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not, while the person’s ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by the alcohol or a drug”.

Section 253(b) of the Criminal Code defines the offence of “Over 80”. It makes it an offence for a person to operate a motor vehicle while your blood alcohol level exceeds 80 milligrams of alcohol in 100 millilitres of blood.

Simply put, section 253 creates two offences. This section makes it a criminal offence to drive a motor vehicle, or assist someone in driving a motor vehicle, while either your ability to do so is “impaired” or your blood level is “over 80”.

Section 254(5) of the Criminal Code makes it an offence to refuse to comply with a lawful demand made for either a roadside screening device, a breathalyser test, or blood samples.

2. What is meant by “impaired”?

Impairment can be as a result of either alcohol or drugs. “Drugs” is meant to be given a broad but reasonable meaning. This

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means that drugs include both prescription and non-prescription drugs, and any other chemical agent that may cause impairment.

Courts are likely to consider glassy or blood-shot eyes, unsteady walk, slurred speech, erratic driving pattern, or a smell of alcohol on the breath as common physical signs of impairment. While these are the most common signs of impairment, there may be many others.

3. What is meant by “care and control”?

A person may be in care and control of a motor vehicle if the person has the present ability to set the vehicle in motion, or where there is a risk that the person could put the vehicle in motion either on purpose or by accident and become a danger to the public.

If someone is found in the driver’s seat of a motor vehicle, care and control is presumed unless they can establish that they did not occupy that seat for the purpose of setting the vehicle in motion. But, even if they are not in the driver’s seat, and it is proven that you were using the motor vehicle in such a fashion that it may be set in motion, you may still be found in care and control. So, there is a danger of someone being found guilty even if they are just sleeping in a motor vehicle. It may even be possible to find

someone in care and control of a motor vehicle if they are simply near the motor vehicle and have the ability to set it into motion.

4. Will a person be arrested if suspected of committing any one of these offences?

Yes. If an officer has the reasonable and probable grounds to believe that either someone’s ability to drive is impaired, or that their blood alcohol limit while driving is “over 80”, she can arrest you immediately. An officer may have reasonable and probably grounds by taking into consideration any signs of impairment, or as the results of a roadside screening device.

5. What is a roadside screening device?

If someone is driving or has care and control of a motor vehicle and a police officer has a reasonable suspicion that they have alcohol in their body, he may demand an “Alco-Sur” or roadside screening device test. This suspicion may come from any physical signs, driving pattern, or statements made.

A roadside screening device (Alco-Sur) is a portable instrument that is kept in many police cars. The device does not measure the actual blood alcohol level, but instead gives a basic indication of whether or not your ability to drive is impaired by alcohol by indicating either a pass, fail, or warning. It is not against the law to fail a roadside screening device test, but if someone fails this test this will give the officer the reasonable and probable grounds to hold them further and demand that they take a *breathalyser* test.

If someone refuses a roadside screening device test they may be charged with refusal.

6. What is the breathalyser test?

The breathalyser is a machine which measures someone’s actual blood alcohol level. If an officer has reasonable and probable grounds to believe that a person has committed an impaired or “over 80” offence in the previous three hours, the officer may demand that the person accompany him to provide breath samples.

The demand must be made right away or as soon as is practical once an officer has reasonable and probable grounds for arrest. These breath samples must be taken as soon as is practical after the demand is made. The test is generally administered either at the police station or at a mobile testing station.

A person will be required to provide at least two samples of their breath by blowing into the mouthpiece of a breathalyser machine. The samples must be taken at least 15 minutes apart and the first

sample should be taken within 2 hours of committing of the alleged offence.

If the test indicates that a person’s blood alcohol content exceeds the legal limit of 80 milligrams of alcohol in one hundred millilitres of blood, the breathalyser technician will complete a certificate of analysis. The certificate will record the results of at least two readings and the times when each was taken. If someone is charged with an “over 80” offence, they will be given a copy of this certificate. It is this certificate that is generally allowed as evidence at trial to prove that their blood alcohol was over the permitted limit.

The test results shown on the certificate will be accepted at trial as the actual blood alcohol content unless you can provide evidence to the contrary.

Refusing or failing to provide "an adequate" breath sample is itself a criminal offence.

7. When can an officer demand a blood sample?

If an officer has reasonable grounds to believe that, because of any physical condition, a person may be incapable of providing a sample of breath, or it would be impractical to obtain a sample of their breath, she may demand that samples of their blood be taken. These samples will then be used to determine the concentration of alcohol in their system. If the blood samples indicate that the person’s blood alcohol level is above the legal limit, they will be given a certificate of analysis and will be charged with an “over 80” offence.

These samples of blood can only be taken by, or under the direction of, a qualified medical practitioner who is sure that taking the samples will not endanger the person’s life or health.

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If someone is unable to give an informed consent to the taking of the blood samples (meaning they have enough information and the ability to agree to give samples) due to a mental or physical condition, such as injuries from a car accident, a police officer may be able to get a judge to give her permission to take the samples. These samples will be taken under the supervision of a qualified medical practitioner.

8. How can I be charged with a refusal?

If someone refuses to comply with a valid demand for either a roadside screening test, a breathalyser, or a blood sample, they can be charged with refusal under section 254(5) of the Criminal Code. Having a “reasonable excuse” is a defence to this charge.

Generally, a “reasonable excuse” is anything which makes agreeing to the demand either extremely difficult or likely to involve substantial risk to their health if they give the sample. If it is impossible for someone to understand the demand because they voluntarily got drunk, they do not have a valid excuse. Although they may have a defence on the mental element of the charge. A lawyer will be able to help a person sort through this defence.

9. Can a person be convicted of both impaired and “over 80”?

No. Impaired and “over 80” are considered alternate charges. This means that someone cannot be convicted of both charges when the counts come out of the same incident.

You can be tried and found guilty of both, however, the rule against double punishment mean that there would be an automatic judicial stay on one. This means that a person cannot be punished for both.

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10. Can a person be convicted of both refusal to blow and impaired?

Yes. A person can be convicted of both refusal to blow and impaired driving if the evidence proves they are guilty of both. The legal consequences of being convicted of refusal are the same as for impaired driving or driving “over 80”.

A PERSON’S RIGHT TO CONTACT A LAWYER OR TO BE INFORMED OF THAT RIGHT

1. When does a person have the right to contact a lawyer?

Generally, a person does *not* have the right to contact a lawyer before taking the roadside screening device. But, a person *does* have the right to speak to a lawyer, before taking any sobriety tests and before taking the breathalyser. The right to contact a lawyer before taking either of these tests is the same whether the person is at a roadside mobile testing station or at the police station.

2. What must the police do to assist a person to contact a lawyer?

The police must tell a person the reason for their arrest or detention. The police must also do more than simply tell them about their right to contact a lawyer. They should also provide a person with information about Legal Aid and duty counsel. The information must be complete and the police must explain to the person how they can reach services which provide free, immediate, legal advice. This means that even if a person thinks that they cannot afford to hire a lawyer they have a right to speak to a lawyer for free before taking any tests.

The police must also give a person a reasonable opportunity to contact a lawyer. Normally, this means that the police will place a person in a room or roadside van alone with a telephone, a phone book, and a legal aid or duty counsel list. These lists provide the

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names of several lawyers who they can speak with immediately, 24 hours a day, and free of charge.

3. What if a person's right to contact a lawyer has been denied?

If a person's right to contact a lawyer has been denied the evidence of the breath or blood samples may not be allowed to be presented at trial because of the violation of their Charter rights. But, evidence obtained before arrest or detention may still be enough to convict a person of impaired driving.

PENALTIES FOR IMPAIRED RELATED OFFENCES

All of these offences are "hybrid offences". This means that the Crown may proceed by either summary conviction or by indictment. Before a person pleads guilty or not guilty the prosecutor will indicate to an accused, and the court, whether the Crown is going ahead summarily or by indictment. If the Crown proceeds by indictment, they will generally be seeking a more serious sentence. In deciding how to proceed, the Crown will consider any past related record the accused may have as well as the circumstances of the offence. Generally, these factors will also affect the seriousness of a sentence.

For a first impaired or refusal conviction, the Crown will generally proceed summarily, and a fine of between the minimum penalty of \$600, and \$2000 will be imposed as well as a minimum one year driving prohibition. However, the judge may also impose a jail sentence of up to 6 months with the fine or in place of it.

If someone has already been convicted of an impaired, "over 80", or refusal charge, and they are again charged with one of these offences, the Crown may put forward a certificate to seek greater punishment. If the Crown does intend to prosecute on the basis of a prior conviction, the person must be served (given a notice) of this intention before they enter a plea. The notice may be in

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writing and is often provided to the accused once they are released from custody along with a certificate of the analysis. As a general rule, if someone has one previous conviction within the past ten years, the Crown will proceed as though the offence is a second or subsequent offence.

If a person is given this notice, they will receive jail time if they are again convicted. Generally, for a second conviction within ten years, a person will receive imprisonment for a period more than 14 days. For a third offence of this type within 10 years, the Crown will seek a period of imprisonment of more than 90 days. The Judge can impose jail time without such notice, but that notice makes a jail sentence mandatory.

Each time someone re-offends, the Crown will likely seek a more serious penalty.

1. If I am given a jail sentence, do I have any other options?

If a jail term is given of 90 days or less it may be served on an intermittent basis. This means that someone can ask that the imprisonment be served on weekends or any other appropriate periodic basis during the week. In deciding whether or not to allow this, the judge will often take into account the circumstances of the offender, such as the work or school schedule.

2. What is a curative discharge?

A person who pleads guilty or is found guilty of impaired driving or driving "over 80" may, instead of being convicted, be given a curative discharge. Curative discharges are very rare. They may be considered appropriate if a court is satisfied that a person has a serious alcohol or drug problem and there is a reasonable chance of overcoming these problems through treatment.

A person who is given a curative discharge will be placed on probation with the strict condition that a treatment program be taken. If the person completes the treatment program

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successfully, the conviction is not registered on the criminal record.

A person who is given a curative discharge will still receive the normal licence suspensions.

A curative discharge is not available for the offence of refusal.

LICENCE SUSPENSIONS

There are three types of licence suspensions which are given in Alberta upon charge and/or conviction.

1. Federal driving suspensions

When imposing a penalty for an impaired driving, "over 80", or refusal charge, the judge must impose a federal driving prohibition. For a first offence, it will be between 1 and 3 years. For a second offence, between 2 and 5 years. For each offence after the second conviction, a person's licence will be suspended for at least 3 years. The suspension can be longer than 3 years if either bodily injury or death occurred to another as a result of the impaired driving.

2. Provincial driving suspensions

In addition to the federal prohibition, there is also a provincial suspension. If a person is found guilty of an impaired, "over 80", or refusal charge, they will also be disqualified from holding a driver's licence under s. 83 of the Alberta Traffic Safety Act. For a first offence, they will be disqualified for 1 year. If they are convicted of another impaired related charge within 10 years, the provincial disqualification will be for 3 years. If they are found guilty of 2 offences within 10 years, their provincial disqualification will be for a period of 5 years.

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3. Automatic licence suspension

The Traffic Safety Act allows the provincial government to automatically suspend an accused's licence for 3 months if "charged" with driving above .08 or refusing provide a breath sample.

If the charge of being above .08 or refusal is accompanied by impaired driving causing death or bodily harm, the automatic suspension is raised to 6 months.

These automatic suspensions come into effect immediately after the 21 day temporary licence issued expires. This temporary licence is issued in place of the accused's original licence which will be confiscated and destroyed by police.

If found not guilty of the offence before the 3 months suspension expires, a person can apply to the Driver Control Board to have their licence re-instated.

The provincial driving disqualification and the federal prohibition run concurrently. This means that they start and run at the same time. They are not added together. For example, if someone receives a federal prohibition of 1 year and a provincial disqualification for a period of 3 years, both will start immediately from the time they are found guilty. In 1 year the federal prohibition will end, but 2 years will still remain on the provincial disqualification.

THE IGNITION INTERLOCK PROGRAM

An interlock device is a machine that a person must blow into before starting their vehicle. If there is alcohol in the person's body then the vehicle cannot be started. This device allows a person to drive before the provincial and federal suspension is over.

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A person must apply for this device and must pay both the installation costs and a monthly charge to rent and service this device. The earliest someone can apply is 3 months into the suspension. If they want to be eligible to apply for the Ignition Interlock Program, they must ask the Judge to make this recommendation at the time they are sentenced and the driving prohibition is imposed. For more information, contact the Driver Control Board.

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REFERRAL NUMBERS

Some of the agencies which may be able to provide you with legal guidance are:

- Lawyer Referral Service 1-800-661-1095
- Native Counselling Services of Alberta [780] 423-2141
- Student Legal Services (University) [780] 492-2226
- Corona Criminal Law Office (Downtown) [780] 425-3356
- Driver Control Board [780] 427-7178
- Legal Aid Society of Alberta [780] 427-7575