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A GUIDE TO THE LAW IN ALBERTA REGARDING

IMPAIRED DRIVING

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GENERAL

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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:

- a. impaired driving
- b. “over 80”, and
- c. refusal or failure to blow.

Section 253(a) of the Criminal Code defines the offence of “impaired driving”. It states that “Everyone 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 with blood alcohol level exceeding 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 alcohol 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 bloodshot 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 it can be established that he or she did not occupy that seat for the purpose of setting the vehicle in motion. But, even if not in the driver’s seat, if it is proven that a person was using the motor vehicle in such a fashion that it may be set in motion, one may still be found in care and control. So, there is a danger of being found guilty even if a person is just sleeping in a motor vehicle. It may even be possible to find someone in care and control of a motor vehicle who is simply near the motor vehicle and has 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 his/her blood alcohol level while driving is “over 80”, the officer can arrest you immediately. An officer may have reasonable and probable 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 he or she has alcohol in their body, the officer may demand an “Alco-Sur” or roadside screening device tests. 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 a person’s 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 failing this test will give the officer reasonable and probable grounds to hold a person further and demand that they take a *breathalyser* test.

A person who refuses a roadside screening device test may be charged with section 254(4), “refusal to blow”. If convicted of refusal, you will receive the same penalty and driving prohibition as if you were impaired.

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 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 two 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, a copy of this certificate will be provided. It is this certificate that is generally allowed as evidence at trial to prove that the 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 breath sample, she may demand that a blood sample be taken. These samples will then be used to determine the concentration of alcohol in the blood. If a blood sample indicates a blood alcohol level above the legal limit, a person 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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A person must be able to give informed consent to the taking of the blood samples (he or she must have enough information about how it works and be able to agree to give samples). If someone is unable to give informed consent 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, he or she 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 the demand either extremely difficult to agree to or makes it involve substantial risk to their health if a sample is given. Generally it is not a valid excuse if it is impossible for someone to understand the demand because he or she is too drunk. 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.

A person can be tried and found guilty of both, however, the rule against double punishment means 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?

When they arrest or detain someone, the police must tell that person the reason for the arrest or detention. The police must also do more than simply mention the 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 to reach services which provide free, immediate, legal advice. This means that even if a person thinks that he or she cannot afford to hire a lawyer, there is still 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 a person 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 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 a maximum of \$2000 will be imposed as well as a minimum one year driving prohibition. 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 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

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this intention before entering a plea. The notice may be in writing and is often provided to the accused once 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.

A person is given this notice will receive jail time if 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.

However, the penalties for impaired driving are changing. If a first impaired driving offence was committed after June 2008, the minimum penalty for impaired driving is \$1000 and a one year driving prohibition. For a second offence of impaired driving committed after June 2008, the minimum penalty is imprisonment for 30 days. For a third offence, it is imprisonment for 120 days.

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 work, children 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

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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 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. A person found guilty of an impaired, "over 80", or refusal charge, will also be disqualified from holding a driver's licence under s. 83 of the Alberta Traffic Safety Act. For a first

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offence, disqualification is for 1 year. If convicted of another impaired related charge within 10 years, the provincial disqualification will be for 3 years. If found guilty of 2 offences within 10 years, provincial disqualification will be for a period of 5 years.

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, impaired driving 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

The Ignition Interlock Program is for sections 253 or 254 convictions. It is an alcohol-sensing device that is attached to the ignition of a vehicle. A person must blow into the device before starting their vehicle. The vehicle will not start if the device detects a level of alcohol on the driver's breath. The device is monitored by the Transportation Safety Board and drivers who are issued a "fail" or "warning" by the device may not be allowed to participate in the Ignition Interlock Program anymore.

A person must apply for the Ignition Interlock Program 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 criminal 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. A driver who is convicted of impaired driving causing bodily harm or death is NOT eligible for this program. For more information, contact the Driver Control Board.

A person may be eligible if:

1. The court has approved the driver's participation in the Ignition Interlock Program;
2. They attend the "Planning Ahead" course, if it is their first offence;
3. They attend the "Impact" course and attend a hearing, if it is a repeat offence;
4. The driver does not have any outstanding fines or un-served suspensions; and
5. They attend the Ignition Interlock Program for at least 6 months.

To be approved for exit from the program, the driver may not have any readings of "warning" or "fail" in the last 3 months.

The cost of the Ignition Interlock Program is:

1. An installation fee of \$150 and a removal fee of \$50;
2. A \$105/month rental fee;
3. Application fee of \$63 and Registry Agent fee; and
4. \$150 for the "Planning Ahead" course and \$375 for the "Impact" course

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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
www.lawsocietyalberta.com/publicservices/lawyerReferralService.cfm

Native Counselling Services of Alberta [780] 423-2141
www.ncsa.ca

Student Legal Services (University) [780] 492-2226
Corona Criminal Law Office (Downtown) [780] 425-3356
www.slsedmonton.com

Legal Aid Society of Alberta [780] 427-7575
www.legalaid.ab.ca

Driver Control Board [780] 427-7178

Elizabeth Fry Society of Edmonton [780] 421-1175
Court Office [780] 422-4775
www.elizabethfry.ab.ca