

The background is a dark blue gradient with abstract geometric elements. On the left, there are several concentric circles and a curved scale with numbers ranging from 140 to 260, resembling a speedometer or a circular gauge. The numbers are white and the scale lines are thin white lines. The overall design is modern and technical.

DRIVING TO THE LEGAL LIMIT – HOW LITTLE IS TOO MUCH? UNDERSTANDING THE NEW IMPAIRED DRIVING REGIME

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SATURDAY MORNING AT THE LAW SCHOOL

FIRST: A DISCLAIMER



THIS IS NOT LEGAL ADVICE



I AM NOT A PRACTICING LAWYER – I AM
AN ACADEMIC



IF YOU HAVE A SPECIFIC LEGAL ISSUE –
CALL A LAWYER



BEST PERSONAL ADVICE: DO NOT DRINK
AND DRIVE AND/OR CONSUME DRUGS
AND DRIVE



BOTTOM-LINE: THIS IS AN EVOLVING,
HIGHLY COMPLEX AREA OF LAW
WITHIN A DUAL FEDERAL AND
PROVINCIAL REGIME

DON'T DRINK AND DRIVE!

The background features a complex design of overlapping circles and arcs in various shades of teal and blue. A prominent circular scale with numerical markings (140, 150, 160, 170, 180, 190, 200, 210, 220, 230, 240, 250, 260) is visible on the left side. The text 'THE LEARNING OBJECTIVES' is centered in the upper left quadrant.

THE LEARNING OBJECTIVES

To gain a general understanding of the new impaired driving regime in Alberta

To identify and discuss some of the issues raised by that new regime

The background of the slide is a teal color with a complex pattern of concentric circles, arcs, and numbers. The numbers are arranged in a circular fashion, with some appearing as 140, 150, 160, 170, 180, 190, 200, 210, 220, 230, 240, 250, and 260. There are also dashed lines and arrows pointing in various directions, creating a sense of movement and rotation.

THE AGENDA

OVERVIEW OF THE *CRIMINAL CODE* REGIME

- changes & issues raised

OVERVIEW OF THE NEW PROVINCIAL ADMINISTRATIVE APPROACH

- "decriminalization"

THE STATISTICAL CONTEXT

2,220 breath tests in the year before mandatory screening to 10,445 tests in the year after

Calgary police have conducted 15,600 breath tests under mandatory screening

Calgary police & RCMP now breath-test every driver they pull over, regardless of the reason

Province-wide, impaired driving charges rose by nine per cent from 2018 to 2019 (11,359 to 12,398)



OVERVIEW OF THE NEW *CRIMINAL CODE* REGIME

CRIMINAL CODE

APPLIES TO:

blood alcohol concentration (BAC) equal to or exceeding .08 mg/ml

2 nanograms (ng) or more of THC (the psychoactive component of cannabis) per milliliter (ml) of blood

combination of a .05 or higher BAC and 2.5 ng/ml or more of THC

any detectable amount of LSD, psilocybin, psilocin ("magic mushrooms"), ketamine, PCP, cocaine, methamphetamine, or 6-mam (a metabolite of heroin)

5mg or more of GHB per ml of blood (controlled substance)

Drivers will also be charged under the Criminal Code if they refuse to comply with a demand for a sample or fail to provide a sample (e.g. breath, blood, oral fluid)

THE CHARGES
GENERALLY:
IMPAIRED/OVER
80(OVER
BDC)/FAILURE
OR REFUSE TO
PROVIDE

3 Charging Scenarios:

- Impaired and Over 80 charges: finding of guilt on both but conviction on one and the other stayed
- Impaired or Over 80 charge or fail to provide: One charge does not rely on the other
- Impaired/Over 80 and Fail or refuse to comply with demand or fail to provide a sample: Can be charged with all three

GENERAL CHANGES



mandatory alcohol
screening at the
roadside



increase in minimum
fines and maximum
penalties



radical changes to
the structure of the
offence



changes to the
investigation of
impaired by drug



addition of driving with a
blood drug concentration over
a proscribed amount

CHANGE NO. 1

mandatory
alcohol screening
at the roadside

THE ISSUE



mandatory alcohol
screening at the
roadside without the
need for reasonable
suspicion

MANDATORY ALCOHOL SCREENING AT THE ROADSIDE WITHOUT THE NEED FOR REASONABLE SUSPICION BUT POLICE NEED LAWFUL REASONS

- POLICE Officers no longer need REASONABLE SUSPICION before breath demand
- BUT do need a LAWFUL stop
- A lawful stop can be a RIDE or random sobriety test program



SAVING LIVES? OR BREACHING RIGHTS?

mandatory
alcohol screening
at the roadside

THE CASE OF CINDY THOMPSON: AN EXAMPLE OF WHAT THE PROBLEM IS WITH MAS

- Stopped by police, had not been drinking, given a breath demand
- 9 tries and could not blow – charged with failing to comply with a breath demand
- License suspended and car impounded
- Tried to give blood sample – not an option
- 4-month legal fight until finally, based on medical evidence that has COPD, Crown withdrew charges



THE PROBLEM

- Thompson's case, no bad driving, no slurred speech, no smell of liquor on her breath, no alcohol in the car and no admission of drinking
- Under the previous law, the officer would not have had legal grounds to demand the breath test

CHARTER CHALLENGES

- BC – NORMA MCLEOD:
<https://nationalpost.com/news/politics/charte-r-challenge-to-mandatory-alcohol-screening-puts-random-stops-provincial-penalties-under-spotlight> (maybe June 2020)
- lawyers have filed a Charter challenge in B.C. Supreme Court that unconstitutional as it “relies solely on a generalized suspicion that will expose countless innocent persons to arbitrary detentions and unlawful searches, conducted on a **random basis**, with no justification required at the time, and no opportunity for judicial oversight.”





WHAT DO
THE
COURTS
SAY?

CHANGE NO. 2

increase some
minimum fines
and maximum
penalties

FIRST OFFENDER

- A first offender with a blood alcohol concentration of 80 to 119 mg of alcohol per 100 ml of blood is subject to a mandatory fine of \$1,000
- The **mandatory minimum fine** for a first offender with a BAC of 120 to 159 mg of alcohol per 100 ml of blood is \$1,500
- The **mandatory minimum fine** for a first offender with a BAC of 160 mg or over of alcohol per 100 ml of blood or more is \$2,000
- The **mandatory minimum fine** for a first offender who refuses to comply with a lawful demand is \$2,000.
- BUT JAIL IS THE MAXIMUM
- Exception is if you are impaired by BDC of less than 5 ng, then a fine not more than \$1000

CHANGE NO. 3

radical change to
the structure of
the offence

BOTTOM-LINE

Filled in gaps and responded to some arguments made by the defence under the old regime

Simplified proof

Tightened investigatory steps

SECTION NUMBER AND PLACEMENT CHANGE

- Old:
 - Sections 253 to 258 – Part VIII Offences Against the Person and Reputation
- Now:
 - Sections 320.11 to 320.40 – Part VIII.1 – Offences Relating To Conveyances
 - Conveyance means a motor vehicle, a vessel, an aircraft or railway equipment





CAN YOU CANOE? CANOING WHILE IMPAIRED

R V SILLARS, 2019 ONCJ 710: "ALCOHOL AND WATER, DON'T MIX"

ADDED RECOGNITION AND DECLARATION SECTION

320.12 It is recognized and declared that

- (a) operating a conveyance is **a privilege** that is subject to certain limits in the interests of public safety that include licensing, the observance of rules and sobriety;
- (b) the **protection of society** is well served by deterring persons from operating conveyances dangerously or while their ability to operate them is impaired by alcohol or a drug, because that conduct poses a threat to the life, health and safety of Canadians;
- (c) **the analysis of a sample of a person's breath by means of an approved instrument produces reliable and accurate readings of blood alcohol concentration; and**
- (d) an **evaluation conducted by an evaluating officer is a reliable method** of determining whether a person's ability to operate a conveyance is impaired by a drug or by a combination of alcohol and a drug.

IMPAIRED/OVER 80 OFFENCES

320.14 (1) Everyone commits an offence who

- (a) operates a conveyance while the person's ability to operate it is **impaired to any degree** by **alcohol or a drug or by a combination of alcohol and a drug**;
- (b) subject to subsection (5), has, **within two hours after ceasing to operate a conveyance**, a blood alcohol concentration that is equal to or exceeds 80 mg of alcohol in 100 mL of blood;

WHAT IF SOMEONE DRIVES HOME SOBER AND THEN CONSUMES ALCOHOL. COULDN'T THEY BE CONVICTED UNDER THIS NEW OFFENCE?

Section 320.14(5)

(5) No person commits an offence under paragraph (1)(b) if

(a) they **consumed alcohol after** ceasing to operate the conveyance;

(b) after ceasing to operate the conveyance, they had **no reasonable expectation that they would be required to provide a sample of breath or blood**; and

(c) their **alcohol consumption is consistent** with their blood alcohol concentration as determined in accordance with subsection 320.31(1) or (2) and with their having had, **at the time when they were operating the conveyance, a blood alcohol concentration that was less than 80 mg of alcohol in 100 mL of blood.**

CHANGE NO. 4

changes to the
investigation of
impaired by drug



CHANGE NO. 5

addition of driving
with a blood drug
concentration over a
proscribed amount





SCREENING DEVICE FOR DRUGS?

- SoToxa : THC impairment – first charge February 2020 Saskatchewan
- Registers a fail if 25 nanograms or higher of THC – legal limit 5 nanograms
- detect the presence but not exact level of drug in saliva
- only used for a driver's licence suspension or a ticket but can lead to further tests that will provide accurate reading
- even if a driver passes, they may still be impaired – DRE can still use other tests
- Device sensitive to extreme cold



OVERVIEW OF THE NEW ALBERTA APPROACH

ADMINISTRATIVE VS CRIMINAL

NEW PROVINCIAL REGIME FOR FIRST OFFENDERS WITH OVER .08 MMG/MML: SAFEROADS AB

- Ticket of \$1,000 fine ([Provincial Administrative Penalties Act](#)) & Immediate Roadside Sanctions such as:
 - Immediate seizure of vehicle for 30 days
 - Immediate licence suspension for three months
 - 12 months of Interlock program
 - 12 months of drug or alcohol-impaired driving education
 - seven days to request a case review online
 - Phone or video “review” by a “panel of traffic safety experts” (Minister quote) who must render a decision within 21 days
- Similar system is BC and Manitoba



PRESENT PROVINCIAL REGIME FOR BETWEEN .05 AND .079 MMG/MML: IMMEDIATE ROADSIDE SUSPENSION PROGRAM

- **FIRST OFFENDER:** immediate 3-day licence suspension and a 3-day vehicle seizure.
- Sanctions increase for second, third, and subsequent offences within a 10-year period.
- **NEW PROVINCIAL REGIME FOR FIRST TIME OFFENDERS BAC BETWEEN .05 AND .079 MMG/MML**
 - license suspension and car impounded for three days
 - \$300 Fine & victim fine surcharge



PRESENT PROVINCIAL REGIME FOR NOVICE DRIVERS: ALBERTA ZERO ALCOHOL/DRUG TOLERANCE PROGRAM



- NO detectable drugs or alcohol permitted
- IF DRIVING WITH DRUGS OR ALCOHOL:
 - immediate 30-day licence suspension and a 7-day vehicle seizure.
 - for every 30-day suspension received in the final year of the GDL program, required to remain in the GDL program for an additional year

PRESENT PROVINCIAL REGIME: 24 HOUR SUSPENSION PROGRAM

- Drivers suspected of being impaired by alcohol or drugs or by a physical or medical condition that affects their ability to safely drive



NEW PROVINCIAL APPROACH FOR REPEAT OFFENDERS OR THOSE WHO COMMIT THE OFFENCE & CAUSE DEATH OR BODILY HARM

- Criminal charges and increase provincial penalties
- Such penalties include a lifetime ignition interlock imposition that only allows driving with an alcohol-free breath sample



ADVANTAGES: ADMINISTRATIVE EFFICIENCIES

- Effective in B.C. where impaired driving incidents have fallen by 36 per cent from 2011 to 2018 and fatalities by 54 per cent in that time
- Summary system (both sanction and review) that works quickly (no criminal court delays)
- Free up criminal court time by 8% & eliminate 1200 trials/year (according to the Minister of Justice)
- No criminal record
- BC since 2010, means regime already “tested” in court

DISADVANTAGES: ADMINISTRATIVE EFFICIENCIES OVER PROCEDURAL FAIRNESS

- Dependent on police discretion
- Lack of access to legal process protections as found in the criminal courts
 - Open to abuse such as racial profiling
 - Presumption of guilt – penalty immediately imposed
 - Problem: What if you do not own the car?
 - Problem: What if you need your car to work?
- Process is too “efficient” with less built-in oversight
 - Onus on the “defendant” to challenge the penalty
 - No onus on the state to prove beyond a reasonable doubt
 - *Charter* rights are less engaged
 - non-judicial appeal process of “traffic safety” experts as opposed to legal experts
 - Not geared to protecting rights through legal defence
 - Even less “fair” than the previous administrative procedure, which included 3-person panel “in-person hearing”

SENTENCING



INCREASED SENTENCES

R v York, 2015 ABCA:

- “Sentences for impaired driving causing death have increased in recent years, commensurate with legislative changes and society’s need to deter and denunciate the senseless loss of life on Canadian roads. In cases where the offender has a prior related record and/or high blood alcohol levels, proportionality demands a higher sentence.”

Where harm (penitentiary sentence) or death results (penitentiary sentence upwards to 8 to 10 years (Marco Muzzo))

AVAILABILITY OF CURATIVE DISCHARGE

- Reserved for individuals who need treatment for substance abuse addiction

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DRIVE

BOTTOM-LINE: BE INFORMED

- <https://saferoads.com>
- <https://www.alberta.ca/impaired-driving-laws-overview.aspx>
- <https://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/>
- <https://www.legalaid.ab.ca/Pages/default.aspx>
- <https://www.lawsociety.ab.ca/public/lawyer-referral/lawyer-referral-request/>
- [Changes to Canada's drunk driving laws will give police sweeping powers, warn legal experts](#) (May 3, 2017)
- [Is driving high as bad as driving drunk? Legalization and what it means for traffic safety](#)
- Look for podcasts and articles by practicing lawyers such as Sean Robichaud (<https://robichaudlaw.ca/driving-while-impaired-by-drug-in-canada/>)

ANY QUESTIONS?

