ISSUE 158 IMPAIRED DRIVING LEGISLATION July 2013

MEMBER OF PARLIAMENT PETER GOLDRING

Recently, Alberta passed legislation with harsher impaired driving penalties, which particularly target those who are in the very controversial grey zone between .05 and .08 percentage of blood alcohol content (BAC) not considered as driver impairment under the Criminal Code of Canada.

Certainly moderately impaired driving is wrong, as is distracted driving, but there are concerns about how these changes in legislation to the perceived problem will impact Albertans' constitutional rights.

Under the previous legislation, police in Alberta were empowered to suspend the licenses of drivers who test between .05 and .08 on an inaccurate screening device which is not even suitable as court evidence. Drivers whose test results are in the .05 to .08 range on these machines receive a provincial 24-hour administrative driving suspension with absolutely no appeal at all. The notable's name would appear on police blotters and be portrayed in the media the next day as being a drunk driver.

Uniform equipped video cameras on patrol would allow for a record to be made of all incidents to protect both parties and save valuable court time.

Under the new Alberta legislation, if you test between .05 and .08 on the same inaccurate device, you will be subject to a much more severe sentence, automatic three-day license suspension and three-day vehicle impoundment on the spot, on first offense. At least now, unlike the previous Alberta legislation for testing between .05 and .08, if you wish to be tested by a second machine to verify the accuracy of the first test you can. You must, however, know that you have to ask for this to be done, it is not automatically done! This is particularly important if you very recently had consumed a drink and they wrongly insist on an immediate test.

A second occurrence will result in a license suspension for 15 days, vehicle impound for seven days, which could be an essential company work vehicle that many other employees depend on regularly. A third occurrence will result in a 30-day license suspension and a

seven-day vehicle seizure. All offenders have no recourse, no appeal. They have been judged, convicted, sentenced and their epitaph written in stone by the roadside constable wielding a questionably accurate screening device.

In every case, the constable administers the breathalyzer test and imposes the penalty, right then and there. This is despite the fact that the screening device may or may not have been operated properly in accordance with its manufacturer's approved specifications. The handheld screening device, the Intoxilyzer 400D, utilized by the Edmonton Police Department has an internal memory that is intended to record date and time on its memory, as well as record refusals to give a breath sample. However this documentation feature of the device is not utilized – why? Likely it is not utilized for the same reason that the Edmonton Police prefer to use the unrecorded open "parks channel" and their unrecorded personal cell phones to communicate.

The handheld breath testing device has to be operated according to strict manufacturer specifications or they claim that the test results can be challenged in court.

Most important is that the screening devices are not to measure the BAC of an individual with a degree of accuracy to be admissible in court. They are only meant to screen an individual, and if they test over, the individual is then to be taken to a central intoxilyzer machine station where more accurate and admissible evidence of BAC is conducted for criminal prosecution if the individual tests over .08 BAC.

The police favour this new, tougher legislation. After all, through provincially legislated empowerment they can accomplish the goal of penalizing the impaired, as all of society wants to, and don't have the nuisance of extensive paper work, or have to attend court to have their actions judged and questioned. In fact they have the empowerment to be judge, jury and executioner at the roadside with absolute impunity. This provincial empowerment is expected to lead to less over .08 charges and more over .05 charges, particularly as testing quality cannot be challenged. Of course sitting in the dark, particularly targeting licensed restaurant guests of these facilities, as they do in Edmonton, the impaired arrest and alarmingly high suspension numbers can be maintained by employing the tactic of just not asking them if they have had a recent drink in the last 15 minutes before you demand them to test. Most people do not know that by doing so they too are at high risk of giving false readings. They unfortunately believe that the constable who knows of the risks would certainly tell them – but they do

not.

For those testing over the legal limit of .08, the new provincial legislation empowers police to strip drivers of their license pending trial. Unfortunately, given the backlog in our country's court system, this could mean a driver (who remember, is innocent until proven guilty) could be without his or her license for a year to two years, unless of course they choose to give up their right to trial and in desperation plead guilty so that they can get their driver's license back a lot quicker.

By choosing to lower the blood alcohol levels for which provincial administrative penalties apply, the legislation is infringing on previously well researched Criminal Code intentions. By utilizing the bludgeoning power of a Criminal Code charge of up to five years in jail for refusing to take the test to determine the questionable administration level of .05% they undermine the intent and spirit of the Criminal Code law.

D'Arcy DePoe, President of the Alberta Criminal Trial Lawyers' Association, points out that when British Columbia introduced their impaired driving legislation, it actually led to fewer formal criminal charges under the Criminal Code of Canada. More people, including those who blew over the criminal limit of .08, simply received administrative penalties at the roadside, instead of being arrested. After all, the police are empowered to be judge and jury, and can operate with impunity. While this may reduce the administrative burden placed on police and the courts, it also completely avoids judicial scrutiny of the police conduction of affairs.

The Canadian Federation of Independent Business (CFIB) has said that similar laws in B.C. created public confusion about whether it is permissible to even have one glass of wine before driving, leading to what it claimed were losses of between 10 per cent and 50 per cent at certain establishments. It is important here to know that those fears are well founded.

Under present law police can suspend your driver's licence before you are found guilty of any crime and there is no appeal. Under Bill 26 police can suspend your licence and also seize your vehicle.

The police themselves know full well of this confusion and have testified in court about it. By aggressively conducting stop checks outside licensed restaurants and ignoring the rules of proper procedures they contribute support to a seemingly growing number of impaired driver problems when it clearly is not.

After consuming only one drink just before leaving, one could spike the test machine into failure, for the one-day to three-day administrative suspension - and there is no appeal. Don't expect the constable to tell

you he must wait 15 minutes to test because you just finished a drink. They are supposed to but they don't regularly ask. You test, then you're toast. If you dare to have the temerity to challenge the police on that issue you may well be arrested anyways.

The public cost of this new legislation should not be the erosion of a citizen's rights to be fairly treated, or in many circumstances to be falsely incriminated, by the police with no Charter rights to appeal.

To greatly protect individual rights and to dramatically reduce court time the following are suggestions to implement:

- Record police radio "park channel" for accuracy.
- Provide police with audio-visual recording device for arrest and evidence accuracy to protect the police and public.
- Require police to use handheld Intoxilyzer PA 400D screening device`s time and date recording capabilities and retain information for proper records.
- Have constables equipped with up to date body audio visual recording devices to ensure clarity and accuracy of reporting incidents.

Update: An Alberta Assistant Chief Judge suggested in June 2013 how the criminal code could be amended to help alleviate concerns for hand held screener accuracy, that the roadside handheld screening test demand be made optional but in such circumstances that the central station intoxilyzer be the mandatory test alternative where the criminal code required mandatory testing applies.

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This brochure series is intended to highlight special issues that Member of Parliament, Peter Goldring, has been involved in. If you wish to comment, please take a moment to fill out the survey below, write or call to the address above.

Your Opinion Matters...

Q1: Do you believe that the criminal code should be amended to allow for mandatory intrusive breath testing to be done on evidential grade central station equipment?

☐ Yes ☐ No

Q2: Do you want there to be absolutely zero blood alcohol tolerance and severe penalties for a driver if they have consumed any amount of alcohol?

☐ Yes ☐ No

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