1 Legislative Changes and Sequence of a Drinking and Driving Case

I. Introduction: Bill C-46

The first copy of this book is running through Emond Montgomery's printing press at a moment of significant change in Canada's criminal driving laws. On December 18, 2018, all *Criminal Code*[1] driving provisions were repealed and replaced with a new comprehensive regime, set out in the new part VIII.1 of the *Criminal Code*. Bill C-46, which introduced these changes, is the first comprehensive revision to Canada's driving laws since 1985 and represents the most significant changes since the offence of driving while intoxicated was introduced in 1921.

Bill C-46 did two things when it received royal assent on June 21, 2018. Part 1 of Bill C-46 came into force immediately, amending a number of *Criminal Code* driving sections. Existing provisions were largely left intact. The changes in Part 1 provided an immediate mechanism to address the impact of Bill C-45—Canada's new marijuana laws—on driving. This wasn't enough. For years, proposed changes to a number of driving provisions had been percolating in Parliament but never made their way into law. On December 18, 2018, Part 2 of Bill C-46 repealed sections 249 to 261—all of Canada's criminal driving provisions—and replaced it with part VIII.1 of the *Criminal Code*, sections 320.11 to 320.4.

Some of the new laws, such as mandatory alcohol screening, drug *per se* limits, and the new "80 or over" offence, are controversial and are expected to generate constitutional litigation. Many of the new provisions contain old friends, laws that have stood the test of time, such as the offence of impaired driving which is familiar to practitioners who prosecute or defend driving offences.

This book is a comprehensive guide to the new regime.

II. Contents of This Book

This book deals with all of Canada's criminal driving offences. While much of the book focuses on impaired-driving-related offences, counsel practising in this area need a broad understanding of the law relating to all *Criminal Code* driving laws. This book discusses substantive charges, procedural rules, evidentiary issues, case law interpretation, and Charter-related issues. The book has been co-written by a Crown counsel and a defence counsel and is written for all criminal law practitioners.

As it takes a while for charges to get through the court system, practitioners will be dealing with offences under the "old law" prior to June 21, 2018, the "interim law" between June 21 and December 18, and the "new regime" that came into existence on December 18, 2018. Much of this book, such as the chapters dealing with impaired driving, dangerous driving, and fail to stop, contains information applicable to both the old, interim, and new regimes. Some chapters, such as Chapter 2, 80 and Over, discuss the law under the old regime but focus more on the new.

1 RSC 1985, c C-46.

The emphasis in this book is on the new regime. Where laws no longer exist and are unlikely to be a significant issue for counsel, we do not discuss them. We do not explain, for example, the elements of the offence of street racing, which Bill C-46 repealed.

This book can, of course, be read cover to cover. Practitioners new to this area of law may wish to do just that. Each chapter, however, stands on its own. One does not need to read the "80 and over" chapter to understand the chapter on impaired driving, for example.

A. Offences

Chapters 2 to 11 deal with all *Criminal Code* driving offences. We begin with drinking and driving and drugged driving offences. The old "over 80," new "80 and over," "impaired operation," and "refuse to provide a breath sample" offences form, by far, the most significant proportion of driving offence charges. This is not merely a drinking and driving book. We discuss, in detail, the offences of operating while prohibited, dangerous driving, criminal negligence, failing to stop at the scene of an accident, flight from police, and the aggravated forms of those offences involving bodily harm or death.

B. Procedure

Chapters 12 to 23 deal with the investigation and prosecution of driving offences and common law defences that may arise. Although some topics apply to all driving offences, readers will note an emphasis in these chapters on issues relating to drinking and driving and drugged driving cases. Again, the reason is that the majority of driving charges laid involve these offences.

C. Charter Issues

This is not a book dedicated to constitutional law. However, the *Canadian Charter of Rights and Freedoms*[2] is commonly raised in driving offence cases. We deal with Charter implications as the topic arises. For example, we deal with arbitrary detention issues repeatedly in the chapter dealing with police powers to stop motor vehicles.

We deliberately have not taken a position on constitutional issues relating to the new legislation. Where debate exists in relation to particular provisions, such as the new mandatory alcohol screening provisions, we briefly introduce the arguments that have been raised during the legislative process. We do not predict how these arguments will ultimately be treated by the courts.

D. Sentencing and Provincial Regulations

Criminal Code sentencing is addressed in Chapter 23, Sentencing. A theme woven throughout this book is that the *Criminal Code* only contains half the picture. Counsel

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.

need to be aware of the significant provincial consequences that accompany driving charges and convictions. Automatic licence suspensions on conviction are only one example of such consequences. Indeed, some provinces such as British Columbia and Alberta have enacted legislation that allows the police to bypass the criminal system, treating impaired-driving-related offences as provincial offences with significant consequences. Provincial consequences are addressed repeatedly during this book, particularly in Chapter 6, Operating While Prohibited, and Chapter 23.

III. Public Safety and Drinking and Driving Cases

Practitioners need to be aware of the role that public safety plays in drinking and driving cases. Public safety has been a significant factor in every constitutional case. Every level of court throughout the country has emphasized public safety when making constitutional determinations. It also finds expression in the mouths of Crowns and defence counsel across the country during sentencing. Arguments that impaired driving is a minor offence will be quickly dismissed.

"Impaired driving is the leading criminal cause of death and injury in Canada."[3] This sad fact, and the carnage caused by drinking and driving, has been reflected in the jurisprudence for decades.[4]

Professors R Solomon and S Pitel estimate there are 150,000 alcohol and drug related crashes annually, involving more than 1,000 motor vehicle deaths. The annual cost of this has been estimated at $20.5 billion, or $621 per Canadian.[5] Courts have responded by recognizing a pressing need for Parliament and the provinces to legislatively address a significant problem of social concern.[6] The dangers of impaired driving are reflected daily in sentences handed down across the country.

Although impaired driving offences remain a significant public safety problem, there is some good news. Impaired driving rates have shown a general decline since 1986. The decrease has been accompanied by increased public attention about this

3 Government of Canada, Health Canada, "Backgrounder: Changes to Impaired Driving Laws" (Ottawa: 13 April 2017), online: <https://www.canada.ca/en/health-canada/news/2017/04/backgrounder_changestoimpaireddrivinglaws.html>.

4 *R v St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 SCR 187 at para 33; *R v Ladouceur*, [1990] 1 SCR 1257, 1990 CanLII 108 at para 43; *R v Larocque* (1988), 5 MVR (2d) 221 (Ont CA).

5 S Pitel & R Solomon, "Estimating the Number and Cost of Impairment-Related Traffic Crashes in Canada: 1999 to 2010" (MADD Canada, April 2013), online:<http://madd.ca/media/docs/estimating_presence.pdf>; R Solomon et al, "Alcohol and/or Drugs Among the Crash Victims Dying Within 12 Months of a Crash on a Public Road, by Jurisdiction: Canada 2014" (MADD Canada, 5 April 2018), online: <https://madd.ca/pages/wp-content/uploads/2018/05/Alcohol-and-or-Drugs-Among-Crash-Victims-Dying-Within-12-Months2c-by-Jurisdiction-Canada2c-2014_April-202c-2018.pdf>.

6 *R v Ladouceur*, *supra* note 2 at para 42.

issue, changes in societal attitudes towards drinking and driving, increased enforcement, and increased provincial and criminal sanctions for drinking and driving.[7]

In 2015, the police reported 72,039 impaired driving instances nationally, which is 65 percent lower than the rate reported in 1986.[8] One commentator on the decline in rates noted that

> [s]ince most impaired driving incidents do not have a direct victim, detection may be influenced, more than other types of crimes, by law enforcement priorities and the allocation of police resources. Legislative changes and the attitudes of the public towards impaired driving can also have an impact.[9]

The general decline in impaired driving has also been reflected by decreases in incidents of impaired driving causing death and impaired driving causing bodily harm. In 2015, there were 122 police-reported incidents of impaired driving causing death and 596 incidents of impaired driving causing bodily harm. In 1986, the police reported 196 and 1,581 of these incidents respectively. This represents a drop of 55 percent in cases of impaired driving causing death, and a 73-percent drop in cases of impaired driving causing bodily harm.[10] Despite this drop, alcohol and drug related driving remains a leading cause of criminal death in Canada.[11]

The statistics in the above paragraph appear to reflect cases where the police were involved and laid charges. They do not include incidents where an impaired driver was killed, nor incidents where the impairment was not detected by responding officers. They also do not reflect the number of deaths involved in each incident.

Studies of impaired driving using both hospital-related data and criminal charges suggest the police regularly fail to detect those with criminal levels of alcohol in their blood.[12] The actual number of deaths relating to drugs and alcohol is substantially

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7 See e.g. A Goodwin et al, *Countermeasures that Work: A Highway Safety Countermeasures Guide for State Highway Safety Offices*, 8th ed (Washington, DC: National Highway Traffic Safety Administration 2015), online: <http://www.nhtsa.gov/staticfiles/nti/pdf/812202-CountermeasuresThatWork8th.pdf>.

8 Statistics Canada, "Impaired Driving in Canada, 2015," by Samuel Perrault, in *Juristat* 30:1, Catalogue No 85-002-X201600114679 (Ottawa: Statistics Canada, 2016), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2016001/article/14679-eng.htm>.

9 *Ibid.*

10 *Ibid.*

11 R Solomon, "Alcohol and/or Drugs Among the Crash Victims Dying Within 12 Months of a Crash on a Public Road, by Jurisdiction: Canada 2014" (MADD Canada, 5 April 2018), online: <https://madd.ca/pages/wp-content/uploads/2018/05/Alcohol-and-or-Drugs-Among-Crash-Victims-Dying-Within-12-Months2c-by-Jurisdiction-Canada2c-2014_April-202c-2018.pdf>

12 *Ibid.*

higher than the number of charges would suggest. In 2014, for example, there were an estimated 1,273 fatalities.[13] Where the driver dies, of course, charges are not laid.

While alcohol-related impaired driving has been declining for decades, drug impaired driving may be on the rise. After Parliament amended the *Criminal Code* to combat drug impaired driving in 2008, drug impaired driving instances increased from 1,455 in 2009 to 2,786 in 2015. It is an open question whether these changes have been caused by increased drug impaired driving or simply better detection and reporting by the police. The number of drug impaired driving deaths and injuries remained stable between 2009 and 2015, while the number of alcohol impaired driving deaths and injuries declined.[14]

In 2015, there were 604 homicides in Canada. According to Professor Solomon, there were more than 1,000 alcohol- and drug-related motor vehicle deaths in the same year. Impaired-driving-related offences remain Canada's leading cause of criminal death.

IV. History of Criminal Code Impaired Driving Offences: Regular Change

Many of the key changes in Bill C-46 deal with drug and alcohol impaired driving offences. The history of impaired driving is characterized by constant change. Those of us prosecuting and defending death cases see first-hand the devastating consequences of criminal driving behaviour. Sentences never make up for lives lost.

Most adult Canadians drive motor vehicles and most experience driving incidents that threaten safety. The sheer number of deaths—along with the even higher number of injuries, as well as property damage—means that criminal driving touches everyone's lives. Public concern about drinking and driving and pressure on governments to decrease impaired driving have existed as long as the motor vehicle.

Defence counsel are tasked with ensuring that their clients are fairly treated and not unfairly convicted in light of the significant public pressures involved. The technical nature of many driving offences requires defence counsel to ensure that the state establishes the technical requirements before a conviction is registered. Frustration with the outcome of court cases has led Parliamentary response. The constant conflict between public pressure, the desire to prosecute, and the essential role of the defence, has led to regular amendments. Practitioners will better understand driving offence law, and drinking and driving law in particular, if they understand how the law developed.

The first drinking and driving conviction occurred in England on September 10, 1897, when a London cab driver named George Smith, after swerving from side to

13 *Ibid.*

14 *Ibid.*

side of the road, drove his four-wheeled electric cab into a building, breaking a water pipe and damaging a window. Witnesses, discovering that he was drunk, took him to the police station. Mr Smith denied that he was drunk, but the divisional surgeon was sent for and certified that he was drunk. Mr Smith was taken the same day before the Police Court, where he denied his guilt on the basis of impossibility. The police claimed he had been travelling at eight miles per hour, and Mr Smith argued that an electric cab couldn't possibly go that fast. When it was pointed out to him that he wasn't being charged with driving furiously, but with driving drunk, Mr Smith agreed that he might have had two or three glasses of beer. After the judicial officer reviewed Mr Smith's considerable record for convictions for drunkenness, he imposed a 20-shilling fine.[15]

Today, 120 years later, any modern practitioner might look at George Smith's case and think that it sounds familiar. Issues such as whether an electric vehicle can be considered a conveyance, how we prove someone is impaired, the role of experts, an accused person who claims he drank only two beers, the role of civilian witnesses, and an accused with a history of alcoholism are all common in modern drinking and driving cases.

Prior to 1921, driving while intoxicated was not a criminal offence in Canada. Issues relating to the drunken operation of motor vehicles led to criminal consequences only when death or serious bodily harm occurred. Offences such as causing bodily harm by an unlawful act, manslaughter, and criminal negligence were used to address deaths and injuries caused by those drinking and driving.[16]

In 1921, Parliament criminalized "driving while intoxicated" for the first time, making this a summary conviction offence under section 285c of the *Criminal Code*. The penalties were a minimum of 7 days' imprisonment and a maximum of 30 days. Second and subsequent offences were punishable by a minimum sentence of three months, and a maximum sentence of a year.[17] The standard of intoxication was not fixed. In some cases, one was considered intoxicated when not in a fit state to drive a car because of the too-free use of liquor.[18] Other courts required proof of stupefaction.[19]

In 1925, Parliament expanded the scope of section 285c, making it an offence to drive or have care or control of a motor vehicle while intoxicated or while under the influence of narcotics. The penalties were unchanged.[20]

15 "Drunken Motor Cab Driver," *Morning Post* (London, England: 11 September 1897).

16 *O'Hearn v Yorkshire Insurance Co*, 1921 CanLII 555, 67 DLR 735 (ONCA); *Rex v Field*, 1928 CanLII 317, 3 WWR 737 (ABCA).

17 *An Act to Amend the Criminal Code*, SC 1921, c 25, s 3, which introduced s 285c of the *Criminal Code*.

18 *McRae v McLaughlin Motor Car Co Ltd*, 1926 CanLII 221, [1926] 1 DLR 371 (ABQB).

19 *Rex v Pollock*, [1947] 90 CCC 171.

20 SC 1925, c 38, s 5.

In 1927, Parliament passed *An Act Respecting the Criminal Law*,[21] which was a comprehensive act containing the complete *Criminal Code*. It criminalized "wanton or furious driving or racing or other wilful misconduct" that caused bodily harm to any person. It also added the offence of failing to remain at the scene of an accident and the offence of joyriding (taking a motor vehicle without consent). The offence under section 285c was renumbered as section 285.4 of the *Criminal Code*.

In 1931, the offences of driving or having care or control of a motor vehicle while intoxicated or under the influence of a narcotic became a hybrid offence. The key difference was a minimum penalty of three months' custody for conviction on indictment, versus a minimum of seven days on summary conviction.[22]

In 1941, the Supreme Court of Canada confirmed in *Provincial Secretary of Prince Edward Island v Egan*[23] that both the provinces and federal government can legislate to regulate driving. Parliament has the power to pass criminal laws governing driving behaviour. The provinces, through highway traffic legislation, govern traffic laws, drivers' licences, and the ability to impose penalties for breaches of provincial traffic legislation. Now it is recognized that public safety is best protected through the cooperative nature of federal and provincial law.[24]

In 1951, as an alternative to the offence of driving while intoxicated, Parliament introduced the offence of impaired operation or impaired care or control of a motor vehicle.[25] Years of litigation followed over what was meant by "impaired." In 1994, the Supreme Court of Canada confirmed that the standard of impairment was any degree of impairment from slight to great, a standard that has stood the test of time and has now been reaffirmed in section 320.14(1)(a) of the *Criminal Code*.[26]

In 1969, the *Criminal Law Amendment Act*[27] introduced the modern approach to drinking and driving. The penalties introduced involved a minimum fine of $500 for a first offence, and minimum terms of imprisonment for second and subsequent offences. Significantly, the "over 80" offence and an investigative scheme that permitted officers to demand an accused provide breath samples was introduced. Also introduced was the offence of failing or refusing to provide a breath sample, although the penalties for this offence could be less than the penalties for impaired operation or "over 80." The legislation created an incentive to refuse to provide a sample.

21 SC 1927, c 36; CC, s 285.

22 SC 1930, c C.11.

23 [1941] SCR 396, 1941 CanLII 1.

24 See the discussion in Chapter 6, Operating While Prohibited.

25 *An Act to Amend the Criminal Code,* SC 1951, c 47, s 14.

26 *R v Stellato*, [1994] 2 SCR 478, 1994 CanLII 94, aff'g 1993 CanLII 3375, [1993] OJ No 18 (QL), at para 14 (CA); s 320.14(1)(a) came into force on 18 December 2018.

27 SC 1968-69, c 38, s 16.

Legislative changes between 1925 and 1969 reflected developments in the science of drinking and driving. It has been known since the 1800s that alcohol is excreted in the breath. In 1927, Dr Emil Bogen published a paper demonstrating a link between breath alcohol and blood alcohol concentration (BAC). The paper also examined the relationship between alcohol consumption and gross symptoms of alcohol intoxication, and discussed the role that tolerance might play.[28]

The first device designed to test breath for alcohol consumption was invented in 1938 by Professor Rolla Harger, in Indiana, and was known as the Drunkometer. Professor Robert Borkenstein collaborated with Dr Harger and invented the first Breathalyzer in 1954. The Breathalyzer was introduced in Canada in 1956 and involved bubbling breath through a chemical solution. This 1950s technology was still in use at the start of the twenty-first century.[29]

It was the provinces rather than Parliament that first introduced (in the 1950s) the use of breath-testing equipment to ascertain BAC. This was done to enforce provincial traffic legislation and was upheld as within provincial jurisdiction. The results of voluntarily obtained samples were held to be admissible in criminal prosecutions.[30]

In 1967, Canada's Alcohol Test Committee (ATC) was formed, with its members being actively involved in breath-testing programs. The committee develops standards for breath-testing equipment. It both recommends and refuses to recommend equipment for *Criminal Code* use. The formal use of such equipment was first legislatively approved in 1969.[31] The ATC is now regarded as an authoritative body.[32]

Parliament introduced roadside screening through the *Criminal Law Amendment Act*, 1975. An order in council approved the Alcohol Level Evaluation Roadside Tester (ALERT) device. Even today, senior practitioners still refer to approved screening devices as "ALERTs." The screening provisions came into force in different provinces, over a period of several years. The penalties for refusing a demand to provide a breath sample were now the same as the penalties for impaired driving or for the "over 80" offence.[33]

By 1980, the offences and procedures set out in the *Criminal Code* dealing with dangerous driving, failing to stop at the scene of an accident, criminal negligence,

28 Emil Bogen, "The Diagnosis of Drunkenness: A Quantitative Study of Acute Alcoholic Intoxication" (June 1927) XXV1:6 J Cal and Western Med 778.

29 DrinkDriving.org, "Breathalyzers in History," online: <https://www.drinkdriving.org/drink_driving_information_breathalysers_early.php>; Evidence of Doug Lucas to the House of Commons Standing Committee on Justice and Human Rights, Wednesday 3 February 1999, 1555-1610.

30 *Reference re Vehicles Act (Sask)*, [1958] SCR 608.

31 Evidence of Doug Lucas, *supra* note 29.

32 *R v Tonkin,* 2016 ONCJ 360 at para 34; *R v St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 SCR 187 at para 25.

33 *Criminal Law Amendment Act*, SC 1975-75-76, c 93, s 15.

impaired driving, "over 80," and operating a motor vehicle while prohibited were similar to the *Criminal Code* provisions in existence in 2007. Between 1980 and 2007 there were numerous amendments as public pressure required Parliament to respond to injuries and deaths caused by the use of motor vehicles.

In 1985, section 36 of the *Criminal Law Amendment Act* repealed all of Canada's *Criminal Code* driving offences and procedural laws, re-enacting them and making a number of changes. Parliament added offences of dangerous operation of vessels and aircraft, as well as the aggravated offences of dangerous operation of a motor vehicle, vessel, or aircraft causing bodily harm or death. The maximum sentences were less than the offences for criminal negligence causing death. This simple change, and the positioning of dangerous driving as a lesser offence than criminal negligence, led to years of legal wrangling over how to describe the *mens rea* and *actus reus* of penal negligence offences, wrangling that still hasn't been fully resolved.[34]

Prior to 1985, where an individual was killed or injured as a result of a drinking and driving incident, the Crown's only option was to lay charges of manslaughter or criminal negligence. In the 1985 *Criminal Law Amendment Act*,[35] Parliament introduced the aggravated offences to ensure that the punishment for impaired driving was more severe when the consequences were more severe.[36]

The act increased the minimum penalties for impaired and "over 80" offences, and added the offences of impaired operation of a motor vehicle causing bodily harm or death. Procedurally, Parliament introduced police powers to make blood demands, providing an alternative method of proof when taking a breath sample was problematic. By 1985, it was recognized that many of those involved in drinking and driving may be alcoholics in need of treatment. Parliament introduced the curative discharge provisions.[37]

In 1985, defence counsel VI Balaban was successful in an Ontario Court of Appeal case, *R v Carter*,[38] which allowed an accused to testify as to his or her drinking history. That history, combined with evidence from a toxicologist, could be used to rebut the calculation of an accused's BAC by an approved instrument—the *Carter* defence. In the following 23 years, the *Carter* defence became a primary method by which accused persons defended against "over 80" charges. We estimate this decision led to tens of thousands of acquittals. The *Carter* defence is recognized today as being

34 See Chapter 8, Criminal Negligence; *R v Tayfel (M)*, 2009 MBCA 124 at para 70; *R v Anderson*, [1990] 1 SCR 265, 1990 CanLII 128 at 269.

35 *Criminal Law Amendment Act 1985*, SC 1985, c 19.

36 *Ibid* at s 36; *R v McVeigh*, 1985 CanLII 115, [1985] 11 OAC 234, (Ont CA); *R v Larocque* (1988), 5 MVR (2d) 221 (Ont CA); *R v Nickle*, [1920] 34 CCC 15.

37 *Criminal Law Amendment Act 1985*, *supra* note 35 at s 36.

38 1985 CanLII 168, 7 OAC 344 (Ont CA).

scientifically unsupportable.[39] The Crown in the case, David Doherty, was later appointed to the Ontario Court of Appeal, where he has become known as one of Canada's foremost jurists, deciding a number of significant driving cases.

In 1999, noting that "impaired driving continues to pose a very serious threat to the lives and health of Canadians," Parliament made having a blood alcohol concentration over 160 milligrams of alcohol in 100 millilitres of blood an aggravating factor. Parliament introduced the ignition-interlock program, though it was up to the provinces to decide whether to implement such programs.[40]

In 2008, the *Tackling Violent Crime Act*[41] introduced a number of significant changes that altered the landscape for drug impaired driving. Parliament introduced the evaluating officer regime, which provided for drug recognition experts. Roadside officers were given the ability to demand an individual conduct physical coordination tests for screening purposes. Parliament also increased the scope of blood and urine demands. In addition, Parliament introduced the offences of "over 80" causing death and bodily harm and increased the minimum penalties for impaired and over 80 offences to a $1,000 minimum fine for a first offence, and 30 days for a second or subsequent offence.

The offence of failing to provide a breath sample, in circumstances where the accused had caused an accident resulting in death, with the potential for a sentence of life imprisonment, was also introduced. Parliament also introduced the rule of conclusive proof, which statutorily repealed the *Carter* defence.[42]

Parliament, in 2018, as it did in 1927 and 1985, enacted a new comprehensive regime dealing with driving laws. The new offences are included in part VIII.1 of the *Criminal Code*. Many of the offences and provisions are familiar, having been in existence for decades. Others, such as the *per se* drug offences and the transformation of the venerable "over 80" offence into the new "80 and over within two hours of operation," are new. New procedural laws have been introduced, including drug testing provisions and the introduction of mandatory alcohol screening.

The century-old conflict involving public pressure over drinking and driving, Crowns who seek to prosecute, and defence counsel who seek to hold the state to its burden, looks set to continue.

This book sets out the law under the new part VIII.1 of the *Criminal Code*.

V. Reviewing the Basics

Experienced practitioners should skip the remainder of this chapter. The next few pages are for those new to this area of law.

39 *R v St-Onge Lamoureux*, 2012 SCC 57, [2012] 3 SCR 187.

40 *An Act to Amend the Criminal Code (Impaired Driving and Related Matters)*, SC 1999, c 32.

41 *Tackling Violent Crime Act*, SC 2008, c 6.

42 *Ibid.*

New practitioners frequently struggle with the basic terminology involved, such as "approved screening devices," "approved instruments," and with rules relating to what evidence is admissible and inadmissible at trial. For you, much of this book, particularly chapters such as Chapter 2, 80 and Over; Chapter 4, Impaired Ability to Operate; Chapter 14, The Stop; and Chapter 18, Proving BAC Through Breath Samples are essential reading. Most likely, the first driving case you will be involved with will be a "simple" impaired or "80 and over" prosecution. We describe here a very simple fact scenario, solely for the purpose of introducing the terminology involved in these cases. The individuals mentioned in it are fictional. This fact scenario does not discuss the potential defences that may be at play.

A. A Simple Fact Pattern

1. **Conveyance stop**. Most prosecutions begin with the police pulling over a conveyance, asking questions, and making observations of the operator. Officer Smith notices a Ford Escape weave slightly within its lane. The officer pulls over the vehicle and approaches the driver, Wilma Jones. Officer Smith asks the operator for a driver's licence, registration, and proof of insurance. She provides that documentation, and the officer smells a faint odour of alcohol coming from Wilma's breath. No rights to counsel and caution are read to her, as there is an implied limit on rights to counsel in traffic stops involving highway safety issues.

   Counsel should consider whether there was lawful authority to stop a vehicle. Issues relating to vehicle stops are canvassed in Chapter 14.

2. **Roadside screening demand**. The officer, based on his observations, has a reasonable suspicion that Wilma Jones has alcohol in her body. The officer makes an **approved screening device (ASD)** demand under section 320.27(1)(b) of the *Criminal Code*.

   Approved screening devices can ascertain whether a driver has a blood alcohol concentration above a criminal or other regulatory level. Screening tests can be performed at the roadside and are intended to quickly identify those drivers committing criminal or provincial drinking and driving offences, while permitting sober drivers to get back on the road promptly. The information from the screening test can be used by an officer to form the grounds for further steps but cannot be used in evidence at trial. The screening process is canvassed in detail in Chapter 16, Roadside Screening Demands.

3. **Failing the ASD test.** Wilma Jones blows into the approved screening device, a Dräger Alcotest 7410 GLC, and registers a fail result.

   Screening devices may produce a number of messages, the most common of which are 0, Fail, or Warn. A 0 result indicates the accused has no alcohol in their body. A fail result indicates an accused has at least 80 milligrams of alcohol in 100 millilitres of blood, and many approved instruments are calibrated to produce a fail result at

that level. A warn result indicates the accused has more than 50 milligrams of alcohol in 100 millilitres of blood. Chapter 17, The Arrest and Evidentiary Demands, explores this issue.

4. **Arrest and evidentiary demand.** Officer Smith, based on the fail result, forms reasonable and probable grounds to believe that Wilma Jones was operating a conveyance with 80 or over milligrams of alcohol in 100 millilitres of blood. Officer Smith arrests Wilma for the offence of "80 or over," contrary to section 320.14(1)(b) of the *Criminal Code*. The officer knows that the screening results are not admissible in evidence against Wilma, so makes an **approved instrument** demand under section 320.28(1)(a)(i) of the *Criminal Code*. At this time, the officer reads rights to counsel and a caution to her.

   Approved instruments are designed to ascertain an individual's blood alcohol concentration. They require an individual to provide two suitable samples of breath, and testing is ordinarily done at a police detachment on an individual in custody. The results are normally admissible in evidence. Issues relating to the arrest and evidentiary demands are discussed in Chapter 17.

5. **Approved instrument tests.** The officer transports Wilma Jones to the police detachment, where tests are carried out by Constable Tinker, a qualified breath technician. Wilma Jones provides two samples of breath into an approved instrument, an Intoxilyzer 8000C. The results show that Wilma Jones has 110 milligrams of alcohol in 100 millilitres of blood. Constable Tinker prepares a certificate of qualified technician for use in court.

   Issues relating to proving blood alcohol concentration using breath samples are discussed in detail in Chapter 18.

6. **Immediate provincial consequences**. Wilma Jones is released from custody on a promise to appear. She suffers a number of immediate consequences, due to provincial highway traffic legislation. Her vehicle is impounded, and she receives an immediate licence suspension under provincial legislation.

   Both the Criminal Code *and provincial highway traffic legislation govern the consequences of drinking and driving. Even in cases where criminal charges are not laid, there can be significant provincial consequences. In some provinces, including British Columbia,* Criminal Code *charges are often not laid, because the provincial consequences are extensive and accomplish the goals of protecting the public. The issue of provincial and federal jurisdiction over drinking and driving is canvassed in a number of chapters, including Chapter 6, Chapter 14, and Chapter 23.*

7. **Sentencing consequences from criminal conviction.** Constable Smith prepares an information, alleging "80 and over." Wilma Jones is convicted. On sentencing she receives a $1,000 fine, a 30 percent victim fine surcharge on top of that amount, and a one-year driving prohibition. In addition, the province suspends her driving licence due to the *Criminal Code* conviction. She can get her licence back only when she completes some provincial remedial training.

She is eligible to apply for an ignition-interlock program to be able to drive earlier, but the fee for this is substantial. Her insurance company increases her insurance rates significantly when she reports the conviction, which she is required to do under her insurance contract. Wilma Jones is employed by CN rail as an engineer and is fired due to the *Criminal Code* conviction.

It is not enough for counsel to understand the Criminal Code *to deal with drinking and driving. In advising clients, counsel need to be aware that there are multiple consequences for both a drinking and driving charge and a drinking and driving conviction. Each client's situation is unique, but consequences include criminal penalties, provincial highway traffic collateral consequences, increases in insurance costs, employment consequences, immigration consequences, and consequences to other forms of operating licence. Chapter 23 deals with these issues.*

VI. Client Checklist

Defence counsel need to be careful when meeting clients in their first driving offence cases. There is much to learn, and counsel should consult with more senior colleagues when advising clients. Crowns need to ensure they understand the process of a drinking and driving case and the technical requirements of the various modes of proof. This book will help you as you begin dealing with these interesting and challenging cases. What follows is principally for defence counsel.

Each client's situation will need to be understood, and counsel will be expected to discuss and provide advice on a number of issues. Some issues may require the criminal lawyer to refer the client out for more specialized legal advice. The following is a generalized checklist of topics for defence counsel to cover with a client:

- review of disclosure and accompanying videos of the client while in police custody;
- issues, if any, concerning pre-arrest conduct of the police, thereby triggering section 8 and section 9 of the Charter;
- rights-to-counsel issues, including timing, privacy, counsel of choice, and other issues associated with the case law under sections 10(a) and (b) of the Charter;
- timing of each event and whether requirements that demands be made immediately and carried out as soon as practicable have been met;
- conduct of police in dealing with the client while in police cells, including but not limited to privacy issues, overhold issues, strip-search issues;
- common law and other defences available to the client once counsel has heard the client's version of events;
- financial costs involved with running a drinking and driving trial;
- whether the client has a criminal record for impaired driving related offences, and the effect, if any, this may have on the decision to run a trial;

- the client's priorities, including detailed discussions on resolving the matter as soon as possible and obtaining the ignition-interlock device, avoiding a criminal record completely; avoiding immigration consequences, and avoiding getting fired or not hired for employment;
- other consequences, including detailed discussions on insurance ramifications, the client's ability to continue being a volunteer and how a criminal record will affect this, how a treatment program may assist in preventing a mandatory minimum jail sentence, the effects of the client being sued for the results of an accident; and any other consequences a conviction may have on this particular individual;
- potential sentence range, including length of driving prohibitions;
- process for obtaining a licence back after conviction, and the costs involved;
- ignition-interlock program costs and practicalities;
- any obligations to report convictions to insurance companies, and the potential insurance increases as a result;
- collateral provincial licence suspensions and provincial consequences;
- strengths and weaknesses in the Crown's case; and
- potential for an acquittal at trial.

VII. Conclusion

This is an exciting time to be a *Criminal Code* driving practitioner. The legislation has just changed. Old arguments have disappeared. New constitutional issues are boiling. While it is harder than ever to defend a simple "80 and over" case on technical grounds, changes to the legislation have resulted in an increased focus on Charter-based arguments. For both Crowns and defence, the next decade will produce new decisions and novel arguments. We look forward to watching the law progress.