



CRIMINAL JUSTICE BRANCH, MINISTRY OF ATTORNEY GENERAL
CROWN COUNSEL POLICY MANUAL

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SUBJECT: Impaired Driving Prosecutions – Immediate Roadside Prohibitions – Resolution Discussions re <i>Motor Vehicle Act</i> Offences		CROSS-REFERENCE: ALT 1 CHA 1 MOT 1 MOT 1.1 MOT 1.2 RES 1

POLICY

Impaired driving offences are serious, prevalent and pose a substantial threat to the safety of the public. They include the nine *Criminal Code* offences prohibiting impaired driving, driving with excessive blood alcohol and refusing or failing to comply with a demand, which are enumerated under “Discussion” below.

The Supreme Court of Canada has stated:

Every year, drunk driving leaves a terrible trail of death, injury, heartbreak and destruction. From the point of view of numbers alone, it has a far greater impact on Canadian society than any other crime. In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country. (R. v. Bernshaw [1995] 1 S.C.R. 254 (at para. 16))

Therefore, there will often be significant public interest factors in favour of proceeding with the prosecution of an impaired driving offence where the evidentiary test is met under the Branch policy on Charge Assessment Guidelines – CHA 1, subject to the considerations outlined below concerning the Immediate Roadside Prohibition (IRP).

Immediate Roadside Prohibition (IRP)

On September 20, 2010, the Province of British Columbia brought into force the Immediate Roadside Prohibition (IRP) scheme under sections 215.41 to 215.51 of the *Motor Vehicle Act*. This legislation provides an administrative scheme with new and significant consequences for a driver who registers a fail on an approved screening device, or fails or refuses to provide a breath sample for analysis. The consequences include a 90-day prohibition from driving (a 90 day IRP), a \$500 monetary penalty and impoundment of the motor vehicle for 30 days. Further consequences may include completing a remedial program and using an Ignition Interlock Device for one full year following the end of the

prohibition from driving; and a \$250 driver's licence reinstatement fee (note that the administrative consequences could total in excess of \$4,000). The consequences described above are relevant to charge assessment on a Report to Crown Counsel recommending a charge for a *Criminal Code* impaired driving offence.

As provided by the Branch policy on Charge Assessment Guidelines - CHA 1, factors to be considered on charge assessment, in addition to the circumstances of the offence and the accused, include whether it is in the public interest to proceed with a prosecution "where there is a likelihood of achieving the desired result without a prosecution by the Criminal Justice Branch". Policy CHA 1 states that "this could require an assessment of the availability and efficacy of any alternatives to such a prosecution, including alternative measures, non-criminal processes or a prosecution by the Federal Prosecution Service". These alternatives include consequences under provincial legislation. Policy CHA 1 further provides that a factor relevant to the public interest is "the length and expense of a prosecution when considered in relation to the social benefit to be gained by it".

This policy takes into account the consequences resulting from the issuance of a 90 day IRP to the driver, as described above, and also the penalties which may result from a conviction for a *Criminal Code* impaired driving offence, including a criminal record, a longer prohibition from driving, a minimum fine for a first offence and the possibility of a jail term.

Accordingly, prosecution for a *Criminal Code* impaired driving offence under section 253(1)(a) impaired driving, 253(1)(b) drive over .08 or 254(5) failing or refusing to comply with a demand under section 254 (which do not include offences of causing, or resulting in, bodily harm or death) will not generally be in the public interest where the accused has been the subject of a 90 day IRP and related consequences, unless there are aggravating factors such as:

- a prior conviction for a *Criminal Code* impaired driving offence
- a breathalyzer reading of more than .16
- evidence of significant impairment
- a prior 90 day IRP or a prior administrative driving prohibition (ADP) under section 94.1 of the *Motor Vehicle Act*
- an allegation in the report to Crown Counsel that other *Criminal Code* driving offences were committed during the same event, including driving while prohibited
- any other aggravating factor relevant to the public interest (for example, where there is a child in the motor vehicle)

On charge assessment for a *Criminal Code* impaired driving offence of causing or resulting in bodily harm or death, where the evidentiary test is met, the public interest will not be satisfied by the imposition of a 90 day IRP without a *Criminal Code* charge, except in exceptional cases, with the approval of Regional or Deputy Regional Crown Counsel.

As the IRP was not in force prior to September 20, 2010, Crown Counsel should not take it into account as a relevant factor on charge assessment, or in respect to a resolution discussion, for offences committed before that date.

Resolution Discussions - Guilty Plea to *Motor Vehicle Act* Offences

A guilty plea to another offence arising out of the same transaction as the alleged impaired driving offence before the court (such as a guilty plea to section 144(1)(a) of the *Motor Vehicle Act*), is available only if the charge assessment standard in policy CHA 1 is no longer met for the impaired driving offence, that is, either there is no longer a substantial likelihood of conviction or prosecution is no longer in the public interest. This applies in all cases, including where section 606(4) of the *Criminal Code* is employed.

In deciding whether a particular case is exceptional so that the public interest can be met by a guilty plea to a *Motor Vehicle Act* offence, Crown Counsel should consider the guidelines in the Branch policy on Charge Assessment Guidelines – CHA 1 and the following factors:

- **The widespread nature of impaired driving offences and the substantial risk to the safety of the public that is posed by all impaired drivers, regardless of their individual circumstances.**
- **Whether the personal circumstances of the accused are such that there are truly compelling circumstances that go significantly beyond the usual hardship arising from a conviction for an impaired driving offence.**
- **The need to maintain public confidence in the administration of justice.**

Where there is no longer a substantial likelihood of conviction with respect to an impaired driving offence, a guilty plea to a *Motor Vehicle Act* offence may be considered only where there is evidence which supports a substantial likelihood of conviction for that lesser offence. For example, evidence of alcohol consumption and driving a motor vehicle, without evidence that the manner of driving constitutes inadvertent negligence, will not support a charge of driving without due care and attention under section 144(1)(a) of the *Motor Vehicle Act*.¹ Where Crown Counsel concludes that a guilty plea to a *Motor Vehicle Act* offence is not appropriate, Crown Counsel should terminate the prosecution.

¹ The offence of driving without due care and attention requires proof of inadvertent negligence in the manner of driving. See R. v. Lambert (1999) 50 M.V.R. (3d) 103 (BCSC) and R. v. Vandale (1989) 22 M.V.R. (2d) 288 (BCCoCt).

Crown Counsel must record, in the Crown Counsel file, the reasons for not proceeding with the prosecution of an impaired driving offence and for accepting a guilty plea to a *Motor Vehicle Act* offence.

Where Crown Counsel is considering a resolution discussion in cases involving serious injury or severe psychological harm, Crown Counsel should follow the guideline on informing the victim or the victim’s family, set out in the Branch policy on Resolution Discussions – RES 1.

Where Crown Counsel is considering a resolution discussion for a charge which alleges that a person is responsible for a death or for any serious charge about which there has been, or is likely to be, significant public concern with respect to the administration of justice, Crown Counsel should follow the guideline concerning consulting with Regional or Deputy Regional Crown Counsel before concluding any resolution discussion, set out in the Branch policy on Resolution Discussions – RES 1.

Section 224 of the *Motor Vehicle Act*

Section 224 of the *Motor Vehicle Act*, which provides an offence of driving over .08 and blood test evidentiary provisions, should not be used in lieu of a charge under the *Criminal Code*.

DISCUSSION

The impaired driving offences in the *Criminal Code* are:

- Section 253(1)(a) impaired driving
- Section 255(2) impaired driving causing bodily harm
- Section 255(3) impaired driving causing death
- Section 253(1)(b) driving with excessive blood alcohol
- Section 255(2.1) driving with excessive blood alcohol and causing an accident resulting in bodily harm
- Section 255(3.1) driving with excessive blood alcohol and causing an accident resulting in death
- Section 254(5) refusing or failing to comply with a demand under section 254 for: an approved screening device (ASD) test, physical co-ordination tests, a breathalyzer test, blood sample, drug evaluation test or sample of a bodily fluid

Section 255(2.2) refusing or failing to comply with a demand and knew or ought to have known that their vehicle caused an accident resulting in bodily harm

Section 255(3.2) refusing or failing to comply with a demand and knew or ought to have known that their vehicle caused an accident resulting in death

Section 144 of the *Motor Vehicle Act* creates three offences: driving without due care and attention, driving without reasonable consideration for other persons using the highway, and driving at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

Consideration of whether to resolve the prosecution of an impaired driving offence by accepting a guilty plea to a lesser offence potentially engages both components of the charge assessment standard in Branch policy CHA 1 – Charge Assessment Guidelines:

- (1) whether there is a substantial likelihood of conviction; and, if so,
- (2) whether a prosecution is required in the public interest.

Crown Counsel must arrive at plea resolutions on a principled basis, in accordance with the Branch policy on Resolution Discussions (RES 1).

Crown Counsel should assess the viability of all potential defences and the resulting likelihood of conviction based on the relevant case authorities and the likely effect of the available evidence on a reasonable trier of fact.

Under Branch policy MOT 1, all charge assessment decisions regarding persons responsible for motor vehicle related deaths should be approved by Regional or Deputy Regional Crown Counsel.

Prohibitions From Driving on *Motor Vehicle Act* Convictions

Crown Counsel should consider asking the court to order a prohibition under section 98 of the *Motor Vehicle Act* consistent with the guidelines in Branch policy MOT 1.1.

The Branch has consistently taken the position that section 133 of the *Offence Act* does not permit the probation provisions of the *Criminal Code* to be used to order an intermittent driving prohibition for a conviction under the *Motor Vehicle Act*.