



RoadSafetyBC

**RoadSafetyBC
Ministry of Justice**

**Guidelines for Reconsideration of Referrals
to Remedial Programs**

Published November 2013

Updated June 2018

RoadSafetyBC
Po Box 9254 Stn Prov Govt
Victoria, BC, V8W 9J2

www.gov.bc.ca/roadsafetybc

1.0 Background

The following guidelines are for use by adjudicators in reconsideration of a referral to remedial programs. The guidelines are designed to assist the adjudicator in reconsidering referrals to remedial programs to ensure that the remedial purpose of section 25.1 of the *Motor Vehicle Act* (MVA) is fulfilled and public safety is protected. Adjudicators must ensure that the requirements for procedural fairness are fulfilled in the exercise of delegated discretion under the MVA.

Section 25.1 of the MVA provides the Superintendent with authority to refer a driver to remedial programs if the Superintendent, or delegate, determines that a person's driving record is unsatisfactory or if the Superintendent considers that, with respect to the person's driving skills, fitness or ability to drive and operate a motor vehicle, it is in the public interest to make a referral.

Section 117 of the MVA gives the Superintendent authority to delegate powers, duties, or functions to staff of ROADSAFETYBC. The role of the adjudicator is to review a driver's referral to a remedial program taking into account all relevant considerations, including the considerations outlined in this document, the legislation, the facts of the case, and the principles of administrative fairness.

1.1 Common Referrals

Where the driving record contains:

- Any combination of 2 or more Criminal Code of Canada (CCC) convictions, MVA offences, or 90-day alcohol related driving sanctions within the last 5 years;
- 3 or more alcohol related driving sanctions within the last 5 years, including prohibitions of less than 90 days;
- 1 CCC conviction, MVA offence or 90-day alcohol related driving prohibition and 1 or more alcohol related driving prohibitions of less than 90 days, within the last 5 years; or
- Where the driver has previously completed a remedial program and receives a subsequent alcohol related prohibition

the referral will generally be to both RDP and IIP unless evidence shows that the remedial purpose of section 25.1 of the MVA will not be served by a referral in the driver's circumstances. In these cases, the serious nature of the driving event or the pattern of drug or alcohol related driving indicates that there is a high likelihood that remediation is warranted. However, each driver's circumstances must be considered.

Where the sanction is a single alcohol-related *Criminal Code of Canada* (CCC) conviction or MVA offence, a 90 day Immediate Roadside Prohibition (IRP) or an Administrative Driving Prohibition (ADP) the referral will generally be to RDP with an initial assessment conducted by the service provider to inform the Superintendent's decision as to whether a referral to IIP is also warranted.

Where the initial assessment conducted by the service provider indicates a high risk, the Superintendent will generally also make a referral to IIP.

In conducting the initial assessment, the service provider may consider a client's driving history and circumstances beyond the last 5 years.

As well, drivers can be referred to remedial programs when the Superintendent, or delegate, forms the opinion that referral to remedial programs is in the public interest with respect to the person's driving skills, fitness or ability to drive.

The driver may seek reconsideration of a referral decision. All reconsiderations of referrals are based on a thorough review of the driver's driving record and other relevant evidence. The reconsideration process is designed to ensure that the remedial programs fulfill their remedial purpose and operate in a manner that is both fair and in the public interest. If a reconsideration is unsuccessful, an applicant may only apply for a subsequent reconsideration where there has been a material change in circumstances.

1.2 General Considerations

The driver has a right, under the principles of administrative fairness, to know the case he or she must meet. Accordingly, an adjudicator can only consider information that is available or has been made available to the driver prior to the reconsideration decision or that is provided by the driver or the driver's representative. That is, the information relied upon by the adjudicator on reconsideration must be either produced by the driver or must have been disclosed to the driver before the decision is made. With this in mind, in reconsidering a remedial program referral an adjudicator should consider all of the following, if they exist:

- Any of the following on the driver's driving record:
 - All administrative alcohol or drug related driving sanctions within the last 5 years;
 - All alcohol-related driving CCC convictions and MVA offences within the last 5 years; and,
 - Documentation from previous RoadSafetyBC remedial programs within the last 5 years;
- The driver's RDP initial assessment (which may include consideration of a client's driving history and circumstances beyond the last 5 years);
- The driver's application for reconsideration;
- All of the driver's relevant written submissions and evidence; and
- Any other relevant information before the adjudicator that has been disclosed to or provided by the driver.

1.3 Guiding Factors

Guidelines are offered to assist adjudicators in making consistent decisions in accordance with the rules of procedural fairness. The guidelines are not binding rules

and the adjudicator must consider all relevant evidence in the circumstances of each individual case in order to determine whether the referral should be upheld, varied or cancelled.

In reconsidering a referral the adjudicator should consider, in the context of the principles of administrative fairness, whether:

- The driver's alcohol or drug related driving behaviour demonstrates either an unsatisfactory driving record or shows that the driver poses a high risk to public safety that can be addressed by participation in remedial programs (**Threshold Factors**)
- There are factors that show that the remedial purpose of the program would not be served in the circumstances of the driver's case. (**Compliance Factors**)

1.3.1 Threshold Factors

In order for a referral to remedial programs to be authorized under section 25.1, the Superintendent, or delegate, must determine that:

- The person's driving record is unsatisfactory; or
- With respect to the person's driving skills, fitness or ability to drive and operate a motor vehicle, it is in the public interest for the person to attend or participate in one or more remedial programs.

In making this threshold determination as to whether section 25.1 applies to the circumstances of a particular driver's case, an adjudicator may consider:

- The seriousness, type, and number of alcohol or drug related suspensions, prohibitions, or offences;
- The RDP initial assessment (which may include consideration of a client's driving history and circumstances beyond the last 5 years);
- Whether the driver is in the graduated licensing program;
- Previous participation in RDP and/or IIP in the last 5 years; and
- Participation in similar or, equivalent programs offered in other provinces.

This is not an exhaustive list, and the adjudicator must consider all relevant information disclosed to the applicant and information provided by the applicant.

Note: If a person has received one 'Fail' Immediate Roadside Prohibition (IRP) prior to November 30, 2011 it should not be considered as evidence that the driver had a Blood Alcohol Level (BAC) of not less than 80 milligrams of alcohol in 100 millilitres of blood and should not form the basis for a referral to remedial programs, despite that the prohibition remains on the driving record. As well, such prohibitions should not be used, in conjunction with other information, as evidence of a pattern of driving while affected by alcohol. However, participation and completion of RDP where that

referral was based upon review of the driving record arising from one of these 'Fail' IRPs may be considered in making a referral to remedial programs based on a subsequent driving event.

1.3.2 Compliance Factors

Compliance factors speak to circumstances raised by the driver that make it unreasonable for them to comply with remedial program requirements or circumstances that conflict with the remedial purpose of the referral.

Considerations that may be relevant to the adjudicator's decision with respect to compliance factors include:

- Economic impact, such as:
 - loss of job
 - loss of home
 - financial impact on family members;
- Impact on community:
 - E.g. Driver is the only paramedic in a rural community and compliance would require that an interlock device be installed on an ambulance;
- Infeasibility to install the device in vehicle:
 - E.g. Where the wiring of a vehicle makes it impossible to install an interlock device or where the driver does not control the vehicles generally driven and the owner will not consent to installation, or if the service provider indicates that the driver's vehicle is not capable of having an interlock device installed;
- Whether driving prohibition occurred in a commercial vehicle - this may be important in determining an appropriate variance;
- Access issues:
 - E.g. The service provider is unable to offer the course in a timely manner given the driver's residence or location
 - E.g. The service provider cannot reasonably accommodate the driver's work schedule to meet program timelines;
- Safety of driver:
 - E.g. Driver works in remote locations without access to IIP technical support should the interlock device malfunction; or
- Medical restrictions of driver:
 - E.g. Driver has a condition that prevents them from attending RDP or the driver has a medical condition that prevents them from expelling sufficient air for the interlock device.

This is not an exhaustive list, and the adjudicator must consider all relevant information that is before the adjudicator on the reconsideration. The adjudicator must, after accepting into evidence all relevant information, make his or her own decision as to the weight to be accorded to each piece of relevant evidence.

There are two questions that adjudicators must ask with respect to each piece of evidence submitted:

- Is the evidence relevant to the fact-finding process in the context of the purpose and subject matter of the decision (admissibility); and
- How accurate and reliable is the evidence and how important is the evidence to the key facts upon which the decision will turn (weight).
 - E.g. The weight given to evidence is impacted by factors such as whether it is verified by a third party, the evidence is direct evidence from the person with first-hand knowledge of the facts stated, the evidence is hearsay, or the evidence is sworn.

1.4 Service Provider Accommodations

RoadSafetyBC refers drivers to two different types of remedial programs: RDP and IIP. The RDP provides drivers with education or counselling depending on their needs. These professionals administer a specific and comprehensive program and the service provider will work with the client directly to accommodate any reasonable special requirements.

IIP is a program that protects the public by ensuring that a driver is not drinking and driving and serves to reinforce the remedial benefits of the education and counselling programs. The service provider administers a program specified by the Superintendent. Therefore, any accommodations made by the service provider that could impact the public safety outcomes of the IIP require written approval by an RoadSafetyBC adjudicator and are considered to be a variance in the referral.

1.5 Variances

A variance is an alteration to the referral that has been approved by the Superintendent or delegate. Adjudicators may consider varying the driver's remedial program requirements, where it is reasonable to do so, in order to:

- Ensure public safety is maintained by having the driver complete remedial programs through a varied process rather than cancelling the referral; or
- Allow for remediation without unreasonable burden by having the driver complete the remedial program through a varied process where, without a variance, the driver would face an unreasonable burden as a result of the requirement to complete a remedial program.

1.5.1 General Variances

An adjudicator may vary the remedial requirements to accommodate the driver's circumstances. These requirements, however, cannot be varied in an arbitrary manner, nor can they be varied in ways that do not comply with legislative requirements or that cannot be operationalized.

Where the adjudicator has confirmed that the referral to remedial programs is reasonable in light of the driving record and public interest considerations, but due to personal circumstances, compliance with remediation requirements would create an unreasonable burden for that driver, an adjudicator may vary the requirement, including but not limited to:

- Prohibiting the driver from driving for an additional specific term under section 93 of the *MVA* and terminating the remedial program requirements once the additional prohibition has been served;
- Varying the RDP or IIP term or waiving the IIP requirement
- Administering a combination of variances; or
- Terminating the requirement.

1.5.2 RDP Variances

Before seeking reconsideration of the referral, the driver should consult with the RDP service provider to determine whether the program can be delivered in a manner that addresses their particular constraints. Where the driver has not first consulted with the RDP service provider to seek accommodation, the adjudicator should direct the driver to seek such accommodation before the reconsideration request will be considered. If the driver has exhausted available options with the RDP service provider, the adjudicator must consider all relevant information that is before the adjudicator in order to determine whether to uphold the referral as originally made, vary the referral or cancel it. If this request is made within the 30 day reconsideration application period, a stay of requirements will be granted while the driver seeks accommodation.

Accommodations that the adjudicator may consider include, but are not limited to:

- Timeframe variances
 - E.g. the adjudicator may extend the 12 month RDP completion term to allow the driver more time to complete the program;
- Substitution of different remedial program
 - E.g. Driver provides evidence that an alternative program will meet the remedial purpose while accommodating their specific circumstances.

Note: Substitute counselling or education programs will only be considered at the request of the driver. Adequate information about the substitute program must be submitted by the driver. The adjudicator is not required to seek out additional information to determine if the program is equivalent to the RDP.

1.5.3 IIP Variances

The IIP is administered by a service provider with RoadSafetyBC oversight. Any variances to the program need to be considered by RoadSafetyBC to ensure public safety is maintained. In considering the driver's circumstances an adjudicator may request variations to the program from the service provider which may include, but are not limited to:

- Modifications to account for medical conditions
 - E.g. Ignition interlock device's required air volume may be lowered to accommodate a respiratory disorder.

2.0 Transition

These Guidelines come into effect on Friday, November 1, 2013.

Update made December 23, 2014 to change OSMV to RoadSafetyBC.

Update made January 1, 2015 to change period to submit reconsideration and get stay of requirements to 30 days from 21 days.

Update made May 14, 2018 to clarify subsequent reconsideration requirement.

Update made June 28, 2018 to clarify subsequent reconsideration requirement.