THE NEW IMPAIRED DRIVING LAWS[1]: WHAT IS NOT BEING SAID

The Ministry of Public Safety and Solicitor General issued a News Release on April 27, 2010[2]. The Release trumpeted that "The province is introducing Canada's most immediate and severe impaired driving penalties to save lives, curb repeat offenders and give police more enforcement tools."

Subsequent to this Release and as an extension of same, the Office of the Superintendent of Motor Vehicles issued bulletins spelling out the penalties which will be part of the new regime. A comparison of the current and new penalties can be found at the foot of this article[3].

Fundamental to the new regime will be an unequivocal acceptance of a police officer's report of what took place at a roadside stop upon a breathalyzer test being administered or upon one being refused. If the reported reading is a fail or if the officer reports a refusal, the new penalties take effect immediately with very limited administrative appeal rights with no true prospect of success. The ostensible intention, as amplified below, is not to engage drinking drivers in the judicial process except in a limited number of situations.

The Backgrounder[4] to the Province's Release stresses: "Major amendments to impaired driving sections of the Motor Vehicle Act (MVA) will ensure impaired drivers caught in BC face instant loss of their driving privileges (90 days) and impoundment of their vehicles (30 days)." There are other corollary mandatory requirements, i.e. completing the Responsible Driver Program and installing an ignition interlock device which must be utilized for a minimum of one year. Both these programs are costly. They are without exceptions for hardship or otherwise. In addition, the financial penalties are substantial. For example, a driver with no relevant history failing a breath sample at roadside or refusing to provide a sample will face minimum fines and fees of approximately $4060. The Release does add that failing or refusing drivers may also face criminal charges.

What the Release does not say is that there is every indication that criminal charges will only be laid in particularly aggravated circumstances (such as an accident or where there is a prior related conviction) which going forward will be increasingly rare. The effect of this is that the overwhelming majority of drivers, tested under the new regime, will have no meaningful recourse to challenge what the police say took place at the roadside. The peace officer will record the reading of the Approved Screening Device (ASD) or alternatively will document the alleged refusal and then "the curtain drops."

While right-minded citizens of British Columbia are acutely concerned about drinking and driving, there is every reason to be discomforted by this 'machine type of justice.' The ASD was intended to be a screening mechanism under the *Criminal Code* to assist a peace officer in evaluating the driver's condition as to sobriety. The ASD does not have a record keeping or memory capacity. The instrument can be operated improperly. The new legislation, however, effectively allows the reading to be definitive. There is no opportunity to challenge the instrument, no opportunity to cross examine the officer as to the integrity of what occurred and no opportunity to challenge the manner in which the ASD was operated. An instrument intended only as a screening device is now elevated to a determinative role[5].

The new regime reposes extraordinary power and authority in a peace officer. Failure to allow for a criminal defence process disregards the unfortunate reality that there are zealous or wrongly disposed peace officers or officers who may mismanage the instrument or simply make a mistake. No cross-examination or scrutiny of the officer takes place under this regime.

What is not being said is that highly culpable behaviour such as driving while drunk will now largely be outside the criminal process. The Office of the Superintendent of Motor Vehicles on its website[6] stresses that the "province is introducing changes to give BC the toughest provincial impaired driving legislation in the country. If you drink and drive after the new law comes into effect on September 20, 2010, you can count on penalties

adding up to between $600 and $4060 – even if it's the first time you're caught – and more time off the road."

The corollary of this new approach, though, is that in not facing criminal charges, the driver will not be exposed to the instructiveness of the criminal justice system. There is significant value in the experience of retaining counsel, facing a public record for criminal behaviour, facing denunciation, and, on some occasions, receiving thoughtful remarks from a presiding judge. There is an irony, a disconnect that behaviour which is such a serious threat to public safety, will now largely avoid the criminal process.

Also unspoken and related to the previous paragraph is that the province clearly intends to save serious treasury by allocating significantly less resources to what has been the criminal process, i.e. police investigations, Crown prosecutions and trials. Ostensibly, the motivation is to free up these resources to allocate to 'more serious' criminal behaviour. If that is so, the priorities are misguided. There is probably no form of criminal behaviour more pervasive than drunk driving. There is probably no criminal behaviour more capable of effective deterrence through public denunciation and the related process. It is also a reality that police officers should be investigating criminal behaviour; this behaviour should not be given diminished significance.

The volume and the cost of the impaired driving problem should not be a rationale for compromising individual rights and protections. There are no practical or genuine checks and balances under this new regime. Criminal law has always required a very high standard of proof and a compelling burden on the Crown to meet its case. What the Federal Government sees as criminal will now be something else – effectively an administrative regulatory matter. It would seem reasonable to expect that the new legislation will face a challenge in seeking to displace the federal criminal law power under s. 91 of the *Constitutional Act*.

What is not mentioned is that there will be a disparity between incidents where there is an ASD handy and those incidents where there is not. Any driver pulled over in the latter

circumstances will likely be subject to the old regime and will in these limited cases have access to the criminal justice system.

Indicative of how far reaching is this philosophical change by the BC government is the Warning protocol. This Warning protocol will apply to drivers whose apparent readings are below the legal limit of .08% blood alcohol content and may not be demonstrating any signs of impairment.

As outlined above, a driver who fails (above .08%) or 'refuses' to provide an ASD sample will be given a 90-day suspension at roadside, will be subject to a one year Interlock Ignition program and financial penalties which amount to $4060. His or her vehicle will be impounded for 30 days. The Warn range is a reading of .05 to .08% (some ASDs are calibrated to .099%). This results in an immediate 3-day suspension, a 30-day impoundment and minimum fines and fees of about $600. This is for the first warn in 5 years. A second warn in the same period draws a 7-day suspension, a longer period of impoundment and minimum fines and fees of $760. A third time warning within 5 years carries with it a 30-day suspension, a 30-day impoundment, a one year Ignition Interlock program and a minimum financial penalty of $3650. Three beers within a two hour period would put virtually anyone in the Warn range. There is again no practical opportunity to challenge these consequential penalties and, in these cases, for not behaving in an illegal manner.

The province's express rationale is that enforcement of drinking and driving offences will be far more expedient under the new regime. It characterizes the new regime as the toughest driving laws in the country. While the penalties under the new laws are certainly swift and severe, the intended approach avoids the criminal justice system and allows a matter of serious legal consequence to be technologically and summarily resolved at the instance of a peace officer whose fairness and ability are taken as a "given." In this author's view this departure from the honoured protections is a matter of concern. A better alternative would be to ensure greater resources as necessary to expedite the process which preserves the rights and protections of individuals.

[1] *Motor Vehicle Amendment Act*, S.B.C. 2010, c. 14: Sections 7 (a) and (b), 8 and 9 in force July 28, 2010 by Regulation 236/2010; Sections 4 and 15 (a) in force July 30, 2010 by Regulation 246/2010; Sections 2, 3, 6, 7 (c), 10 to 12, 14, 15 (b) to (e), 19, 24, 25 and 28 in force September 20, 2010 by Regulation 238/2010.

[2] Ministry of Public Safety and Solicitor General, News Release, 2010PSSG0026-000472, "B.C. INTRODUCES CANADA'S TOUGHEST IMPAIRED DRIVING LAWS" (27 April 2010).

[3] See Appendix: Office of the Superintendent of Motor Vehicles, online: CURRENT and NEW Penalties Comparison Chart <http://www.pssg.gov.bc.ca/osmv/publications/docs/impaireddriving-currentandnewpenalties.pdf>.

[4] Ministry of Public Safety and Solicitor General, Backgrounder, 2010PSSG0026-000472, " B.C.'S IMPAIRED DRIVING LAW TO CHANGE" (27 April 2010).

[5] The Supreme Court of Canada held in *R. v. Orbanski*, [2005] S.C.J. No. 37, that there is no entitlement at the roadside to be advised of or to receive counsel as the evidence obtained would only go to the police officer's reasonable grounds to make a breathalyzer demand. The new legislation extends that principle to a situation of a very different character.

[6] Office of the Superintendent of Motor Vehicles, online: Impaired Driving <http://www.pssg.gov.bc.ca/osmv/impaired-driving/index.htm>.