THE SHIFTING FOCUS OF CANADIAN IMPAIRED DRIVING ENFORCEMENT:
The Increased Role of Provincial & Territorial Administrative Sanctions

Published March, 2020

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INTRODUCTION

In Canada, both the federal Parliament and the provincial and territorial legislatures have broad constitutional authority to enact legislation that would minimize impaired driving. Pursuant to section 91(27) of the Constitution Act, 1867 (UK), the federal government has legislative authority over criminal law and criminal procedure, which provides the basis for the Criminal Code’s impaired driving offences and enforcement powers. In turn, the provinces’ power over property and civil rights alone, or in conjunction with their power over matters of a merely local or private nature, gives them authority to regulate all aspects of driving within their territory, including eligibility to drive, licence suspensions and revocations, and vehicle impoundments.

This paper examines the growing importance of provincial administrative licence suspensions (ALSs) and vehicle impoundments (AVIs) in impaired driving enforcement, the effectiveness of these measures and the legal challenges that they have generated. Based on this analysis, best practices are identified in regard to three specific categories of impairment-related ALSs and AVIs. The law governing these measures in each jurisdiction is then assessed.

For many years, federal criminal charges and prosecutions played the dominant role in impaired driving enforcement. However, the processing of federal impaired driving charges became increasingly technical, time-consuming and frustrating due to a flood of challenges under the Canadian Charter of Rights and Freedoms [the Charter], judicial acceptance of several questionable defences and rigorous legal claims by the defence bar. These factors contributed to the growing reluctance of the police to lay federal impaired driving charges.

In a national police survey published in 1999, about 30% of the officers reported that impaired drivers were frequently or sometimes released with a short-term provincial ALS, rather than being charged criminally. The officers expressed concern about the inordinate amount of time (an average of 2 hours and 48 minutes) and paperwork (an average of 8.2 forms) involved in processing even a simple impaired driving case. They also complained about the limited weight given to their testimony and the legal technicalities that allowed impaired drivers to escape criminal liability. A police survey in British Columbia released in 2000 indicated that almost half of the officers refused to lay federal charges, even if they concluded that the driver was legally impaired.

In fairness, the decrease in federal impaired driving charges from 1998 to 2018 was also partially attributable to decreases in drinking and driving. However, while the number of impaired driving incidents known to the police did decrease by 20% during this period, the number of persons charged with a federal impaired driving offence fell by 39%.

Crown counsel faced their own challenges in prosecuting alcohol-related impaired driving cases. In a national survey, 70% of Crown and defence counsel reported that it takes longer to resolve impaired driving cases than it did at the outset of their careers. Fifty-three percent of Crowns agreed or strongly agreed that their caseload, which was typically more than four times that of defence counsel, made it difficult to adequately prepare. For example, Crowns spend an average of 2½ hours preparing for a summary conviction impaired driving case, compared to 1½ hours spent by defence counsel. The relative difference in preparation time was less in the more serious cases, but it was still substantial.

Even greater challenges arise in prosecuting drug-impaired driving cases. For example, 71% of alcohol-impaired incidents known to the police were cleared by charge in 2015, compared to only 59% of drug-impaired incidents. Drug-impaired driving cases take far longer to resolve than alcohol-impaired driving cases (227 vs. 127 days) and require more court appearances (7 vs. 5 appearances). In terms of cases completed in court, drug-impaired driving cases are less likely to result in a guilty verdict (61% vs. 81%).

Additional pressures have resulted from section 11(b) of the Charter which provides that anyone charged with an offence has the right to be tried within a reasonable time. The Supreme Court of Canada has addressed this issue in a series of cases starting with R. v. Askov and culminating with R. v. Jordan. In Jordan, the Court set out presumptive timeframes within which cases must be resolved. Unless the Crown can establish exceptional circumstances, failing to meet the presumptive deadline will result in the criminal proceedings being stayed.
may drop impaired driving charges or accept a guilty plea to a provincial offence in order to reduce their caseloads and focus on impending deadlines in what they consider to be more serious criminal cases.

The first provincial impairment-related ALSs focused on supplementing the criminal law sanctions. The provinces typically imposed a 90-day ALS on drivers who were charged with a federal impaired driving offence and a 1-year ALS on drivers who were convicted. Several provinces also briefly suspended the licence of drivers who were suspected of being impaired or affected by alcohol or drugs. While these provisions have been modified, they remain largely in force.

In 1981, Ontario enacted legislation authorizing the police to establish sobriety check points and impose a short-term (12-hour) roadside ALS on drivers with a blood-alcohol concentration (BAC) of .05% or more. However, the law was not publicized, the suspension was not recorded on the driver's record and the driver's licence was not seized. There were no escalating sanctions for repeat occurrences, no licence reinstatement fees, and the vehicle was only impounded if it could not be safely parked or there was no sober licensed passenger who was willing to drive it home.

By 1999, most provinces had a low-BAC range ALS of some kind. Most jurisdictions have since increased the length of the suspensions, introduced administrative vehicle impoundments and licence reinstatement fees, and enacted escalating sanctions and mandatory education, assessment and treatment for repeat occurrences.

Although there is considerable variation across Canada, provincial ALSs and AVIs have been increasingly used not just to augment, but also in lieu of federal criminal charges. This occurred first and most dramatically in British Columbia after it enacted comprehensive mandatory roadside ALS and AVI legislation in 2010. While the number of drivers charged with a federal impaired driving offence fell 69% (9,905 to 3,097) from 2010 to 2017, the number of impairment-related ALSs increased 237% (9,282 to 21,978). Alberta, Saskatchewan, Manitoba, and other provinces have followed British Columbia’s lead in further strengthening their ALS and AVI legislation. This second generation of provincial alcohol-related ALSs and AVIs were implemented at roadside, were generally not tied to the laying of federal impaired driving charges and included significant ongoing sanctions.

The provinces are currently in the midst of amending their impairment-related administrative driving sanctions in response to major changes in the federal criminal law. In 2018, Bill C-46 repealed, replaced and renumbered all the Criminal Code impaired driving provisions. Among other things, the Bill broadened the scope of the alcohol-impaired driving offences, created new per se drug-impaired driving offences and gave the police new powers to demand ASD tests, oral fluid drug tests and blood-drug tests. This overhaul of the federal impaired driving laws coincided with Bill C-45 which broadly legalized and commercialized the recreational cannabis market. The provinces have also been struggling to address the sharp increases in driving after cannabis use that occurred in anticipation of legalization.

Although legislative attempts have been made to improve the processing of criminal cases, the provinces will likely continue to broaden their impairment-related administrative sanctions and increase their use. In Part I of the paper, we review the research on the effectiveness of these provincial administrative sanctions. Part II summarizes the major cases in which this legislation has been legally challenged. Based on the preceding research evidence and legal challenges, Part III provides suggested best practices for three categories of ALSs and AVIs. In Part IV, we critically review these categories of impairment-related ALSs and AVIs in each jurisdiction.
PART I:
THE IMPACT OF IMPAIRMENT-RELATED ALSS AND AVIS

There is considerable research on the American and Canadian 90-day ALSSs that were imposed on individuals charged with a criminal drinking and driving offence. An early study found that the American 90-day ALSSs reduced impaired driving among the general public (general deterrence), and among offenders (specific deterrence) both during and after their suspension periods. A 2007 meta-analysis of the ALS laws in 46 states reported that they led to significant reductions in single-vehicle nighttime crashes and fatal crashes involving drivers at all BAC levels, and had stronger general deterrent effects than licence suspensions that were imposed after a criminal conviction. Most recently, the National Highway Traffic Safety Administration (NHTSA) strongly recommended that all states enact 90-day ALS legislation.

Positive results were also reported for the Canadian alcohol-related, 90-day ALS programs. For example, in the six years following the introduction of Manitoba’s 90-day ALS legislation in 1989, there was a 12% net decrease in drinking-driver fatalities and an approximately 32% decrease in overall impaired driving charges. Impaired drivers who received an ALS had a 44% lower recidivism rate over the next four years than drivers who had not received an ALS. A study of Ontario’s initial 90-day ALS legislation found that self-reported driving after having two or more drinks in the previous hour fell by about 35%. A 2009 study reported that Ontario’s 90-day ALS legislation was associated with a 14.5% decrease in total driver fatalities in the 25 months following its introduction. No corresponding reduction was observed in the two jurisdictions that were used as control provinces.
By far the most relevant research\textsuperscript{38} comes from British Columbia which enacted comprehensive impairment-related administrative sanctions in 2010 that included: mandatory roadside ALSs and AVIs; licence reinstatement fees; monetary penalties; escalating sanctions for repeat occurrences; and driver improvement courses, alcohol interlock orders and other mandatory remedial measures.\textsuperscript{39} The legislation was controversial, generating ongoing media attention and a series of legal challenges. Although the legislation was significantly amended in June 2012, its basic features were maintained.\textsuperscript{40} A study conducted one year after the law came into effect reported that it reduced alcohol-related fatal collisions by 40.4\%, alcohol-related injury collisions by 23.4\%, and alcohol-related, property-damage-only collisions by 19.5\%. There were no significant changes in the three corresponding types of non-alcohol collisions.\textsuperscript{41} The authors concluded that the legislation and associated publicity were more effective in minimizing alcohol-related collisions than the \textit{Criminal Code} impaired driving offences.\textsuperscript{42}

The results of roadside surveys conducted immediately before and almost two years after the enactment of the British Columbia legislation were equally positive. The authors reported that the percentage of drivers with BACs above .08\% decreased by 59\%, the percentage with BACs of .05\% or more decreased by 44\%, and the percentage who were positive for alcohol decreased by 32\%. These were the lowest levels recorded going back to roadside surveys starting in 1995.\textsuperscript{43} A similar 2018 roadside survey indicated that the percentage of drivers in each of these categories continued to fall.\textsuperscript{44} RoadSafetyBC reported that by the end of 2017, the legislation had helped to save 403 lives and to reduce alcohol-related fatalities by 50\%.\textsuperscript{45} The studies did not address the relative effectiveness of the ALSs, the AVIs or the other individual components of the legislation. In other words, the studies assessed the impact of the legislation as a whole.\textsuperscript{46}

Alberta proclaimed in force similar legislation in June 2012 that included mandatory “immediate roadside suspensions” (IRSs) and roadside AVIs.\textsuperscript{47} Alcohol-related fatalities fell 46\% in the first six months, relative to the five-year average for the same period.\textsuperscript{48} The latest data from 2016 indicate that the number of crash deaths and injuries involving a drinking driver continued to decrease.\textsuperscript{49}

Most of the provinces have enacted drug-related ALSs and AVIs of some kind in response to the 2018 federal impaired driving amendments and cannabis legalization legislation.\textsuperscript{50} Although it will be some time before these drug-related measures are evaluated, they will likely have significantly less impact than the comparable alcohol-related legislation. As explained elsewhere,\textsuperscript{51} detecting drug use and impairment among drivers is far more costly, time-consuming\textsuperscript{52} and challenging than detecting alcohol use and impairment.\textsuperscript{53} The signs and symptoms of drug use are not as widely recognized as those for alcohol.\textsuperscript{54} Nevertheless, these new provincial drug-related ALSs and AVIs will provide a faster, less costly and more certain means of sanctioning drug-impaired driving than criminal charges and prosecutions.
PART II:

LEGAL CHALLENGES

The provincial alcohol-related ALS legislation has been challenged in a series of cases stemming from 1941.55 The courts have repeatedly held that the provinces have constitutional authority to enact legislation imposing lengthy ALSs on drivers who have been charged with,56 or convicted of,57 a federal impaired driving offence. The courts have also held that these suspensions do not conflict with the federal Criminal Code driving prohibitions. Nor have the provincial ALSs been held to violate section 7 which is the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.58

For example, in Buhlers v. British Columbia (Superintendent of Motor Vehicles),59 a driver challenged the mandatory 90-day “administrative driving prohibition” (ADP) that was imposed on drivers who registered a BAC above .08% and drivers who failed or refused to provide a required breath or blood sample, without a reasonable excuse.60 Drivers subject to an ADP were invariably processed at the police station and were tested on an “approved instrument” (i.e. evidentiary breathalyzer). The 90-day ADP came into effect 21 days after the notice of prohibition was served and the driver was given 7 days to challenge the prohibition to the Superintendent of Motor Vehicles.61 Consistent with established authorities, the British Columbia Court of Appeal held that the ADP provision did not encroach upon Parliament’s exclusive constitutional authority over criminal law and procedure, but rather came within the province’s legislative authority over licensing and highway safety.62 Again, consistent with the established authorities, the Court held that driving is not a “liberty” within the meaning of section 7 of the Charter.63

The courts have also rejected claims that the provincial ALSs violated section 12 of the Charter which prohibits the imposition of cruel and unusual treatment or punishment.64 Finally, the courts have held that subjecting impaired drivers to both a provincial ALS and a federal criminal sanction does not violate section 11(h) of the Charter which prohibits punishing an offender twice for the same conduct.65 However, it is the recent challenges to British Columbia’s and Alberta’s ALS and AVI legislation that are most important for our purposes.

(a) BRITISH COLUMBIA

Among other things, British Columbia’s 2010 legislation required the police to impose a 3-day immediate roadside driving prohibition (IRP) on a driver who registered a “Warn” on an ASD if they had reasonable grounds to believe, as a result of the analysis, that his or her ability to drive was affected by alcohol. A second occurrence within five years resulted in a 7-day IRP, and a third occurrence resulted in a 30-day IRP. Drivers who registered a “Fail” on an ASD (BAC of .08% or more) or who failed or refused, without a reasonable excuse, to comply with a demand to take an ASD test were subject to a 90-day IRP. The police had discretion to impose an AVI on a driver who received a 3 or 7-day IRP but were required to impose a 30-day AVI on drivers who were subject to a 30 or 90-day IRP.66

The legislation included mandatory monetary penalties ranging from $200 (3-day IRP) to $500 (90-day IRP)67 and a $250 licence reinstatement fee.68 In addition, the Superintendent of Motor Vehicles had broad discretion to require drivers to participate in a driver improvement course, an alcohol interlock program and other remedial programs.69 Drivers who were subject to a 90-day IRP were required, as a matter of course, to complete the “Responsible Driver Program” which cost $88070 and to participate in the alcohol interlock program for one year at a cost of approximately $1,650.71 These sanctions were imposed based on a single roadside ASD test. Although drivers had a right to request a second breath test on a different ASD, the police were not required to inform them of this right. Drivers could also apply to the Superintendent for a review of the IRP, but the grounds for challenging the initial decision were very limited.72 This 90-day IRP must be distinguished from the pre-existing, 90-day ADP which the British Columbia Court of Appeal had upheld in the 1999 case of Buhlers.
The IRP provisions were subject to a series of legal challenges. In *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, the Court rejected all but one challenge to the 3, 7, 30, and 90-day IRPs. The Court discussed at length the collateral fees, penalties and costs associated with the IRP, noting that these “additional consequences” amounted to over $4,000 in the case of a 90-day IRP. The Court held that a 90-day IRP based on a single roadside ASD test infringed section 8 of the Charter and could not be justified under section 1. In the Court’s view, the onerous consequences of a 90-day IRP and the limited means of challenging the ASD test on which it was based rendered the provision unreasonable. In subsequent reasons clarifying its initial ruling, the Court stated that the 90-day IRP imposed for failing or refusing to provide a breath sample did not violate section 8 of the Charter. The Court suspended the declaration of invalidity until June 30, 2012.

In response, British Columbia amended its IRP legislation in 2012. The amendments required the police to advise drivers of their right to challenge the first ASD test result by taking a second test on a different ASD. The police also had to inform drivers that the lower of the two ASD test results would prevail. Additionally, the amendments required the police to submit sworn reports to the Superintendent which included information on the calibration of the ASD and broadened the grounds for appealing the officer’s decision.

British Columbia’s initial 90-day IRP continued to generate legal challenges. In March 2014, the British Columbia Court of Appeal handed down its decision in a case commonly referred to as *Sivia 2*. The case involved six appeals challenging the 90-day IRP on two grounds and a government cross-appeal challenging the finding that the 90-day IRP violated section 8 of the Charter. The Court of Appeal dismissed the appeals and cross-appeal, essentially affirming the trial decision in *Sivia* on the 90-day IRP.

In *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, the Supreme Court of Canada dismissed another set of constitutional challenges to the initial 90-day IRP, but affirmed that they violated section 8 of the Charter and could not be justified under section 1. The Supreme Court emphasized the differences between the initial 90-day IRP and the 90-day ADP that was upheld in *Buhlers*. The Supreme Court stated that the amended IRP legislation was not in issue and that it did not need to address whether the initial 3, 7 and 30-day IRPs violated section 8 of the Charter.

*Wilson v. British Columbia (Superintendent of Motor Vehicles)* arose in the context of the amended IRP legislation and involved a statutory interpretation issue. The driver was issued a 3-day IRP pursuant to section 215.41(3.1) of the Motor Vehicle Act after he registered a Warn on two ASD tests. The section requires the police to issue the IRP if they have “reasonable grounds to believe, as a result of the analysis, that the driver’s ability to drive is affected by alcohol.” The driver claimed that the section was ambiguous and needed to be given a “robust interpretation.” He argued that registering a Warn, in and of itself, does not meet the “reasonable grounds to believe requirement” and thus does not provide grounds for issuing the IRP. Rather, the police must introduce additional evidence, such as erratic driving, slurred speech or other signs that would indicate that the driver’s ability to drive was affected by alcohol. Since no such additional evidence was adduced, the driver claimed that the police had no authority to issue the IRP and that it had to be quashed.
The Supreme Court of Canada rejected the driver’s argument, ruling that an ASD reading alone meets the statutory requirement for issuing the IRP. The Court focused on the specific wording of the section which expressly required the officer’s belief about the individual’s ability to drive to be based on the ASD reading. However, in the absence of such a direct statutory link, the driver’s argument might well have prevailed. This problem could have been avoided by requiring the police to impose an IRP on any driver who registers a Warn on an ASD. As will be discussed, the criteria for imposing impairment-related administrative sanctions should be defined as simply and clearly as possible to avoid potential ambiguity and the inevitable legal challenges that it generates.

(b) ALBERTA

Alberta proclaimed in force new mandatory ALS and AVI legislation in June 2012. Among other things, the legislation required the police to impose an indefinite ALS on any driver charged with a federal alcohol-related driving offence. These ALSs applied immediately and pursuant to section 88.1 remained in effect until the charge was withdrawn, or the accused was convicted or acquitted.

In Sahaluk v. Alberta (Transportation Safety Board), the majority of the Alberta Court of Appeal held that this indefinite ALS violated section 11(d) of the Charter. First, it infringed the presumption of innocence by imposing immediate sanctions “equally on the innocent, the guilty, and the not guilty,” without providing any procedural safeguards. Second, it induced drivers to abandon their right to a fair trial.
and plead guilty because it would likely result in a substantially shorter licence suspension than going to trial. The majority held that the provision also violated a driver’s liberty under section 7 of the Charter. Although recognizing that driving is not generally considered to be a liberty, the majority stated that the indefinite ALS was “sufficiently punitive, and sufficiently tied to the criminal prosecution” to engage and infringe a driver’s liberty interest. This infringement was “overly inclusive and overbroad” and thus inconsistent with the principles of fundamental justice. The majority concluded that these Charter violations could not be justified under section 1, but stayed the declaration of invalidity for one year.

The majority went to great lengths to distinguish section 88.1 from the issue in Goodwin and other appellate cases. The majority emphasized the punitive nature of section 88.1 and the pressure it exerts on accused drivers to forgo trial. In the majority’s view, section 88.1 was “designed without any consideration for constitutional values underlying the Canadian legal system.”

The dissenting justice acknowledged that section 88.1 was harsh. However, after thoroughly reviewing the existing authorities, the dissenting justice concluded that section 88.1 did not violate sections 7 or 11(d) of the Charter.

The Alberta government announced that it was not appealing the decision and amended section 88.1 to limit the ALS to 90 days. However, the amendments imposed a further 1-year ALS on all drivers who had been subject to a 90-day ALS. The 1-year ALS may be set aside if the driver agrees to participate in an alcohol interlock program and complies with any conditions imposed by the Registrar of Motor Vehicles.

This provision applies even if the 90-day ALS involved no alcohol and there is no indication that the driver has an alcohol problem of any kind. This provision may well be challenged by drivers who receive a drug-related, 90-day ALS, particularly if it is based on having a “low-range” tetrahydrocannabinol (THC) blood-drug level (i.e. 2 to 4.99 nanograms of THC per millilitre of blood).

(c) SUMMARY

The courts gave the provinces broad leeway to enact impairment-related administrative sanctions when they were used to briefly remove potentially unsafe driver from the roads or were limited to drivers who were charged with or convicted of a federal impaired driving offence. However, as the recent British Columbia and Alberta cases illustrate, there are limits on the provinces’ legal authority to impose significant sanctions that are based on a single roadside screening test. The legality of any particular provision will likely be assessed in terms of three factors: the severity of the consequences, the reliability of the test or evidence upon which the sanction is based, and whether the driver is afforded a meaningful opportunity to challenge the decision. Given that the cases to date have been limited to the provinces’ alcohol-related administrative sanctions, they will likely be less helpful in predicting the legality of the comparable drug-related sanctions. As discussed below, the provinces should take a more cautious approach to the drug-related administrative sanctions given that the drug screening and evidentiary tests are generally not as accurate as those for alcohol.
PART III: BEST PRACTICES

Based on the preceding review of the research and legal challenges, we have developed suggested best practices for three categories of ALSs and AVIs, namely: mandatory 24-hour ALSs and discretionary 24-hour AVIs; mandatory 7-day ALSs and mandatory 7-day AVIs; and mandatory 90-day ALSs and mandatory 30-day AVIs. Within each category, some of the recommendations may be specifically alcohol-related, while others may be specifically drug-related. Similarly, some recommendations may relate to a specific subcategory of ALS or AVI, such as those based on a single roadside ASD test, as opposed to those based on an evidentiary breath test.

(a) MANDATORY 24-HOUR ALS & DISCRETIONARY 24-HOUR AVIS

The provinces should authorize the police to impose a mandatory 24-hour ALS on a driver if they have reasonable grounds to suspect that his or her physical or mental ability is affected by alcohol and/or a drug. This provision allows police officers who lack SFST training to remove a potentially unsafe driver from the road when they do not have an ASD or oral fluid test kit in their possession. This legislation is not meant to punish the driver, but rather to protect the public. Consequently, the police power to impound the driver’s vehicle should be discretionary and limited to situations in which the vehicle cannot be safely secured, there is no sober licensed passenger willing to drive it home or the officer has reasonable grounds to believe that the driver will breach the ALS.

Drivers should be permitted to apply to the provincial licensing authority for a review. The review should be limited to written submissions and the grounds should be restricted to whether the applicant was operating a motor vehicle (i.e. driving, or having care or control) and whether the officer had reasonable grounds to suspect that the driver was affected by alcohol and/or drugs. In order to facilitate a meaningful review, the police should be required to record the facts, observations and statements that underlie their decision to impose the ALS. Drivers should be provided with a copy of the officer’s report and given a relatively short period of time within which to file their submission. Granted, the suspension period will have ended long before a review is conducted. Nevertheless, if the suspension is revoked, the driver’s record should be appropriately amended and any associated fees and penalties that have been paid should be refunded.

If the police have reasonable grounds to believe that the driver’s condition is due to a long-term or ongoing problem, they should be required to report the driver to the provincial licensing authority which can investigate further and take appropriate action.

(b) MANDATORY 7-DAY ALS & MANDATORY 7-DAY AVIS

Alcohol: The police should be required to impose an immediate roadside 7-day ALS and 7-day AVI on drivers who register a Warn (BAC of .05% or more) on an ASD or who fail a standardized field sobriety test (SFST). In the case of an ASD test, the driver should be advised of his or her right to a second analysis on a different ASD and informed that the lower of the two test results will govern. Admittedly, giving the driver an option to take a second ASD test may not be legally necessary, given that Sivia upheld British Columbia’s initial 3, 7 and 30-day IRPs which were based on a single roadside ASD test. However, Sivia was a trial decision, and neither the British Columbia Court of Appeal in Sivia 2 nor the Supreme Court of Canada in Goodwin addressed whether imposing 3, 7 and 30-day, alcohol-related ALSs based on a single ASD test violated the Charter. Providing drivers with this option will minimize challenges and is not particularly onerous given that ASD testing is efficient and inexpensive.

To our knowledge, the courts have not yet addressed whether imposing a 7-day ALS based on a single SFST violates the Charter. Although Sivia did not require drivers to be given a second ASD in the case of 7 and even 30-day ALSs, SFST is less accurate than an ASD test in predicting a driver’s specific BAC. Consequently, giving drivers who fail an SFST the right to take an ASD would minimize the
likelihood of legal challenges. Since the investigating officer would have conducted an ASD test initially if he or she had one in his or her possession, the driver may have to wait for another officer to arrive with an ASD. If the officer believes that waiting for an ASD to arrive is impractical in the circumstances, a driver who insists on challenging the SFST should be required to accompany the officer to the police station to be tested on an evidentiary breathalyzer. However, the driver should be informed that more serious legal consequences will likely result if he or she registers a BAC of .08% or more on the evidentiary breath test.\textsuperscript{102}

**Drugs:** The police should be required to impose an immediate roadside 7-day ALS and 7-day AVI on a driver who fails an oral fluid test or a drug-related SFST. Again, to our knowledge, the courts have not yet addressed whether imposing a 7-day ALS based on a single oral fluid test or failed SFST violates the Charter. Without getting into the specific details about individual drugs, the different oral fluid test kits and the related testing thresholds, oral fluid testing for drugs is, and is generally viewed as, less accurate than ASD testing for alcohol.\textsuperscript{103} Even greater concerns arise in regard to the accuracy of drug-related SFST.\textsuperscript{104} Consequently, \textit{Sivia} may not be viewed as a persuasive authority regarding whether reliance on a single failed oral fluid test or SFST violates the Charter.

Drivers who have failed an oral fluid test should be given the right to challenge the results by submitting, without delay, to a blood-drug test. Similarly, drivers who have failed a drug-related SFST should be given the right to challenge the results by submitting to a DRE.

**Right to Review:** Drivers who are subject to a 7-day ALS and 7-day AVI should be able to apply to the provincial licensing authority for a review. However, the grounds for reviewing an ALS based on a failed ASD or oral fluid test should be limited to whether the applicant was driving or had care and control of a motor vehicle, whether the driver’s BAC or blood-drug level (BDL) was above the relevant threshold, and whether the test was conducted in accordance with proper procedures. The grounds for challenging an SFST should be limited to whether the applicant was driving or had care and control of a motor vehicle and whether the SFST was conducted in accordance with proper procedures. The provinces should consider whether the review should be limited to written submissions or whether the driver should be given the option of applying for an oral hearing.

The grounds for reviewing an AVI should be restricted largely to situations which warrant the revocation of the underlying ALS. In addition, the owner of an impounded vehicle should be able to appeal the AVI on the basis that the vehicle had been taken without his or her consent or knowledge. The alcohol and drug-related ALSs and AVIs should come into force immediately, regardless of whether a review has been sought. If the ALS or AVI is overturned, the driver’s record should be amended and any fees or penalties that have been paid should be refunded.

**(c) MANDATORY 90-DAY ALSS & MANDATORY 30-DAY AVIS**\textsuperscript{105}

**Alcohol:** The police should be required to impose an immediate roadside 90-day ALS and 30-day AVI on drivers who register a Fail (BAC of .08% or more) on an ASD. In light of \textit{Sivia}, drivers need to be advised of their right to request a second test on a different ASD and informed that the lowest of the two test results will prevail.\textsuperscript{106} These sanctions should apply as well to drivers if the results of an evidentiary breath or blood-alcohol test indicate that their BAC is .08% or more.
Drugs: As noted above, drivers who fail an oral fluid test or drug-related SFST should be subject to an immediate 7-day ALS and 7-day AVI, provided they are informed of their right to take a confirmatory oral fluid test. However, given the limitations in current oral fluid testing and SFST, drug-related, 90-day ALSs should not be imposed at roadside. Drivers who fail one of these tests should be required to accompany the officer and submit to a Drug Recognition Evaluation (DRE) or evidentiary blood-drug test. The confirmatory evidentiary test should be conducted as soon as possible because BDLs decline rapidly, particularly THC levels.

Although requiring a confirmatory DRE or evidentiary blood-drug test involves considerable costs and delays, failing to do so would likely generate legal challenges. As Sivia documented, the imposition of a 90-day ALS and 30-day AVI results in substantial direct financial costs, in addition to their impact on the driver's life. In Sahaluk, the majority bluntly stated: “While the administrative suspension of a driver’s licence prior to trial includes a public safety objective, it has an overwhelmingly punitive impact on the accused.” Given the courts’ views and the limitations in oral fluid testing and SFST, adopting a cautious approach to imposing drug-related, 90-day ALSs and AVIs would be the safest legal course of action.
Failing or Refusing a Demand for a Required Test: A mandatory 90-day ALS and 30-day AVI should be imposed on drivers who fail or refuse, without a reasonable excuse, to comply with a demand for any test or sample under section 320.27 or 320.28 of the Criminal Code (i.e. an ASD test, SFST, oral fluid test, evidentiary breath or blood-alcohol test, DRE, or evidentiary blood-drug test). The police should be required to first inform drivers of the potential legal consequences of failing or refusing to comply with a demand for a required test or sample.

Timing of the 90-day ALSs: Most jurisdictions impose the 90-day ALSs immediately, while several impose an initial short-term ALS as a prelude to the 90-day ALS. Upon the expiration of the initial 24-hour ALS, the driver is typically granted a 7 or 14-day temporary licence, allowing him or her to apply for review and to arrange alternate transportation before the 90-day ALS comes into force. While an immediate 90-day suspension may be less complicated, granting the driver a grace period may be perceived as less punitive and therefore less susceptible to legal challenge. In our view, both approaches have merit.

Right to Review: Drivers who are subject to a 90-day ALS and 30-day AVI should have a right to apply to the provincial licensing authority for a review. However, as indicated, the grounds for reviewing a failed screening or evidentiary test should be limited to whether the applicant was operating a motor vehicle, whether his or her BAC or BDL was above the relevant threshold, and whether the test was conducted in accordance with proper procedures. In the case of failing or refusing to comply with a demand, the review should be limited to whether the driver failed or refused to comply and whether he or she had a reasonable excuse for doing so. Given the serious consequences and significant financial costs of a 90-day ALS and 30-day AVI, the driver should be given the option of making a written submission or seeking an oral hearing.

The grounds for reviewing a 30-day AVI should be restricted largely to situations which warrant the revocation of the underlying ALS. In addition, the owner of an impounded vehicle should be able to appeal the AVI on the basis that the vehicle had been taken without his or her consent or knowledge. If the ALS or AVI is overturned, the driver’s record should be amended and any fees or penalties that have been paid should be refunded.

Fees and Penalties: It is appropriate for the provinces to charge drivers a fee to apply for a review or licence re-instatement, take a required driver education or improvement course, or participate in a required assessment, treatment or interlock program. No legal issues are likely to arise as long as these fees are reasonably related to the province’s or the provider’s costs. In addition to these fees, both British Columbia and Ontario charge drivers substantial monetary penalties geared to the seriousness of the driver’s conduct. For example, the penalties in Ontario range from $250 in the case of a 3-day ALS to $550 in the case of a 90-day ALS. In contrast to the administrative fees, monetary penalties are inherently punitive, making the legislation more susceptible to claims that it encroaches on the federal criminal law power and violates the Charter. While the current monetary penalties appear to be acceptable, substantially higher monetary penalties if coupled with other onerous administrative sanctions may well result in the legislation being legally challenged.
PART IV:

A REVIEW OF THE PROVINCIAL IMPAIRMENT-RELATED ADMINISTRATIVE SANCTIONS

In this part of the paper, we briefly assess the legislation relating to: mandatory 24-hour ALSs and discretionary 24-hour AVIs; mandatory 7-day ALSs and mandatory 7-day AVIs; and mandatory 90-day ALSs and mandatory 30-day AVIs. These categories of sanctions are not mutually exclusive, in that a driver may be subject to a series of successive or concurrent ALSs and AVIs as a result of being stopped, charged and convicted of an impaired driving offence.

Our commentary is based on the provincial legislation and does not take into account the enforcement policies and practices in each jurisdiction. As a result, internal police practices may alleviate or address some of the apparent gaps in the legislation. For example, the absence of provincial authority to impose an alcohol-related ALS on drivers who fail an SFST would not be problematic if all of the police in the jurisdiction had immediate access to an ASD.

**ALBERTA**

The province’s legislation authorizing the police to impose a 24-hour mandatory roadside ALS and a 24-hour discretionary AVI on a driver who they reasonably suspect to be affected by alcohol and/or drugs is consistent with best practice.

The police are authorized to impose a mandatory alcohol-related, 3-day ALS and mandatory 3-day AVI on a driver if they have reasonable grounds to believe that, based on an ASD or approved instrument, his or her BAC is .05% or more. The province should lengthen these ALSs and AVIs to 7 days and enact comparable drug-related provisions for failing an oral fluid test or drug-related SFST.

The province’s mandatory 90-day alcohol and drug-related ALS provisions are somewhat consistent with best practice. The police are required to impose a 90-day ALS on a driver if they have reasonable grounds to believe that he or she has a prohibited BAC or BDL, or if they have reasonable grounds to believe the driver is impaired to any degree by alcohol and/or a drug. The legislation does not expressly require an officer’s belief to be based on any screening or evidentiary test or sample. If the 90-day ALS is imposed based solely on the officer’s observations, he or she should be required to submit a report to the licensing authority which is sufficiently detailed to allow the driver to seek a meaningful review. The province should consider increasing the length of the accompanying AVI from 3 to 30 days.

The province’s mandatory 90-day ALS provisions for failing or refusing to comply with a demand for a required test or sample are consistent with best practice. The province should again consider increasing the length of the accompanying AVI from 3 to 30 days.

As indicated earlier, all drivers who receive a 90-day ALS are subject to an additional 1-year ALS which may be set aside if they participate in an alcohol interlock program and comply with any other conditions imposed by the Registrar of Motor Vehicles. This provision applies even if the 90-day ALS involved no alcohol and there is no indication that the driver has an alcohol problem of any kind. Drivers who receive a drug-related, 90-day ALS may well challenge this provision, particularly if it is based on having a prohibited blood-THC level based on a single roadside oral fluid test. The province should consider developing a more relevant remedial program for drivers that relates to the drug-related conduct in issue or is based on an assessed substance abuse problem.
**BRITISH COLUMBIA**

The police are authorized to impose a discretionary 24-hour roadside ALS and a 24-hour discretionary AVI on a driver if they have reasonable grounds to believe that his or her ability to drive is affected by alcohol or drugs. The province should make the ALS mandatory. The province’s alcohol-related, 3-day ALS and discretionary 3-day AVI could be strengthened. The ALS and AVI should be increased to 7 days and the AVI should be made mandatory. Currently, the police can only impose an AVI on a driver if they believe that doing so is necessary to prevent the driver from breaching the ALS. Our concern is that the police will seldom have grounds for imposing AVIs on this basis unless the driver has a record of driving while suspended or makes incriminating statements about ignoring the ALS. This provision would be appropriate if the province only wanted the police to impound vehicles in exceptional circumstances.

The province needs to enact a comparable 7-day, drug-related ALS and AVI for drivers who fail a roadside oral fluid test or drug-related SFST. Drivers should be informed of their right to challenge the initial failed test by submitting to a blood-drug test or DRE depending on if they failed an oral fluid test or drug-related SFST respectively.

Although the mandatory alcohol-related, 90-day ALS and mandatory 30-day AVI provisions are consistent with best practice, the province needs to enact comparable drug-related ALS and AVI provisions. As noted, the safest legal course of action would be to limit drug-related, 90-day ALSs and accompanying AVIs to situations in which a failed roadside oral fluid test or drug-related SFST has been confirmed by a DRE or evidentiary blood-drug test.

British Columbia’s 90-day ALS for failing or refusing, without a reasonable excuse, to comply with a demand for a required test or sample is consistent with best practice. However, the province only imposes a mandatory 30-day AVI on drivers who have failed or refused to provide a breath sample for an ASD test. British Columbia should extend this mandatory 30-day AVI to drivers who fail or refuse to comply with any demand for a required test or sample.

**MANITOBA**

The province has a mandatory 24-hour ALS, but it can only be invoked if the police believe that a driver is too impaired to comply with a demand for a test or sample. The police are also authorized to impose a discretionary 24-hour ALS on a driver if they have reason to believe that he or she is unable to drive safely due to a drug. Manitoba should consider expanding its mandatory 24-hour ALS to include any situation in which the police reasonably suspect that a driver’s ability is affected by alcohol and/or a drug. The province should enact accompanying discretionary 24-hour AVI provisions.

Manitoba’s mandatory 72-hour alcohol and drug-related ALS legislation is largely in line with best practice. The province should consider enacting a comparable AVI provision for drivers who fail an oral fluid test or drug-related SFST.

The police are required to inform drivers who have registered a Warn (or a Fail) on an ASD of their right to a second ASD test. The lower of the two results governs. However, drivers who fail an alcohol-related SFST should be given the right to take a confirmatory roadside ASD. Similarly, drivers who fail a drug-related SFST should be given the right to submit to a DRE and drivers who fail an oral fluid test should be given the right to submit to a blood-drug test.
Recent amendments have brought the province’s mandatory impairment-related, 3-month ALS and mandatory 30-day AVI provisions in line with best practice. Manitoba’s drug-related, 3-month ALSs and 30-day AVIs are limited to situations in which the driver has failed an evidentiary blood test. The province should expand the grounds for imposing these drug-related ALSs and AVIs to include situations in which the results of a failed roadside oral fluid test or drug-related SFST have been confirmed by a DRE or evidentiary blood-drug test.

Manitoba’s mandatory 3-month ALS and 60-day AVI provisions for failing or refusing to comply with a demand for a required test or sample are consistent with best practice.

NEW BRUNSWICK

The police are authorized to impose a discretionary 24-hour ALS on a driver if they are of the opinion that he or she is unfit to drive safely for a medical or other reason. The province should consider enacting a specific mandatory impairment-related, 24-hour ALS provision and an accompanying discretionary AVI.

The province’s discretionary impairment-related, 7-day ALS and AVI provisions could be strengthened. New Brunswick should make the ALSs mandatory and expand the alcohol-related ALS provision to include drivers who have failed an SFST. Similarly, the grounds for imposing a drug-related ALS should be expanded to include a failed oral fluid test. The province should also lengthen its discretionary 3-day AVI and make it mandatory. Currently, the police can only impose an AVI on a driver if they believe that doing so is necessary to prevent the driver from breaching the ALS.
As noted, the police will seldom have grounds for imposing an AVI on this basis unless the driver has a record of driving while suspended or makes incriminating statements about ignoring the ALS. This provision would be appropriate if the province only wanted the police to impound vehicles in exceptional circumstances.

New Brunswick’s alcohol-related, 3-month ALS and 30-day AVI are largely consistent with best practice but could be strengthened. The police are required to impose these sanctions on a driver if they have reason to believe that, based on a breath or blood test, the driver’s BAC is .08% or more. This provision does not expressly require the officer’s belief to be based on an evidentiary breath or blood test. Since the right to request a second ASD test does not apply to these provisions, the ALS could be imposed based on a single ASD test, which is inconsistent with Sivia and Goodwin.

New Brunswick’s mandatory drug-related, 3-month ALS and 30-day AVI provisions could be strengthened by extending them to drivers who have failed a drug-related SFST or oral fluid test, provided the results were confirmed by a DRE or evidentiary blood-drug test.

The province’s mandatory alcohol-related, 3-month ALS and 30-day AVI provisions are overly complicated. Currently, the legislation requires the officer to have reasonable grounds to believe that the driver failed or refused “while having alcohol in his or her body.” Consequently, these sanctions cannot be imposed on a driver who showed no apparent signs of alcohol consumption, such as the great majority of drivers who are screened for alcohol at MAS checkpoints. This added provincial requirement is inconsistent with the purpose of the MAS legislation, which is to allow very large numbers of drivers to be randomly stopped and quickly screened in the absence of any individualized suspicion of drinking. Nor does this 3-month ALS and 30-day AVI apply to drivers who fail or refuse to comply with an officer’s demand to submit to an alcohol-related SFST.

The police are authorized to impose a mandatory 7-day...

The province’s mandatory drug-related, 3-month ALS and 30-day AVI provisions also require the police to have reason to believe that the driver has drugs in his or her body. This requirement is not as problematic, given that the police cannot demand that drivers submit to drug-testing unless they reasonably suspect that the driver has drugs in his or her body. Nevertheless, this provision might encourage more drivers to question whether the officer had sufficient grounds to make the demand and, in any event, unnecessarily complicates the law. Moreover, this 3-month ALS and 30-day AVI do not apply to drivers who fail or refuse to comply with an officer’s demand to submit to a drug-related SFST.

New Brunswick should amend these provisions and impose a mandatory 3-month ALS and 30-day AVI on any driver who fails or refuses, without a reasonable excuse, to comply with a demand for any required impairment-related test or sample.

NEWFOUNDLAND AND LABRADOR

The province should enact legislation authorizing the police to impose a mandatory 24-hour ALS and discretionary 24-hour AVI on a driver if they have reasonable grounds to suspect that he or she is affected by alcohol and/or a drug.

The province’s mandatory alcohol-related, 7-day ALS and AVI provisions could be strengthened. Currently, the police can impose these sanctions on a driver who registers a BAC of .05% or more on an ASD or an evidentiary blood test. However, if the driver challenges the initial ASD, the confirmatory breath test can only be performed on an approved instrument. In this case, the ALS and AVI cannot be imposed at roadside. The police should be authorized to conduct the second test on a different ASD, and the lower of the two test results should apply.

The grounds for imposing these sanctions should be extended to drivers who have failed an alcohol-related SFST, provided they are given an opportunity to take a confirmatory ASD test.
ALS and AVI on a driver if they have reasonable grounds to believe that he or she is impaired by a drug or a drug in combination with alcohol. The legislation does not expressly require the officer’s belief to be based on any test or sample. If the officer’s belief is not based on a test or sample, he or she should be required to submit a report to the licensing authority which is sufficiently detailed to allow the driver to seek a meaningful review. The province should consider expanding these provisions to expressly include drivers who have failed a roadside drug-related SFST or oral fluid test, provided that drivers can challenge the initial failed test by submitting to a DRE in the case of a failed SFST or a blood-drug test in the case of a failed oral fluid test.

Newfoundland and Labrador’s mandatory alcohol-related, 90-day ALS and 30-day AVI provisions are largely consistent with best practice. However, as outlined above, if a driver challenges the initial ASD test result, the second test cannot be performed at roadside. The province should permit the second test to be performed on a different ASD, and the lower of the two test results should apply.

The province’s mandatory drug-related ALS and AVI provisions could be strengthened. Currently, these sanctions can be imposed on a driver if an analysis of a bodily substance indicates that he or she has a prohibited BDL, or a prohibited BDL in combination with a prohibited BAC. The legislation does not expressly require the BDL to be based on evidentiary blood-drug test. If the BDL is based on an oral fluid test, a confirmatory DRE or evidentiary blood-drug test should be required. The grounds for imposing this 90-day ALS should be extended to include drivers who fail a DRE. The legislation should also be amended to include a mandatory 30-day AVI for drivers who are subject to a 90-day, drug-related ALS.

Newfoundland and Labrador’s mandatory 90-day ALS for failing or refusing to comply with a demand for a required test or sample is consistent with best practice. However, the accompanying mandatory 30-day AVI only applies to drivers who fail or refuse to comply with a demand under section 254 of the Criminal Code. It is not clear if the courts would give effect to this impoundment provision given that section 254 was repealed, replaced (in an amended form) and renumbered. The province needs to update this reference to the Criminal Code. The grounds for imposing this AVI should be broadened to include a failure or refusal to comply with any demand pursuant to sections 320.27 and 320.28 of the Criminal Code.

THE NORTHWEST TERRITORIES

It should be noted at the outset that the territorial legislation does not include any impairment-related AVIs. The territory should enact AVI legislation to supplement its impairment-related ALSs.

The territory’s legislation authorizing the police to impose a mandatory 24-hour ALS on drivers who they reasonably suspect to be affected by alcohol or drugs is consistent with best practice.

The territory also imposes a mandatory 24-hour ALS on drivers who register a BAC above .05% on an ASD, evidentiary breath or blood-alcohol test. If this ALS is based on an ASD test, the driver has the right to a second test, but it must be performed on an approved instrument. This provision prevents the ALS from being imposed at roadside. The police should be authorized to conduct the second test on a different ASD, and the lower of the two test results should apply. The territory should lengthen this ALS to 7 days and broaden the grounds to include drivers who have failed an alcohol-related SFST, provided they are given an opportunity to take a confirmatory ASD test. Parallel ALS provisions should also be enacted for drivers who fail an oral fluid test or drug-related SFST.

The territory has other 24-hour, impairment-related ALSs, but they are only imposed as a prelude to the imposition of a related 90-day ALS. The police are authorized to impose a mandatory 90-day ALS on a driver who has a BAC in excess of .08% as indicated by an evidentiary breath or blood-alcohol test. The territory should expand the grounds for imposing this mandatory 90-day ALS to include drivers who fail an SFST or ASD test, provided they are afforded an opportunity for a confirmatory roadside ASD.
The police are required to impose a 30-day ALS if they reasonably believe that a driver who has taken an SFST, or failed or refused to take an SFST, is impaired by a drug or a drug in combination with alcohol. A 90-day ALS is imposed on drivers who have taken a DRE, or failed or refused to take a DRE, if they are reasonably believed to be impaired by a drug or a drug in combination with alcohol. The territory should expand the grounds for imposing a mandatory drug-related, 90-day ALS to include drivers who fail an SFST or oral fluid test, provided the result is consistent with the results of a DRE or evidentiary blood-drug test.

The Northwest Territories imposes a mandatory 90-day ALS on drivers who fail or refuse to comply with a demand for a breath or blood sample pursuant to section 254 of the Criminal Code. It is not clear if the courts will give effect to this provision given that section 254 was repealed, replaced (in an amended form) and renumbered. The territory needs to update this (and other) references to the Criminal Code. The grounds for imposing this ALS should be broadened to include a failure or refusal to comply with any demand pursuant to sections 320.27 and 320.28 of the Criminal Code.

**NOVA SCOTIA**

It should be noted at the outset that the provincial legislation does not include any impairment-related AVIs. The province should enact AVI legislation to supplement its impairment-related ALSs.

The province’s 24-hour alcohol and drug-related ALS provision is largely consistent with best practice. However, the province should make the 24-hour ALS mandatory.

Nova Scotia’s mandatory alcohol-related, 7-day ALS is largely consistent with best practice, but it should be extended to include drivers who fail an SFST, provided they are given a right to a confirmatory roadside ASD test. The province’s mandatory drug-related, 7-day ALS is largely consistent with best practice, but drivers who have failed a drug-related SFST should be given a right to challenge the initial failed test by submitting to a DRE. This drug-related, 7-day ALS should be extended to drivers who have failed an oral fluid test, provided they are given a right to challenge the initial failed test by submitting to a blood-drug test.

The province’s mandatory alcohol and drug-related, 90-day ALSs are largely consistent with best practice. However, in two instances, the 90-day ALS could be based on a single ASD or oral fluid test, which is incompatible with Sivia and Goodwin. The 90-day ALS provision based on a single ASD test should be amended to expressly indicate that the driver has a right to take a confirmatory roadside ASD. Similarly, the 90-day ALS provision based on a single oral fluid test should be amended to require a confirmatory DRE or evidentiary blood-drug test.

The police are also required to impose a 90-day ALS on a driver if they have reason to believe that he or she is impaired by alcohol and/or drugs contrary to section 320.14 of the Criminal Code. The legislation does not expressly require an officer’s belief to be based on any test or sample. If an officer’s belief is not based on a test or sample, he or she should be required to submit a report to the licensing authority which is sufficiently detailed to allow the driver to seek a meaningful review.

The province’s mandatory 90-day ALS for failing or refusing to comply with a demand for a breath or blood sample is overly complicated. Currently, the legislation requires the officer to have reason to believe that the driver failed or refused while having alcohol or a drug in his or her body. Consequently, this ALS cannot be imposed on a driver who showed no apparent signs of alcohol consumption, such as the great majority of drivers who are screened for alcohol at MAS checkpoints. This added provincial requirement is inconsistent with the purpose of the MAS legislation, which is to allow very large numbers of drivers to be randomly stopped and quickly screened in the absence of any individualized suspicion of drinking.
Moreover, given that this provision only applies to demands for a breath or blood sample, it does not include drivers who fail or refuse to comply with a demand for an alcohol or drug-related SFST, an oral fluid test or a DRE. Nova Scotia should amend the provision to impose a mandatory 90-day ALS on drivers who fail or refuse to comply with any demand pursuant to sections 320.27 and 320.28 of the Criminal Code.

**NUNAVUT**

The territory’s legislation authorizing the police to impose a mandatory 24-hour ALS on drivers who they reasonably suspect to be affected by alcohol or drugs is consistent with best practice. Nunavut also imposes a mandatory 24-hour ALS on a driver if an analysis of breath, blood or other bodily substance indicates that he or she has a BAC equal to or exceeding .05%, a prohibited BDL, or a prohibited BAC in combination with a prohibited BDL.

Nunavut has no other impairment-related ALSs and no AVI provisions. Comprehensive amendments are necessary to bring the territory’s legislation into line with best practice.

**ONTARIO**

The province should enact legislation authorizing the police to impose a mandatory 24-hour ALS and discretionary 24-hour AVI on a driver if they have reasonable grounds to suspect that his or her ability is affected by alcohol and/or a drug.

The province’s discretionary alcohol-related, 3-day ALS program could be improved in several ways. Ontario should make these ALSs mandatory, lengthen them to 7 days and enact accompanying mandatory 7-day AVIs. The police should be required
to inform a driver, who has registered a BAC of .05% or more on an ASD, of the right to take a second ASD test on a different device. The lower of the two test results should prevail. The grounds for imposing this ALS should be broadened to include a failed alcohol-related SFST, provided the driver is given the right to take a confirmatory ASD test.

The police are required to impose a 3-day ALS on a driver if they reasonably believe, based on an SFST or other prescribed test, that his or her ability is impaired by a drug or a drug in combination with alcohol. A driver who has failed a drug-related SFST should be afforded the right to challenge the initial failed test by submitting to a DRE. The grounds for imposing this ALS should expressly include a failed oral fluid test, provided the driver is given the right to challenge the initial failed test by submit to a blood-drug test. This drug-related ALS should be lengthened to 7 days and an accompanying 7-day AVI should be enacted.

The province’s mandatory 90-day ALSs and 7-day AVIs could be strengthened. The province should lengthen the accompanying AVIs from 7 to 30 days. Ontario’s alcohol-related, 90-day ALSs are currently limited to situations in which the driver has failed an evidentiary breath or blood test, which precludes imposing them at roadside. Pending legislation will allow the 90-day ALS to be based on any breath or blood test, including a roadside ASD test. Although this a positive development, the provision does not include a right to take a second roadside ASD test, which is inconsistent with Sivia and Goodwin. The grounds for imposing this ALS should be broadened to include drivers who have failed an alcohol-related SFST, provided they are afforded the right to demand a confirmatory ASD test.

Currently, the police may impose a drug-related, 90-day ALS on a driver if they reasonably believe that, “taking into account all of the circumstances,” including a DRE or other tests that his or her ability to drive is impaired by a drug or a drug in combination with alcohol. This provision is overly complicated and susceptible to legal challenge.

Defence counsel will argue that the police cannot simply rely on a failed DRE or other test, but rather must adduce additional evidence, such as erratic driving or a lack of physical co-ordination, indicating that the driver’s ability to drive was impaired by a drug or a drug in combination with alcohol. The provision should be amended to authorize imposing a drug-related, 90-day ALS on any driver who fails a DRE or evidentiary blood-drug test and on drivers who fail an oral fluid or drug-related SFST, provided the result is confirmed by a DRE or evidentiary blood-drug test.

Ontario’s 90-day ALS and AVI provisions for failing or refusing to comply with a demand for a required test or sample are largely consistent with best practice, but still refer to demands made pursuant to section 254 of the Criminal Code, which was repealed, replaced (in an amended form) and renumbered in 2018. While the current provisions are convoluted, they will be given legal effect because Ontario enacted a regulation which provides that references to specified repealed Criminal Code impaired driving sections, including section 254, shall be read as including the corresponding sections in the current Criminal Code. Pending Ontario legislation will update the references to the renumbered Criminal Code impaired driving sections.

**PRINCE EDWARD ISLAND**

The province should enact legislation authorizing the police to impose a mandatory 24-hour ALS and discretionary 24-hour AVI on a driver if they have reasonable grounds to suspect that he or she is affected by alcohol and/or a drug. Although the province has a mandatory alcohol-related, 24-hour ALS, it serves as a prelude to the province’s 90-day ALS and is based on the same narrow criteria.

Prince Edward Island authorizes the police to impose a mandatory alcohol-related, 7-day ALS on drivers in a broad range of circumstances. These include situations in which the driver registers a BAC of .05% or more on an ASD, and situations in which the officer believes, based on an
SFST, that a driver is unable to drive safely. The police must inform drivers of their right to a second test, the nature of which is not defined. The ALS will be terminated if the second test indicates that the driver’s BAC is below .05% and in other specified circumstances. Although overly complicated, the province’s alcohol-related, 7-day ALS is largely consistent with best practice.

Prince Edward Island’s mandatory 90-day ALS provisions for failing or refusing to comply with a required test or sample are consistent with best practice, but there is no accompanying AVI.

**QUEBEC**

It should be noted at the outset that the provincial legislation does not include any impairment-related AVIs. The province should enact AVI legislation to supplement its impairment-related ALSs. The province has a mandatory 24-hour ALS, but it is limited to situations in which the police have reasonable grounds to believe that, based on an SFST, a driver’s ability to drive is impaired. Quebec could strengthen its legislation by requiring the police to impose the 24-hour ALS on a driver if they have reasonable grounds to suspect that he or she is affected by alcohol and/or a drug. Quebec should also enact an accompanying discretionary 24-hour AVI.

The province does not have impairment-related, 7-day ALSs or any comparable short-term sanction. The police should be required to impose a 7-day ALS and AVI on any driver who registers a BAC of .05% or more on an ASD, fails an alcohol or drug-related SFST or fails an oral fluid test. If this ALS is imposed based on an ASD test or alcohol-related SFST, the driver should be given the right to take a confirmatory ASD test. In the case of a failed oral fluid test, the driver should have the right to challenge the initial failed test by submit to a blood-drug test. Similarly, drivers who have a failed a drug-related SFST should be given the right to submit to a DRE.

Quebec’s mandatory alcohol and drug-related, 90-day ALSs are based on very narrow grounds. An alcohol-related, 90-day ALS can only be imposed on drivers if they register a BAC of .08% or more on an approved instrument. The grounds for imposing this ALS should be broadened to include a failed evidentiary blood test, and a failed roadside ASD test or SFST, provided the driver is afforded the right to take a confirmatory ASD test.
A drug-related, 90-day ALS can only be imposed on drivers if, according to a DRE, they are impaired by cannabis, another drug, or a combination of drugs and alcohol.\textsuperscript{183} Pending legislation would require the police to impose a 90-day ALS on drivers if an oral fluid test indicated that they had cannabis or another drug in their body.\textsuperscript{184} This provision should be amended to bring it into line with Sivia and Goodwin.\textsuperscript{185} As indicated, the safest course of action would be to require the failed oral fluid test to be confirmed by a DRE or evidentiary blood-drug test. This 90-day ALS should be further broadened to include: drivers who have failed a drug-related SFST, provided the result is confirmed by a DRE or blood-drug test; and drivers who have failed an evidentiary blood-drug test.

Quebec’s mandatory alcohol and drug-related, 90-day ALS provisions for failing or refusing to comply with a required test or sample are consistent with best practice.\textsuperscript{186}

**SASKATCHEWAN**

The province should enact legislation authorizing the police to impose a mandatory 24-hour ALS and discretionary 24-hour AVI on a driver if they have reasonable grounds to believe that his or her ability is affected by alcohol and/or a drug.

The police are authorized to impose a mandatory 3-day ALS and AVI on a driver if they have reasonable grounds to believe that, based on an ASD, his or her BAC is equal to or exceeds .04%.\textsuperscript{187} The ALS and AVI must be terminated if a second ASD test indicates that the driver’s BAC is below .04%\textsuperscript{188} and in other specified circumstances.\textsuperscript{189} The provision should be amended to expressly indicate that drivers must be informed of their right to challenge the initial ASD test.\textsuperscript{190} The ALS and AVI should be lengthened to seven days.

The police are also authorized to impose an open-ended ALS on a driver if they have reasonable grounds to believe that his or her ability to drive is impaired by alcohol and/or a drug.\textsuperscript{200} The legislation does not expressly require the officer’s belief to be based on any test or sample. If the officer’s belief is not based on a test or sample, he or she should be required to submit a report to the licensing authority which is sufficiently detailed to allow the driver to seek a meaningful review.

Unlike any other jurisdiction, Saskatchewan continues to impose an open-ended, impairment-related ALS on drivers until the criminal prosecution has been stayed or withdrawn, or the driver has been acquitted or convicted.\textsuperscript{193} Given the Court of Appeal decision in Sahaluk\textsuperscript{194} these open-ended ALSs will likely be struck down under the Charter.

Saskatchewan imposes impairment-related, open-ended ALSs on drivers in a broad range of circumstances;\textsuperscript{195} but some of the provisions are convoluted and difficult to interpret.\textsuperscript{196} Moreover, in some situations these open-ended ALSs can be based on a single ASD\textsuperscript{197} or oral fluid test,\textsuperscript{198} which is incompatible with Sivia and Goodwin.\textsuperscript{199} The ALS provision based on a single ASD test should be amended to expressly indicate that the driver has a right to take a confirmatory ASD test. Similarly, the ALS provision based on an SFST or a single oral fluid test should be amended to require the police to undertake a confirmatory DRE or evidentiary blood-drug test.

The police are also authorized to impose an open-ended ALS on a driver if they have reasonable grounds to believe that his or her ability to drive is impaired by alcohol and/or a drug.\textsuperscript{200} The legislation does not expressly require the officer’s belief to be based on any test or sample. If the officer’s belief is not based on a test or sample, he or she should be required to submit a report to the licensing authority which is sufficiently detailed to allow the driver to seek a meaningful review.
The province imposes a mandatory 30-day AVI on drivers who are charged with the Criminal Code offences of driving with a BAC of .08% or more, driving with a prohibited BDL, or driving while their ability to do so is impaired to any degree by alcohol and/or a drug. This mandatory 30-day AVI provision should be broadened to include any driver who is subject to an open-ended ALS, whether or not the police decide to lay a criminal charge.

The province’s ALS provisions for failing or refusing to comply with a demand for a required test or sample are consistent with best practice, except that the ALS is open-ended. The accompanying 60-day AVI is limited to drivers who have been charged with the Criminal Code offence of failing or refusing to take a required test or submit a required sample. This mandatory 60-day AVI provision should be broadened to include any driver who has failed or refused to comply with a demand for any required test or sample, whether or not the police lay a criminal charge.

In the Yukon, the long-term impairment-related ALSs are imposed for the lesser of 90 days or until the driver is convicted of an offence under sections 253-255 of the Criminal Code. It is not clear what impact this provision would have on the length of the ALS, given that these Criminal Code sections were repealed, replaced (in an amended form) and renumbered in 2018. This provision should be updated to incorporate the current Criminal Code impaired driving offences.

The police have discretion to impose a long-term ALS on a driver if they have reasonable grounds to believe that, based on a breath or blood sample, he or she has a BAC exceeding .08%. Currently, this provision would authorize the police to impose a long-term ALS on a driver based on a single ASD test, which is incompatible with Sivia and Goodwin. Drivers who fail a roadside ASD should be afforded the right to take a second confirmatory ASD, and the lower of the two test results should prevail. This ALS provision could be further strengthened by making the ALS mandatory and broadening the grounds to include drivers who have failed an alcohol-related SFST, provided they were given the right to take a confirmatory ASD test.

The Yukon does not have impairment-related, 7-day ALSs and AVIs or any comparable short-term sanction. The police should be required to impose a roadside 7-day ALS and AVI on any driver who registers a BAC of .05% or more on an ASD, fails an alcohol or drug-related SFST, or fails an oral fluid test. In the case of a failed ASD test or alcohol-related SFST, the driver should have the right to take a confirmatory ASD test. In the case of a failed oral fluid test or failed drug-related SFST, the driver should have the right to submit to a blood-drug test or DRE respectively.

While the territory does not have a comparable long-term ALS for drugs, the preceding discretionary 30-day AVI provision encompass several drug-related situations. As indicated, the AVI provisions should be updated and redrafted. The police are authorized to impose a discretionary long-term ALS and a discretionary 30-day AVI on a driver if they have reasonable grounds to believe that he or she has failed or refused to comply with a demand for a breath or blood sample under section 254 of the Criminal Code. The provision needs to be updated, the ALS should be made mandatory and it should apply to a driver who fails or refuses to comply with a demand for any required impairment-related test or sample.
CONCLUSION

Provincial administrative sanctions are increasingly used to supplement or replace federal impaired driving charges. Despite recent amendments, the enforcement of the federal impaired driving offences will remain a relatively protracted, labour-intensive and uncertain process. This is particularly true compared to the most recent generation of provincial ALSs and AVIs which are imposed at roadside, include significant administrative fees and penalties, and are linked to driver improvement, alcohol interlock and other remedial programs.

While the provinces have broad leeway, there are limits on their authority to impose significant administrative sanctions on drivers, particularly if they are based on a single screening test. The legality of these measures will likely be assessed in terms of the severity of the sanction, the reliability of the test or evidence upon which it is based, and whether the driver is afforded a meaningful opportunity to challenge the decision. The courts have upheld the imposition of alcohol-related, 90-day ALSs and 30-day AVIs based on a single roadside ASD test or SFST, provided the driver was informed of his or her right to take a second ASD test and was afforded the opportunity to seek a meaningful review. The courts may adopt a more critical approach regarding roadside oral fluid testing and drug-related SFSTs, because they are not as accurate as comparable alcohol screening measures. Despite the remaining uncertainty regarding drug testing, clearly all the provinces could strengthen their ALS and AVI legislation. Many provinces are not taking full advantage of their ability to impose roadside alcohol-related, 90-day ALSs, while others have limited or no accompanying AVI provisions. Most of the provinces should enact a broader range of drug-related ALSs and AVIs. Several provinces have failed to provide drivers with a statutory right to take confirmatory roadside tests and about half have complex or restrictive provisions that invite legal challenges that could be easily avoided. Finally, several provinces impose mandatory 90-day ALSs and other onerous sanctions on drivers who fail or refuse to comply with Criminal Code provisions that no longer exist.

As indicated, our analysis is based on a review of the current legislation. Consequently, it is likely that several jurisdictions have adopted internal police practices that address some of the concerns that we have raised. Nevertheless, we would encourage all the provinces to review their legislation and enact a comprehensive set of impairment-related administrative measures.
1 Subsequent references to the words “provincial” and “provinces” should be interpreted as including the words “territorial” and “territories” unless otherwise indicated.

2 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [Constitution Act, 1867]. This comprehensive power would allow Parliament to enact laws criminalizing virtually all aspects of impaired driving, provided the law was framed as a prohibition, included a penalty and served a typical criminal law purpose, such as public peace, order, safety, health, or morality.


4 Constitution Act, 1867, supra note 2, s. 92(13).

5 Ibid., s. 92(16).


The provinces also have constitutional authority over the administration of justice which includes the prosecution of Criminal Code offences, the allocation of police resources and police enforcement practices. Constitution Act, 1867, supra note 2, s. 92(14). Moreover, s. 92(15) gives the provinces authority to create offences in relation to matters within their legislative competence. Provincial driving offences have been repeatedly upheld under this head of power. See for example, O’Grady v. Sparling, [1960] S.C.R. 804 and Mann v. The Queen, [1966] S.C.R. 238 (upholding the provincial offence of careless driving); and Stephens v. The Queen, [1960] S.C.R. 823 (upholding the provincial offence of failing to remain at the scene of a crash).


8 B. Jonah et al., “Front-line police officers’ practices, perceptions and attitudes about the enforcement of impaired driving laws in Canada” (1999) 31(5) Accident Prevention & Analysis 421 at 426. About 29% of officers indicated that they frequently or sometimes took no legal action, but rather arranged for a taxi, allowed a sober passenger to drive the car or otherwise ensured that the impaired driver was taken home safely. Ibid.

9 Ibid. at 429 and 432.

10 Ibid. at 435.

11 Police Services Division, Safe Roads, Safe Communities (Victoria: Ministry of the Attorney General, Public Safety and Regulatory Branch, 2000) at B-4.

12 Statistics Canada, Table 35-10-0177-01: Incident-based crime statistics, by detailed violations, Canada, provinces, territories, and Census Metropolitan Areas (Ottawa: Statistics Canada, 2019) [Table 35-10-0177-01]. While the number of impaired driving charges fell in every province from 2010 to 2018, the rate of decline varied significantly among the jurisdictions. The decline in impaired driving charges (and shift to administrative sanctions) has been most pronounced in British Columbia. Despite the 19% increase in the number of impaired driving incidents known to the police from 1998 to 2018, the number of persons charged fell 60%. Ibid.

The sharp fall in alcohol-related impaired driving charges has been slightly offset by the gradual increase in drug-impaired driving charges that followed the 2008 Criminal Code amendments. The police were finally given some ability to gather evidence of drug-impaired driving, albeit 83 years after Canada first criminalized this conduct. While the number of drug-impaired driving charges continues to increase, they still accounted for less than 6% of the 44,770 impaired-impaired driving charges in 2018. Ibid.

14 Ibid. at 49.

15 Ibid. at xi.


17 Ibid. at 15-16. The bracketed data in this paragraph are based on the impaired driving cases completed in the criminal courts from 2010/2011 to 2014/2015.

18 Ibid. at 16.


20 2016 SCC 27.

21 For a summary of the current impairment-related ALS legislation across Canada, see L. MacLeod & R. Solomon, Provincial and Territorial Alcohol and Drug-Related Administrative Licence Suspensions and Vehicles Impoundments (Oakville, Ontario: MADD Canada, 2019) [MacLeod & Solomon].


23 MacLeod & Solomon, supra note 21.

24 For the criminal charges, see Table 35-10-0177-01, supra note 12; and for the ALS data, see British Columbia, RoadSafetyBC, Administrative Alcohol and Drug Related Driving Prohibitions (Victoria: Ministry of Public Safety and Solicitor General, 2019) at 2, online: <https://www2.gov.bc.ca/gov/driving-and-transportation/driving/publications/drinking-driving-report-may-2019.pdf>.

25 MacLeod & Solomon, supra note 21.

26 An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts, 1st Sess., 42nd Parl., 2017 (assented to 21 June 2018), S.C. 2018, c. 21 [Bill C-46].

27 An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, 1st Sess., 42nd Parl., 2017 (assented to 21 June 2018), S.C. 2018, c. 16. The Bill largely repealed the federal criminal prohibitions relating to the cultivation, possession and distribution of cannabis for recreational purposes. It also set a minimum lawful purchase age of 18; authorized the provinces to establish public or private cannabis stores, and direct-to-consumer mail order marketing systems; permitted those under 18 to possess, consume and share up to five grams of cannabis; allowed for public consumption; and did not prohibit possession or use of cannabis while driving.

28 Canadian survey data, roadside driver screening studies and post-mortem toxicological data indicate that there has been a dramatic increase in driving after drug use, particularly among young cannabis users. R. Solomon, E. Chamberlain & M. Vandenberghe, “Canada’s New Cannabis-Related Driving Legislation: The Elusive Quest for an Effective Deterrent” (2018) 23 Canadian Criminal Law Review 265 at 271-73 [Elusive Quest].

29 Bill C-46 addressed some procedural and evidentiary issues that contributed to making alcohol-impaired driving enforcement time-consuming, costly and frustrating. Supra note 26, s. 320.29 and ss. 320.31-320.37. It also authorized the police to undertake mandatory alcohol screening (MAS) or what is commonly called “random breath testing” (RBT). Pursuant to this provision, the police may demand a breath sample from any driver who they have lawfully stopped. Supra note 26, s. 320.27(2). MAS will allow large numbers of drivers to be efficiently screened at roadside and will likely encourage more impaired drivers to plead guilty. Nevertheless, the criminal prosecution of impaired driving cases will remain relatively labour-intensive and protracted compared to the imposition of provincial administrative sanctions.

See also, An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, 1st Sess., 42nd Parl., 2015 (assented to 29 June 2019), S.C. 2019, c. 25 [Bill C-75]. This omnibus criminal law Bill, which ran to several hundred pages, addressed some perceived inefficiencies in the criminal justice system that overburdened the police, Crowns, courts, and jails.
30 In most American states, the BAC threshold for a criminal charge was .10%, but this has been reduced to .08%. In Canada, the Criminal Code threshold was a BAC above .08%, but in practice criminal charges were generally not laid unless the driver’s BAC exceeded .10%. It is not clear whether the 2018 Criminal Code amendments establishing a BAC threshold of .08% or more will alter police charging practices. R.S.C. 1985, c. C-46, s. 320.14(1)(b).


32 A. Wagenaar & M. Maldonado-Molina, “Effects of Drivers’ License Suspension Policies on Alcohol-Related Crash Involvement: Long-Term Follow-Up in Forty-Six States” (2011) 31(8) Alcoholism: Clinical and Experimental Research 1. The authors noted that ALS laws result in more certain sanctions than post-conviction suspensions, since numerous criminal cases result in an acquittal or a conviction for a lesser offence, such that no post-conviction suspension applies. Ibid. at 6.

A National Highway Traffic Safety Administration (NHTSA) study concluded that the American ALS programs were associated with a 19% decline in alcohol-related fatal crashes. R. Voas & J. Lacey, Alcohol and Highway Traffic Safety 2006: A Review of the State of Knowledge (Washington, DC: NHTSA, 2011) at xxxii.

33 C. Richard et al., Countermeasures that work: A highway safety countermeasures guide for State Highway Safety Offices, 9th ed. (Washington, DC: NHTSA, 2018) at 1-15. In the authors’ words, these 90-day pre-trial ALSs “provide for swift and certain penalties for DWI [driving while impaired] rather than the lengthy and uncertain outcome of criminal courts.” Ibid.

34 D. Beirness, H. Simpson & D. Mayhew, Evaluation of Administrative Licence Suspension and Vehicle Impoundment Programs in Manitoba (Ottawa: Transport Canada, 1997) at 34 and 46. The proportion of accused involved in crashes during the 97 days following their impaired driving event dropped 69% from before to after the introduction of the ALS provision (i.e. from 94% to 29% of accused). Ibid. at 55. Obviously, if all offenders had observed their suspensions, the number of crashes during the ALS period would have been zero.

Manitoba also enacted AVI legislation in 1989, but it did not apply to impaired driving suspects. Rather, it applied to drivers who were in breach of a driving suspension, disqualification or prohibition.

35 Ibid. at 51.


37 M. Asbridge et al., “The effects of Ontario’s administrative driver’s licence suspension law on total driver fatalities: A multiple time series analysis” (2009) 16(2) Drugs: Education, Prevention and Policy 140. See also, R. Mann et al., “The Early Effects of Ontario’s Administrative Driver’s Licence Suspension Law on Driver Fatalities with a BAC > 80 mg%” (2002) 93 Canadian Journal of Public Health 176. The authors reported that the Ontario ALS law was associated with an estimated reduction of 17.3% in the proportion of fatally-injured drivers with BACs above .08%.

38 While some initial short-term, low-BAC range ALS legislation has been evaluated, this legislation was far more limited than the current comprehensive ALS and AVI laws that are the focus of our current study. For example, Ontario’s 12-hour ALS for drivers with a BAC of .05% or more and Saskatchewan’s 24-hour ALS for drivers with a BAC in excess of .04% were narrow in scope and carried no ongoing consequences. Not surprisingly, they were found to have a limited or no deterrent impact. See respectively, Vingilis, supra note 22 at 16; and D. Beirness & D. Singhal, Short-term Licence Suspensions for Drinking Drivers: An assessment of effectiveness in Saskatchewan (Washington, DC: AAA Foundation for Traffic Safety, 2007) at 16. In any event, both provinces have dramatically broadened and strengthened their alcohol-related ALS legislation. These studies aptly illustrate the types of ALS programs that are not effective.

Somewhat more comprehensive short-term ALS legislation was reported to result in significant decreases in impaired driving deaths and injuries. See E. Blais et al., “Effects of introducing an administrative .05% blood alcohol concentration limit on law enforcement patterns and alcohol-related collisions in Canada” (2015) 82 Accident Analysis and Prevention 101; and P. Byrne et al., “Evaluation of the general deterrence capacity of recently implemented (2009-2010) low and Zero BAC requirements for drivers in Ontario” (2016) 88 Accident Analysis and Prevention 56.
39 Among other things, the police were authorized to impose: a roadside 24-hour driving prohibition on a driver if they reasonably believed that his or her ability to drive was affected by alcohol and/or drugs; and a 3-day “immediate roadside driving prohibition” (IRP) on a driver who registered a Warn on an ASD (BAC of .05% or more). A second and third Warn range BAC within five years resulted in a 7-day and 30-day IRP, respectively. Drivers who registered a “Fail” on an ASD (BAC of .08% or more) were subject to a 90-day IRP, as were drivers who failed or refused to comply with a lawful demand for a test or sample. The police routinely impounded the vehicle of these drivers, even though they were only required to do so in the case of the 30 and 90-day IRPs. In all cases, the driver’s licence was seized and the prohibition was recorded on the individual’s driving record. Motor Vehicle Amendment Act, 2010, S.B.C. 2010, c. 14, s. 19.


41 S. Macdonald et al., “The impact on alcohol-related collisions of the partial decriminalization of impaired driving in British Columbia, Canada” (2013) 59 Accident Analysis and Prevention 200 at 203. The authors analyzed non-alcohol and alcohol-related collisions for the 15-year period prior to and the 1-year period after the enactment of British Columbia’s ALS and AVI law, controlling for seasonality, trend effects and other variables. Ibid. at 202.

42 Ibid. at 200. Another study conducted two years after the implementation of the IRP legislation reported that total fatal crashes decreased by 21%, and that hospital admissions and ambulance calls for road crashes fell by 8% and 7.2%, respectively. The authors also reported that alcohol-related fatal crashes decreased by 52%. J. Brubacher et al., “Reduction in Fatalities, Ambulance Calls, and Hospital Admissions for Road Trauma After Implementation of New Traffic Laws” (2014) 104(10) American Journal of Public Health e89.


45 British Columbia, RoadSafetyBC, Report on Alcohol-Related Motor Vehicle (MV) Fatalities (Victoria: Ministry of Public Safety and Solicitor General, 2018), online: <https://www2.gov.bc.ca/assets/gov/driving-and-transportation/driving/publications/dec-2017-alcohol-related-fatalities.pdf>. It should be noted that the number of alcohol-related crash deaths increased in 2017. However, it is not clear if this is an aberration or an indication that the legislation’s deterrent impact, like other new well-publicized countermeasures, has decreased somewhat as its novelty and notoriety wanes.

46 Saskatchewan Government Insurance (SGI) credited a series of impaired driving initiatives, starting in 2014, with a 40% decrease in impairment-related crash deaths in 2017 relative to the previous five-year average. Among other things, these measures included lengthening the alcohol and drug-related ALSs from 24 hours to 3 days and introducing accompanying AVI provisions. Unfortunately, it is impossible to determine the role that these ALSs and AVIs played in the reported decreases in impairment-related deaths. SGI, “Sharp decrease in impaired driving deaths and injuries in 2017” (24 May 2018), online: <https://www.sgi.sk.ca/news?title=sharp-decrease-in-impaired-driving-deaths-and-injuries-in-2017>.

47 Traffic Safety Act, R.S.A. 2000, c. T-6, s. 172.1(1)(a) & (b).


50 For a summary of the new drug-related ALS and AVI legislation, see MacLeod & Solomon, supra note 21.
51 Elusive Quest, supra note 28 at 286-89.

52 For example, oral fluid test kits apparently cost approximately $30 or more per unit, and it can take up to 10-15 minutes to obtain the sample and get a result. The cost of an evidentiary blood-drug test appears to be in the range of several hundred dollars, and it can take months to obtain the results. In contrast, a roadside alcohol screening or evidentiary breath test costs pennies and the results are available in a minute. Phone interviews with A. Verghis, Regulatory Affairs, Alcohol Countermeasure Systems (30 July 2019) and A. Murie, CEO MADD Canada (24 July 2018).

53 The difficulties in enforcing the drug-impaired driving laws are reflected in the charge data. Recent survey, roadside screening and post-mortem studies indicate that the prevalence of driving after drug use exceeds that for driving after drinking. Elusive Quest, supra note 28 at 271-73. Nevertheless, the number of people charged with drug-impaired operation of a motor vehicle accounted for only 6% (2,508) of the total number of persons charged with impaired operation (42,020) in 2018. Table 35-10-O177-O1, supra note 12.

54 Consequently, officers may have difficulty meeting the legal requirement for demanding a roadside oral fluid test, namely that they have reasonable grounds to suspect that a driver has a drug in his or her body. Research indicates that defence counsel often aggressively challenged whether the police had reasonable grounds to suspect that a driver had alcohol in his or her body, and this argument can be made with greater force regarding drugs. Robertson, supra note 13 at 68.

Moreover, while the 2018 Criminal Code amendments authorize the police to demand a roadside ASD test from any driver who they have lawfully stopped, the police continue to need reasonable grounds to suspect that a driver has a drug in his or her body to demand an oral fluid drug test or SFST.

55 Egan, supra note 6.


The courts have also upheld the provincial alcohol-related, 24-hour ALSs in the face of various constitutional and other legal challenges. See for example, R. v. Wolff, (1977) 46 C.C.C. (2d) 467 (B.C.A.); and R. v. Art (1987), 39 C.C.C. (3d) 563 (B.C.A.) [Art].

57 Egan, supra note 6; Ross, supra note 6; and Bell v. Prince Edward Island (Attorney General), [1975] 1 S.C.R. 5.


59 Buhlers, supra note 56.

60 Motor Vehicle Act, R.S.B.C. 1996, s. 94.1.

61 Ibid., s. 94.2 and s. 94.4.

62 Buhlers, supra note 56 at paras. 55 and 61.

63 Ibid., at paras. 107 and 110.


67 Motor Vehicle Act Regulations, BC Reg. 26/58, s. 43.09.


69 Motor Vehicle Act, supra note 60, s. 25(11).

70 Motor Vehicle Amendment Act, 2010, supra note 66, s. 19; and Motor Vehicle Act Regulations, supra note 67, s. 46.01.
71 Sivia v. British Columbia (Superintendent of Motor Vehicles), 2011 BCSC 1639 at para. 30 [Sivia].

72 Motor Vehicle Amendment Act, 2010, supra note 66, s. 19.

73 Sivia, supra note 71. The Court held that the IRP legislation did not constitute criminal law, and did not violate sections 11(d) (the presumption of innocence and the right to a fair trial) or 10(b) of the Charter (the right to retain and instruct legal counsel upon arrest or detention). The Court also held that the 3, 7 and 30-day IRPs did not violate section 8 of the Charter. The Court and petitioners referred to the 3, 7, 30, and 90-day IRPs as “automatic roadside prohibitions” (ARPs), but the Crown referred to these sanctions as IRPs.

74 Ibid. at paras. 24-31.

75 Ibid. at paras. 318-320.

76 Sivia v. British Columbia (Superintendent of Motor Vehicles), 2011 BCSC 1783 at paras. 4, 5 and 28.


78 Sivia v. British Columbia (Superintendent of Motor Vehicles), 2014 BCSC 79 [Sivia 2].

79 The Court rejected the claim that the 90-day IRP encroached on the federal criminal law power and the claim that it violated s. 11(d) of the Charter. Ibid.

80 Supra note 6.

81 This IRP provision was again unsuccessfully challenged on the basis that it was criminal law and violated s. 11(d) of the Charter. Ibid.

82 Ibid. at paras. 8-12.

83 Ibid. at paras. 85 and 78, respectively.

84 Wilson, 2015 SCC 47.

85 Supra note 60.

86 Wilson, supra note 84 at paras. 23 and 24.

87 Ibid. at paras. 25 and 26.


89 2017 ABCA 153.

90 Ibid. at para. 99.

91 Ibid. at para. 100.

92 Ibid. at para. 112.

93 In the majority’s words, ibid. at para. 89:

[The] cases do not, however, go so far as to state that all possible driver’s licence suspension legislation, no matter what its provisions, is insulated from Charter review. No prior case has addressed Charter application to a provincial licence suspension regime which is both triggered and terminated by events arising under a federal statute, the Criminal Code. Prior judicial commentary to the effect that only criminal or quasi-criminal proceedings attract Charter review must be interpreted in that light.

94 Ibid. at para. 103.

95 Ibid. at paras. 160, 190 and 218.

Traffic Safety Act, supra note 46, s. 88.1(3)(a)(ii). Saskatchewan also enacted an indefinite alcohol and drug-related ALS provision. The Traffic Safety Act, S.S. 2004, c. T-18.1, s. 148(5)(a) & (iii). To our knowledge, this provision has not yet been challenged in the courts. Although the Saskatchewan legislation is inconsistent with the majority decision in Sahaluk, there was a strong dissent in that case. The Saskatchewan courts may not follow the majority decision in Sahaluk, and the Supreme Court of Canada may have to resolve the issue.

Alberta, Traffic Safety Act, ibid., s. 88.1(3)(a), (3.1) & (3.2).

Under the Criminal Code, a failed oral fluid test or Standardized Field Sobriety Test (SFST) merely provides an officer with grounds to demand that the driver submit to an evidentiary blood-drug test or a drug recognition evaluation (DRE). The results of the oral fluid test and SFST are not admissible in criminal proceedings as evidence that the driver has committed a drug-impaired driving offence. Moreover, a conviction for the low-range, THC driving offence carries no minimum penalty and a maximum penalty of a 1-year driving prohibition and a $1,000 fine. Criminal Code, s. 320.19(2) and s. 320.24(3).

In contrast, under Alberta’s Traffic Safety Act, drivers who fail an oral fluid test or SFST are subject to an immediate 90-day ALS, a 3-day AVI and an additional 1-year ALS unless they enroll in an alcohol interlock program. The cost of participating in the interlock program for a year is approximately $1,500. Traffic Safety Act, supra note 97, s. 88.1(3)(a), (3.1) & (3.2), and s. 172.1(h)(a); and Government of Alberta, Alberta Administrative Licence Suspension Ignition Interlock Program, online: <http://www.alberta.ca/alberta-administrative-licence-suspension-ignition-interlock-program.aspx>.

The fact that the provincial consequences are potentially far more serious than the federal consequences will not necessarily result in the courts holding the provincial legislation to be invalid. However, in addition to its serious consequences, the provincial legislation may induce drivers who have never had a drinking problem to enroll in an alcohol-interlock program. The imposition of these consequences based on a single roadside oral fluid test or SFST will most likely be held to violate the Charter. Sivia, supra note 71; and Goodwin, supra note 6. Even if an opportunity to take a second test were provided, the interlock provision might still be struck down given that it is irrelevant to the sanctioned conduct at issue.

See respectively, supra note 78; and supra note 6.

Taking the driver to the station for an evidentiary breath test is labour-intensive and time-consuming. However, the number of situations in which this is necessary is likely relatively small, and many drivers may opt out of challenging the SFST when informed of the potentially more serious consequences of failing the evidentiary breath test.


As well as the situations outlined in this subsection, several jurisdictions authorize the police to impose a 90-day ALS on drivers who they have reasonable and probable grounds to believe are impaired by alcohol and/or a drug in the absence of any test or sample. See for example, Alberta, Traffic Safety Act, supra note 46, s. 88.12(1)(a) and s. 172.11(1)(a); and Nova Scotia, Motor Vehicle Act, R.S.N.S. 1989, c. 293, s. 279A(l)1(iii) & (5).

This provision may provide the only basis for imposing a 90-day ALS on an impaired driver in situations where the police are unable to demand or conduct screening or evidentiary testing. However, in order to ensure that the driver can seek a meaningful review, the police will need to submit a detailed report fully explaining the basis upon which they concluded that the driver was impaired.

The police should also be required to impose a 90-day ALS and a 30-day AVI on any driver who they have charged with a federal impaired driving offence. For examples of this type of provision, see New Brunswick, Motor Vehicle Act, R.S.N.B. 1973, c. M-17, s. 310.01(3) & (4)(a); and Saskatchewan, The Traffic Safety Act, S.S. 2004, c. T-18.1, s. 148(5)(b)(ii)-(iv).

See Sivia 2, supra note 78 and the accompanying text. The Supreme Court of Canada upheld the decision in Sivia that imposing an immediate roadside 90-day ALS on drivers based on a single failed ASD test violated s. 8 of the Charter. Goodwin, supra note 6.

See supra notes 103 and 104.

This requirement for a confirmatory DRE or blood-drug test should also apply to 90-day ALSs and 30-day AVIs imposed on drivers who violate s. 320.14(1)(d) of the Criminal Code, which establishes a prohibited BAC and a prohibited BDL “for instances where alcohol and that drug are combined.”

For example, THC levels in oral fluid and blood peak during or immediately after use and fall an estimated 80% to 90% within 30 minutes. R. Compton, Marijuana-Impaired Driving – A Report to Congress (Washington, DC: NHTSA, 2017) at 5; and M. Huestis & E. Cone, “Relationship of Δ9–Tetrahydrocannabinol Concentrations in Oral Fluid and Plasma after Controlled Administration of Smoked Cannabis” (2004) 28 Journal of Analytical Technology 394.

See supra note 52.

See the text accompanying notes 68-72.

Sahaluk, supra note 89 at para. 91. As noted, even the dissenting justice in Sahaluk, who upheld the constitutionality of Alberta’s 90-day ALS, agreed with the majority that the law was “harsh.” Ibid. at para. 160.

See respectively, Northwest Territories, Motor Vehicle Act, R.S.N.W.T. 1988, c. M-16, s. 116.6(2)(b) & (3) and s. 116.84(3)(a) & (4); and Newfoundland and Labrador, Highway Traffic Act, R.S.N.L. 1990, c. H-3, s. 60.03(1), s. 60.04(2) and s. 60.003(2).

The application and licence reinstatement fees vary greatly among the provinces. For example, while Alberta’s application fee is $150 for a written review and $250 for an oral review, Manitoba’s comparable fees are $50 and $100, respectively. Alberta Transportation, Alberta Administrative Licence Suspension Program, online: <http://atsb.alberta.ca/503.htm>; and Manitoba Public Insurance, Licensing fees and other charges, online: <https://www.mpi.mb.ca/Pages/licensing-fees.aspx>.

Similarly, the licence reinstatement fee is $281 in Ontario compared to only $52 in New Brunswick. Ontario, Ministry of Transport, online: <http://www.mto.gov.on.ca/english/safety/ impaired-driving.shtml>; and Government of New Brunswick, Licence Suspension, online: <https://www2.gnb.ca/content/gnb/en/services/services..renderer.200812.Licence..Suspension.html>.

Motor Vehicle Act Regulations, BC Reg. 26/58, s. 43.09.


The provinces typically have several other categories of impairment-related ALSs and AVIs. For example, virtually all the jurisdictions impose a one-year ALS on any driver who is convicted of a federal impaired driving offence. Similarly, most of the provinces have enacted impairment-related ALSs and AVIs that apply to specific classes of licence holders, such as drivers in the graduated licence program, drivers who are under 22 years of age or who have limited driving experience, and drivers of commercial vehicles. R. Solomon, C. Ellis & C. Zheng, A Summary of Provincial and Territorial Traffic Legislation Related to Impaired Driving (Oakville, Ont.: MADD Canada, 2017) at 9-22, and 28.
118 For example, assume that the police, based solely on their observations, have reasonable grounds to believe that a driver’s ability to drive is adversely affected by drugs. In most jurisdictions, the police would be authorized to suspend the driver’s licence for 24 hours. If the police allowed a sober licensed passenger to drive the vehicle home and took no further action that would be the end of the matter. However, assume that the police demand that the driver submits to an oral fluid test and that the driver refuses, without a reasonable excuse, to do so. Depending on the jurisdiction, the driver would be subject to a 90-day ALS, or an initial 24-hour, 3-day or 7-day ALS followed by a 90-day ALS. If the driver was subsequently convicted of the federal criminal offence of refusing, without a reasonable excuse, to comply with the demand for the oral fluid test, the jurisdiction would suspend his or her licence for an additional year. These provincial administrative sanctions apply in addition to any federal penalties that the judge might impose following the driver’s criminal conviction.

119 Alberta, Traffic Safety Act, supra note 46, at s. 88(2)(b) & (3)(a)(ii), and s. 172.1(1)(a).

120 As noted earlier, the safest legal course of action would be to limit drug-related, 90-day ALSs and accompanying AVIs to situations in which the failed roadside oral fluid test or drug-related SFST has been confirmed by a DRE or evidentiary blood-drug test.

121 Traffic Safety Act, supra note 46, s. 88.1(2)(a), (b) & (d) and s. 172.1(1)(a).

122 Ibid., s. 88.1(3)(a), (3.1) & (3.2).

123 Supra note 88.

124. Imposing the interlock requirement on drivers who were subject to a drug-related, 90-day ALS would not be problematic if the drivers had been assessed and found to have an alcohol problem or a history of alcohol-related driving sanctions or offences.

125 British Columbia, Motor Vehicle Act, supra note 60, s. 215(2), (3) & (5).

126 Ibid., s. 215.41(3.1) and s. 215.43(1)(a).

127 Ibid., s. 215.46(2) and s. 253(7).

128 Manitoba, The Highway Traffic Act, C.C.S.M. c. H60, s. 265(2) & (5).

129 Ibid., s. 265(2), (2.1) & (5).

130 Ibid., s. 263.1(11)& (12).

131 The amendments have authorized the police to impose 90-day ALSs and 30-day AVIs on drivers who fail an ASD test. Ibid., s. 242.1(1)(1) (g) & (7.1)(h) and s. 263.1(11)(1) & (7). As noted, these drivers are afforded the right to a second ASD test, which would remove the possibility that they could be subject to a 90-day ALS and a 30-day AVI based on a single failed ASD test.

132 As noted, it may take months to obtain the results of these tests and they appear to cost several hundred dollars each. Supra note 52.

133 New Brunswick, Motor Vehicle Act, R.S.N.B. 1973, c. M-17, s. 310.0001(3) & (4)(a).

134 If the scope of the ALS is expanded as suggested, the driver should be informed of his or her right to take a second screening test.

135 Supra note 133, s. 310.01(11)(a).

136 Ibid., s. 310.04(2)(a), (7)(a) & (9).

137 Supra note 71; and supra note 6.

138 Supra note 133, s. 310.04(2)(1b) & (9).

139 Criminal Code, s. 320.27(2).

140 Supra note 133, s. 310.04(2.1)(b) & (9).

141 Criminal Code, s. 320.27(1)(a) & (c).
142 Newfoundland and Labrador, *Highway Traffic Act*, R.S.N.L. 1990, c. H-3, s. 60.01(1)-(5), s. 60.03(1)(a) and s. 60.04(1)(a); and *Vehicle Seizure and Impoundment Regulations, 2012 (Amendment)*, N.L.R. 86/18, s. 6.1(f), (2)(a), (4)(b) & (5).

143 *Highway Traffic Act*, ibid., s. 60.002(1) and s. 60.003(1)(a); and *Vehicle Seizure and Impoundment Regulations, 2012 (Amendment)*, ibid.

144 *Highway Traffic Act*, ibid., s. 60.01(3) & (4).

145 Ibid., s. 60.004(1). Unfortunately, the Act does not define the term “bodily substance.” However, the term appears to be limited in this context to oral fluid, blood and urine. The legislation should define the term or, at a minimum, use it consistently.

146 *Vehicle Seizure and Impoundment Regulations, 2012 (Amendment)*, supra note 142, s. 6.1(e) & (7).

147 *Criminal Code*, s. 320.27 and s. 320.28.


149 Ibid., s. 116.4(2), (4) & (10).

150 Ibid., s. 116.6(1)(a) & (2)(c).

151 Ibid., s. 116.82(1), (2) & (3)(a).

152 Ibid., s. 116.84(1), (2) & (3)(b).

153 Ibid., s. 116.6(1)(b) & (2)(c).


155 Ibid., s. 279C(2), (6) & (7).

156 Ibid., s. 279A(1)(a)(ii) & (5).

157 Ibid., s. 279A(1)(a), (4) & (5).

158 Supra note 71; and supra note 6.

159 Motor Vehicle Act, supra note 154, s. 279A(1)(a)(iii) & (5).

160 Ibid., s. 279A(1)(a)(ii) & (5).

161 *Criminal Code*, s. 320.27(2).


163 Ibid., s. 116.3(1) & (2)(b)(i)-(iii).


165 Ibid., s. 48.3(3)1 and s. 48.4(1).

166 Getting Ontario Moving Act (*Transportation Statute Law Amendment Act*) 2019, S.O. 2019, c. 8, Sched. 1, s. 18(1).

167 Supra note 71; and supra note 6.

168 *Highway Traffic Act*, supra note 164, s. 48.3.1(1)-(3) and s. 48.4(1).

169 While this line of argument failed in *Wilson*, the Supreme Court of Canada focused on the specific wording of the statutory provision which expressly required the officer’s belief about the individual’s ability to drive to be based directly and exclusively on the (ASD) test. Supra note 84 at paras. 25 and 26. In contrast, the Ontario provision states that all of the circumstances of the case must be taken into account in addition to the test results. Given the wording of the Ontario provision, the line of argument in *Wilson* may well prevail.
References to Criminal Code, O. Reg. 479/18.

Getting Ontario Moving Act (Transportation Statute Law Amendment Act) 2019, supra note 166, s. 1.

Prince Edward Island, Highway Traffic Act, R.S.P.E.I. 1988, c. H-5, s. 277.2(1)(a)-(c) & (c.1), and s. 277.2(1.1).

See respectively, ibid., s. 277.1(1)(a) & (3.2), and s. 277.1(1)(c) & (3.2).

Ibid., s. 277.1 (5) & (5.3).

For example, the ALS will also be terminated if the driver produces a medical certificate that indicates that his or her BAC is below .05%. Ibid. However, it is difficult to imagine how a driver would go about obtaining such a certificate and, in any event, how this could be done quickly enough to be relevant to his or her BAC at the time of driving.

Highway Traffic Act, supra note 172, s. 277.1(1)(c), (3.2), (5), & (5.3).

Ibid., s. 277.2(1)(b) & (3)(c).

Ibid., s. 277.2(1)(c) & (3)(c).

Ibid, s. 277.2(1)(a) & (3)(c).

Supra note 71; and supra note 6.

Highway Traffic Act, supra note 172, s. 277.2(1)(a) & (3)(c).


Ibid, s. 202.4(1).

Ibid, s. 202.4.1(1).

Ibid, s. 202.4.1(2).

Ibid, s. 202.4.1(2).

Ibid, s. 202.4.1(2).

Ibid note 71; and supra note 6.

Highway Safety Code, supra note 181, s. 202.5.


Ibid. s. 146(8).

For example, the ALS and AVI will also be terminated if a driver produces a medical certificate or takes a test “of a kind” designated by “the Minister” that indicates that his or her BAC is below .04%. Ibid. However, it is difficult to imagine how a driver would go about obtaining such a certificate and, in any event, how this could be done quickly enough to be relevant to his or her BAC at the time of driving.

However, this right to challenge the initial test may be set out in the notice of suspension and/or it may be police practice to so inform drivers.

The Traffic Safety Act, supra note 187, s. 146.1(2)(c) and (4)(a)(i) & (b)(i).

Criminal Code, s. 320.27(1)(a).


Sahaluk, supra note 89.

The Traffic Safety Act, supra note 187, s. 148(2)(a), (b) & (d).
196 For example, the police are required to impose an ALS on a driver if they have reasonable grounds to believe that, based on an analysis of a sample of “breath or blood by means of an approved instrument or an approved screening device,” his or her BAC exceeds .08%. Ibid., s. 148(2)(a). Under the Criminal Code, approved instruments and approved screening devices are used to test breath samples, not blood. However, Saskatchewan adopts a unique definition of the term “approved screening device” which raises issues about its applicability to the testing of blood samples. The provision should be redrafted to expressly include situations in which a driver fails an evidentiary blood-alcohol test.

197 Ibid., s. 148(2)(a).

198 Ibid., s. 148(2)(c).

199 Supra note 71; and supra note 6.


201 Ibid., s. 148(5)(b)(ii) & (iii). Note that a 60-day AVI is imposed on drivers who are charged with impaired driving involving bodily harm or death, and on drivers who have a BAC that equals or exceeds .16%. Ibid., s. 148(5)(b)(i) & (iv).

202 Ibid., s. 148(2)(e).

203 Ibid., s. 148(5)(b)(ii).

204 The Yukon, Motor Vehicles Act, R.S.Y. 2002, c. 153, s. 256(1) & (4).

205 Ibid., s. 257(2) & (8).

206 Ibid., s. 257(1)(a).

207 Supra note 71; and supra note 6.

208 Motor Vehicles Act, supra note 204, s. 235(1). As well, the police have authority to impose a discretionary 60-day AVI on drivers in specified circumstances. Ibid., s. 235(1)(b) and s. 238(1) & (11).

209 Ibid., s. 257(1)(b).
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