

PROVISIONS TO BE CONSIDERED	NOTES
<p style="text-align: center;"><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) and the CRIMINAL PROCEDURE (C-1) checklists. Use this checklist where the accused is charged under one or more of <i>Criminal Code</i>, R.S.C. 1985, c. C-46, ss. 253(1)(a), 253(1)(b), and 254(5). If a suitable breath sample is provided through an approved screening device (“ASD”) in response to a demand made under s. 254(2)(b), or two suitable samples are provided in the case of a breath demand made under s. 254(3), disregard those sections of this checklist relating to the failure or refusal to supply such samples.</p> <p>The checklist may be used by both Crown and defence counsel in preparing for the examination or cross-examination of witnesses. The checklist includes factors that may be relevant to either the prosecution or defence of a particular case. However, counsel must assess the relevance and usefulness of each item to their own case. The witnesses listed are most typically called as part of the Crown’s case.</p> <p>Though many of the same considerations listed will apply to blood demand/blood sample cases, additional considerations that are not set out here will also apply. This checklist does not comprehensively address cases involving impairment by drugs other than alcohol, and although many considerations will be similar, the new provisions in the <i>Criminal Code</i> described briefly below will apply, and these provisions should be reviewed thoroughly and carefully.</p> <p>This checklist is current to August 31, 2016.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li>• <b>Cases currently before the Supreme Court of Canada.</b> In <i>R. v. Alex</i>, 2015 BCCA 435, the Court of Appeal addressed the “<i>Rilling</i> issue”: whether the lack of reasonable grounds to make a breath demand renders breath test results inadmissible in the absence of a <i>Charter of Rights and Freedoms</i> challenge. The court agreed with other appellate courts that <i>Rilling v. The Queen</i>, [1976] 2 S.C.R. 183 remains good law and that an attempt to exclude breath test results due to a lack of reasonable grounds should be brought under the <i>Charter</i>. The Supreme Court of Canada has granted leave ([2015] S.C.C.A. No. 533 (QL)), and the appeal is scheduled to be heard on December 8, 2016.</li> </ul> <p>On October 13, 2016 the Supreme Court of Canada heard and reserved judgment in an appeal ([2015] S.C.C.A. No. 361 (QL)) from the Ontario Court of Appeal’s decision in <i>R. v. Bingley</i>, 2015 ONCA 439, which deals with the admissibility of opinion evidence from a drug recognition expert (“DRE”) as to whether an accused’s ability to operate a motor vehicle is impaired by a drug.</p> <ul style="list-style-type: none"> <li>• <b>Articled students permitted to act as commissioners for taking affidavits.</b> Effective September 1, 2015, articled students and temporary articled students are prescribed as persons who are commissioners for taking affidavits in British Columbia (B.C. Reg. 142/2015, made pursuant to s. 60(1) of the <i>Evidence Act</i>, R.S.B.C. 1996, c. 124). Principals remain responsible for students’ actions and will need to ensure that students understand the effect of acting as commissioner.</li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li>• <b>Law Society Rules.</b> On July 1, 2015, revised and consolidated Law Society Rules came into effect. See <a href="http://www.lawsociety.bc.ca/page.cfm?cid=4089&amp;t=Law-Society-Rules-2015">www.lawsociety.bc.ca/page.cfm?cid=4089&amp;t=Law-Society-Rules-2015</a>.</li> <li>• <b>Code of Professional Conduct for British Columbia (the “BC Code”).</b> In July 2015, rule 3.7-9 of the <i>BC Code</i> was amended to require that a lawyer promptly notify the client, other counsel, and the court or tribunal of the lawyer’s withdrawal from a file.</li> </ul>	

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<p>• <b>Additional resources.</b> Further information related to impaired driving offences is available in <i>Introducing Evidence at Trial: A British Columbia Handbook</i>, 2nd ed., print and online (CLEBC, 2012); annual editions of the <i>Annual Review of Law and Practice</i> (CLEBC); <i>Criminal Driving Offences—2012</i> (CLEBC, 2012), <i>Sentencing</i> (CLEBC, 2007); <i>Impaired Driving and Breath Demands—The Section 8 Context</i> (CLEBC, 2009); <i>Canadian Criminal Jury Instructions</i>, 4th ed., looseleaf (CLEBC, 2005); and <i>Impaired Driving in Canada—2012/2013 ed.</i> (LexisNexis, 2012).</p> <p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Initial Contact</li> <li>2. Examination of Driver, Passenger, Pedestrian Witness</li> <li>3. Examination of Investigating Officer</li> <li>4. Examination of Qualified Technician</li> </ol> <p style="text-align: center;"><b>CHECKLIST</b></p> <ol style="list-style-type: none"> <li><b>1. INITIAL CONTACT</b> <ol style="list-style-type: none"> <li>1.1 Confirm compliance with the Law Society Rules on client identification and verification; complete the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1) checklist.</li> <li>1.2 Send a letter confirming your retainer, instructions from the client, and instructions to the client. See s. 3.6 of the <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”) for the rules regarding reasonable fees and disbursements, and note rule 3.6-3, commentary [1] regarding the duty of candour owed to clients respecting fees and other charges for which a client is billed. If you are acting under a “limited scope retainer” (a defined term in the <i>BC Code</i>), you must advise the client about the nature, extent, and scope of the services that you can provide and must confirm in writing as soon as practicable what services will be provided.</li> </ol> </li> <li><b>2. EXAMINATION OF DRIVER, PASSENGER, PEDESTRIAN WITNESS</b> <ol style="list-style-type: none"> <li>2.1 Witness’s background and general matters.           <ol style="list-style-type: none"> <li>.1 Witness’s relationship with, or prior knowledge of, the accused or other witnesses.</li> <li>.2 Witness’s personal observations re: effects of alcohol consumption.               <ol style="list-style-type: none"> <li>(a) Any unique knowledge or experience (e.g., through work, personal life).</li> <li>(b) Any knowledge of the effect of alcohol on this accused.</li> </ol> </li> <li>.3 Witness’s preconceived views (e.g., prejudice, favour).               <ol style="list-style-type: none"> <li>(a) Toward the accused.</li> <li>(b) Toward complainants or other witnesses.</li> <li>(c) About drinking and driving generally.</li> </ol> </li> <li>.4 Witness’s initial observation point.               <ol style="list-style-type: none"> <li>(a) In the accused’s vehicle.</li> <li>(b) In other vehicle.</li> <li>(c) As pedestrian/bystander.</li> </ol> </li> </ol> </li> </ol> </li> </ol>	

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<p>(d) Anything to enhance or inhibit the view of events (e.g., lighting, obstructions, relative location, length of observation).</p> <p>.5 Review notes/statements from all sources, including the police, ICBC, and participants, and consider rules regarding the use of such notes in testifying.</p> <p>2.2 Date, time, and place of observation of driving/care or control.</p> <p>2.3 Identification of the accused (as driver or person in care or control).</p> <p>.1 Ability to describe the accused (age, height, weight, race, clothes, marks, hair).</p> <p>.2 Ability to observe (distance, lighting, length of observation period, obstructions, environmental conditions).</p> <p>.3 Any subsequent contact and details of same.</p> <p>.4 Ability to recognize the accused in court.</p> <p>.5 Whether the witness observed police dealing with the accused. If so, when and where.</p> <p>.6 If the witness got details from the accused (e.g., name, address, phone number, licence information). If there were notes and where they are.</p> <p>2.4 Description of the accused's motor vehicle (make, model, year, colour, licence number, distinguishing features).</p> <p>2.5 If it is alleged that the accused was driving:</p> <p>.1 Number of persons seen in the accused's vehicle and their positions (any seat swapping).</p> <p>.2 Was the accused seen:</p> <p>(a) Driving.</p> <p>(b) Seated behind the wheel of the car just before or just after the relevant time.</p> <p>.3 Actions of the accused's vehicle:</p> <p>(a) Speed.</p> <p>(b) Path of travel.</p> <p>(c) Unusual, erratic, or dangerous movements.</p> <p>(d) Traffic violations observed.</p> <p>(e) Use/non-use of signals, lights, horn, brakes.</p> <p>(f) Observations of anything inconsistent with impairment.</p> <p>.4 Movements of other vehicles in relation to or in response to the accused's vehicle.</p> <p>.5 Whether there was an accident, and details of such accident, including observations as to causes.</p> <p>.6 Distance travelled by the accused's motor vehicle during the period of observation.</p> <p>.7 Duration of observations and whether the accused's motor vehicle was under constant observation. If not, time/distance over which continuity was lost. If continuity was lost, consider if identification of the vehicle/driver can still be made.</p>	

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<p>.8 Description of the scene and conditions (e.g., nature of roadway (straight, curved, urban, rural, number of lanes), road conditions, weather, traffic, posted speed, lighting, condition of vehicle, other vehicles, distractions). Assess whether these might provide an explanation other than impairment by alcohol, for the driving or accident.</p> <p>.9 Movements of the accused after the motor vehicle stopped.</p> <p>.10 Condition of passengers.</p> <p>.11 Mechanical condition of the accused’s motor vehicle.</p> <p>2.6 If it is alleged that the accused was in care or control:</p> <p>.1 Location of the vehicle.</p> <p>.2 Whether the vehicle was moving or the engine running.</p> <p>.3 Condition of the vehicle (e.g., lights, engine, transmission, keys, door locks, radio, heater, parking brake).</p> <p>.4 Whether the accused was in the vehicle, in the driver’s seat, or out of the vehicle.</p> <p>.5 If the accused was in the vehicle, the precise location of the accused’s feet, legs, upper body, head.</p> <p>.6 Was the vehicle inoperable, or was there a risk of the vehicle being a danger.</p> <p>.7 Were photographs taken?</p> <p>.8 Other actions of the accused relevant to the issue of care or control.</p> <p>.9 Special features of the vehicle (e.g., sleeper cab in a large truck).</p> <p>.10 Condition of, or use of, seat belt.</p> <p>.11 Note presumed care or control provisions (<i>Criminal Code</i>, s. 258(1)(a)).</p> <p>2.7 Statements by the accused:</p> <p>.1 Admissions regarding:</p> <p>(a) Driving/care or control (including intent to drive).</p> <p>(b) Alcohol consumption (type, amount, timing, location, last drink).</p> <p>(c) Drugs consumed (type, amount, timing).</p> <p>(d) Acknowledgement of intoxication level.</p> <p>(e) Cause of any accident.</p> <p>(f) Use of seat belt.</p> <p>.2 Any mention of contacting (or not contacting) police.</p> <p>.3 When and where admissions were made.</p> <p>.4 Who was present when the admissions were made:</p> <p>(a) Police.</p> <p>(b) Other witnesses.</p> <p>.5 Exact words spoken, and any notes of same.</p> <p>.6 Accused’s coherence or responsiveness, or capacity at the time.</p>	

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<p>2.8 Damage resulting from the accident:</p> <ul style="list-style-type: none"> <li>.1 To the accused's vehicle, including any damage consistent with head trauma (e.g., broken windshield; airbag deployment).</li> <li>.2 To other vehicles.</li> <li>.3 To other property.</li> </ul> <p>2.9 Injury to the accused:</p> <ul style="list-style-type: none"> <li>.1 Apparent injury.</li> <li>.2 Complaint of injury.</li> <li>.3 Requests for medical assistance.</li> <li>.4 Injuries suffered during the accident that might explain any symptoms of impairment, particularly if there was head trauma.</li> </ul> <p>2.10 Injury to others.</p> <p>2.11 Whether and to what extent the accused was drinking after the incident. Continuity of observations. Was any alcohol observed in the vehicle or at the scene (if so, was it open or not).</p> <p>2.12 Evidence either that the accused intended to wait for the police or intended to (or perhaps did) leave the scene.</p> <p>2.13 Accused's symptoms of impairment:</p> <ul style="list-style-type: none"> <li>.1 Breath.</li> <li>.2 Eyes (e.g., glassy, bloodshot).</li> <li>.3 Face (e.g., flushed).</li> <li>.4 Clothing (e.g., dishevelled, soiled).</li> <li>.5 Coherence/responsiveness/capacity/speech (e.g., slurred).</li> <li>.6 Demeanour (e.g., sleepy, silly, cocky, quiet, aggressive, polite, mood swings).</li> <li>.7 Balance and coordination (e.g., ability to stand/walk, swaying, weaving, leaning).</li> <li>.8 Ability to produce documents and licence.</li> <li>.9 Other observations (e.g., belching, vomiting, incontinence).</li> <li>.10 Comparison between the offence date and the court date/other dates of observation.</li> <li>.11 Any opinion about degree of impairment and basis for same.</li> <li>.12 Other innocent explanation for symptoms (e.g., medical condition, disability, footwear, environmental).</li> <li>.13 Any drug-related evidence or special observations.</li> </ul> <p>2.14 If known, when the accused had his or her last drink; how much the accused had to drink; whether the accused ate (if so, when and how much); the weight of the accused. Any witnesses to the consumption.</p> <p>2.15 Arrival of police:</p> <ul style="list-style-type: none"> <li>.1 Were police called, and if so, how and by whom.</li> </ul>	

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<ul style="list-style-type: none"> <li>.2 Information provided during call to police.</li> <li>.3 Time from call to police arrival.</li> <li>.4 Time from incident to police arrival.</li> <li>.5 Information provided to police upon arrival               <ul style="list-style-type: none"> <li>(a) Identification of suspect, verbal or by gesture.</li> <li>(b) Vehicle and physical observations.</li> <li>(c) Admissions by the accused.</li> </ul> </li> <li>.6 Was the accused under observation until police arrival. Consider the impact of any break in continuity of observation.</li> <li>.7 Observation of the accused consuming alcohol prior to police arrival.</li> <li>.8 Observation of the accused's response to police and dealings with police.</li> <li>2.16 If the accused is charged under <i>Criminal Code</i>, s. 254(5), whether any witness saw or heard any evidence of refusal to provide a breath sample or to accompany police officers for that purpose.</li> <li>2.17 Defence should seek details (and copies) of any statements witnesses provided to police or to ICBC, and of any other notes taken.</li> <li>2.18 Defence should canvass whether any witness discussed the case with other witnesses at the scene, or at any other time; whether witnesses were interviewed separately; and whether witnesses spoke about the case with each other while waiting to testify.</li> </ul>	
<p><b>3. EXAMINATION OF INVESTIGATING OFFICER</b></p>	
<ul style="list-style-type: none"> <li>3.1 Background of officer and general matters.           <ul style="list-style-type: none"> <li>.1 Peace officer.</li> <li>.2 Police force and jurisdiction.</li> <li>.3 Experience (years on the force, and years spent investigating drinking-and-driving matters; experience and knowledge garnered through previous jobs or personal experience with persons under the influence of alcohol).</li> <li>.4 Any specialized training or qualifications.</li> <li>.5 Review of officer's notes (consider any disclosure issue).</li> <li>.6 Review and prepare for direct and cross-examination on report to Crown counsel, MVA report, notes, as well as administrative driving prohibition documents (including the sworn Report to Superintendent).</li> </ul> </li> <li>3.2 Date, time, and place of the alleged offence.</li> <li>3.3 Identification of accused:           <ul style="list-style-type: none"> <li>.1 See item 2.3 above.</li> <li>.2 Driver's licence used for comparison and identification.</li> <li>.3 Any other documents (ID card, passport, bank card, credit card, etc.) in the accused's possession.</li> <li>.4 Whether the accused was photographed by the police.</li> </ul> </li> </ul>	

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<ul style="list-style-type: none"> <li>.5 Whether the accused was pointed out or otherwise indicated by a witness.</li> <li>.6 Motor Vehicle Branch Certificate of the vehicle's registered owner on the date of the allegation—whether the accused was the registered owner.</li> <li>.7 Other means of identification, including process (e.g., appearance notice or promise to appear).</li> <li>3.4 Description of the accused's motor vehicle (make, model, year, colour, licence number, distinguishing features).</li> <li>3.5 If it is alleged that the accused was driving:               <ul style="list-style-type: none"> <li>.1 Number of persons seen in the accused's vehicle, and position (any seat swapping).</li> <li>.2 Was the accused seen:                   <ul style="list-style-type: none"> <li>(a) Driving.</li> <li>(b) Seated behind wheel of car just before or just after relevant time.</li> </ul> </li> <li>.3 Actions of the accused's vehicle:                   <ul style="list-style-type: none"> <li>(a) Speed.</li> <li>(b) Path of travel.</li> <li>(c) Unusual, erratic, or dangerous movements.</li> <li>(d) Traffic violations observed.</li> <li>(e) Use/non-use of signals, lights, horn, brakes.</li> <li>(f) Observations of anything inconsistent with impairment.</li> </ul> </li> <li>.4 Movements of other vehicles.</li> <li>.5 Whether there was an accident.</li> <li>.6 Distance travelled by the accused's motor vehicle during the period of observation.</li> <li>.7 Duration of observations and whether the accused's motor vehicle was under constant observation. If not, time/distance over which continuity was lost. If continuity was lost, whether identification of vehicle/driver can still be made.</li> <li>.8 Description of the scene and conditions (e.g., nature of roadway (straight, curves, urban, rural, number of lanes), road conditions, weather, traffic, posted speed, lighting, condition of vehicle, other vehicles, distractions). Assess whether these might provide an explanation, other than impairment by alcohol, for the driving or accident.</li> <li>.9 Movements of the accused after the motor vehicle stopped.</li> <li>.10 Condition of passengers.</li> <li>.11 Mechanical condition of the motor vehicle after it was stopped.</li> <li>.12 Any difficulty stopping the vehicle:                   <ul style="list-style-type: none"> <li>(a) Emergency equipment used.</li> <li>(b) Response to emergency equipment and time to response.</li> </ul> </li> <li>.13 Manner in which the accused stopped/parked vehicle.</li> </ul> </li> </ul>	

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<p>.14 Reason vehicle was stopped. Consider any <i>Canadian Charter of Rights and Freedoms</i> (“<i>Charter</i>”) issues, including those arising under s. 10(a).</p> <p>3.6 If the officer did not witness the accused driving, having care or control, or being in an accident.</p> <p>.1 Time dispatched and contents of dispatch.</p> <p>.2 Time of arrival at the scene:</p> <p>(a) In relation to dispatch.</p> <p>(b) Precise time of arrival.</p> <p>(c) Status of the investigation at time of arrival (impaired or accident investigation).</p> <p>(d) Whether the status of the investigation changed; if so, consider the effect of the change.</p> <p>.3 Scene upon arrival:</p> <p>(a) Scene layout (e.g., roadways, intersections, traffic controls, skid marks).</p> <p>(b) People and positions.</p> <p>(c) Cars and positions.</p> <p>(d) How the accused was identified (e.g., pointed out, sitting in car).</p> <p>(e) Were photographs taken of the scene?</p> <p>.4 Information (including hearsay) received upon arrival from witnesses regarding:</p> <p>(a) Identification of the accused.</p> <p>(b) Time of the incident.</p> <p>(c) Details of the incident.</p> <p>(d) Exact comments and gestures of witnesses.</p> <p>(e) Exact details of any witness conversations/dealings with the accused.</p> <p>.5 Note that hearsay and information from incomplete sources can be used to establish reasonable and probable grounds for demands under <i>Criminal Code</i>, s. 254 (see <i>R. v. Mellors</i>, 2012 BCSC 1357, and <i>R. v. Bush</i>, 2010 ONCA 554 at para. 66). The test for reasonable and probable grounds is discussed in <i>R. v. Usher</i>, 2011 BCCA 271.</p> <p>3.7 If it is alleged that the accused was in care or control:</p> <p>.1 Location of the vehicle.</p> <p>.2 Whether the vehicle was moving.</p> <p>.3 Condition of lights, engine, transmission, keys, door locks, radio, heater, parking brake, etc.</p> <p>.4 Whether the accused was in the vehicle, in the driver’s seat, or out of the vehicle.</p> <p>.5 If accused was in the vehicle, the precise location of the accused’s feet, legs, body, head, etc.</p> <p>.6 Was the vehicle inoperable or at risk of being a danger.</p> <p>.7 Other actions of the accused relevant to the issue of care or control.</p>	



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<p>.8 Special features of the vehicle (e.g., sleeper cab in a large truck).</p> <p>.9 Condition of, or use of, seat belt.</p> <p>.10 Note presumed care or control provisions (<i>Criminal Code</i>, s. 258(1)(a)).</p> <p>3.8 Statements by the accused:</p> <p>.1 Prosecution must assess the need for statements:</p> <p>(a) To prove grounds for demands under <i>Criminal Code</i>, s. 254.</p> <p>(b) To prove the essential elements of the offence.</p> <p>(c) For potential cross-examination of the accused.</p> <p>(d) Statements may form a factual basis for Crown or defence expert opinion, or may establish evidence to the contrary or other defences.</p> <p>.2 Consider and assess the admissibility of any statements.</p> <p>(a) Consider the need for/likely success of voir dire.</p> <p>(b) <i>Charter</i> issues, including s. 10(a), 10(b), and the issue of statutorily compelled statements.</p> <p>(c) Voluntariness issues.</p> <p>.3 Defence must consider admissibility objections.</p> <p>(a) Timely disclosure of <i>Charter</i> issues.</p> <p>(b) Voluntariness.</p> <p>(c) Whether a statement is useful as factual basis for an expert to give an opinion that assists the defence.</p> <p>.4 Content of the accused’s statements.</p> <p>(a) Driving/care or control (including intent to drive).</p> <p>(b) Alcohol consumption (type, amount, timing, location, last drink).</p> <p>(c) Drugs consumed (type, amount, timing).</p> <p>(d) Acknowledgement of intoxication level.</p> <p>(e) Cause of any accident.</p> <p>(f) Use of seat belt.</p> <p>.5 Who was present (persons in authority).</p> <p>.6 Where was the statement taken.</p> <p>.7 Length of statement.</p> <p>.8 Exact contents of statement.</p> <p>.9 Accused’s condition when giving statement (e.g., coherence, responsiveness, ability to understand language).</p> <p>.10 Was the accused arrested or detained at the time of the statement, and was the accused advised of reasons for same.</p> <p>.11 Were promises or threats of any kind made to the accused?</p> <p>.12 Other factors bearing on any <i>Charter</i> issues.</p> <p>.13 Other factors bearing on voluntariness.</p> <p>3.9 Damage resulting from the accident:</p> <p>.1 To the accused’s vehicle including any damage consistent with head impact (e.g., broken windshield, airbag deployment).</p>	

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<ul style="list-style-type: none"> <li>.2 To other vehicles.</li> <li>.3 To other property.</li> <li>.4 Documentation available, including photographs.</li> <li>3.10 Injury to the accused:               <ul style="list-style-type: none"> <li>.1 Apparent injury.</li> <li>.2 Complaint of injury.</li> <li>.3 Requests for medical assistance.</li> <li>.4 Possibility that injuries suffered during the accident could explain any symptoms of impairment, particularly in relation to head trauma.</li> <li>.5 Documentation or medical records available.</li> </ul> </li> <li>3.11 Injury to others.</li> <li>3.12 Whether the accused made any statement about the cause of the incident.</li> <li>3.13 Whether the accused was drinking liquor after the police officer arrived, and to what extent. Was any liquor in the accused’s vehicle; if so, how much, and was it open.</li> <li>3.14 Accused’s symptoms of impairment.               <ul style="list-style-type: none"> <li>.1 Breath.</li> <li>.2 Eyes (e.g., glassy, bloodshot).</li> <li>.3 Face (e.g., flushed).</li> <li>.4 Clothing (e.g., dishevelled, soiled).</li> <li>.5 Coherence/responsiveness/capacity/speech (e.g., slurred).</li> <li>.6 Demeanour (e.g., sleepy, silly, aggressive, polite, mood swings).</li> <li>.7 Balance and coordination (e.g., ability to stand/walk, swaying, leaning).</li> <li>.8 Ability to produce documents and licence.</li> <li>.9 Other observations (e.g., belching, vomiting, incontinence).</li> </ul> </li> <li>.10 Were any observations made after the accused exited his/her vehicle? If so, did the police officer direct the accused to exit in order to further evaluate the accused for symptoms of impairment?</li> <li>.11 Comparison between the offence date and court date/other dates of observation.</li> <li>.12 Performance of Standard Field Sobriety Tests (SFSTs) or any other physical tests administered. Consider admissibility and weight issues (may only go to grounds for demands).               <ul style="list-style-type: none"> <li>(a) If a demand was made for physical coordination tests pursuant to <i>Criminal Code</i>, s. 254(2)(a), review preconditions of s. 254(2)(a) and the basis for all grounds for the demand (e.g., observation, witnesses, admissions, hearsay, physical tests).</li> <li>(b) Qualifications of the officer to administer SFSTs or physical coordination tests.</li> <li>(c) Were SFSTs or physical coordination tests properly administered.</li> <li>(d) SFSTs or physical coordination tests—results and interpretation.</li> </ul> </li> </ul>	

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<ul style="list-style-type: none"> <li>(e) Any other tests used (consider admissibility and weight).</li> <li>(f) Describe the test and what constitutes a pass/fail.</li> <li>(g) Officer’s opinion of the accused’s performance.</li> <li>(h) Officer should demonstrate the test.</li> <li>(i) Location and condition of the area where the tests were conducted (e.g., dark, uneven surface).</li> <li>(j) Effect of any physical or medical conditions.</li> </ul> <p>.13 Any opinion about degree of impairment and the basis for it.</p> <p>.14 Other innocent explanations for symptoms (e.g., medical condition, disability, footwear, environmental, handcuffing).</p> <p>3.15 Details of driver’s licence.</p> <p>3.16 If an approved screening device (“ASD”) demand was made pursuant to <i>Criminal Code</i>, s. 254(2)(b):</p> <ul style="list-style-type: none"> <li>.1 Grounds required for demand—review the preconditions of s. 254(2). <ul style="list-style-type: none"> <li>(a) Basis for all grounds (e.g., observation, witnesses, admissions, hearsay, physical tests).</li> <li>(b) Admissibility considerations regarding admissions by the accused.</li> <li>(c) Time when the grounds were formed.</li> <li>(d) Residual mouth alcohol concerns (vomiting, belching, recent ingestion).</li> <li>(e) Time of last drink information.</li> <li>(f) Whether the officer had the required suspicion.</li> <li>(g) Whether the officer’s suspicion was reasonable (see item 3.6.5).</li> <li>(h) Proof of care or control or operation when the suspicion was formed.</li> </ul> </li> <li>.2 Time of demand.</li> <li>.3 Any delay in making the demand, and the reason for same.</li> <li>.4 Exact wording of the demand (was a card used, or was it from memory).</li> <li>.5 Whether the accused understood the demand, and how the accused indicated comprehension. Were there any language barriers.</li> <li>.6 Was there any delay in administering the ASD test, and if so, the reason (e.g., device unavailable).</li> <li>.7 Officer’s training and experience in use of the ASD.</li> <li>.8 Proof that the device is an ASD under <i>Criminal Code</i> regulations (Approved Screening Devices Order, SI/85-200).</li> <li>.9 Was the ASD operating properly, and were there tests to ensure same. Defence may consider seeking records relating to the device.</li> <li>.10 Was the sample suitable to enable proper analysis by ASD.</li> <li>.11 Was the mouthpiece retained by the police? Consider making it an exhibit at trial.</li> <li>.12 Is there any basis to seek exclusion of ASD evidence (e.g., insufficient grounds, delay). Consider <i>Charter</i> issues and raise them in a timely fashion.</li> </ul>	

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<p>.13 Result of the test and its meaning to the officer, including the officer’s understanding of mouth alcohol issues and recent consumption of alcohol.</p> <p>.14 Limited use of ASD result as a basis for a s. 254(3) demand.</p> <p>3.17 If a breath demand is made pursuant to <i>Criminal Code</i>, s. 254(3):</p> <p>.1 Grounds for demand—review preconditions of s. 254(3):</p> <p>(a) Basis for all grounds (e.g., observation, witnesses, admissions, ASD result, hearsay, physical tests).</p> <p>(b) Admissibility considerations regarding admissions by the accused.</p> <p>(c) When the grounds were formed (note restrictions of section).</p> <p>(d) If the officer had the required belief.</p> <p>(e) If the officer’s belief was reasonable (see item 3.6.5).</p> <p>.2 The timing of the demand, including practicability.</p> <p>.3 Any delay in making the demand, and the reason for same.</p> <p>.4 Consideration of the impracticability of breath samples.</p> <p>.5 Exact wording of the demand (card used/from memory).</p> <p>.6 If the accused understood the demand, and how that comprehension was indicated. Any language barriers.</p> <p>3.18 If the accused is charged under <i>Criminal Code</i>, s. 254(5), and it is alleged that there was an outright refusal pursuant to a s. 254(2)(b) or (3) demand (if failure to comply, see item 4.5.13):</p> <p>.1 Were the purpose and procedure explained to and understood by the accused?</p> <p>.2 Consider whether the words or actions alleged to indicate refusal were clear and unequivocal, and whether the accused made any subsequent offers to comply.</p> <p>.3 Whose request was refused? If the accused refused a request from a person other than the witness, that other person might need to be called.</p> <p>.4 Did the accused give any reason for the refusal?</p> <p>.5 Could the accused’s state of mind (e.g., shock, injury) have made him or her unable to understand the demand?</p> <p>.6 If the accused has a poor understanding of English, might that have affected the accused’s understanding of the demand, and were there any efforts made to find an interpreter?</p> <p>.7 Could the accused have been physically unable to comply with the demand due to injury or illness?</p> <p>.8 Was there any animosity between any officers and the accused?</p> <p>.9 How many opportunities to comply were provided?</p> <p>.10 Was an approved instrument immediately available to take the breath sample?</p> <p>.11 Was anyone else present at the time of the alleged refusal?</p> <p>.12 Were there any other potentially reasonable excuses?</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.13 If there was more than one officer present, do their recollections of the accused's exact words in refusing the demand vary?</p> <p>3.19 Consider the validity of the demand and any admissibility issues.</p> <p>.1 Consider <i>Charter</i> issues (e.g., s. 8) and raise them in a timely fashion. Was it a lawful demand? Refer to and review the grounds required for lawful demand, and note the different requirements for a s. 254(2)(b) demand and a s. 254(3) demand.</p> <p>.2 If evidence of the results of the analysis can be excluded.</p> <p>.3 If evidence of refusal/failure can be excluded.</p> <p>3.20 Arrest:</p> <p>.1 Reason for arrest.</p> <p>.2 Time of arrest.</p> <p>.3 Exact wording (from card/from memory) re: <i>Charter</i>, s. 10(a).</p> <p>.4 The accused's reaction and whether the accused appeared to understand, and if so, how the accused indicated comprehension. Any language barriers?</p> <p>3.21 Advice of right to retain and instruct counsel:</p> <p>.1 Time and location given.</p> <p>.2 Exact wording (from card, or from memory) (e.g., advice must include legal aid, 24-hour availability as well as right to have a phone call "in private": <i>Charter</i>, s. 10(b)). Determine whether adequate warning was given and whether any admissibility issues arise.</p> <p>.3 Accused's reaction and whether the accused appeared to understand; if yes, how did the accused indicate comprehension. Any language barriers?</p> <p>.4 If the accused had a cellular phone available. Where the nearest phone was.</p> <p>.5 Whether the accused asked to consult counsel. If so, whether the request was granted and when.</p> <p>3.22 The time the officer and accused left the scene and the method of transport.</p> <p>3.23 Explanation for any delay between police arrival at the scene and departure for the station.</p> <p>3.24 Time of arrival at the station; whether there were any delays en route.</p> <p>3.25 Location of the station:</p> <p>.1 Address and distance from the scene of the alleged offence.</p> <p>.2 Whether the officer was acting within his or her jurisdiction.</p> <p>.3 Whether the accused was taken to the station nearest to the scene.</p> <p>3.26 Whether the accused ate, drank, or smoked on the way to the station.</p> <p>3.27 Whether there was any further conversation in the vehicle on the way to the station. If so, how and when. Was the conversation recorded?</p> <p>.1 Admissibility concerns (see item 3.8).</p>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>3.28 Events upon arrival at the station:</p> <p>.1 Continued observations of the accused’s physical condition and demeanour:</p> <ul style="list-style-type: none"> <li>(a) Was observation continuous throughout the process at the station?</li> <li>(b) Any belching, vomiting, consumption, etc.</li> <li>(c) Any change in symptoms.</li> <li>(d) Who was present with the accused throughout the process at the station?</li> </ul> <p>.2 Accused’s access and opportunity to consult counsel:</p> <ul style="list-style-type: none"> <li>(a) Privacy.</li> <li>(b) Contact made with counsel. If the accused’s choices were accommodated and how. Who chose to call Legal Aid—the accused or police.</li> <li>(c) Reasonable assistance provided by the officer to effect contact.</li> <li>(d) Any observed difficulty using the phone.</li> <li>(e) Reasonable opportunity provided.</li> <li>(f) Officer refused/agreed to speak to counsel to provide background.</li> <li>(g) Who decided it was time to terminate contact with counsel or efforts to contact counsel. Why the decision was made.</li> <li>(h) If message was left and no response received from counsel prior to presentation to a technician for sample. Explanation.</li> <li>(i) Any s. 10(a) or (b) <i>Charter</i> issues (raise in a timely fashion).</li> <li>(j) Any concern regarding reasonable opportunity based on language problems.</li> <li>(k) If waiver of rights alleged.</li> </ul> <p>.3 Accused presented to qualified technician:</p> <ul style="list-style-type: none"> <li>(a) Time presented.</li> <li>(b) Identity of the qualified technician.</li> <li>(c) Continual observation throughout sample taking process.</li> <li>(d) Information provided to the technician.</li> <li>(e) Breath samples provided/refusal or failure.</li> <li>(f) If refusal or failure, the words/actions of refusal or failure.</li> <li>(g) Investigating officer present throughout the process.</li> <li>(h) Any discrepancies among officers’ notes or testimony or both?</li> </ul> <p>.4 Certificate of qualified technician:</p> <ul style="list-style-type: none"> <li>(a) Prepared by a qualified technician.</li> <li>(b) Review all required statements set out in <i>Criminal Code</i>, s. 258(1)(g).</li> <li>(c) Is the date correct and was it signed by a qualified technician? Watch for date change if the investigation occurred at or near midnight.</li> <li>(d) If information matches the approved instrument, check sheet/ticket.</li> <li>(e) Accurately completed notice of intention to produce, signed and dated.</li> </ul>	

PROVISIONS TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> <li>(f) True and accurate copy of evidence, including comparison of copy to original.</li> <li>(g) Service upon the accused, confirming that the accused understands the meaning and significance.</li> <li>(h) Copy left with the accused.</li> <li>(i) Affidavit of service completed at the time by the officer who served a copy of the certificate.</li> <li>(j) Crown to produce and tender the original certificate as exhibit.</li> <li>(k) Any contradictions between the certificate and (viva voce) evidence.</li> <li>(l) Review the certificate of analyst, including solution lot number and expiry.</li> </ul> <p>3.29 Disposition of the accused:</p> <ul style="list-style-type: none"> <li>.1 Released: <ul style="list-style-type: none"> <li>(a) Time.</li> <li>(b) Process.</li> <li>(c) Any reason for delay in release.</li> </ul> </li> <li>.2 Lodged in cells: <ul style="list-style-type: none"> <li>(a) Time.</li> <li>(b) For how long.</li> <li>(c) Reason.</li> </ul> </li> <li>.3 Any <i>Charter</i>, s. 9 arguments (raise in a timely fashion).</li> </ul> <p>3.30 Any subsequent contact with the accused (such as on a later date for fingerprinting, or a date pursuant to the appearance notice or promise to appear, or on the trial date), and whether there was any notable difference in the accused's appearance and observable sobriety then, as compared to the date of the alleged offence.</p> <p>3.31 Do not call evidence at trial regarding notice of greater punishment (not admissible at trial, only admissible in sentencing proceedings).</p>	
<p><b>4. EXAMINATION OF QUALIFIED TECHNICIAN</b></p> <p>4.1 Witness background and general matters:</p> <ul style="list-style-type: none"> <li>.1 Attorney General designation (consider seeing letter). Is it current?</li> <li>.2 Education.</li> <li>.3 Training.</li> <li>.4 Experience.</li> <li>.5 Review any notes (consider disclosure issue).</li> <li>.6 Consider the need for viva voce evidence (e.g., overcome/correct certificate defect).</li> </ul> <p>4.2 Witness involvement:</p> <ul style="list-style-type: none"> <li>.1 On duty on the relevant date, location.</li> <li>.2 Time the person presented.</li> <li>.3 Presented pursuant to a <i>Criminal Code</i> s. 254 demand.</li> </ul>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>.4 Identification of the accused:</p> <ul style="list-style-type: none"> <li>(a) Recognize the person. (See items 2.3 and 3.3.)</li> <li>(b) Recognize the name (e.g., only one person by that name was dealt with on that date).</li> <li>(c) Recall presentation by the investigating officer.</li> </ul> <p>4.3 Accused’s symptoms of impairment:</p> <ul style="list-style-type: none"> <li>.1 Breath.</li> <li>.2 Eyes (e.g., glassy, bloodshot).</li> <li>.3 Face (e.g., flushed).</li> <li>.4 Clothing (e.g., dishevelled, soiled).</li> <li>.5 Coherence/responsiveness/capacity/speech.</li> <li>.6 Demeanour (e.g., sleepy, silly, aggressive, polite, mood swings).</li> <li>.7 Balance and coordination (e.g., ability to stand/walk, swaying, leaning).</li> <li>.8 Other observations (e.g., belching, vomiting, incontinence).</li> <li>.9 Comparison between observations on the date of the offence and the court date (or on other dates of observation).</li> <li>.10 Any opinion about the degree of impairment and basis for same.</li> <li>.11 Other innocent explanations for symptoms (e.g., medical condition, disability, footwear, environmental).</li> </ul> <p>4.4 If demand is made by a qualified technician, see considerations under item 3.17.</p> <p>4.5 Breath sample process—samples obtained/refusal/failure to comply:</p> <ul style="list-style-type: none"> <li>.1 Prepare the approved instrument for purpose of taking samples of breath.</li> <li>.2 Type of approved instrument (see regulations under the <i>Criminal Code</i>: the Approved Screening Devices Order, SI/85-200, and the Approved Breath Analysis Instruments Order, SI/85-201).</li> <li>.3 Prepare the approved instrument in accordance with training.</li> <li>.4 Opinion on whether the approved instrument was functioning properly.</li> <li>.5 Was there an observation period: <ul style="list-style-type: none"> <li>(a) Reasons and length.</li> <li>(b) Details of observations (both before and between samples).</li> <li>(c) People present throughout the process both in the room and with the accused.</li> </ul> </li> <li>.6 Breath samples: <ul style="list-style-type: none"> <li>(a) How many samples were taken?</li> <li>(b) Exact times taken (note the time of first sample and the interval between samples; note the terminology used by the technician and compare to the terminology mandated by the <i>Criminal Code</i>).</li> <li>(c) Were the samples received directly into the approved instrument?</li> <li>(d) Did the samples enable proper analysis by the approved instrument?</li> <li>(e) Was an analysis performed by the approved instrument?</li> </ul> </li> </ul>	



PROVISIONS TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> <li>(f) What were the results?</li> <li>(g) Was any explanation given if more than two samples were required?</li> <li>(h) Was there any explanation for any significant delays in taking samples?</li> <li>(i) Note preconditions to a s. 258 presumption.</li> <li>.7 Identification of standard alcohol solution/external standard. Certificate of analyst.</li> <li>.8 Standard alcohol solution/external and internal standard tests and their meaning.</li> <li>.9 Consider technical matters (they will vary depending on the type of approved instrument—counsel should review the instrument manual prior to court appearance):               <ul style="list-style-type: none"> <li>(a) Temperature of room, instrument, solution.</li> <li>(b) Mouthpiece condition.</li> <li>(c) Review ticket or checksheet for all steps, and any irregularities or omissions or both.</li> <li>(d) Presence of radios, transmitters.</li> <li>(e) Review and consider filing tickets.</li> <li>(f) Any issues on proper temperature, or other details.</li> <li>(g) Was the override key used—explanation.</li> <li>(h) “Ambient Fail” or other messages, and explanation.</li> </ul> </li> <li>.10 Completion and signature of any certificate. (See item 3.28.4.)</li> <li>.11 Compare viva voce evidence to any certificate prepared/tendered:               <ul style="list-style-type: none"> <li>(a) Can any deficiencies/inconsistencies be explained?</li> <li>(b) Import of any inconsistencies.</li> </ul> </li> <li>.12 Refusal. (See item 3.18.)</li> <li>.13 Failure to comply:               <ul style="list-style-type: none"> <li>(a) Was the purpose and procedure explained to and understood by the accused.</li> <li>(b) Samples necessary to enable analysis.</li> <li>(c) Details of the accused’s attempts to provide samples.</li> <li>(d) Were any obstructions in the components (e.g., mouthpiece), retained as exhibits?</li> <li>(e) Was the accused physically unable to comply due to injury or illness; were there any relevant comments by the accused?</li> <li>(f) How did the accused react to the technician’s conclusion of failure?</li> <li>(g) Technician’s opinion (e.g., weak blow, blowing around mouthpiece).</li> <li>(h) Consider other possible instrument failures.</li> <li>(i) Any animosity between officers and the accused.</li> <li>(j) Number of opportunities provided.</li> </ul> </li> </ul>	

PROVISIONS TO BE CONSIDERED	NOTES
<p>4.6 Seek disclosure of documentation:</p> <ul style="list-style-type: none"><li>.1 The technician's past performance in the three months before the date of the offence.</li><li>.2 The results of the technician's last proficiency testing.</li><li>.3 The most recent annual maintenance and repair on the approved instrument.</li><li>.4 The log for the approved instrument since the last annual maintenance.</li><li>.5 The certification and testing of the standard alcohol solution.</li><li>.6 The last time the standard alcohol solution was changed before the offence date.</li></ul>	