

## 3.1, Grounds for Review for Impaired Driving Prohibitions

This procedure describes the grounds for review for all driving prohibitions, including:

- Grounds for review for IRPs and ADPs
- Technical grounds for review
- Operation or care or control of a motor vehicle (IRP/ADP)
- Blood alcohol concentration did not exceed 80 mg% (ADP only)
- ASD did not register a warn or a fail (IRP only)
- Did not fail or refuse to comply with an ASD demand (IRP/ADP) or blood/breath test (ADP only)
- Had reasonable excuse for failing or refusing to comply (IRP/ADP)
- Invalid grounds for review
- Grounds for review for 24-hour driving prohibitions
- Grounds for review for unlicensed driving prohibitions

### Important Caveats

The considerations, questions, and examples given in this section are intended as guidelines for adjudicators and are not binding. Other situations may occur besides the examples given. Remember that each case is unique based on its facts, even if they appear similar.

You must make a determination of the validity of the grounds by reviewing only the evidence before you, including the applicant's written submissions and oral arguments. If any relevant evidence is missing, you cannot request it from the applicant or their lawyer, even if the lack of it may compromise their case.

You may consult legal opinions, but note that legal opinions are not themselves law, but are an interpretation of law that may be binding on adjudicative decisions. The full text of these opinions is available in the OSMV legal opinion registry.

You must carefully consider all facts before reaching a decision. Depending on the circumstances, certain factors may be given more weight than others.

### Grounds for Review for IRPs and ADPs

The applicant selects one or more grounds on the *Application for Review* form, and they include:

#### **ADP**

- I did not operate or have care or control of a motor vehicle.
- The concentration of alcohol in my blood did not exceed 80 milligrams in 100 millilitres of blood.
- I did not fail or refuse to comply with a demand under Section 254 of the *Criminal Code* to supply a breath or blood sample.

I had a reasonable excuse for failing or refusing to comply with a demand under Section 254 of the *Criminal Code* to supply a breath or blood sample.

**IRP**

- I was not driving or in care or control of the motor vehicle.
- An approved screening device did not register a WARN reading (50 mg%).
- An approved screening device did not register a FAIL reading (80 mg%).
- I did not fail or refuse to comply with the peace officer's demand to provide a breath sample.
- I had a reasonable excuse for failing or refusing to comply with the peace officer's demand to provide a breath sample.
- My 7-day or 30-day prohibition should be reduced because I did not have the required number of previous IRP(s).

**Changed ground in submissions**

If the selected grounds for review are not the grounds upon which the applicant submissions are based, that does not invalidate the application, as you may consider other applicable grounds. For example, if the applicant applies on the ground that they had a reasonable excuse for failing or refusing to comply with the ASD demand, but provides evidence that they were not the driver, the adjudicator must consider that evidence.

**Technical Grounds for Review**

Technical grounds for revoking a prohibition are usually caught at the intake level, but adjudicators should check to be sure.

Prohibitions must be revoked when no box on the *Notice of Driving Prohibition* (NoDP) was ticked off by the police officer (*Lang* case law).

**ADPs**

If the officer did not forward a *Certificate of Analysis* issued under s.254 of the *Criminal Code*, as required by the *MVA* s.94.3(e), you have no jurisdiction to remedy the officer's failure. Instead, you can make a finding on the basis of other evidence of BAC (e.g., breath test tickets, *Report to Superintendent*).

However, when the officer checks the box indicating they attached a Certificate, but it is not attached, the Appeal Registry will make one request for the missing Certificate before giving the file to an adjudicator. *MVA* s.94.5(2.1) gives you the authority to proceed with a review in the absence of a document that should have been forwarded by the police.

Additionally, if the lot number for the alcohol solution is not provided on the Certificate, the Appeal Registry will not assign the file to an adjudicator (because of the decision in *Streeter v. Superintendent of Motor Vehicles*, which held that an adjudicator cannot consider a Certificate with a missing lot number). If you receive a Certificate with a missing lot number, return it to the Appeal Registry. If there is any other information missing from the Certificate, please see your Team Leader.

Even if the *Report to Superintendent* (RTS) is not sworn or solemnly affirmed (i.e., it lacks the signature of the commissioner or the officer) as required by s.94.3(d), Sections 94.5(2.1) and (2.2) permit you to consider this evidence and determine the weight to give it.

**Operation or Care or Control of a Motor Vehicle (IRP/ADP)**

To confirm a prohibition you must be satisfied that the applicant was properly identified by the police officer as the person who was operating **or** had care or control of the vehicle. (See the *Glossary* for definitions.)

This ground for review is most often chosen by the applicant because police found them in the vehicle but they did not intend to drive. In such cases, the vehicle may have been inoperable, or the applicant may have been just sitting or sleeping in the driver's seat. Sometimes the person found in the driver's seat by police may not be the driver of the vehicle because, for example, they switched places with the actual driver after an accident. There is a great deal of case law in this area (see the case law summary). The main issues are the risk to public safety, the intent of the alleged driver, and the actions of the alleged driver.

**Note:** Although the MVA does not require an adjudicator to consider the driver's intention in the context of assessing wrongdoing, intention does have a place in determining whether or not a person is in care or control of a motor vehicle.

Proof that the police properly identified the applicant as the driver includes:

**Direct police observation:**

- The driver produced a photo driver's licence.
- Schriver's testing – Vital statistics on the driver's licence were compared to the physical characteristics of the suspect, such as eye colour or height.
- The driver's identity was confirmed by police through an interview.

**Witness observation** (admissible hearsay):

- A witness directly observed the applicant operating or in care or control of the vehicle.

Based on the submissions, you should try to answer the following questions to determine whether the applicant was operating the vehicle:

- Does the applicant admit to driving the vehicle?
- Was the vehicle in operation at the time the officer found the vehicle?
- Did the officer or any witnesses see the applicant operating the vehicle?
- Is there evidence that the applicant was operating the vehicle prior to the time they were found by the police officer?

If the vehicle was not in operation, consider these questions to determine whether the applicant was in care or control of the vehicle:

**In what position was the applicant found?**

- In, near, or away from the vehicle
- Awake or asleep
- Lying down, seated upright, or slumped
- Occupying the front or back seat
- Occupying the passenger or driver's seat
- Lying with their head or feet on the driver's seat

**Where were the keys to the vehicle found?**

- On the applicant's person
- In the vehicle

**In what state was the vehicle found?**

- Engine running or off

- Vehicle's transmission standard or automatic
- Vehicle in gear, park, or neutral
- Parking brake engaged
- Anti-theft device on steering wheel
- Obstructions behind or in front of the vehicle

**Note:** There are a number of legal opinions on care or control. For example, see ad-20100125 in the ADP legal opinions folder. Also, refer to legal opinion ad-20100125, which contains various legal memos on this issue.

**Successful grounds  
for review**

The following examples illustrate when you may be satisfied that the applicant did **not** operate or have care or control of a motor vehicle:

- Someone else admits to having been the driver and there is a lack of police evidence that the applicant was the driver.
- The vehicle was inoperable and could not be put in motion (unless the vehicle inoperation had just occurred, e.g., the car was in the ditch or in an accident when the officer arrived on the scene).
- The applicant was found away from the vehicle, did not have the keys in their possession, and there is a lack of police evidence establishing them as the driver.
- More than one person was potentially in care or control of the vehicle, and nothing in the circumstances places this particular person in care or control rather than someone else. (For example, the officer finds three people trying to push a vehicle out of a ditch and nobody is actually inside the vehicle.)

**Unsuccessful  
grounds for review**

The following examples illustrate when you may be satisfied that the applicant **did** operate or had care or control of a motor vehicle:

- The applicant makes an unsubstantiated claim that someone else was driving. For example: "Someone dropped me off and I fell asleep in my car." "Someone else was driving but they fled the vehicle."
- The applicant claims they were only moving the vehicle a short distance and no one else was available to do it.
- The officer observed the applicant in care or control of the vehicle, but approached the applicant after they had relinquished care or control.
- The applicant provides statements naming another person as the driver, but there is credible evidence that the applicant and the alleged driver switched seats. (For example: The officer observed the switch while approaching the vehicle; see legal advice in the ADP folder ad-17072006.)
- The applicant claims that they had no intention to drive. (For example: "I was just starting the car but I wasn't going to drive." "It was cold outside." "I started the car to get warm and then I was going to walk home." "I wasn't even driving." "I was going to sleep in the car until I felt OK to drive.")
- The applicant was found in the driver's seat with the engine running and there were no obstructions in front of or behind the vehicle.

### Blood Alcohol Concentration Did Not Exceed 80 mg% (ADP Only)

To confirm an ADP issued on the basis that the individual's BAC exceeded 80 mg%, you must be satisfied that the person's BAC exceeded 80 mg% at any

time within three hours after the time of operation or care or control of the vehicle. Further, you must be satisfied that this was as a result of alcohol consumed prior to or while driving.

The applicant may claim this ground if they believe that the breath test reading was not valid, either because the breath test equipment was faulty, or the operator did not follow proper procedures. See a Team Leader for any ADPs where there is only one breath sample, where there is less than 15 minutes between samples, or where there is more than 20 mg% between the samples.

The applicant may also claim this ground if their BAC reading was over the legal limit because they consumed alcohol after driving.

**Successful grounds  
for review**

The following examples illustrate when you may be satisfied that the applicant's BAC did **not** exceed 80 mg%:

**Evidence deficiencies or discrepancies:**

- Time of driving cannot be established or inferred.
- Time of breath samples cannot be established (for ADPs in particular).

**Instrument error:**

- The applicant provides satisfactory corroborating evidence that the instrument wasn't working properly. (In this case, return the file to the Appeal Registry, as this is not a revocation.)

**Unabsorbed alcohol:**

- Drinking after driving: The person consumed alcohol after they stopped operating or relinquished care or control of the vehicle. (For example: The police locate the driver at home and there is convincing evidence that the driver consumed alcohol at home.)

**Note:** You may have to assess the amount of alcohol consumed after driving and its effect on the BAC reading, in order to determine whether enough alcohol was consumed before or while driving to cause the person's BAC to exceed 80 mg% within 3 hours after driving. Further, it may be necessary to consider the credibility of the applicant's overall drinking pattern in order to accept evidence that they consumed alcohol after operating or being in care or control of a vehicle.

**Unsuccessful  
grounds for review**

The following examples illustrate when you may be satisfied that the applicant's BAC **did** exceed 80 mg%:

- The applicant claims that the instrument readings must be incorrect because:
  - They are inconsistent with the stated drinking pattern, or
  - They indicate a level of impairment inconsistent with the applicant's impairment indicators,
  - **But** the applicant does not provide satisfactory evidence that the instrument was not working properly.
- The applicant provides:
  - A drinking pattern statement, or
  - The results of their own simulated test, or
  - A forensic alcohol specialist's statement,

- **But** the applicant does not provide satisfactory evidence that the instrument was not working properly.
- The applicant claims that the time of driving or the time of the accident is unknown; however, it is substantiated by the evidence – e.g., by a witness or driver statement at the scene.
- The applicant questions the legality or validity of the officer's demand for a breath sample. (The validity is not relevant if the applicant provided a sample.)
- The applicant claims they had blood in their mouth and this would have affected the readings.
- The applicant claims that the readings are unsuitable because:
  - There are three readings.
  - There is a 20 mg% difference between the readings.
  - The second reading was higher than the first, and this indicates that their BAC was rising.

### ASD Did Not Register a Warn or a Fail (IRP Only)

**Successful grounds for review** The following examples illustrate when you may be satisfied that the ASD did **not** register a warn or a fail:

- The ASD serial number is missing. (If there is an issue with the number of digits, see a Team Leader.)
- The ASD calibration expiry and/or service expiry date is either missing or in the past.
- The driver requested a second ASD test but was not permitted to provide a second sample.
- The driver did provide a second sample, but it was on the same ASD used to obtain the first sample.
- There is evidence that mouth alcohol could have caused the result. (This may be where the driver consumed alcohol less than 15 minutes prior to the test – see a Team Leader.)

**Unsuccessful grounds for review** The following examples illustrate when you may be satisfied that the ASD **did** register a warn or a fail:

- The ASD calibration or expiry date is the same day as the incident.
- The applicant was already prohibited for 3, 7, or 30 days at the time they provided a fail sample on the ASD. (In this case, you must confirm the prohibition – see MVA s.215.5(5).)
- The applicant was already prohibited for 90 days when they provided a warn sample on the ASD, but the officer issued the IRP on the basis of a 'fail.' (In this case, you must substitute the prohibition for the appropriate length of 3, 7, or 30 days – see MVA s.215.5(3)(a).)

### Did Not Fail or Refuse to Comply with ASD Demand (IRP/ADP) or Demand for Blood/Breath Test (ADP only)

To confirm an IRP, you must be satisfied that the applicant failed or refused, without reasonable excuse, to comply with an ASD demand. To confirm an ADP, you must be satisfied that the applicant failed or refused, without a reasonable excuse, to comply with a demand to supply a sample of their breath or blood

under Section 254 of the *Criminal Code*. Under the *MVA*, you must take into consideration any reasonable excuse.

You must also confirm that a valid demand was made by the police officer. The demand must leave the applicant in no doubt of their legal obligation to provide a sample or samples. A request or offer to take a test is not sufficient. The precise wording is not set out, but most officers read the demand from an official card.

This ground is often misinterpreted by applicants to apply in cases where the BAC was properly demanded and found to be over 80 mg%, or in cases where they provided a sample on an ASD and it registered a warn or a fail. In effect, the applicant is claiming that because they provided breath samples, they did not fail to comply with the demand (and presumably should have the prohibition revoked).

Refer to the case law summary for case law definitions regarding a failure or refusal to comply.

**Successful grounds  
for review**

The following examples illustrate when you may be satisfied that **no** ASD demand or demand for blood or breath samples was made:

- Only a refusal is mentioned but not the demand itself.
- The applicant gives persuasive evidence that the police only asked them to give a breath sample.
- The demand was not made as soon as practicable (i.e., there is an unexplained delay between the formation of the grounds to make the demand and the demand itself).

The following examples illustrate when you may be satisfied that the applicant did **not** fail or refuse to comply with an ASD demand or a demand for blood or breath samples.

- There is insufficient police evidence to support a refusal.
- The applicant was burping or vomiting, but truly could not stop, and there was no verbal refusal.
- There is evidence that the police misinterpreted the applicant's actions as a refusal.
- The applicant asks reasonable questions about the machine and the process, but the officer refuses to answer them and charges the person with refusal.
- The applicant changed their mind and offered to blow after initially refusing, but the police refused to administer the test. (This may be a reasonable ground if you are satisfied that the officer had no good reason to refuse; however, keep in mind there is no legal obligation for the officer to offer the driver another opportunity to provide a sample after the first demand was refused.)

**Unsuccessful  
grounds for review**

The following example illustrates when you may be satisfied that the police **did** make an ASD demand or a demand for blood or breath samples:

- The applicant claims no demand was made, but there is strong police evidence that it was.



The following examples illustrate when you may be satisfied that the applicant **did** fail or refuse to comply with an ASD demand or a demand for blood or breath samples.

- The refusal was explicit (i.e., verbal) or implied by the individual's behaviour (e.g., willfully burping, vomiting, sucking back on the tube, releasing air from the nose, blowing too hard or too softly or too briefly).
- The applicant claims "I was trying," but the evidence indicates they were unresponsive to the officer's instructions.
- The applicant gave only one sample when two were demanded.
- The applicant gave one or two samples that were unsuitable.
- The applicant refused to provide any additional samples and does not provide satisfactory evidence that the samples were in fact suitable.
- The applicant refused to take an ASD test, but offered to provide a sample on a BTA at the police station or offered to provide a blood sample.

**Legal issues  
regarding demands**

**ASD demands:**

- Before making an ASD demand, the police officer must have a suspicion that the driver has alcohol in their body.
- The driver has no right to consult with a lawyer.
- The *Charter of Rights* warning does not have to be read by the police officer.
- The time it takes to administer the test is not considered a detention if the ASD is done "forthwith" – usually within 15 minutes, although the officer may delay the sample if the driver has mouth alcohol (e.g., burp, recent drink).

**BTA demands:**

- Before making a demand for a breath test, the officer must form an opinion on reasonable and probable grounds that the driver's ability to drive is impaired by alcohol.
- Administering a BTA involves a detention, so the officer must read the *Charter of Rights* warning.
- Once the *Charter of Rights* warning is read, the driver has a right to consult a lawyer and be given a reasonable opportunity to do so.

**BAC grounds:**

- **IRPs:**
  - One breath sample must be taken on an ASD.
  - If the driver requests a second test, they must be given an opportunity to provide it, but on a different ASD).
- **ADPs:**
  - BTA reading(s) must be obtained using an approved instrument operated by a qualified technician.
  - For ADPs where there is only one breath sample, where there is less than 15 minutes between samples, or where there is more than 20 mg% between the samples, see a Team Leader..

### **Had Reasonable Excuse for Failing or Refusing to Comply (IRP/ADP)**

To revoke a prohibition, you must be satisfied that all the evidence supports the applicant's claim that they had a reasonable excuse to refuse to comply with a



demand. It is not sufficient for the applicant to simply make that claim – they must provide corroborating evidence.

Many applicants apply on this ground when they attempted to blow but failed to provide valid breath samples. However, a failure is the same offence as an outright refusal, even if the evidence shows that the applicant was willing to continue the attempts.

The issue is whether the applicant has an excuse *in fact* – i.e., the reason they refused at the time of the demand.

**Successful grounds  
for review**

The following examples illustrate when you may be satisfied that the applicant **did** have a reasonable excuse to fail or refuse to comply with a demand:

**Legal counsel:**

- The applicant was not provided with a reasonable opportunity to access legal counsel (see note below). Factors to consider:
  - How much time had passed since the latest time of driving?
  - Were they diligent in trying to access counsel?
  - How long had they been waiting for a lawyer to call back?
  - Did they tell the police that they were waiting?
  - Did they try to contact more than one lawyer?
- The applicant felt that their personal safety would be jeopardized by blowing into the instrument. For example, refusing to blow into an ASD while standing in the middle of an intersection might constitute a reasonable excuse. Other examples might include having a medical condition for which giving a breath sample might endanger their physical well-being. (In such a case, police would usually take them to a hospital and make a blood demand.)

**Note:** The right to legal counsel applies in cases of refusal if the police officer read the *Charter of Rights* warning (i.e., to bring the driver to the detachment for a BTA test).

However, if the police officer advised the applicant they had a right to legal counsel (without the Charter warning), and then did not provide the driver with a reasonable opportunity to speak with legal counsel, the right to legal counsel may be said to exist. In that case, the driver may have a reasonable excuse for failing to comply with the demand. But if the driver simply told police they wanted to contact a lawyer, there is no right to counsel and the officer has no obligation to provide the opportunity.

**Health issues:**

- The applicant was offered an unwrapped mouthpiece.
- The applicant was refused treatment for a medical emergency.
- The applicant had a medical condition that prevented them from complying. Factors to consider:
  - What is the nature of the medical condition?
  - Did they tell the police about their condition?
  - Does the *Report to Superintendent* (RTS) indicate that they were feigning attempts to blow (e.g., tongue over hole, sucking back)?
  - Do they provide a doctor's letter that names their condition and explicitly states that the condition could interfere with their ability to provide a breath sample?

**Other:**

- The applicant provides satisfactory evidence that the instrument was not working properly. Factors to consider:
  - Did they tell the officer about their concerns?
  - What does the RTS indicate?
- The person did not understand the consequences of a refusal because of a language barrier. Factors to consider:
  - What does the RTS indicate?
  - Was a translator provided?
  - What details did the applicant seem to understand based on their actions or as contained in their statement?
- The applicant had consumed alcohol within the previous 15 minutes and had told the officer, but the officer did not wait before performing the test.

**Unsuccessful grounds for review**

The following examples illustrate when you may be satisfied that the applicant did **not** have a reasonable excuse to fail or refuse to comply with a demand:

**Applicant's concerns:**

- The applicant did not feel that they were impaired.
- The applicant believed that giving one satisfactory sample was sufficient (for ADPs).
- The applicant's religious beliefs prevented them from agreeing to the demand.
- The applicant feared that medication would interfere with the results.
- The applicant held an unsubstantiated belief that the instrument wasn't working properly.
- The applicant was having personal problems or was too upset to take the test, but was not suffering from a documented mental illness.

**Legal counsel:**

- The applicant was not advised of their right to legal counsel. (If the *Charter of Rights* warning was read, that is evidence the applicant was advised of their right to legal counsel; otherwise there is no such right.)
- ADPs: The applicant was unable to contact a lawyer despite being provided with a reasonable opportunity to do so.
- The applicant was unable to contact the lawyer of their choice but showed diligence in the attempt.
- The applicant's lawyer advised them not to comply.

**Health issues:**

- The applicant feared catching a disease but was given a wrapped mouthpiece.
- The applicant claims that a medical condition prevented them from complying but does not provide satisfactory evidence to support the claim.

**Other:**

- You are not satisfied that the applicant did not understand the consequences of their actions.
- The applicant offered a blood or urine sample instead of a breath sample.

- The applicant refused to comply with an ASD demand but offered to provide a blood sample or breath sample for a breathalyser (BTA).
- The applicant was too drunk to understand the consequences of their actions or to comply.
- The applicant was not present while the instrument was being calibrated.
- The RTS indicates that the applicant's efforts were consistent with a willful avoidance to provide a sample.

### Invalid Grounds for Review

The *Motor Vehicle Act* does not contain any provisions that allow adjudicators to modify the parameters of the penalties being imposed, or to consider any personal circumstances including economic hardship. (except for impoundments of vehicles owned by businesses, as per *MVA* s.262).

The following arguments offered by applicants are examples of **invalid** grounds for review:

- "I need my driver's license to get to work."
- "Can you give me a partial prohibition and allow me to drive during the hours of...?"
- "I need a couple of weeks to get my things in order and then I'll comply with the prohibition."
- "I need my driver's license to drive myself or someone else to the hospital for medical treatment."
- "There is no public transportation where I live."
- "I was under a lot of stress."
- "I will never do it again."
- "I have a good driving record."
- "My safety will be jeopardized if I can't drive."
- "I was driving on non-provincial land."
- "Someone else was pouring my drinks and I didn't know how much alcohol I had consumed."

The applicant may also make technical arguments that are not valid grounds for review, including but not limited to:

- The time of driving supported by the evidence (RTS) is not exactly the same as that indicated on the NoDP.
- Personal information is missing from the NoDP (address, date of birth, etc.). This is irrelevant because the applicant is identified by name and driver's licence number.
- The wrong offence box is ticked off on the NoDP or more than one box. (s.215.5(3) allows you to substitute a warn for a fail and s.215.5(5) allows you to confirm as a warn even if the result was a fail.)
- The police officer did not forward a RTS as required by s.94.3(d) or s.215.47(d). You can proceed with the review based on whatever is in the file (see *MVA* s.94.5(2.1) and s.215.49(3)).

## Grounds for Review for 24-hour Prohibitions

There are two possible grounds for a review of a 24-hour prohibition (*MVA* s.215.3):

1. The police officer failed to administer a blood alcohol test when requested by the driver after the NoDP was served.
2. The person served with the prohibition alleges they were not the driver of the motor vehicle.

For the first ground, a driver who is served a 24-hour prohibition notice does **not** have the right to request or undergo a test if (see *MVA* s.215(6.2)):

- The officer had already performed a test of the driver's BAC with an ASD.
- The test indicated that the driver's BAC exceeded 50 mg%, and the officer used the results of the test as part of the basis on which they formed reasonable and probable grounds to believe that the driver's ability to drive was affected by alcohol.

### **Factors to consider**

In considering an application for review, you may only consider (see *MVA* s.215.2):

- The *Notice of 24-Hour Prohibition and Report to ICBC* issued under *MVA* s.215(10).
- Other relevant information provided by the police officer with the report
- Any written statements or other relevant information provided by the person on whom the notice of driving prohibition was served

The onus is on the driver to provide evidence on the issues to be determined. In order to revoke the prohibition, you must be satisfied that one of the criteria is met as set out in s.215.3 according to the balance of probabilities:

- The driver had a right to a test and requested the test, but was denied the test, or
- The person was not the driver or did not have care or control of the vehicle.

The absence of evidence does not lead to a revocation of the 24-hour prohibition. For example, the absence of a report from the police officer is not in itself grounds for revoking the prohibition.

This table lists some factors to consider when reviewing the grounds. However, keep in mind that you can confirm the prohibition based solely on the driver's name on the front of the *Notice of 24-Hour Prohibition*.

| Ground  | Questions to consider   |
|---|---|
| The police officer failed to administer a blood alcohol test when requested.  | <ul style="list-style-type: none"> <li>• Did the applicant have a right to request a test?</li> <li>• Did they request a test?</li> <li>• How did the officer respond?</li> <li>• Was a proper breath test administered?</li> </ul> |
| <b>Note:</b> The police officer is not required to administer a further breath test if the officer used the results of the first test as part of the basis on which the officer formed reasonable and probable grounds to believe that the driver's ability to drive was affected by alcohol. |   |

| Ground  | Questions to consider   |
|---|---|
| The person was not the driver or did not have “care or control” of a vehicle on a highway or industrial road  | <ul style="list-style-type: none"> <li>• What brought the applicant to the attention of police?</li> <li>• Was the applicant driving the vehicle?</li> <li>• Was the applicant seated in the driver’s seat?</li> <li>• Was the vehicle operable?</li> <li>• Was someone else driving?</li> <li>• Did the police or someone else see the applicant driving?</li> <li>• Did the applicant get out of the car before the police approached them?</li> <li>• Where were the keys?</li> <li>• Was the engine on or off?</li> <li>• Was the transmission in park or in gear?</li> <li>• Were the headlights on or off?</li> </ul> |
| <p><b>Note:</b> Although “intent to drive” should be considered as a factor, it is not determinative, because an intention to set the vehicle in motion is not an essential element of care or control. A person can be in care or control without intending to drive in some cases. You can consider the risk to the public when determining whether someone was in care or control.</p> |   |

### **Other factors – legal opinions**

Several legal opinions have been received on 24-hour prohibition reviews. The following is a high-level summary of the legal opinions to help guide decision making. The legal opinions are not themselves law, but they are an interpretation of law that may be binding on adjudicative decisions. The full text of these opinions is available in the OSMV legal opinion registry.

- **Blood test versus breath test:** Legal advice suggests that a driver who specifically requests a blood test cannot rely on s.215(6) to say that they requested a test of their BAC. The option of obtaining a blood test to dispute a 24-hour prohibition was removed from the statute in January 2005 because this option was unused and impractical. Medical practitioners generally will not provide the test, and when available it is not done in a time-frame that reflects the driver’s blood alcohol at the time of driving. Similarly, if a driver requests a test and the ASD is not working, the police should take the person to the police station to undergo a BTA test.
- **Submission – no evidence:** In a 24-hour prohibition review (unlike for an ADP), the onus is on the driver to provide evidence to support the allegations in their submission or the prohibition cannot be revoked.
- **Relevant information:** The sentence “relevant information provided by the person on whom the notice of driving prohibition was served” (s.215(2)(b)) should be interpreted broadly. Therefore, witness statements given by a passenger can be considered, provided that they are relevant to the issues to be determined under s.215.3. Submissions by an applicant’s lawyer would also be permitted under this provision.
- **When a driver must request a breath test:** Although s.215(6) states that the driver must request a breath test **after** being served with the 24-hour prohibition, the timing issue is not critical. The court took a more nuanced approach to this requirement in *Auja v. Superintendent* (see legal advice in 24-20081212).