

ACTION 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, VERIFICATION, AND SOURCE OF MONEY (A-1), CLIENT FILE OPENING AND CLOSING (A-2), and the CRIMINAL PROCEDURE (C-1) checklists. Use this checklist where the accused is charged under the <i>Criminal Code</i>, R.S.C. 1985, c. C-46, ss. 320.14 and/or 320.15. If a suitable breath sample is provided through an approved screening device (“ASD”) in response to a demand made under s. 320.27, or two suitable samples are provided in the case of a breath demand made under s. 320.28, 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. This checklist is current to September 1, 2023.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li>• <b>Appearance by counsel.</b> Check the BC Courts website (<a href="http://www.bccourts.ca">www.bccourts.ca</a>) to obtain up-to-date Practice Directions, Notices to the Profession, guides to remote proceedings, and announcements from all levels of court for methods of appearance by counsel and accused persons.</li> <li>• <b>Forms of address.</b> The Supreme Court of British Columbia provided direction on how parties and counsel are to address a justice in a courtroom (see Supreme Court Civil <a href="#">Practice Direction PD-60</a>) and provided clarification on how to introduce themselves in proceedings (see Supreme Court Civil <a href="#">Practice Direction PD-59</a>).</li> <li>• <b>Criminal Code amendments.</b> Counsel who do not regularly practice in the area of impaired driving and other driving offences are reminded to review Part VIII.1 of the <i>Criminal Code</i> (ss. 320.11 to 320.4) as these provisions significantly changed the investigation and prosecution of these offences.</li> <li>• <b>Valid roadside screening demands.</b> In <i>R. v. Breault</i>, 2023 SCC 9, the police did not have an Approved Screening Device (“ASD”) present at the scene when they demanded that the accused provide a roadside breath sample. The accused refused and was charged with failing to comply with the demand. The accused was convicted at trial but acquitted by the Quebec Court of Appeal on the basis that the demand for a roadside sample was not valid, because it could not be carried out immediately. The Supreme Court of Canada dismissed the Crown’s appeal, confirming that the word “forthwith” in what was then s. 254(2)(b) of the <i>Criminal Code</i> means “immediately and without delay”, absent unusual circumstances. Note that s. 320.27(1) uses the word “immediately”. The court further held that the burden was on the Crown to establish that there were unusual circumstances, and that such circumstances cannot arise from budgetary considerations or considerations of practical efficiency. The absence of an ASD at the scene is not in itself an unusual circumstance.</li> <li>• <b>Credit may be granted for pre-sentence driving prohibitions.</b> In <i>R. v. Basque</i>, 2023 SCC 18, the court held that judges have discretion to credit time spent under a release document driving prohibition toward a mandatory criminal driving prohibition. Note, however, that this decision was rendered on the basis of statutory interpretation of what was then s. 259 of the <i>Criminal Code</i>, which has since been repealed and replaced by s. 320.24. Whether the rule in <i>Basque</i> applies to driving prohibitions under the latter provision may be the subject of future court rulings.</li> </ul>	

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<ul style="list-style-type: none"> <li>• <b>Breathalyzer results admissible despite arbitrary detention.</b> In <i>R. v. McColman</i>, 2023 SCC 8, the court restored a conviction for driving over the legal limit. The accused was subject to a roadside sobriety check while on private property. The court held that such a stop was not authorized under Ontario’s <i>Highway Traffic Act</i>, R.S.O. 1990, c. H.8 and therefore amounted to an arbitrary detention under s. 9 of the <i>Charter</i>. Despite this, on a s. 24(2) analysis, the court held that on balance, the reliability and importance of the evidence was such that the admission of the breathalyzer results better served the truth-seeking function of the trial process and would not bring the administration of justice into disrepute.</li> <li>• <b>The presumption of accuracy and evidence of the alcohol standard.</b> In <i>R. v. Goldson</i>, 2021 ABCA 193, leave to appeal refused 2022 CanLII 10371 (SCC), the court held that the <i>viva voce</i> or certificate evidence of a qualified technician as to the certification of the alcohol standard by an analyst is inadmissible hearsay. The court held that to rely on the presumption contained in s. 320.31(1), the Crown must lead evidence from the analyst, either <i>viva voce</i> or in certificate form, to establish that fact. However, in <i>R. v. MacDonald</i>, 2022 YKCA 7, the court (with a panel including two members of the Court of Appeal for British Columbia) considered the decision in <i>Goldson</i> and came to a different conclusion. In <i>MacDonald</i>, the court held that it was not necessary for the Crown to call evidence from the analyst (either by certificate or otherwise) and that s. 320.32(1) provides a statutory exception to the rule against hearsay, allowing the Crown to rely on the statements contained in the Certificate of the Qualified Technician as sufficient proof of the certification of the alcohol standard. Note that decisions of the Court of Appeal of Yukon are persuasive, but not binding on courts in BC (see <i>R. v. Romanchych</i>, 2018 BCCA 26 at paras. 10 and 11, though the reasoning in <i>MacDonald</i> has also found favour with summary conviction appeal courts in Ontario: <i>R. v. Hepfner</i>, 2022 ONSC 6064; <i>R. v. Gault</i>, 2023 ONSC 2994). Note also that s. 320.34(1)(e) requires that the Crown disclose to the accused a copy of the certificate of analyst, and s. 320.32(2) requires that the Crown give reasonable notice of its intention to rely on a certificate.</li> <li>• <b>Credible evidence to the contrary as to the reliability of an ASD result.</b> A police officer is entitled to rely on a “fail” result on an ASD in the absence of “credible evidence to the contrary”. In <i>R. v. McGuire</i>, 2023 YKCA 5, the court considered what is required to constitute such evidence to the contrary. The court held that “the inquiry is ... focused on what is known to the police officer at the time they choose to rely on the ASD result, and the impact of that knowledge on the objective reasonableness of their subjective belief in grounds for an arrest and/or breathalyzer demand” (at para. 42).</li> <li>• <b>The “read back” presumption for breath samples is mandatory and must be applied.</b> In <i>R. v. Tweedie</i>, 2023 NSCA 11, leave to appeal refused 2023 CanLII 76809 (SCC), the court held that the trial judge had erred by not applying the presumption in s. 320.31(4). That s. provides that if a breath (or blood) sample is taken more than two hours after the person ceased operating a conveyance, the person’s blood alcohol content (“BAC”) is conclusively presumed to be that reflected by the test plus an additional 5 mg of alcohol in 100 ml of blood for every 30 minutes in excess of those two hours. The Crown called expert evidence from a toxicologist regarding the accused’s BAC, but this evidence was not accepted by the trial judge. The Nova Scotia Court of Appeal held that the presumption was mandatory and should have been applied by the trial judge, notwithstanding that the Crown had not relied on it.</li> </ul>	

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<ul style="list-style-type: none"> <li>• <b>Constitutionality of mandatory alcohol screening upheld.</b> While decided in the context of a regulatory offence, in <i>McLeod v. British Columbia (Superintendent of Motor Vehicles)</i>, 2023 BCSC 325, the court found that mandatory alcohol screening (“MAS”) under s. 320.27(2) did not infringe on <i>Charter</i> rights, and even if it did, such infringement was justified under s. 1 of the <i>Charter</i>. Note that similar constitutional challenges to MAS have also been dismissed in other provinces: <i>R. v. Dylan Alexander Pratt</i>, 2022 ABQB 407; <i>R. v. Kortmeyer</i>, 2021 SKPC 10; <i>R. v. Brown</i>, 2021 NSPC 32; and <i>R. v. Blyzniuk</i>, 2020 ONCJ 603.</li> <li>• <b>Police can choose between a MAS demand and one based on reasonable suspicion.</b> In <i>R. v. Bradley</i>, 2022 NBQB 31, the accused argued that the officer should have proceeded with an ASD demand based on reasonable suspicion (<i>Criminal Code</i>, s. 320.27(1)), rather than making a MAS demand (s. 320.27(2)) when there was evidence the accused had consumed alcohol. The court disagreed, finding police are free to choose between the two demands (paras. 81 to 96).</li> <li>• <b>Refusal to comply with a demand under s. 320.15 is an offence of general intent.</b> In <i>R. v. Doiron</i>, 2023 BCPC 127, the court followed several recent cases from across Canada finding that the offence of refusal under s. 320.15 is an offence of general intent. This means the Crown must prove knowledge of a lawful demand and a refusal (or failure) to comply. It then falls to the accused to establish a reasonable excuse.</li> <li>• <b>Interference with an accused’s right to counsel is not a reasonable excuse for refusing a breath sample.</b> In <i>Gordon v. British Columbia (Superintendent of Motor Vehicles)</i>, 2022 BCCA 260, the Court held that in both the criminal and regulatory context, police interference with the accused’s right to counsel cannot provide a reasonable excuse to refuse a breath sample. According to the decision, this was an issue that had not previously been considered by the Court of Appeal for British Columbia, and the court adopted a 1992 decision of the Ontario Court of Appeal with approval (<i>R. v. Williams</i>, 1992 CanLII 7657 (ONCA)). The <i>Williams</i> case suggests that any alleged breach of <i>Charter</i> rights must be dealt with by an application under s. 24(2), not in the context of alleging a reasonable excuse for refusing a breath sample.</li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li>• <b>Additional resources.</b> Further information related to impaired driving offences is available in <i>Introducing Evidence at Trial: A British Columbia Handbook</i>, 4th ed. (CLEBC, 2020); <i>Canadian Criminal Jury Instructions</i>, 4th ed. (CLEBC, 2005–); annual editions of the <i>Annual Review of Law and Practice</i> (CLEBC); the course presentation and materials from <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) available through CLEBC Courses on Demand; and <i>Impaired Driving in Canada—2012/2013</i> ed. (LexisNexis, 2012).</li> <li>• <b>Law Society of British Columbia.</b> For changes to the Law Society Rules and other Law Society updates and issues “of note”, see LAW SOCIETY NOTABLE UPDATES LIST (A-3).</li> </ul> <p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Initial Contact/Interview</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>	

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<p style="text-align: center;"><b>CHECKLIST</b></p> <p><b>1. INITIAL CONTACT/INTERVIEW</b></p> <p>1.1 Conduct a conflicts of interest check. Complete the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p> <p>1.2 Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110).</p> <p>1.3 Discuss and confirm the terms of your retainer and the calculation of your fee. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p> <p><b>2. EXAMINATION OF DRIVER, PASSENGER, PEDESTRIAN WITNESS</b></p> <p>2.1 Witness's background and general matters.</p> <p>.1 Consider <i>Code of Professional Conduct for British Columbia</i> ("BC Code"), rules 5.3, 5.4-2 and 7.2-9 with respect to interviewing witnesses and communicating with witnesses giving evidence.</p> <p>.2 Witness's relationship with, or prior knowledge of, the accused or other witnesses.</p> <p>.3 Witness's personal observations re: effects of alcohol or drug consumption.</p> <p>(a) Any unique knowledge or experience (e.g., through work, personal life).</p> <p>(b) Any knowledge of the effect of alcohol or drugs on the accused.</p> <p>.4 Witness's preconceived views (e.g., prejudice, favour).</p> <p>(a) Toward the accused.</p> <p>(b) Toward complainants or other witnesses.</p> <p>(c) About operating while impaired, generally.</p> <p>.5 Witness's initial observation point.</p> <p>(a) In the accused's vehicle.</p> <p>(b) In other vehicle.</p> <p>(c) As pedestrian/bystander.</p> <p>(d) Anything to enhance or inhibit the view of events (e.g., lighting, obstructions, relative location, length of observation).</p> <p>.6 Review notes/statements from all sources, including the police, ICBC, and participants, and consider rules regarding the use of such notes in testifying and the collateral facts rule.</p> <p>2.2 Date, time, and place of observation of operation.</p> <p>2.3 Identification of the accused (as the person operating the conveyance).</p> <p>.1 Ability to describe the accused (age, height, weight, race, clothes, distinguishing features or marks, hair).</p> <p>.2 Ability to observe (distance, lighting, length of observation period, obstructions, environmental conditions).</p>	

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<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 plate number, distinguishing features).</p> <p>2.5 If it is alleged that the accused was driving (note: both driving and care and control are covered by “operate” (<i>Criminal Code</i>, s. 320.11)):</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 cause.</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 whether identification of the vehicle/driver can still be made.</p> <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 facts 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 the accused was not observed actually driving (note: both driving and care and control are covered by “operate” (<i>Criminal Code</i>, s. 320.11)):</p>	

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<ul style="list-style-type: none"> <li>.1 Location of the vehicle.</li> <li>.2 Whether the vehicle was moving or the engine was running.</li> <li>.3 Condition of the vehicle (e.g., lights, engine, transmission, keys, door locks, radio, air conditioner/heater, parking brake).</li> <li>.4 Whether the accused was in the vehicle, in the driver’s seat, or outside the vehicle.</li> <li>.5 If the accused was in the vehicle, the precise location of the accused’s feet, legs, upper body, and head.</li> <li>.6 Whether the vehicle was operable, or whether there was a risk of the vehicle being a danger.</li> <li>.7 Were photographs taken?</li> <li>.8 Other actions of the accused relevant to the issue of care or control.</li> <li>.9 Special features of the vehicle (e.g., sleeper cab in a large truck).</li> <li>.10 Condition of, or use of, seat belt.</li> <li>.11 Note presumption of operation provision (<i>Criminal Code</i>, s. 320.35).</li> <li>2.7 Statements by the accused: <ul style="list-style-type: none"> <li>.1 Admissions regarding: <ul style="list-style-type: none"> <li>(a) Operation (including intent to drive).</li> <li>(b) Alcohol consumption (type, amount, timing, location, last drink, consumption of food).</li> <li>(c) Drugs consumed (type, amount, timing).</li> <li>(d) Acknowledgement of intoxication level.</li> <li>(e) Cause of any accident.</li> </ul> </li> <li>.2 Any mention of contacting (or not contacting) police.</li> <li>.3 When and where admissions were made.</li> <li>.4 Who was present when the admissions were made: <ul style="list-style-type: none"> <li>(a) Police.</li> <li>(b) Other witnesses.</li> </ul> </li> <li>.5 Exact words spoken, and any notes of same.</li> <li>.6 Accused’s coherence or responsiveness, or capacity at the time.</li> </ul> </li> <li>2.8 Damage resulting from the accident: <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> </li> <li>2.9 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> </ul> </li> </ul>	

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<p>.4 Injuries suffered during the accident that might explain any symptoms of impairment, particularly if there was head trauma.</p> <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). (Note the elements of the offences in <i>Criminal Code</i>, s. 320.14(b), (c), and (d) regarding operating within two hours of consumption and whether the accused could have reasonably expected to be required to give a sample of breath or blood.)</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, etc.).</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 their 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> <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> </ul>	

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<ul style="list-style-type: none"> <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. (Note the elements of the offences in <i>Criminal Code</i>, s. 320.14(b), (c), and (d) regarding operating within two hours of consumption and whether the accused could have reasonably expected to be required to give a sample of breath or blood.)</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. 320.15(1), whether any witness saw or heard any evidence of refusal to provide a sample or to accompany police officers for that purpose.</li> <li>2.17 Defence may wish to seek details (or copies) of any statements witnesses provided to police or to ICBC (note that the disclosure of third party records regime may apply), 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 agency 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 in this checklist).</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> <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> </ul> </li> </ul>	



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<p>3.4 Description of the accused’s motor vehicle (make, model, year, colour, licence plate number, distinguishing features).</p> <p>3.5 If it is alleged that the accused was driving (note: both driving and care and control are covered by “operate” (<i>Criminal Code</i>, s. 320.11)):</p> <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 and, if so, the apparent cause (e.g., unexplained driver error).</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, 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> <li>.14 Reason vehicle was stopped. Consider any Canadian <i>Charter of Rights and Freedoms</i> (“<i>Charter</i>”) issues, including those arising under ss. 9 and 10(a).</li> </ul> <p>3.6 If the officer did not witness the accused operating the vehicle (either driving or having care or control) or being in an accident.</p> <ul style="list-style-type: none"> <li>.1 Time dispatched and contents of dispatch.</li> </ul>	

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<p>.2 Time of arrival at the scene:</p> <ul style="list-style-type: none"> <li>(a) In relation to dispatch.</li> <li>(b) Precise time of arrival.</li> <li>(c) Status of the investigation at time of arrival (impaired, accident investigation, or other reason).</li> <li>(d) Whether the status of the investigation changed; if so, consider the effect of the change.</li> </ul> <p>.3 Scene upon arrival:</p> <ul style="list-style-type: none"> <li>(a) Scene layout (e.g., roadways, intersections, traffic controls, skid marks).</li> <li>(b) People and positions.</li> <li>(c) Vehicles and positions.</li> <li>(d) How the accused was identified (e.g., pointed out, sitting in car).</li> <li>(e) Were photographs taken of the scene?</li> </ul> <p>.4 Information (including hearsay) received upon arrival from witnesses regarding:</p> <ul style="list-style-type: none"> <li>(a) Identification of the accused.</li> <li>(b) Time of the incident.</li> <li>(c) Details of the incident.</li> <li>(d) Exact comments and gestures of witnesses.</li> <li>(e) Exact details of any witness conversations/dealings with the accused.</li> </ul> <p>.5 Note that hearsay and information from incomplete sources can be used to establish reasonable suspicions and reasonable and probable grounds for demands under <i>Criminal Code</i>, ss. 320.27 and 320.28 (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 operating by being in care or control rather than by driving (note: both driving and care and control are covered by “operate” (<i>Criminal Code</i>, s. 320.11)):</p> <ul style="list-style-type: none"> <li>.1 Location of the vehicle.</li> <li>.2 Whether the vehicle was moving.</li> <li>.3 Condition of lights, engine, transmission, keys, door locks, radio, air conditioner/heater, parking brake, etc.</li> <li>.4 Whether the accused was in the vehicle, in the driver’s seat, or out of the vehicle.</li> <li>.5 If accused was in the vehicle, the precise location of the accused’s feet, legs, body, head, etc.</li> <li>.6 Was the vehicle operable or at risk of being a danger.</li> <li>.7 Other actions of the accused relevant to the issue of operation or care or control.</li> <li>.8 Special features of the vehicle (e.g., sleeper cab in a large truck).</li> <li>.9 Condition of, or use of, seat belt.</li> </ul>	

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<p>.10 Note presumed operation provisions (<i>Criminal Code</i>, s. 320.35).</p> <p>3.8 Statements by the accused:</p> <p>.1 Prosecution must assess the need for statements:</p> <ul style="list-style-type: none"> <li>(a) To prove grounds for demands under <i>Criminal Code</i> s. 320.27 or 320.28, or both (see item 3.8.2(c) in this checklist).</li> <li>(b) To prove the essential elements of the offence, including the identity of the driver.</li> <li>(c) For potential cross-examination of the accused.</li> <li>(d) Statements may form a factual basis for Crown or defence expert opinion.</li> </ul> <p>.2 Consider and assess the admissibility of any statements.</p> <ul style="list-style-type: none"> <li>(a) Consider the need for/likely success of <i>voir dire</i>.</li> <li>(b) <i>Charter</i> issues, including ss. 10(a) and 10(b), and the issue of statutorily compelled statements.</li> <li>(c) Voluntariness issues (note that there is no requirement to prove voluntariness of any statements used only in support of grounds for an officer's demand (<i>R v. Paterson</i>, 2017 SCC 15)).</li> </ul> <p>.3 Defence must consider admissibility objections.</p> <ul style="list-style-type: none"> <li>(a) Timely notice of <i>Charter</i> issues.</li> <li>(b) Voluntariness (see item 3.8.2(c) in this checklist).</li> <li>(c) Whether a statement is useful as factual basis for an expert to give an opinion that assists the defence.</li> </ul> <p>.4 Content of the accused's statements.</p> <ul style="list-style-type: none"> <li>(a) Operation (including intent to drive).</li> <li>(b) Alcohol consumption (type, amount, timing, location, last drink, consumption of food).</li> <li>(c) Drugs consumed (type, amount, timing).</li> <li>(d) Acknowledgement of intoxication level.</li> <li>(e) Cause of any accident.</li> </ul> <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 and how it was recorded (audio, video, officer's notebook).</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 Promises or threats made to the accused (if any).</p> <p>.12 Other factors bearing on any <i>Charter</i> issues.</p> <p>3.9 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 impact (e.g., broken windshield, airbag deployment).</li> </ul>	

ACTION TO BE CONSIDERED	NOTES
<p>.2 To other vehicles.</p> <p>.3 To other property.</p> <p>.4 Documentation available, including photographs.</p> <p>3.10 Injury to the accused:</p> <p>.1 Apparent injury.</p> <p>.2 Complaint of injury.</p> <p>.3 Requests for medical assistance.</p> <p>.4 Possibility that injuries suffered during the accident could explain any symptoms of impairment, particularly in relation to head trauma.</p> <p>.5 Documentation or medical records available.</p> <p>3.11 Injury to others and the extent thereof (especially for cases involving allegations of causing bodily harm).</p> <p>3.12 Whether the accused made any statement about the cause of the incident (see item 3.8 in this checklist).</p> <p>3.13 Whether the accused was drinking liquor or consuming drugs after the police officer arrived, and to what extent. Was any liquor or drugs found in the accused's vehicle? If so, how much, and if there was liquor, whether it was open.</p> <p>3.14 Accused's symptoms of impairment.</p> <p>.1 Breath.</p> <p>.2 Eyes (e.g., glassy, bloodshot).</p> <p>.3 Face (e.g., flushed).</p> <p>.4 Clothing (e.g., dishevelled, soiled).</p> <p>.5 Coherence/responsiveness/capacity/speech (e.g., slurred).</p> <p>.6 Demeanour (e.g., sleepy, silly, cocky, quiet, aggressive, polite, mood swings, etc.).</p> <p>.7 Balance and coordination (e.g., ability to stand/walk, swaying, leaning).</p> <p>.8 Ability to produce documents and licence.</p> <p>.9 Other observations (e.g., belching, vomiting, incontinence).</p> <p>.10 Observations made after the accused exited their vehicle. Whether police officer directed the accused to exit in order to further evaluate the accused for symptoms of impairment (<i>R. v. Visser</i>, 2013 BCCA 393) or for some other purpose (<i>R. v. Chand</i>, 2006 BCSC 617 and <i>R. v. Guillemain</i>, 2017 BCCA 328).</p> <p>.11 Comparison between the offence date and court date/other dates of observation.</p> <p>.12 Performance of physical coordination tests pursuant to <i>Criminal Code</i>, s. 320.27(1)(a). Consider admissibility and weight issues (may only go to grounds for demands).</p> <p>(a) If a demand was made for physical coordination tests prescribed by regulation or an evaluation pursuant to s. 320.27(1)(a), review pre-conditions of s. 320.27(1)(a) and the basis for all grounds for the demand (e.g., observation, witnesses, admissions, hearsay, physical tests).</p>	

ACTION TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> <li>(b) Qualifications of the officer to administer the physical coordination tests pursuant to s. 320.27(1)(a).</li> <li>(c) Whether physical coordination tests were properly administered.</li> <li>(c.1) Whether physical coordination tests were prescribed by regulation as stipulated by s. 320.27(1)(a).</li> <li>(d) Physical coordination tests—results and interpretation.</li> <li>(e) Any other tests used (consider admissibility and weight).</li> <li>(f) Describe the physical coordination 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 physical coordination 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> <li>.13 Any opinion about degree of impairment and the basis for it.</li> <li>.14 Other innocent explanations for symptoms (e.g., medical condition, disability, footwear, environmental, handcuffing).</li> <li>3.15 Details of driver’s licence.</li> <li>3.16 If an ASD demand was made pursuant to <i>Criminal Code</i>, s. 320.27(1)(b): <ul style="list-style-type: none"> <li>.1 Grounds required for demand—review the preconditions of s. 320.27(1). <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.</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 in this checklist).</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 (card used or from memory?).</li> <li>.5 Whether the accused understood the demand, and how the accused indicated comprehension (e.g., language barriers).</li> <li>.6 Was there any delay in administering the ASD test and, if so, the reason (e.g., device unavailable). (Note that if the ASD was not available at the time the demand is made, the Crown will need to establish that there were “unusual circumstances”. See “Valid roadside screening demands” under “New developments” in this checklist.</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> </ul> </li> </ul>	

ACTION TO BE CONSIDERED	NOTES
<p>.9 Whether ASD was operating properly, and whether there were tests to ensure same. Defence may consider seeking records relating to the device. See item 3.15.9 in this checklist.</p> <p>.10 Was the sample suitable to enable proper analysis by ASD.</p> <p>.11 Whether ASD mouthpiece was retained by the police. Consider making it an exhibit at trial.</p> <p>.12 Basis to seek exclusion of ASD evidence (e.g., non-compliance with the requirements of <i>Criminal Code</i>, s. 320.27(1)). Consider <i>Charter</i> issues and raise them in a timely fashion).</p> <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 Note limited use of ASD result as a basis for a <i>Criminal Code</i>, s. 320.28(1)(a) demand (<i>R. v. Orbanski</i>, 2005 SCC 37).</p> <p>3.16.1 If an approved drug screening equipment demand is made pursuant to <i>Criminal Code</i>, s. 320.27(1)(a) and (c):</p> <p>.1 Grounds required for demand—review the preconditions of s. 320.27(1).</p> <p>(a) Basis for all grounds (e.g., observation, witnesses, admissions, hearsay, discovery, and location of any drugs and/or drug paraphernalia).</p> <p>(b) Admissibility considerations regarding admissions by the accused.</p> <p>(c) Time when the grounds were formed.</p> <p>(d) Residual mouth contaminant concerns (vomiting, belching, recent ingestion).</p> <p>(e) Whether the officer had the required suspicion.</p> <p>(f) Whether the officer’s suspicion was reasonable.</p> <p>(g) Proof of care or control or operation when the suspicion was formed.</p> <p>.2 Time of demand.</p> <p>.3 Any delay in making the demand, and the reason for same.</p> <p>.4 Exact wording of the demand (was a card used, or was it from memory).</p> <p>.5 Whether the accused understood the demand, and how the accused indicated comprehension (e.g., language barriers).</p> <p>.6 Officer’s training and experience in use of the approved drug screening equipment.</p> <p>.7 Proof that the device is an ASD under <i>Criminal Code</i> regulations (<i>Approved Screening Devices Order</i>, SI/85-200).</p> <p>.8 Whether the approved drug screening equipment was operating properly, and whether there were tests to ensure same. See item 3.17.9 in this checklist.</p> <p>.9 Whether the sample was suitable to enable proper analysis by the approved drug screening equipment.</p> <p>.10 Basis to seek exclusion of the approved drug screening equipment evidence (e.g., insufficient grounds, delay). Consider <i>Charter</i> issues and raise them in a timely fashion.</p>	

ACTION TO BE CONSIDERED	NOTES
<p>.11 Result of the test and its meaning to the officer, including the officer’s understanding of mouth contaminant issues.</p> <p>3.17 If a MAS demand was made pursuant to <i>Criminal Code</i>, s. 320.27(2):</p> <ul style="list-style-type: none"> <li>.1 Time of demand.</li> <li>.2 Did the officer have the ASD in their possession? Where exactly was the ASD located when the demands were made?</li> <li>.3 Was the accused operating a motor vehicle at the time of the demand?</li> <li>.4 Exact wording of the demand (card used or from memory?). (See <i>R. v. Azram</i>, 2019 ABPC 194 on the wording necessary to effect a MAS demand.)</li> <li>.5 Whether the accused understood the demand and how the accused indicated comprehension (e.g., language barriers).</li> <li>.6 Whether there was any delay in administering the ASD test. If so, the reason.</li> <li>.7 Officer’s training and experience in the 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 Whether the ASD was operating properly, and whether there were tests to ensure same. Defence may consider seeking records relating to the device. See <i>R. v. Gubbins</i>, 2018 SCC 44 where similar records for a breathalyser were considered third party records and were not required to be disclosed unless it could be shown that they were likely relevant. See also <i>R. v. Black</i>, 2011 ABCA 349, leave to appeal refused 2012 S.C.C.A. No. 49.</li> <li>.10 Whether sample suitable to enable proper analysis by the ASD.</li> <li>.11 Whether ASD mouthpiece retained by the police. Consider making it an exhibit at trial.</li> <li>.12 Basis to seek exclusion of ASD evidence (e.g., non-compliance with the requirements of <i>Criminal Code</i>, s. 320.27(2)). Consider <i>Charter</i> issues and raise them in a timely fashion).</li> <li>.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.</li> <li>.14 Note limited use of ASD result as a basis for a s. 320.28(1)(a) demand (<i>R. v. Orbanski</i>, 2005 SCC 37).</li> </ul> <p>3.18 If a breath demand is made pursuant to <i>Criminal Code</i>, s. 320.28(1):</p> <ul style="list-style-type: none"> <li>.1 Grounds for demand—review preconditions of s. 320.28(1): <ul style="list-style-type: none"> <li>(a) Basis for all grounds (e.g., observation, witnesses, admissions, ASD result, hearsay, physical coordination tests).</li> <li>(b) Admissibility considerations regarding admissions by the accused (see item 3.16.1 in this checklist).</li> <li>(c) Whether the officer had the required belief.</li> <li>(d) Whether the officer’s belief was reasonable (see item 3.6.5 in this checklist).</li> </ul> </li> <li>.2 The timing of the demand, including practicability.</li> <li>.3 Any delay in making the demand, and the reason for same.</li> </ul>	

ACTION TO BE CONSIDERED	NOTES
<p>.4 Consideration of the impracticability of breath samples.</p> <p>.5 Exact wording of the demand (card used or from memory?).</p> <p>.6 Whether the accused understood the demand, and how that comprehension was indicated (e.g., language barriers).</p> <p>3.19 If the accused is charged under <i>Criminal Code</i>, s. 320.15(1), and it is alleged that there was an outright refusal pursuant to a demand under one of ss. 320.27(1)(a), 320.27(1)(b), 320.27(1)(c), 320.27(2), or 320.28(1) (if failure to comply, see item 4.5.13 in this checklist):</p> <p>.1 Whether the purpose and procedure was explained to and understood by the accused.</p> <p>.2 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 Person who refused request (note that if the accused refused a request from a person other than the witness, that other person might need to be called).</p> <p>.4 Whether the accused gave any reason for the refusal.</p> <p>.5 Whether accused's state of mind (e.g., shock, injury) made them unable to understand the demand.</p> <p>.6 If the accused has a poor understanding of English, whether that affected the accused's understanding of the demand, and whether there were any efforts made to find an interpreter.</p> <p>.7 Whether accused could have been physically unable to comply with the demand due to injury or illness.</p> <p>.8 Animosity between any officers and the accused.</p> <p>.9 Number of opportunities to comply provided.</p> <p>.10 If a demand for breath or bodily substance, was an approved instrument immediately available to take the sample(s)?</p> <p>.11 Whether anyone else was present at the time of the alleged refusal.</p> <p>.12 Whether there were any other potentially reasonable excuses.</p> <p>.13 If there was more than one officer present, whether their recollections of the accused's exact words in refusing the demand vary.</p> <p>3.20 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. Refer to and review the grounds required for lawful demand, and note the different requirements for demands under <i>Criminal Code</i>, s. 320.27(1) and (2) and s. 320.28(1).</p> <p>.2 Whether evidence of the results of the analysis can be excluded.</p> <p>.3 Whether evidence of refusal/failure can be excluded.</p> <p>3.21 Arrest:</p> <p>.1 Reason for arrest.</p> <p>.2 Time of arrest.</p> <p>.3 Exact wording (from card or from memory) and possible applicability of s. 10(a) of the <i>Charter</i>.</p>	



ACTION TO BE CONSIDERED	NOTES
<p>.4 The accused’s reaction and whether the accused appeared to understand, and if so, how the accused indicated comprehension (e.g., language barriers.)</p> <p>3.22 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 (e.g., language barriers).</p> <p>.4 Whether accused had a cell phone and whether they were permitted to use it. Location of nearest cell phone. Note that in <i>R. v. Patrick</i>, 2017 BCCA 57, leave to appeal refused 2017 S.C.C.A. No. 108, the court held that police officers are not required to provide their own cell phones to detained motorists to contact counsel.</p> <p>.5 Whether the accused asked to consult counsel. If so, whether the request was granted and when.</p> <p>3.23 The time the officer and accused left the scene and the method of transport.</p> <p>3.24 Explanation for any delay between police arrival at the scene and departure for the station.</p> <p>3.25 Time of arrival at the station; whether there were any delays enroute.</p> <p>3.26 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 their jurisdiction.</p> <p>.3 Whether the accused was taken to the station nearest to the scene.</p> <p>3.27 Whether the accused ate, drank, or smoked on the way to the station.</p> <p>3.28 Whether there was any further conversation in the vehicle on the way to the station. If so, how and when. Whether the conversation was recorded.</p> <p>.1 Admissibility concerns (see item 3.8.2 in this checklist).</p> <p>3.29 Events upon arrival at the station:</p> <p>.1 Continued observations of the accused’s physical condition and demeanour (see <i>R. v. Visser</i>, 2013 BCCA 393):</p> <p>(a) Whether observation was continuous throughout the process at the station.</p> <p>(b) Any belching, vomiting, consumption, etc.</p> <p>(c) Any change in symptoms.</p> <p>(d) Identify persons present with the accused throughout the process at the station.</p> <p>.2 Accused’s access and opportunity to consult counsel:</p> <p>(a) Privacy.</p>	

ACTION TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> <li>(b) Contact made with counsel. Whether the accused's choices were accommodated and how. Whether the accused or police chose to call Legal Aid.</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) Identify person or persons who decided it was time to terminate contact with counsel or efforts to contact counsel and reason for decision.</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 barriers.</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) Whether discrepancies between 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. 320.31(1).</li> <li>(c) Whether certificate dated correctly and 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 printout/check sheet/ticket.</li> <li>(e) Accurately completed notice of intention to produce, signed and dated.</li> <li>(f) True and accurate copy of evidence.</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. Reasonable notice is required of the Crown's intention to rely on this certificate (<i>Criminal Code</i>, s. 320.32(2)).</li> <li>(k) Any contradictions between the certificate and (<i>viva voce</i>) evidence.</li> </ul>	

ACTION TO BE CONSIDERED	NOTES
<p>(l) Review the certificate of analyst, including solution lot number and expiry.</p> <p>(m) There is conflicting appellate jurisprudence on whether the Crown must tender the certificate of analyst (or <i>viva voce</i> evidence on this point) if it wishes to rely on the presumption of accuracy in s. 320.31(1) of the <i>Criminal Code</i> (see the discussion “The presumption of accuracy and evidence of the alcohol standard” under “New developments” in this checklist). Reasonable notice is required of the Crown’s intention to rely on this certificate (s. 320.32(2)).</p> <p>3.30 Disposition of the accused:</p> <p>.1 Released:</p> <p>(a) Time.</p> <p>(b) Process.</p> <p>(c) Any reason for delay in release.</p> <p>.2 Lodged in cells:</p> <p>(a) Time.</p> <p>(b) For how long.</p> <p>(c) Reason.</p> <p>.3 Any s. 9 <i>Charter</i> arguments (raise in a timely fashion).</p> <p>3.31 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>3.32 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> <p>.1 Attorney General designation (consider seeing letter). Whether designation current. Note: Bill C-46, <i>An Act to Amend the Criminal Code</i> (s. 36) provided that persons designated as qualified technicians pursuant to former <i>Criminal Code</i>, s. 254(1) are deemed to have the same designation under the new s. 320.4(a).</p> <p>.2 Education.</p> <p>.3 Training.</p> <p>.4 Experience.</p> <p>.5 Review any notes (consider disclosure issue).</p> <p>.6 Consider the need for <i>viva voce</i> evidence (e.g., overcome/correct certificate defect).</p> <p>4.2 Witness involvement:</p> <p>.1 On duty on the relevant date, location.</p> <p>.2 Time the person presented.</p> <p>.3 Presented pursuant to a <i>Criminal Code</i> s. 320.28 demand.</p>	

ACTION 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 in this checklist).</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, cocky, quiet, aggressive, polite, mood swings, etc.).</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> <li>.12 Consider whether observational evidence from the qualified technician is admissible (i.e., post <i>Charter</i> rights; see <i>R. v. Visser</i>, 2013 BCCA 393).</li> </ul> <p>4.4 If demand is made by a qualified technician, see considerations under item 3.17 in this checklist.</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 and why/why not.</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) Number of samples taken.</li> </ul> </li> </ul>	

ACTION TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> <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>; if the samples were taken more than two hours after the person ceased operating the conveyance, see <i>Criminal Code</i>, s. 320.31(4)).</li> <li>(c) Whether the samples enabled proper analysis by the approved instrument.</li> <li>(d) Whether an analysis was performed by the approved instrument.</li> <li>(e) The results of the analysis.</li> <li>(f) Whether any explanation was given if more than two samples were required</li> <li>(g) Whether there was any explanation for any significant delays in taking samples.</li> <li>(h) Note preconditions to a s. 320.31(1) presumption. There is conflicting appellate jurisprudence on whether the statements in the Certificate of Qualified Technician as to the certification of the alcohol standard is inadmissible hearsay and must be proven by tendering the certificate of analyst (see the discussion of <i>R. v. Goldson</i>, 2021 ABCA 193 and <i>R. v. MacDonald</i>, 2022 YKCA 7 under “New developments” of this checklist).</li> <li>.7 Identification of standard alcohol solution/external standard and that it was certified by an analyst. This must be proven either by tendering the certificate of analyst or calling other admissible evidence to prove that the alcohol standard was so certified, under <i>Criminal Code</i>, s. 320.31(1). See item 4.5.6(h) in this checklist. Reasonable notice must be given of the Crown’s intention to rely on the certificate (s. 320.32(2)).</li> <li>.8 Standard alcohol solution/external and internal standard tests and their meaning (see item 4.5.6(h) in this checklist and <i>Criminal Code</i>, s. 320.31(1)(a)).</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 solution (if a solution was used instead of dry gas).</li> <li>(b) Mouthpiece condition.</li> <li>(c) Review printout 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 printouts. See <i>Criminal Code</i>, s. 320.33.</li> <li>(f) Was the override key used—explanation.</li> <li>(g) “Ambient Fail” or other messages, and explanation.</li> </ul> </li> <li>.10 Completion and signature of any certificate. (See item 3.29.4 in this checklist.)</li> <li>.11 Compare <i>viva voce</i> 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 3.19 in this checklist.)</li> <li>.13 Failure to comply:</li> </ul>	

ACTION TO BE CONSIDERED	NOTES
<p>(a) Was the purpose and procedure explained to and understood by the accused? Note: <i>Criminal Code</i>, s. 320.31(7) provides that the person need not be warned that they are not required to provide a sample or that the sample can be used in evidence.</p> <p>(b) Samples necessary to enable analysis.</p> <p>(c) Details of the accused’s attempts to provide samples.</p> <p>(d) Were any obstructions in the components (e.g., mouthpiece), retained as exhibits?</p> <p>(e) Was the accused physically unable to comply due to injury or illness; were there any relevant comments by the accused?</p> <p>(f) How did the accused react to the technician’s conclusion of failure?</p> <p>(g) Technician’s opinion (e.g., weak blow, blowing around mouthpiece).</p> <p>(h) Consider other possible instrument failures.</p> <p>(i) Any animosity between officers and the accused.</p> <p>(j) Number of opportunities provided.</p> <p>4.6 Seek disclosure of documentation:</p> <p>.1 <i>Criminal Code</i>, s. 320.34(1) provides that the Crown shall disclose the following information:</p> <p>(a) The results of the system blank tests;</p> <p>(b) The results of the system calibration checks;</p> <p>(c) Any error or exception messages produced by the approved instrument at the time the samples were taken;</p> <p>(d) The results of the analysis of the accused’s breath samples; and</p> <p>(e) A certificate of an analyst stating that the sample of an alcohol standard is suitable for use with an approved instrument.</p> <p>.2 Review the requirements for applications for further disclosure in <i>Criminal Code</i>, s. 320.34.</p>	