



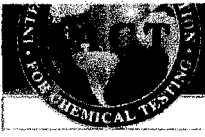
INDIANA UNIVERSITY

BORKENSTEIN
COURSE

Center for Studies
of Law in Action

Canada Bans the “Two Beers Defence”

by
J.G. Wigmore



Canada Bans the "Two Beers Defence"

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The "two beers defence" has been one of the most common defences used in Canadian criminal courts against the charge of driving with a blood alcohol concentration greater than 0.08 g/100mL. In this type of case, which is known in Ontario as *R v. Carter*, the accused impaired driver would testify as to their self-reported consumption of alcohol for the several hours prior to the offence (typically "two beers"). An expert would then testify that if the accused only had this amount to drink that the BAC (blood alcohol concentration) at the time of driving would be below 0.08 g/100mL. The defence was under no obligation to show where the evidential breath alcohol instrument was in error, but if the testimony raised a reasonable doubt, then the prosecutor (crown attorney) would lose the legal presumption and thus the case.

Self-reporting of drinking by drivers has been known for many years to be highly unreliable.^{1 2 3} One study concluded that:

'The results support the contention that the DWI offenders were misrepresenting their alcohol use and raise questions about the use of self-reports to gather such information'⁴

In order to prevent this type of scientifically invalid evidence, the Criminal Code of Canada was amended by Bill C-2 on July 2nd 2008 to restrict the use

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of the alleged drinking history of the accused as "evidence to the contrary." In order to raise evidence to the contrary in court the defence must now show that the approved instrument was malfunctioning or operated improperly and that this malfunction or improper use must be to such a degree that the BAC of the accused would be below 0.08 g/100mL.

The new law is now being contested throughout the criminal courts in Canada as "unconstitutional," as it supposedly restricts the rights of the accused to a full and complete defence. The final legal outcome of the new amendments will probably not be completely known for a few years as litigation proceeds and most likely will have to be settled by the Supreme Court of Canada. Lower criminal courts in Ontario and other provinces, however, have ruled that the changes are evidentiary in nature and as such the amendments are retroactive and are not unconstitutional.

Bill C-2 has updated Canada's impaired driving laws which have not been substantially changed since 1969. Before C-2, the police could not conduct Standardized Field Sobriety Tests (SFST) or conduct tests by Drug Recognition Experts (DRE). Blood samples could be collected by police demand only in restricted cases and only for alcohol. Both SFST and DRE are now allowed and there is a criminal charge if the suspected impaired drivers refuse to perform the tests. The collection of urine, saliva or blood is now allowed in the Criminal Code to determine the presence of drugs as part of the DRE evaluation.

The changes to the Criminal

Code of Canada by Bill C-2 are expected to give the police and prosecution valuable tools to assist in solving the problem of impaired driving by alcohol and/or other drugs. The complete Bill C-2 may be obtained at the following website: <<http://www2.parl.gc.ca/HouseBills/BillsGovernment.aspx?Language=E&Mode=1&Parl=39&Ses=2#C2>> and then click on the Royal Assent button of C-2.

References

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