

# IT.CAN NEWSLETTER

Canadian IT Law Association

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## Breathalyser "Evidence to the Contrary" Charter Challenge

Changes were made to the breathalyser provisions in the *Criminal Code* in July 2008 (see the discussion at the time in the [IT.Can newsletter](#)) which limited the ability of an accused to provide "evidence to the contrary" when a breathalyser test had shown him or her to have a blood alcohol reading of over .08%. Those provisions were challenged as violating sections 11(d) and 7 of the *Charter* in *R. v. Powichrowski* but in a very detailed and thorough decision have been upheld.

The breathalyser provisions depend on two presumptions: the presumption of accuracy and the presumption of identity. The latter presumption allows a court to conclude that an accused's blood alcohol level was the same at the time of testing and the time of driving, and was not in dispute in the case. Rather, the issue was the presumption of accuracy, which permitted a trier of fact to presume that the results of a breathalyser test accurately showed the accused's blood alcohol level "in the absence of evidence to the contrary". The particular issue addressed by the 2008 legislative change, and in issue again in *Powichrowski*, was what is known as the "Carter defence". In a *Carter* defence, the accused leads evidence as to the amount of alcohol consumed in the period prior to driving, and then leads evidence from a toxicologist to the effect that based on that level of consumption the accused's blood alcohol level would have been below .08. That evidence had been taken to constitute evidence to the contrary on the accuracy of the breathalyser reading: in essence, if the toxicologist is right, then the breathalyser must have been wrong for some

unknown reason, and so there is reasonable doubt.

Indeed, Duncan J. notes that various court decisions had made the *Carter* defence very attractive to an accused. The Supreme Court of Canada had concluded that the results of the breathalyser itself could not be used to challenge the accused's evidence to the contrary (see the discussion in the [IT.Can newsletter of the time](#)). In addition, other decisions in some provinces had eliminated the use of a roadside screening devices, roadside sobriety tests, and statements made at the roadside to rebut the *Carter* evidence. The result, Duncan J. noted, had been to make it increasingly difficult for a trial judge to reject a *Carter* defence on a reasoned and principled basis, with the result that what had initially been thought to be a faint hope had become to a defence that was difficult to deny.

The 2008 legislative changes effectively eliminated the *Carter* defence, in the sense that they specifically provided that evidence which only relied on expert testimony to show a different blood alcohol level would not on its own constitute "evidence to the contrary". Rather, the new provision required more specific evidence to show doubt about the accuracy of the breathalyser reading: specifically,

258(c)...all of the following three things - that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 mL of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 mL of blood at the time when the offence was alleged to have been committed.

To make very clear that the *Carter* defence was no longer available, section 258(d.01) provides that:

(d.01) for greater certainty, evidence tending to show that an approved instrument was

malfunctioning or was operated improperly, or that an analysis of a sample of the accused's blood was performed improperly, does not include evidence of

- (i) the amount of alcohol that the accused consumed,
- (ii) the rate at which the alcohol that the accused consumed would have been absorbed and eliminated by the accused's body, or
- (iii) a calculation based on that evidence of what the concentration of alcohol in the accused's blood would have been at the time when the offence was alleged to have been committed

The *Carter* defence had amounted to saying that a toxicologist's evidence was inferentially evidence that the breathalyser must have operated improperly: section 258(d.01) declares that a toxicologists report does not establish that point, and therefore that a judge is still bound by the presumption or accuracy. In *Powichrowski*, the accused argued that in those circumstances the presumption violated the accused's right to be presumed innocent, guaranteed by section 11(d) of the *Charter*, and his right to make full answer and defence, guaranteed by section 7. Duncan J. rejected both claims.

In considering section 11(d), Duncan J. held that the question was whether, given a breathalyser reading of over .08%, it would be unreasonable not to accept that the accused's blood alcohol level was in fact over .08%. If it would be unreasonable not to reach that conclusion, then the presumption did not violate the presumption of innocence, because the need for proof beyond a reasonable doubt would have been satisfied. After examining the evidence regarding the way in which a breathalyser – in particular the Intoxilizer 5000C, a computer based breath testing instrument specifically designed for use in Canada – was designed, he concluded that it would be unreasonable not to take its results as reliable. It was not, he concluded, that the machine could not possibly be in error, but the possibility that it would be in error and yet appear to be acting normally was virtually non-existent. He pointed at para 41 to a number of features of its design:

Unlike the earlier instruments, the Intoxilizer produces a printed record of all relevant aspects of the subject tests and matters preliminary and incidental to them. This permits later scrutiny by those not present at the time of testing. This record itself is sufficiently detailed that it permits the formation of a scientific opinion as to whether the machine functioned and was operated properly...

The machine goes through a large number of self tests both on start up and in the testing sequence itself. If there is a problem the machine will either "hang" (freeze) and not permit further steps, will display an error message and will record what occurred on the test record card...

The Canadian protocol, programmed into the machine, is to conduct a calibration or standard alcohol test mimicking the subject breath test immediately before each subject sample is taken. This is an additional check, largely external to the machine itself, not required in other jurisdictions, such as New Zealand, where the internal checks alone are deemed sufficient. This simple but important test will determine if the machine is accurately measuring samples introduced into it, quite apart from anything self-reported by the instrument. It is the primary means of assuring the accuracy of the machine...

Immediately before and immediately after the standard alcohol test (immediately before the subject test) the instrument performs a set of 10 system checks and 3 internal standard tests to ensure stability of the electronic components. These 26 tests are in addition to the tests the machine goes through at the start of the testing procedure.

The calibration tests seek a target value of between 90 and 110 mgs %. If they fall outside that range it is up to the qualified technician to recognize that. However, the results of the calibration tests appear on the test record card and if for some reason any deviant result was not noticed by the technician, it would be apparent on examination of the card....

The Canadian requirement of two samples is an additional safeguard not required in some other jurisdictions. Concordance of the results of the two samples provides additional confirmation of the accuracy of each. The additional requirement that the samples be 17 minutes apart (again, programmed into the machine) adds further weight to that confirmation.

Duncan J. concluded, on the basis of this evidence, that:

46 To have a reasonable doubt one would have to conclude that there is a reasonable possibility that scientific history was made in the testing of the defendant; that the machine passed over 50 internal checks, accurately measured the known alcohol standard and then immediately went inexplicably and unnoticeably haywire in measurement of the defendant's first sample. It then corrected itself for the second calibration test and produced the targeted result but then went inexplicably haywire again for the defendant's second test but despite the malfunction managed to give a result that was in good agreement with the first test! In my view this is fantasy, not reasonable doubt.

It would therefore be unreasonable for a trier of fact to have a doubt about the accuracy of the breathalyser reading in the absence of the type of evidence called for in the section, and so there was no violation of section 11(d).

Note that Duncan J. did hold (more or less in passing) that the new provision had to be read in a particular way in order to be constitutional. On its face, section 258(d.01) requires an accused to lead evidence of all three listed points in order to rebut the presumption of accuracy: in effect, the *Carter* defence had relied on leading evidence only about the third, that the accused's blood alcohol level was in fact below .08%. Although Duncan J. rejects the argument that evidence of that third point is sufficient, his decision seems to conclude that it is also not even necessary, despite what the provision says. He notes that:

31...if material malfunction or error is shown (or doubt raised) there would then be no reliable evidence of BAC in the case at all and

necessarily a doubt would also have been raised as to the accused being over 80 at the time of the offence. Such an interpretation is not only the proper one but also a necessary one in order to preserve the constitutionality of the section.

If this is so, then only the first listed requirement, or at most first two requirements, of section 258(d.01) need to be satisfied.

The section 7 violation was based on the claim that the accused was denied the right to full answer and defence, since he was prevented from presenting relevant evidence. Duncan J., however, held that the effect of the legislative change was not to prevent the accused leading the evidence of a toxicologist as to his blood alcohol level. The new provision only provided that such evidence was not sufficient on its own to undermine the reliability of a breathalyser defence, but section 7 did not guarantee the accused the availability of the *Carter* defence in the form it had existed. It was true that if a defence was provided for, it must not be illusory. In that event, if the possibility of rebutting the presumption of accuracy were unattainable, there would be a section 7 violation. However, Duncan J held:

69 In any event, I disagree that the defence is unattainable. As discussed above, error in the machine or its operation, if and when it occurs will almost always be apparent on the face of the test record card and readily available to the defence. In addition, the qualified technician can be produced for cross-examination providing opportunity to uncover errors he may have made. Counsel may explore any acceptable avenue by way of disclosure or production from the Crown or present its own evidence, such as the evidence of Dr Krishnan presented here, to attempt to raise a doubt. While it may be that the defendant, having explored every avenue, will be unable to meet the requirements of the section and rebut the presumption, that is what often happens when a defendant is faced with credible and reliable evidence against him.

Accordingly the new provision was upheld as constitutional.

## Compromised Secrecy: Jury Abandons Folder on Crown Desktop

The Ontario Superior Court of Justice has delivered its ruling in an application in *R v. Johnson*. The accused is charged with the second degree murder, attempted murder and two counts of discharging firearms with intent to kill. After the jury failed to reach a verdict, a mistrial was declared and a second trial is now scheduled for September 2010. In the present application, the accused seeks an order for the removal of the Assistant Crown Attorney (ACA) who prosecuted the first trial from record and from participating in the second trial for post mistrial conduct. A key issue in the failed trial for the jury was to determine whether the accused was the shooter depicted in the video of the shooting for which he was charged. All the surveillance videos that captured the incidents at a bar leading to the charge were collected on an external hard drive which was connected to the personal computer belonging to the ACA. The videos were then connected to the court room video monitoring system. The external hard drive was admitted in evidence. The video was made an exhibit which the jury could view during their deliberations. The Crown demonstrated to the jury how frames from the video surveillance images could be saved onto a computer and how they could be cut and pasted side by side one another to facilitate comparison with a view to determining the identity of the shooter or matching the latter with the accused.

Because the court was unable to provide the jury with a computer to view the images and do what was required during deliberation, the parties did not object to the ACA lending his computer to the jury after it had been cleaned up to rid it of any documents. After the jury did not reach a verdict, and a mistrial was declared, the computer was returned to the ACA. When the ACA turned on the computer, he discovered a folder under the name of "Jury Work" on the desktop. He opened the folder and found that it contained several Excel documents, all of which he opened. It turned out that inside each of them were images which the jury had transposed from the surveillance video on the external drive, and arranged in juxtaposition to one another. It was agreed by the parties that the folder only revealed jury concern

with the identity of the shooter and that should the ACA prosecute the case, his seeing the documents would be of no impact.

In agreeing with the applicant's argument for the removal of the ACA from further trial of the case, the court noted that the fact that the ACA did not know he was acting improperly by viewing the files was a matter of concern. Also, the fact that parties agreed that ACA's access to the documents would be of no impact to how he prosecutes the case was not the issue. Rather, the court observed that from the time the ACA "saw the folder entitled "Jury Work" on his desk top, and throughout his exploration of the folder's contents, it had to have been obvious to him that he was not looking at exhibits but rather at materials that the jury had created. All of the material are well within the boundaries of "the deliberation process", all of it was protected by the guarantee of secrecy" (para 13). According to the court, anything short of disallowing the ACA from further participating in the prosecution of the case "would send the wrong message both to the justice system participants and to the general public" (para 23).

## Dispensing Contact Lenses via the Internet

The British Columbia Court of Appeal has delivered its ruling in *College of Opticians of BC v. Coastal Contacts Inc*. The appellants appealed the dismissal of their application in which they sought to enjoin the respondents from selling prescription contacts lenses to the BC public over the internet. According to the appellants, the practice of the respondent contravened some sections of the *Opticians Regulation, BC* (the *Regulation*). Specifically, the appellants alleged that the respondents were fitting lenses within the definition of the *Regulation* without appropriate supervision as required by the *Regulation*. Also, the appellants claimed that by not requiring prescription verification from its patrons, the respondents were in contravention of the *Regulation*. In its internet business model, the respondents only required customers to certify that they held valid prescription for the contact lenses they ordered/purchased. In addition, customers were required to provide some information on their prescription which can be taken from elsewhere in the manufacturer's box other than the actual

prescription. The Chambers Judge rejected the arguments of the appellants and found that the respondents were not in breach of the sections of the Regulation relied upon by the appellants in their bid to enjoin the respondents.

In allowing the appeal, the Court of Appeal (Neilson, Finch, JJA) agreed with the appellants that the *Regulation* in question requires that a person dispensing contact lenses verify customer's prescription independent of how and what the customer represented the prescription. In the internet model, the respondents only require the customer to provide a self-reported and limited detail of a prescription which the respondents do not actually see. In addition, the respondents disclaim all liability for the product they dispense. For the Court, "the fact that a prescription must be a written record implies that it must be seen by the dispenser" (para. 21). Also, "the information on a manufacturer's box [from current contact lens] is not a "prescription"" (para. 24). The Court noted that Chambers Judge was right in holding that central objective of the *Regulation* is to protect the public by ensuring that only qualified professionals dispensed contact lenses and "to preclude a wide monopoly that would unnecessarily drive up costs for consumers on sales that do not require significant professional intervention" (para. 33).

The court held that a case has been made to enjoin the respondents for breach of the *Regulation*. But cognizant of the objective of the *Regulation* as articulated by the Chambers Judge, the Court of Appeal granted the injunction sought but suspended its operation for six months (May 1, 2010) within which the respondent is required to devise a business model that complies with the *Regulation*. The court noted that "Internet sales of optical lenses are consistent with that second objective [i.e. prevention of cost escalation]. Section 6(5) of the *Regulation* entitles customers to receive copies of their prescription. In the age of electronic communication, the respondents may be able to devise a business model that satisfies the *Regulation* ... they should be given an opportunity to do so, rather than be required to cease operations peremptorily" (para. 33)

P.D. Lowry, JA (dissenting).

## Estate Procedure: Courts Drowning in Paper in Electronic Age

The Ontario Superior Court has delivered its ruling *In the Matter of the Estate of Michael Joseph O'Flynn (deceased)*. The applicant, represented by counsel, applied for a certificate of appointment as estate trustee without a will for the estate of his deceased brother. All other beneficiaries were the deceased's siblings, and each of them signed documents titled "Renunciation and Consent to Applicant's Appointment as Estate Trustee without a Will" in which they renounced any right to act as estate trustee and granted consent to the applicant to be so appointed. They also consented to the dispensing of administration bond. The Estate Registrar has approached the Court for direction in regard to the veracity of sending out a deficiency notice to the applicant's solicitor pursuant to Rule 74.05 which required that the renunciation and consent must be done by separate forms, a situation that will result in a delay. Meanwhile, even though the applicant used one form for renunciation and consent for each of the beneficiaries, the information they submitted using one form is the same as those they would submit if they had used two forms each as required under the *Rules*.

The court (D.M. Brown, J) held the forms prescribed under the *Rules* (Forms 74.18 and 74.19) "are very simple in content and I see no danger to the integrity of the court's process in permitting an applicant to combine the information contained in each prescribed form into one document. On the contrary, there is definite advantage to the court in so doing. Unfortunately, the Superior Court of justice still operates in a paper-based environment. In the age of sophisticated information technology, our court lags far, far behind the acceptable norm for electronic communication and, I believe, we thereby fail to provide the public with the appropriate level of choice in regard to the various modes, or options, of filing documents. Instead, we drown in paper" (para 6).

## Estate Procedure: “Snail Mail” vs. Electronic Mail

The Ontario Superior Court has delivered its ruling *In the Matter of the Estate of William Woodrow Charles (deceased)*. The applicant, through counsel, had applied to the Toronto Region Estates Office for a certificate of appointment as estate trustee. It is customary for staff of the office to review the material filed for compliance with the *Rules*. Where the material is deficient, a correction notice identifying the deficiencies is sent to the applicant, who is then requested to submit further or corrected materials. Pursuant to the *Rules*, where the applicant fully complies, the certificate of appointment is issued. In the present case, three correction notices were mailed and four responding letters issued by applicant counsel. Most of these transactions were either lost or delayed via regular mail. On reference from the Estates Registrar, the court is asked to decide whether pursuant to Rule 74.14(2) of the *Rules of Civil Procedure* the Estate Office has to continue relying on regular or “snail” mail to communicate with applicant’s counsel on the issue of the completeness of this file, or whether it can send out the proposed correction notice by e-mail.

Answering the question in the affirmative, the court observed that the present process raises questions as to “why applicants must be subjected to multiple correction notices issued *seriatim*, instead of receiving one comprehensive corrections notice after initial filing” (para. 7). According to the court, there is no reason under the *Rules of Civil Procedure*, which is intended for efficient administration of justice, why an e-mail would not be used for this kind of communication. The court noted that “time has come to recognize the stark reality that our court, for whatever reason, lags unacceptably behind in the use of electronic communications with our court users. Why this is so remains, for me, a mystery. Law firms, our major users, have embraced electronic media to provide information to potential clients and to service existing clients ... Some provincial tribunal such as the Ontario Energy Board, offer parties to proceedings before them comprehensive e-filing services. To which one must ask: why not our courts too?” (para. 12).

## Pharmaceutical Patent: Notice of Compliance

The Supreme Court of Canada has dismissed an application for leave to appeal the decision of the Federal Court of Appeal in *Eli Lilly Canada v. Apotex Inc* (hyperlink not available). The appellants applied pursuant to the *Patented Medicine Notice of Compliance (NOC) Regulation* for an order to prohibit the Minister of Health from issuing an NOC to Apotex for a drug containing raloxifene, which is used in the treatment or prevention of osteoporosis, especially in post-menopausal women, pending the expiry of Eli Lilly’s patent ‘356. The drug is also used in treatment of breast cancer, but had not been invented by Eli Lilly save that the latter claims to have developed a new use for an old medicine pursuant to its patent under reference. Apotex’s argument was that five claims of ‘356 patent were invalid on a number of grounds, including anticipation, obviousness, sound prediction, overbreadth, sufficiency of disclosure and ambiguity. It claimed that the drug would treat or prevent osteoporosis or inhibit bone loss in post-menopausal females without eliciting significant estrogenic response in primary sex tissues. There was evidence of prior art which disclosed similar information regarding raloxifene. At the court of first instance (Federal High Court, Trial Division) the applicant’s application was dismissed—a decision upheld by the Federal Court of Appeal. In the present application, the Supreme Court dismissed Eli Lilly’s application for leave without assigning reasons.

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This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Robert Currie, Chidi Oguamanam and Stephen Coughlan at [it.law@dal.ca](mailto:it.law@dal.ca).

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Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Robert Currie, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : [it.law@dal.ca](mailto:it.law@dal.ca)

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