



NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

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AMENDMENTS TO SECTION 258(1) OF THE CRIMINAL CODE

(Per Bill C-2, 2008)

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Amendments to Section 258(1) of the Criminal Code (per Bill C-2, 2008)

Amendments to Section 258 (1) of the Criminal Code, effective July 2, 2008 impact the "Carter" defence in certain "over 80" prosecutions. A question has arisen as to whether or not these amendments are retrospective i.e. do they apply to offences which occurred before July 2, 2008 and which are still before the courts? **It is the position of the PPS that these amendments are procedural/evidentiary in nature and thus are retrospective**, there being no contrary intention expressed by Parliament.

The relevant amendments may be summarized as follows:

1. Subsections 258(1)(c) and (d.1) have been amended to provide that the results of the blood or breath analysis is conclusive proof of an accused's blood-alcohol concentration at the time of the offence, in the absence of evidence tending to show that: (i) the approved instrument malfunctioned or was improperly operated; (ii) the malfunction or improper operation of the approved instrument resulted in the determination that the blood alcohol concentration exceeded eighty milligrams of alcohol in 100 millilitres of blood; and, (iii) the accused's blood-alcohol concentration would not have exceeded eighty milligrams of alcohol in 100 millilitres of blood at the time of the offence.

2. Subsection 258(1)(d.01) has been added to the Criminal Code to provide that, for greater certainty, evidence sufficient to meet the criteria in (i) and (ii) in paragraph 5 supra [regarding instrument malfunction or improper operation], cannot include evidence of the amount of alcohol the accused consumed, the rate at which the alcohol would have been absorbed and eliminated from the body of the accused, or a calculation based on such information as to the accused's blood-alcohol concentration at the time of the alleged offence.

3. Subsection 258(1)(d.1) has been amended to provide that where the analysis reveals a blood-alcohol concentration exceeding eighty milligrams of alcohol in 100 millilitres of blood, evidence of the results is proof that the blood-alcohol concentration exceeded eighty milligrams of alcohol in 100 millilitres of blood at the time of the alleged offence, in the absence of evidence tending to show that the accused's alcohol consumption was consistent with both a blood-alcohol concentration that did not exceed eighty milligrams of alcohol in 100 millilitres of blood at the time of the alleged offence, and the blood-alcohol concentration revealed in the analysis.

Note:

There are now a number of trial-level judgments e.g. *R. V. Delorey*, 2009 NSPC 1 (per Sherar, PCJ), supporting the PPS position. A search of current reported cases is recommended.