



*BREATHALYZER LAW IN CANADA* — 2nd Edition  
By R.M. McLeod, J.D. Takach, and M.D. Segal  
Toronto: Carswell Company Ltd. 1982

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It has been a decade since Messrs. McLeod and Takach published the first edition of *Breathalyzer Law In Canada*. Since that time, there have been important developments in breathalyzer law. Foremost among these developments was the *Criminal Law Amendment Act*<sup>1</sup> of 1975 which introduced the offense of failing or refusing to provide a roadside sample of breath<sup>2</sup>, equalized the penalties for the four "impaired" offenses<sup>3</sup>, and enacted evidentiary and procedural changes. More recently, the adoption of an entrenched Charter of Fundamental Rights and Freedoms in 1982<sup>4</sup> will have important ramifications on criminal procedure in general, and evidentiary presumptions in breathalyzer law in particular<sup>5</sup>.

In 1981, the original authors, joined by Mr. M. Segal, updated the original 1973 text. Long overdue, this supplement was in excess of 200 pages, and while well cross-indexed, its sheer bulk left it somewhat unmanageable.

With the second edition, however, the authors have not only updated the relevant case law, they have also structured the book in a loose leaf format which will be complemented by regular service releases<sup>6</sup>. Given the volatile area of the law, the extensive ongoing litigation concerned, and possible "charter" effects, it was indeed a wise decision to adopt this type of format.

The material comprising the second edition is basically a continuation of the first edition<sup>7</sup> and its supplement<sup>8</sup>, in a more manageable form. The book is divided by tabs into eleven major parts. Where applicable, each part has been further divided into chapters, and each chapter into sections and subsections. The ordering is logical, and almost exactly the same as the earlier edition.

The first two parts are the Table of Cases, and the Statute key. For some reason, only a minority of the cases have been fully cited in the case list, while in the text, all cases referred to are fully cited. For consistency, a uniform approach to case citation is preferable, and given that the cases cited refer only to a particular subject area in the text, rather than to a page number, a full citation would make this table much more useful for quick reference.

The next four parts, including chapters one through seven, comprise the main body of the text, and deal with the four offenses which exist in the *Criminal Code* relating to "impaired driving". They are, in order of their treatment: impaired driving s.234; failing or refusing to comply with a roadside screening device s.234.1; failing or refusing to comply with a breathalyzer

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1. *Criminal Law Amendment Act*, S.C. 1974-75-76 c.93.

2. Now s.235.1 of the *Criminal Code*, R.S.C. 1970 C.c-34 en. 1974-75-76 c.93 s.15.

3. *Criminal Code*, R.S.C. 1970 C.c-34 sectins 234, 234.1, 235(2), and 236.

4. The historic date being April 17, 1982.

5. See for example, the unsuccessful challenge that the evidence of a breathalyzer reading was inadmissible on the grounds that it breached section 11(c) of the Charter which prohibits the compellability of a person as a witness against himself, in *R. v. Holman* (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.).

6. The first such release came approximately six months after initial publication.

7. *Breathalyzer Law in Canada* (1973) McLeod, Takach & Co.

8. *Breathalyzer Law in Canada: Supplement* (1981) Carswell Co. Ltd.

demand s.235(2); and driving (care or control) "over .08" s.236. Treatment of these areas proceeds by introduction of the relevant legislation, and then breaking it down into its component parts and annotating those specific parts which have given rise to litigation by use of numerous cases. The nature of the issue involved is largely factual, hence there is much more case quotations than one would encounter in a discussion of a legal point. This is not a shortcoming on the part of the authors, but rather a reflection of the nature of the issues which have arisen with respect to these offenses. Their point is better made by example than by discussion.

The part that follows, comprising chapters eight through seventeen, is the lengthiest in the book, and deals with the evidentiary rules and presumptions applicable by s.237 to prosecutions of offenses under sections 234 and 236. Each sub heading of s.237 is carefully and thoughtfully explored in its own chapter. Here, too, I found the discussion to be of a limited nature, but where included, it was succinct.

In the next part, entitled "Penalties" (chapter 18), a perhaps too concise discussion of issues which arise subsequent to a conviction is included. The chapter is divided into five issues affecting the penalty ultimately meted out. They are: the imposition of a fine; imprisonment; proof of previous convictions; prohibition and/or suspension of driver's license; and conditional discharge for curative treatment.

I feel the sections on "fines" and "imprisonment" are treated too quickly, and do not have sufficient case law to allow the inexperienced practitioner to judge the parameters of sentencing. While each sentence or fine imposed on an offender depends upon the particular fact situation of the offense, as well as the offender's prior record, some examples would perhaps allow the reader to better anticipate consequences, which can be of vital importance in not only advising the client, but in plea bargaining as well.

Chapters nineteen and twenty which follow, include essays which deal with the mechanics of how the breathalyzer and roadside screening device work. Both chapters, written by D.M. Lucas, I found to be both well structured and informative. The inclusion of these two essays, while not strictly necessary for a good grasp of the law, is certain to make the practitioner more comfortable in examining the expert technician should the occasion arise. As well, the chapters will give to the reader a measure of familiarity with the proper operation and limits of the breathalyzer devices.

The second last part that follows is a series of checklists which the Crown would cover in prosecutions under sections 234, 234.1, 235(2), and 236. For the practitioner who deals with "impaired driving" cases on a regular basis, and who has established his own effective method of cross-examination, these checklists will do little more than remind him of areas which will likely be covered by the Crown Attorney. To those not familiar with courtroom procedure in this area, the list will be very helpful in assessing the best mode of attacking the Crown's case. While a checklist of points to cover on cross-examination is not included, most of the fruitful areas of cross-examination should present themselves as the Crown witness responds to the direct examination.

The final part of the book consists of a collection of 14 appendices, most notably including the relevant statutory amendments, sample certificates and designations of a qualified technician and of an analyst, a sample notice of increased penalty, and a sample notice of intention to produce certificate evidence. There is no mention in this part on how to attack the results' and samples' validity, but this can be found in the main body of the text. The inclusion of these appendices is useful in that familiarity with these documents may be of some benefit to the inexperienced practitioner.

On the whole, while critical analysis is lean, the volume of cases cited allows one to pursue the historical development of the law regarding the issue in question. Thus one would be well advised not to read only portions of a section. While the annotated form appears to be amenable to such an approach, failure to read on could result in an embarrassing moment in court. The nature of a historical analysis unavoidably includes cases which were, but are no longer "the law". A few of the cases cited, and quoted at length, are specifically and explicitly overruled a few pages later. For example, a passage from *R. v. McPhee*, *R. v. Mullon* (1975) 30, C.R.N.S. (Ont. C.A.), is quoted at paragraph 1.6 of chapter 1. It is only a few pages later, however, that we learn that this particular passage was specifically disapproved of by the recent Supreme Court of Canada case of *Ford v. The Queen* (1982), 40 N.R.451 (S.C.C.).

There are those who would object to the author's inclusion of pages of cases on what "the law" is not, but I would expect that the reader will have a better perspective on the issues involved, after reading a broad collection of cases on which the law has developed. I see nothing wrong with their inclusion.

It was disappointing not to find in such a practical text, a chapter devoted to plea bargaining. While plea bargaining practise is highly subjective, varying from one Crown Attorney to the next, there must be some statistics relevant essays, or helpful hints that the experienced authors could share with the reader.

It is also worthy of mention that the entrenched charter has received no attention in this work as of yet. I would hope that as litigation regarding the Charter increases, future releases will incorporate the more important of these cases either in the body of the text, or, more preferably, (due to the volume of constitutional challenges which can be expected), in a new section devoted to the Charter.

In conclusion, the small proportion of text devoted to overview and commentary makes this book more useful to the practitioner than to the student. As well, the nature of the text makes the work relatively more valuable to the inexperienced practitioner than the experienced one.

The object of the book is stated in the preface to be "a guide and . . . a collection and organization of the case law for members of the Bar and others involved in the administration of justice". In achieving this goal, the authors do an admirable job. This book is a good reference tool.