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How long is “as soon as practicable” when an officer is making a breath demand from a detainee?

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Memorandum of Law

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Criminal law—Offences—Driving/care and control with excessive alcohol—Presumption of alcoholic content at time of offence—Sample taken as soon as practicable

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No fact summary provided.

Cases Cited:

R. v. Amirthalingam (2007), 165 C.R.R. (2d) 1, 2007 ONCJ 529, 2007 CarswellOnt 7384, [2007] O.J. No. 4437 (Ont. C.J.)

R. v. Anderson (2005), 2005 CarswellOnt 1878, [2005] O.J. No. 1900 (Ont. C.A.)

R. v. Ashby (1981), 37 N.R. 393 (S.C.C.)

R. v. Ashby (1980), 57 C.C.C. (2d) 348, 1980 CarswellOnt 28, 9 M.V.R. 158 (Ont. C.A.)

R. v. Barrick (1998), 1998 CarswellOnt 3193, [1998] O.J. No. 3252, 36 M.V.R. (3d) 258, 55 C.R.R. (2d) 327 (Ont. Gen. Div.)

R. v. Bazil (2012), 2012 CarswellBC 647, 2012 BCSC 274, [2012] B.C.J. No. 366 (B.C. S.C.)

R. v. Beckler (2013), 2013 BCSC 1697, 52 M.V.R. (6th) 256, 291 C.R.R. (2d) 127, 292 C.R.R. (2d) 1, [2013] B.C.J. No. 2021, 2013 CarswellBC 2767 (B.C. S.C.)

R. v. Bisset (1993), [1993] O.J. No. 2319, 1993 CarswellOnt 5426 (Ont. Prov. Div.)

R. v. Bloom (2011), 2011 CarswellOnt 2146, [2011] O.J. No. 1472 (Ont. C.J.)

R. v. Breland (2011), [2011] S.J. No. 405, 373 Sask. R. 130, 2011 SKPC 54, 2011 CarswellSask 448 (Sask. Prov. Ct.)

R. v. Burwell (2015), [2015] S.J. No. 172, 323 C.C.C. (3d) 1, 2015 CarswellSask 196, 2015 SKCA 37, 76 M.V.R. (6th) 4, [2015] 5 W.W.R. 448 (Sask. C.A.)

R. v. Carriere (2010), 2010 CarswellSask 563, 2010 SKPC 118, 1 M.V.R. (6th) 262, 363 Sask. R. 76, [2010] S.J. No. 499 (Sask. Prov. Ct.)

R. v. Carter (1981), 9 Sask. R. 1, 1981 CarswellSask 2, 10 M.V.R. 187, 59 C.C.C. (2d) 450, [1981] S.J. No. 1337 (Sask. C.A.)

R. v. Charette (2009), 189 C.R.R. (2d) 341, 2009 ONCA 310, 2009 CarswellOnt 1946, 94 O.R. (3d) 721, 247 O.A.C. 369, 79 M.V.R. (5th) 1, 243 C.C.C. (3d) 480, 65 C.R. (6th) 224, [2009] O.J. No. 1506 (Ont. C.A.)

R. v. Clarke (1991), 27 M.V.R. (2d) 1, [1991] O.J. No. 3065, 1991 CarswellOnt 3 (Ont. C.A.)

R. v. Coverly (1979), 21 A.R. 233, 50 C.C.C. (2d) 518 at 523, 1979 CarswellAlta 468 (Alta. C.A.)

R. v. Crewson (2014), 2014 ONSC 4311, [2014] O.J. No. 3593, 2014 CarswellOnt 10356 (Ont. S.C.J.)

R. v. Damoff (2013), 2013 ONCJ 422, [2013] O.J. No. 3461, 2013 CarswellOnt 10545, 48 M.V.R. (6th) 338 (Ont. C.J.)

R. v. Davidson (2005), 2005 CarswellOnt 3708, [2005] O.J. No. 3474, 23 M.V.R. (5th) 77, [2005] O.T.C. 716 (Ont. S.C.J.)

R. v. Dolezsar (2012), 2012 CarswellSask 89, [2012] S.J. No. 95, 2012 SKQB 6, 28 M.V.R. (6th) 183, 394 Sask. R. 60 (Sask. Q.B.)

R. v. Fiander (1989), 1989 CarswellNfld 298, [1989] N.J. No. 340 (Nfld. T.D.)

R. v. Fisher (1995), [1995] A.J. No. 1299, 1995 CarswellAlta 1170 (Alta. Prov. Ct.)

R. v. Fletcher (2013), 2013 ONCJ 396, [2013] O.J. No. 3361, 2013 CarswellOnt 10026 (Ont. C.J.)

R. v. Forsythe (2010), 268 Man. R. (2d) 318 (note), 520 W.A.C. 318 (note), [2010] S.C.C.A. No. 60, 2010 CarswellMan 307, 2010 CarswellMan 308, 409 N.R. 392 (note), 254 C.C.C. (3d) vi (note), [2010] 1 S.C.R. ix (note) (S.C.C.)

R. v. Forsythe (2009), 251 Man. R. (2d) 90, 478 W.A.C. 90, 91 M.V.R. (5th) 7, [2010] 4 W.W.R. 90, 2009 MBCA 123, 2009 CarswellMan 570, 250 C.C.C. (3d) 90, [2009] M.J. No. 438 (Man. C.A.)

R. v. Franklin (1997), [1997] A.J. No. 760, 221 A.R. 356, 1997 CarswellAlta 1248 (Alta. Q.B.)

R. v. Friesen (2012), 2012 CarswellSask 901, [2012] S.J. No. 825, 407 Sask. R. 282, 2012 SKQB 488 (Sask. Q.B.)

R. v. Green (1991), 108 N.S.R. (2d) 181, 294 A.P.R. 181, 1991 CarswellNS 384, [1991] N.S.J. No. 648 (N.S. Prov. Ct.)

R. v. Hayward (2009), 2009 CarswellBC 3268, 2009 BCPC 350, [2009] B.C.J. No. 2399 (B.C. Prov. Ct.)

R. v. Inataev (2015), [2015] O.J. No. 1561, 2015 CarswellOnt 4218, 2015 ONCJ 166 (Ont. C.J.)

R. v. Keddy (1995), 19 M.V.R. (3d) 72, 147 N.S.R. (2d) 171, 426 A.P.R. 171, 1995 CarswellNS 283, [1995] N.S.J. No. 526 (N.S. S.C.)

C *R. v. Krivoblocki* (2010), 356 Sask. R. 153, 2010 SKQB 76, 2010 CarswellSask 117 (Sask. Q.B.)

R. v. Kubas (1997), [1997] O.J. No. 4230 (Ont. Gen. Div.)

R. v. Letford (2000), [2000] O.J. No. 4841, 51 O.R. (3d) 737, 139 O.A.C. 387, 8 M.V.R. (4th) 6, 2000 CarswellOnt 5034, 150 C.C.C. (3d) 225 (Ont. C.A.)

R. v. Litwin (1997), 1997 CarswellOnt 3925, [1997] O.J. No. 4242, 30 M.V.R. (3d) 152 (Ont. Prov. Div.)

C *R. v. MacEachern* (1982), 1982 CarswellBC 444, [1982] B.C.J. No. 979, 18 M.V.R. 31 (B.C. Co. Ct.)

C *R. v. Mailey* (2009), 2009 CarswellAlta 2107, 2009 ABPC 364 (Alta. Prov. Ct.)

H *R. v. Marchildon* (2013), [2013] O.J. No. 5039, 57 M.V.R. (6th) 128, 2013 ONSC 6876, 2013 CarswellOnt 15401, 295 C.R.R. (2d) 337 (Ont. S.C.J.)

C *R. v. Mario* (2010), 36 Alta. L.R. (5th) 110, 2010 CarswellAlta 2018, 2010 ABPC 305, [2010] A.J. No. 1163, 4 M.V.R. (6th) 101 (Alta. Prov. Ct.)

C *R. v. McCarthy* (2013), 2013 ONSC 599, 42 M.V.R. (6th) 114, [2013] O.J. No. 467, 2013 CarswellOnt 1158 (Ont. S.C.J.)

H *R. v. McCorriston* (2009), 2009 MBQB 7, 2009 CarswellMan 6, 184 C.R.R. (2d) 330, [2009] M.J. No. 12, 235 Man. R. (2d) 141 (Man. Q.B.)

H *R. v. McCorriston* (2010), 478 W.A.C. 106, 251 Man. R. (2d) 106, [2010] M.J. No. 2, 2010 MBCA 3, 2010 CarswellMan 1, [2010] 6 W.W.R. 218, 90 M.V.R. (5th) 70, 251 C.C.C. (3d) 102 (Man. C.A. [In Chambers])

R. v. McDougall (2013), 2013 CarswellSask 913, 2013 SKQB 358, 55 M.V.R. (6th) 183, 430 Sask. R. 173, [2013] S.J. No. 791 (Sask. Q.B.)

R. v. Mena (2012), 278 C.R.R. (2d) 138, 2013 ONCJ 286, 2012 CarswellOnt 17344, [2013] O.J. No. 1075 (Ont. C.J.)

R. v. Merritt (1997), [1997] O.J. No. 4229 (Ont. Prov. Div.)

C *R. v. Mikan* (1994), 1994 CarswellOnt 7368 (Ont. Prov. Div.)

R. v. Middlebrook (1995), [1995] A.J. No. 975, 1995 CarswellAlta 1194 (Alta. Prov. Ct.)

H *R. v. Naidu* (2010), [2010] B.C.J. No. 1188, 2010 BCSC 851, 2010 CarswellBC 1489, 95 M.V.R. (5th) 91 (B.C. S.C.)

C *R. v. Noel* (2015), [2015] O.J. No. 1757, 79 M.V.R. (6th) 245, 2015 ONSC 2140, 2015 CarswellOnt 5064 (Ont. S.C.J.)

R. v. Parkin (2015), [2015] A.J. No. 395, 2015 ABPC 76, 2015 CarswellAlta 634 (Alta. Prov. Ct.)

R. v. Pauls (1994), [1994] A.J. No. 289, 4 M.V.R. (3d) 199, 1994 CarswellAlta 306 (Alta. Prov. Ct.)

C *R. v. Payne* (1990), 23 M.V.R. (2d) 37, 1990 CarswellOnt 13, [1990] O.J. No. 639, 38 O.A.C. 161, 56 C.C.C. (3d) 548 (Ont. C.A.)

R. v. Phillips (1988), 4 M.V.R. (2d) 239, 1988 CarswellOnt 65, 27 O.A.C. 380, 64 C.R. (3d) 154, 42 C.C.C. (3d) 150, 44 C.R.R. 244, [1988] O.J. No. 415 (Ont. C.A.)

R. v. Plonka (2008), [2008] B.C.J. No. 1282, 2008 BCSC 881, 2008 CarswellBC 1410 (B.C. S.C.)

R. v. Poohachoff (2012), 2012 BCPC 68, 2012 CarswellBC 713, [2012] B.C.J. No. 495 (B.C. Prov. Ct.)

R. v. Purdon (1989), 19 M.V.R. (2d) 129, 100 A.R. 313, 52 C.C.C. (3d) 270, [1989] A.J. No. 1030, 1989 CarswellAlta 229 (Alta. C.A.)

R. v. Rasmussen (1981), 1981 CarswellBC 348, 13 M.V.R. 138, [1981] B.C.J. No. 2079, 33 B.C.L.R. 25, 64 C.C.C. (2d) 304 (B.C. C.A.)

R. v. Reid (2001), 2001 CarswellOnt 3908, [2001] O.J. No. 4285 (Ont. C.J.)

R. v. Reid (2013), 2013 SKPC 62, [2013] S.J. No. 219, 2013 CarswellSask 243, 419 Sask. R. 164 (Sask. Prov. Ct.)

R. v. Rilling (1975), [1976] 2 S.C.R. 183, 24 C.C.C. (2d) 81, 1975 CarswellAlta 81, 1975 CarswellAlta 140, 31 C.R.N.S. 142, [1975] 6 W.W.R. 626, 5 N.R. 327, 60 D.L.R. (3d) 128, [1975] S.C.J. No. 72 (S.C.C.)

R. v. Seed (1998), [1998] O.J. No. 4362, 1998 CarswellOnt 4176, 38 M.V.R. (3d) 44, 114 O.A.C. 326 (Ont. C.A.)

R. v. Shepherd (2009), 194 C.R.R. (2d) 86, 2009 SCC 35, 2009 CarswellSask 430, 2009 CarswellSask 431, 81 M.V.R. (5th) 111, [2009] S.C.J. No. 35, [2009] 8 W.W.R. 193, 66 C.R. (6th) 149, 245 C.C.C. (3d) 137, 460 W.A.C. 306, 331 Sask. R. 306, [2009] 2 S.C.R. 527, 309 D.L.R. (4th) 139, 391 N.R. 132 (S.C.C.)

R. v. Shin (2007), 2007 ONCJ 20, 2007 CarswellOnt 141, [2007] O.J. No. 125 (Ont. C.J.)

R. v. Sicord (2014), 2014 CarswellOnt 11890, 2014 ONSC 5004, [2014] O.J. No. 3990 (Ont. S.C.J.)

R. v. Singh (2014), [2014] O.J. No. 1858, 2014 ONCA 293, 2014 CarswellOnt 4953, 120 O.R. (3d) 76, 310 C.C.C. (3d) 285, 64 M.V.R. (6th) 1, 318 O.A.C. 232 (Ont. C.A.)

R. v. Squires (2002), 2002 CarswellOnt 1891, 7 C.R. (6th) 277, 24 M.V.R. (4th) 172, 159 O.A.C. 249, 166 C.C.C. (3d) 65, 59 O.R. (3d) 765, [2002] O.J. No. 2314 (Ont. C.A.)

R. v. St. Jean (2012), 2012 ONCJ 378, [2012] O.J. No. 2684, 2012 CarswellOnt 7687, 35 M.V.R. (6th) 335 (Ont. C.J.)

R. v. Sullivan (2008), 2008 BCSC 1865, 2008 CarswellBC 3090, [2008] B.C.J. No. 2724 (B.C. S.C.)

R. v. Van der Veen (1988), 89 A.R. 4, 1988 CarswellAlta 131, [1988] A.J. No. 710, 61 Alta. L.R. (2d) 175, 44 C.C.C. (3d) 38, 11 M.V.R. (2d) 251 (Alta. C.A.)

R. v. Vanderbruggen (2006), 2006 CarswellOnt 1759, 29 M.V.R. (5th) 260, 206 C.C.C. (3d) 489, [2006] O.J. No. 1138, 208 O.A.C. 379 (Ont. C.A.)

R. v. Walmsley (2008), 2008 CarswellBC 2538, 2008 BCSC 1625, [2008] B.C.J. No. 2299 (B.C. S.C.)

R. v. Wetzel (2011), 2011 SKPC 9, [2011] S.J. No. 8, 2011 CarswellSask 5, [2011] 5 W.W.R. 657, 7 M.V.R. (6th) 124 (Sask. Prov. Ct.)

R. v. Wetzel (2012), [2012] S.J. No. 54, 2012 SKQB 24, 2012 CarswellSask 68, 28 M.V.R. (6th) 224, [2012] 8 W.W.R. 395, 391 Sask. R. 112 (Sask. Q.B.)

R. v. White (2015), [2015] A.J. No. 685, 2015 CarswellAlta 1114, 2015 ABPC 77 (Alta. Prov. Ct.)

R. v. Whitesell (1998), 1998 CarswellBC 249, 32 M.V.R. (3d) 318, [1998] B.C.J. No. 303 (B.C. S.C.)

R. v. Willette (2011), 11 M.V.R. (6th) 273, 2011 CarswellOnt 672, 2011 ONSC 1055, [2011] O.J. No. 504 (Ont. S.C.J.)

R. v. Yamka (2009), 2009 CarswellOnt 7414, 2009 ONCJ 528 (Ont. C.J.)

Statutes Cited:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
- generally
- s. 7

Criminal Code, R.S.C. 1985, c. C-46
- generally
- s. 253
- s. 254
- s. 254(3) [rep. & sub. 2008, c. 6, s. 19(3)]
- s. 258
- s. 258(1)(c)(ii)

Traffic Safety Act, S.S. 2004, c. T-18.1
- s. 280(1)
- s. 280(1)(a)(ii)

Commentary Considered:

R.M. McLeod, Judge J.D. Takach, Murray D. Segal, *Breathalyzer Law in Canada: The Prosecution and Defence of Drinking and Driving Offences*, 4th ed. (Toronto: Carswell, 2009)

Alan D. Gold, *Drinking & Driving Law*, looseleaf (Toronto: Carswell, 2015)

Alan D. Gold, *Defending Drinking & Driving Cases 2010*, looseleaf (Toronto: Carswell, 2010)

CONCLUSION:

It is clear that some level of delay is acceptable in assessing the “as soon as practicable” requirement. It is equally clear that the greater the delay, the greater the need for a suitable explanation for that delay.

Given the countless factors that may contribute to a delay and the many possible legal arguments that derive from them, this already large body of case law will continue to grow and counsel must be alert to the almost daily developments in this area.

ANALYSIS:

Under s. 254(3) of the *Criminal Code*, a demand for a breath sample is proper only if it is made “as soon as practicable” in circumstances where a police officer has determined that there are reasonable grounds to believe that a person is committing,

or at any time within the preceding three hours has committed, the offence of impaired driving or the offence of operating a motor vehicle with a blood alcohol concentration exceeding 0.08 contrary to s. 253 of the *Criminal Code*.

This memo will provide a useful starting point for counsel examining whether a breath demand took place “as soon as practicable” within the meaning of this section. To assist counsel, some of the more common causes for delay will be examined. Note also that cases under s. 258 of the *Criminal Code*, which provides that the breath tests themselves must be taken “as soon as practicable” in order to give rise to a presumption of identity, may also be applicable by analogy.

It is important to note, however, that there is no definitive legal test or established threshold nor is there a decreed measure of time after which it cannot be said that the demand or test was taken “as soon as practicable”. The key issue is whether the police have acted both promptly and reasonably in all the circumstances. There is no requirement that the tests be taken as soon as possible: *R. v. Vanderbruggen*, 2006 CarswellOnt 1759 (Ont. C.A.) at para. 12; *R. v. Singh*, 2014 ONCA 293, 2014 CarswellOnt 4953 (Ont. C.A.) at paras. 14 and 15. The circumstances of each case must be evaluated. Any error in the interpretation of the test raises a question of law: *R. v. Plonka*, 2008 CarswellBC 1410, 2008 BCSC 881 (B.C. S.C.); *R. v. Shepherd*, 2009 CarswellSask 430, 2009 SCC 35 (S.C.C.).

Purpose Behind the Legislative Requirement

The legislated inclusion of the “as soon as practicable” requirement in s. 254(3) relates to the presumption of identity, i.e. that the blood alcohol level at the time of driving is identical to the blood alcohol level at the time of testing. Due to the blood absorption and elimination processes, the longer the delay between driving and testing the less true the presumption will be. The requirement that the demand is made “as soon as practicable” therefore ensures that the presumption operates fairly and produces accurate results: *R. v. Willette*, 2011 CarswellOnt 672, [2011] O.J. No. 504 (Ont. S.C.J.); *R. v. Davidson*, 2005 CarswellOnt 3708, [2005] O.J. No. 3474 (Ont. S.C.J.); *R. v. Crewson*, 2014 ONSC 4311, 2014 CarswellOnt 10356 (Ont. S.C.J.). The protected interest relates to the accused's right to a fair trial: *R. v. St. Jean*, 2012 CarswellOnt 7687, 2012 ONCJ 378 (Ont. C.J.).

It has been confirmed by the Supreme Court of Canada in *R. v. Shepherd*, *supra*, that in order to rely on the breath sample taken in response to a demand under s. 254(3), the Crown must prove beyond a reasonable doubt that the police officer, prior to making the demand, had reasonable grounds to believe that the accused had committed an offence under s. 253 of the *Criminal Code*.

***Canadian Charter of Rights and Freedoms* generally, Considerations**

The question of whether the demand was made “as soon as practicable” may be irrelevant if the accused does not specifically launch a *Charter* generally, -based challenge to the admissibility of the evidence derived.

Relying on the principles stated by the Supreme Court of Canada in *R. v. Rilling*, 1975 CarswellAlta 81, 31 C.R.N.S. 142 (S.C.C.) (which have subsequently been questioned on this point; see for example *R. v. Charette*, 2009 CarswellOnt 1946, 2009 ONCA 310 (Ont. C.A.)), it has been held that absent a *Charter* generally, -based application, where the police officer has not formed reasonable grounds yet makes a demand under s. 254(3), the provided sample may nonetheless be admissible: *R. v. Anderson*, 2005 CarswellOnt 1878, [2005] O.J. No. 1900 (Ont. C.A.); *R. v. Bloom*, 2011 CarswellOnt 2146 (Ont. C.J.); *R. v. Noel*, 2015 ONSC 2140, 2015 CarswellOnt 5064 (Ont. S.C.J.); *R. v. McCarthy*, 2013 ONSC 599, 2013 CarswellOnt 1158 (Ont. S.C.J.); *R. v. Inataev*, 2015 ONCJ 166, 2015 CarswellOnt 4218 (Ont. C.J.). The Crown may rely on the presumption of identity even without proving that the officer had reasonable grounds for making the demand, and there is no remedy available to the accused unless he or she institutes a *Charter* generally, application: *R. v. Charette*, *supra*; *R. v. Forsythe*, 2009 CarswellMan 570 (Man. C.A.); leave to appeal to the S.C.C. refused 2010 CarswellMan 307 (S.C.C.); *R. v. Inataev*, *supra*.

Similarly, specifically in connection with demands under s. 254(3), it has been held that in order for a court to consider excluding evidence on the basis that the samples were not taken “as soon as practicable”, there must be a *Charter* generally, application filed by the accused: *R. v. Charette*, *supra*; *R. v. Forsythe*, *supra*; *R. v. Bloom*, *supra*; *R. v. Dolezsar*, 2012 CarswellSask 89, 2012 SKQB 6 (Sask. Q.B.); *R. v. Inataev*, *supra*.

Interpretation of “As Soon As Practicable”

Divergence in Case Law

In some Canadian jurisdictions, the decisions considering the interpretation of s. 254(3) sometimes diverge in terms of the practical breadth given to the phrase “as soon as practicable”.

For example, in *R. v. Walmsley*, 2008 CarswellBC 2538 (B.C. S.C.) and in subsequent rulings that follow it, there is some suggestion that the demand must essentially be made forthwith except in extenuating circumstances. In contrast, a slightly more broad approach is taken in a line of cases commencing with *R. v. Sullivan*, 2008 CarswellBC 3090 (B.C. S.C.), which suggest that whatever tasks are performed by police prior to the demand must be reasonable and logically connected to the furtherance of the investigation into the accused's impairment. See also *R. v. Naidu*, 2010 CarswellBC 1489, 2010 BCSC 851 (B.C. S.C.) and *R. v. Beckler*, 2013 BCSC 1697, 2013 CarswellBC 2767 (B.C. S.C.), where accused's appeal from conviction was allowed on the basis that the demand was not made as soon as practicable as it had to be given at the scene in order to give the police office the authority to require the accused to accompany him to the detachment to administer breathalyzer test.

It seems that the majority of modern courts across Canada favour this latter interpretation, and impute legislative intent from the fact that the term “forthwith” was expressly removed from the wording of s. 254(3) effective July 2, 2008 pursuant to the *Tackling Violent Crime Act*, S.C. 2008, c. 6.

Distinct from “As Soon As Possible”

Several cases have interpreted the words “as soon as practicable” to mean “within a reasonably prompt time,” and not “as soon as possible”: *R. v. Ashby*, 1980 CarswellOnt 28, 57 C.C.C. (2d) 348 (Ont. C.A.), at 351, leave to appeal refused, (1981), 37 N.R. 393 (S.C.C.); *R. v. Phillips*, 1988 CarswellOnt 65, 42 C.C.C. (3d) 150 (Ont. C.A.), at 156; *R. v. Letford*, 2000 CarswellOnt 5034, 150 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Squires*, 2002 CarswellOnt 1891, 166 C.C.C. (3d) 65 (Ont. C.A.); *R. v. Coverly*, 1979 CarswellAlta 468, 50 C.C.C. (2d) 518 at 523 (Alta. C.A.), at 522; *R. v. Marchildon*, 2013 ONSC 6876, 2013 CarswellOnt 15401 (Ont. S.C.J.). Additional insight by the Ontario Court of Appeal into the meaning of the term “as soon as practicable”, in the context of s. 258(1)(c)(ii) of the *Criminal Code*, (which in turn relates s. 253 (Operation While Impaired)) and s. 254 (Testing for Presence of Alcohol or a Drug)) can be found in the decision of *R. v. Vanderbruggen*, *supra* and *R. v. Singh*, *supra*.

While the Crown does not have to “account for every minute of time that elapses between arrest and testing” (*R. v. Rasmussen*, 1981 CarswellBC 348, 64 C.C.C. (2d) 304 (B.C. C.A.), at 312; *R. v. Letford*, *supra*, at para. 20; *R. v. Seed*, 1998 CarswellOnt 4176, [1998] O.J. No. 4362 (Ont. C.A.), at para. 7, *R. v. White*, 2015 ABPC 77, 2015 CarswellAlta 1114 (Alta. Prov. Ct.) at para. 68), the Crown must establish that in the interval of time between the arrest and the administration of the breathalyzer test, “the conduct of the police was reasonable, having regard to all of the circumstances”: *R. v. Payne*, 1990 CarswellOnt 13, 56 C.C.C. (3d) 548 (Ont. C.A.), at 552; *R. v. Letford*, *supra*, at para. 9; *R. v. Carter*, 1981 CarswellSask 2, 59 C.C.C. (2d) 450 (Sask. C.A.), at 453; *R. v. Van der Veen*, 1988 CarswellAlta 131, 44 C.C.C. (3d) 38 (Alta. C.A.), at 47; *R. v. Seed*, *supra*.

The requirement that the breath samples be taken “as soon as practicable” includes the period up to the first test and the time between tests: *R. v. Damoff*, 2013 CarswellOnt 10545 (Ont. C.J.).

Distinct from “Forthwith”

Even leaving aside the legislative amendment to s. 254(3) under the *Tackling Violent Crime Act*, S.C. 2008, c. 6., which removed the term “forthwith” effective July 2, 2008, it has been held that the phrase “as soon as practicable” is not synonymous with “forthwith” except perhaps where public or officer safety requires otherwise: *R. v. Poohachoff*, 2012 CarswellBC 713 (B.C. Prov. Ct.).

Consideration of Reasons for Delay

Courts have determined that a substantial delay is one of sufficient duration that requires a reasonable explanation. As the court in *R. v. Bazil*, 2012 CarswellBC 647 (B.C. S.C.) explained:

> ... the correct approach is to ask whether there is a reasonable explanation for any delay and in assessing that reasonableness whether it is logically connected to the officer's duties in relation to investigating the incident.

In situations where the promptness of the testing is called into question, the Crown is required to produce evidence setting forth the reasons for the delay. As such, “a bare explanation that refers to police policy does not suffice,” nor does “an explanation that shows the investigating officers were dealing with matters extraneous to the investigation”: *R. v. Hayward*, 2009 CarswellBC 3268, [2009] B.C.J. No. 2399 (B.C. Prov. Ct.), at para. 21. Instead, there must be a nexus or logical connection between the duties performed and the delay occasioned by it: *R. v. Naidu*, *supra* and *R. v. Beckler*, *supra*. The fact that the demand could possibly have been made before carrying out some of the tasks is not the proper test: *R. v. Bazil*, *supra*.

The following section sets forth some of the types of delays that courts have been faced with in determining whether breath samples were taken “as soon as practicable”.

Completing Other Police Duties Associated With the Detention

In *R. v. Squires*, *supra*, a 59-minute delay between the time at which the demand was made and the time at which the breath sample was taken, was found to satisfy the “as soon as practicable” requirement. The court reasoned at para. 32 that the delay was reasonable because the officer was concerned about the accused receiving medical treatment and a demand should “only be taken once an accused is able to understand the questions and respond to them in a meaningful way”. Likewise, it was held in *R. v. Purdon*, 1989 CarswellAlta 229, [1989] A.J. No. 1030 (Alta. C.A.) and *R. v. McDougall*, 2013 SKQB 358, 2013 CarswellSask 913 (Sask. Q.B.) that concerns for the accused's medical condition justified the delay in making the demand.

In *R. v. White*, *supra*, there was a ten minute delay between the arrest and the demand. The Court found the explanation that the officer was dealing with an increasingly agitated passenger in order to secure the scene was reasonable, prudent and necessary.

In *R. v. Vanderbruggen*, *supra*, the Court held at para. 14 that the administration of a breathalyzer test one hour and fifteen minutes after the accused was arrested was reasonable based upon the following evidence adduced by the Crown: “time was taken in arresting the appellant, reading him his rights, transporting him to the station, waiting for the technician to arrive, searching the appellant, conveying the information as to the grounds for the breath demand and waiting for the technician to prepare the breathalyzer.” The record revealed that the officers were attentive to their duties and to the need to administer the tests to the appellant as soon as practicable.

In *R. v. Whitesell*, 1998 CarswellBC 249, [1998] B.C.J. No. 303 (B.C. S.C.), an officer engaged in a number of activities during the 26-minute interval between forming the opinion and making the demand. These activities included: securing the accused's vehicle, advising him of his rights, placing him in handcuffs and in the police vehicle, contacting a tow truck, making his notes, completing a 24-hour suspension notice, searching the vehicle and waiting for the tow truck to arrive. The court held that the demand was not been made as soon as practicable because the evidence did not disclose any reason why the 26 minute delay was necessary.

In *R. v. Amirthalingam*, 2007 ONCJ 529, 2007 CarswellOnt 7384 (Ont. C.J.), the time between arrest and the first demand was 1 hour and 50 minutes. The Court found that the demand was made as soon as practicable because the police officer did not have a breathalyzer device on site and needed to drive to a location where it was certain there would be one.

Similarly in *R. v. Pauls*, 1994 CarswellAlta 306, [1994] A.J. No. 289 (Alta. Prov. Ct.), a 25-minute delay was attributed to a police officer waiting for the arrival of a roadside screening device. Because the officer had already formed the necessary opinion to require the accused to provide a breath sample, the court held that there was no reason to wait for the device. As such, although the time was accounted for, the court reasoned that the explanation was not reasonable (at para. 25). For additional examples of cases where time has been accounted for, but where the explanation has been found to be unreasonable, see *R. v. Bisset*, 1993 CarswellOnt 5426, [1993] O.J. No. 2319 (Ont. Prov. Div.).

In contrast, in *R. v. Bazil*, *supra*, a 13-minute delay in making the demand and a 23-minute delay between the taking of two samples were held to have satisfied the “as soon as practicable” requirement. Although the duties performed by the officer in the pre-demand period were not the type that had to be discharged before making the demand, the correct test was whether there was a reasonable explanation for the delay, and whether the duties were logically connected to the officer's duties in connection with investigating the incident.

In *R. v. Reid*, 2013 SKPC 62, 2013 CarswellSask 243 (Sask. Prov. Ct.), the Court provided a detailed review of the case law illustrating how the courts have determined whether a delay was reasonably explained. At paras. 29–31:

In *R. v. Friesen*, 2012 CarswellSask 901 (Sask. Q.B.), *supra*, the demand was not made until 21 minutes after the accused was arrested, because the police officers had to deal with other obstructive persons at the scene. In that case, the demand was found to be made as soon as practicable, because the delay was satisfactorily explained.

In *R. v. Breland*, 2011 CarswellSask 448 (Sask. Prov. Ct.), *supra*, the demand was not made until 22 minutes after the arrest, because the accused, upon arrest, was incoherent, and it took that long for him to be alert enough to understand the demand. Then, after the demand, police waited another 17 minutes for a tow truck to attend the scene. Following transport to the detachment, the accused spoke to counsel and went to the bathroom. The first breath sample was obtained 83 minutes after arrest. The Court found that it was obtained as soon as practicable, because all the delay was satisfactorily explained.

In a number of cases, delays relating to medical treatment of the accused did not violate the “as soon as practicable” requirement: 20 minutes in *R. v. Green*, 1991 CarswellNS 384, [1991] N.S.J. No. 648 (N.S. Prov. Ct.); 45 minutes in *R. v. Purdon*, 1989 CarswellAlta 229, [1989] A.J. No. 1030 (Alta. C.A.); and 19 minutes in *R. v. Fiander*, 1989 CarswellNfld 298, [1989] N.J. No. 340 (Nfld. T.D.). In other cases, delays caused by allowing the accused to contact counsel before the demand was made were found to violate the “as soon as practicable” requirement: 16 minutes in *R. v. Middlebrook*, 1995 CarswellAlta 1194, [1995] A.J. No. 975 (Alta. Prov. Ct.); 27 minutes in *R. v. Fisher*, 1995 CarswellAlta 1170, [1995] A.J. No. 1299 (Alta. Prov. Ct.). In *R. v. Franklin*, 1997 CarswellAlta 1248, [1997] A.J. No. 760 (Alta. Q.B.), a pre-demand delay of 90 minutes, to allow for a combination of medical treatment and a call to counsel was held to violate the “as soon as practicable” requirement.

At paras. 33-34, the Court concluded:

> In this case, it is true that Cst. Lingelbach formed his grounds for making the demand almost immediately upon dealing with Mr. Reid. Accordingly, he placed him under arrest. He could have made the breath test demand at that time. Instead, he informed Mr. Reid that he would need to wait for another officer to attend and take over the traffic control duty before he could take Mr. Reid to the RCMP Detachment. Cst. Lingelbach immediately called for another officer to attend the scene to do that. He had no control over when another officer could attend the scene. In the meantime, he made what efforts he could to ensure that Mr. Reid was safe and comfortable, while at the same time continuing to direct traffic.

> At first blush, it would be easy to look at a delay of 80 minutes, and conclude that the demand was not made as soon as practicable. However, when one considers the circumstances that faced Cst. Lingelbach that evening, it would be unfair to conclude that he did not act reasonably.

Tow Truck Delays

A number of cases have dealt with the delay caused by a decision to tow the accused's vehicle. “In some cases, that decision itself is found to be unwarranted by the circumstances. In other cases, it is the decision to wait until the tow truck arrives that attracts disapproval”: *R. v. Hayward*, *supra*, at para. 24.

In *R. v. Wetzel*, 2011 CarswellSask 5, 2011 SKPC 9 (Sask. Prov. Ct.) there was a 35-minute delay because the police officers had to wait for a tow truck to remove the accused's vehicle from the street. Although several explanations were offered by police as to why the vehicle needed to be removed, the court concluded that it had been towed as a matter of policy, and not for any valid reason. The “as soon as practicable” requirement was accordingly not met in the circumstances. On appeal, *R. v. Wetzel*, 2012 SKQB 24, 2012 CarswellSask 68 (Sask. Q.B.), the Court found that the trial judge failed to consider whether the vehicle constituted a hazard within the meaning of s. 280(1) of the *Traffic Safety Act* and erred in concluding that towing the vehicle was not lawful. More importantly, the Court found that the officers' decision to wait for the tow truck to arrive was not unreasonable and satisfactorily explained. On appeal to the Court of Appeal, *R. v. Wetzel*, 2013 SKCA 143, 2013 CarswellSask 888 (Sask. C.A.), the Court allowed the accused's appeal in part and restored the acquittal on the basis that the summary conviction appeal court judge improperly overturned a finding of fact and failed to consider the subjection dimension of s. 280(1)(a)(ii) of the *Traffic Safety Act*. However, the Court explained at paras. 22:

> ... [I]t is clear that a delay caused by waiting for a tow truck does not necessarily create a situation where the sample is not taken as soon as practicable: *R. v. Berrecloth*, 2012 SKQB 175 (Sask. Q.B.); *R. v. Dion*, 2010 SKPC 76 (Sask. Prov. Ct.); *R. v. Litzenberger*, 2009 BCPC 69 (B.C. Prov. Ct.); *R. v. Plonka*, 2008 BCSC 881 (B.C. S.C.); *R. v. Ritson*, 2008 BCPC 26 (B.C. Prov. Ct.); *R. v. Godin*, 2007 ABPC 162 (Alta. Prov. Ct.); *R. v. Otto*, 2000 CarswellOnt 1864 (Ont. S.C.J.); *R. v. Hafermehl* (1993), 50 M.V.R. (2d) 78 (Alta. C.A.).

In *R. v. Keddy*, 1995 CarswellNS 283, 147 N.S.R. (2d) 171 (N.S. S.C.), and *R. v. McCorriston*, 2009 CarswellMan 6, [2009] M.J. No. 12 (Man. Q.B.), the court rejected a breathalyzer test on grounds that the demand was not made as soon as practicable. Both courts held that a police policy could not supersede a legislated requirement. As such, both courts found that it was unreasonable to delay a breathalyzer test on the basis that the police were abiding by their policy to wait for a tow truck to arrive in order to ensure the security of the vehicle. In *Keddy*, the Court noted that a 33- or 36-minute delay was unreasonable given that the parked vehicle posed no threat to any other vehicle, and that once the vehicle was secured, there was no reason to wait for the tow truck. Further in *McCorriston*, the Court held that a 41-minute wait for a tow truck before transporting the accused to the police detachment for a breathalyzer test was unreasonable given that the vehicle had been pulled off the road and did not pose a public hazard. Because neither vehicle's contents were exposed to a specific risk of theft or vandalism, the courts found that there was no reason for the delay in administering the breathalyzer tests.

In contrast, the court in *R. v. Plonka*, *supra*, held at para. 32 that a tow truck delay was reasonable in a remote location where backup from other police officers was problematic. Distinguishing this case from *Keddy* and *McCorriston*, the Court noted that the accused, along with many other cars had been stopped pursuant to a check-stop in a rural area, miles away from the police detachment (para. 30). Given that the location posed safety and security concerns for vehicles if left unattended, and the fact that police were faced with a series of unexpected events, including another accident; the Court found that the decision of the officers to await the arrival of the tow truck was reasonable and sensible (para. 32).

Similarly in *R. v. MacEachern*, 1982 CarswellBC 444, [1982] B.C.J. No. 979 (B.C. Co. Ct.), the Court found at para. 27 that a demand for a breathalyzer test was made as soon as practicable, considering all of the investigating officers' duties that arose out of the case at hand. The Court noted at para. 27:

> Where there is an explanation for the impugned “delay” showing that the time was taken up in carrying out duties related to the accused's case, and not interrupted by some diversionary unrelated activity to suit the police officer's convenience, the trial judge should normally be entitled to hold that the “delay” was reasonable.

As such, the Court found (at para. 28) that the time spent in waiting for the tow truck formed a legitimate part of the constable's duties.

Given the conflicting authorities in this area of the law, a useful guiding question is whether the duties that the officer engaged in were the type that had to be discharged before a valid breath demand could be made. If the question is answered affirmatively, an argument challenging the “as soon as practicable” requirement will likely fail.

Waiting for Duty Counsel

Courts have considered the issue of whether breath samples are taken “as soon as practicable” in situations where the accused indicates that they do not wish to speak to a lawyer but the police officer delays testing in order to contact counsel. The court in *R. v. Reid*, 2001 CarswellOnt 3908, [2001] O.J. No. 4285 (Ont. C.J.), at para. 17, adopted the approach of *R. v. Barrick*, 1998 CarswellOnt 3193, [1998] O.J. No. 3252 (Ont. Gen. Div.), which proposed a line of reasoning to use for cases of this nature. First, the trial judge should ask whether there was a “clear and unequivocal waiver” of the right to counsel. In the case that the waiver was not clear and unequivocal, the court stated it would “reasonable for the police to place a telephone call to duty counsel on behalf of the accused.” Furthermore, it would also be reasonable for the police to make such a call, “if the degree of intoxication of the accused was so significant” as to suggest that the right to counsel was not fully understood. However, if the waiver is clear and unequivocal, the court stated that it would not be reasonable for the police to call duty counsel. Lastly, the court noted that “the fact that the accused ultimately takes the telephone call from duty counsel does not, by itself, operate as an estoppel in respect of the waiver.” As such, all of the circumstances must be examined: *R. v. Barrick*, *supra*, at para. 47.

The following section examines various court decisions pertaining to these type of delays specifically.

In *R. v. Shin*, 2007 CarswellOnt 141, [2007] O.J. No. 125 (Ont. C.J.), the Ontario Court of Justice was faced with whether a 42-minute delay caused by the officer calling duty counsel and the accused speaking with duty counsel was unreasonable, and therefore resulted in breath tests not being taken as soon as practicable (at para. 1). The court held at para. 32 that the delay was unreasonable since the evidence revealed that the accused did not want to speak to counsel.

Similarly in *R. v. Kubas*, [1997] O.J. No. 4230 (Ont. Gen. Div.), the Court held at para. 1 that a 32-minute delay waiting for counsel was unreasonable, given that the accused indicated on two occasions that she did not wish to speak to a lawyer. The Court reasoned that “the police had no right to insist that the accused speak to duty counsel.” See also *R. v. Merritt*, [1997] O.J. No. 4229 (Ont. Prov. Div.) at paras. 12 and 17 (following the reasoning in *Kubas*, the court held that a 25-minute delay caused by the investigating officer calling duty counsel was unreasonable, given the accused did not wish to speak to duty counsel and it was forced upon him).

In *R. v. Mena*, 2013 ONCJ 286, 2012 CarswellOnt 17344 (Ont. C.J.), the taking of breath samples was delayed by 21 minutes because the officer wanted the accused to speak to duty counsel even though he did not want to do so and waived his right. The Court douns that the samples were not taken as soon as practicable. See also *R. v. Sicord*, 2014 ONSC 5004, 2014 CarswellOnt 11890 (Ont. S.C.J.), where appeal allowed as breath samples were not taken as soon as practicable and there was no evidence to conclude accused's waiver of counsel was not unequivocal.

The court came to the opposite result in *R. v. Mikan*, 1994 CarswellOnt 7368 (Ont. Prov. Div.) (unreported decision of the Ontario Provincial Court on December 1, 1994), where there was a 23 minute delay at the police station in the administration of the first breathalyzer sample. Despite the fact that the accused expressed a desire not to speak to a lawyer, the officer placed a call to duty counsel and awaited a response. In this case, the court held that the delay was reasonable and therefore the sample was taken as soon as practicable, basing its decision on the fact that the accused did speak with counsel when the opportunity was provided. The court reasoned that “had the accused maintained the position that he did not want to exercise his right to counsel, a different result may have ensued” (*R. v. Mikan*, *supra*; *R. v. Litwin*, 1997 CarswellOnt 3925, [1997] O.J. No. 4242 (Ont. Prov. Div.), holding that a 71-minute delay in administering a breath sample was conducted as soon as practicable given the police acted reasonably in ensuring the accused spoke to receive advice from counsel.

Waiting for Qualified Technician

Despite the fact that the arresting officer was a qualified breathalyzer technician, in *R. v. Clarke*, 1991 CarswellOnt 3, [1991] O.J. No. 3065 (Ont. C.A.) at para. 1, the officer chose to wait for another technician to arrive to conduct the breath sample. In holding that the tests were nonetheless conducted as soon as practicable, the court reasoned that the police policy of “ensuring the objectivity and independence of the breathalyzer by seeing to it that the technician was not the investigating and arresting officer” was a reasonable one under the circumstances (at para. 2).

In *R. v. Letford*, *supra*, the taking of breath samples was delayed because at the time of the arrest there was no qualified breathalyzer technician on duty at the arresting officer's OPP detachment at the time of the arrest. The accused was acquitted at trial and an appeal to the Summary Conviction Appeal Court was dismissed the Crown's appeal. On further appeal to the Court of Appeal for Ontario, the court found that the trial judge erred. While the way the police organized their staff and equipment was relevant to assessing if they were unprepared to administer breath tests in compliance with the requirements of the *Criminal Code* generally, the test is not one of preparedness but whether the tests were conducted as soon as practicable. As the trial judge had erred in the application of the law, the acquittals were quashed and a new trial was ordered (paras. 18–20).

Similarly, a delay stemming from the qualified technician setting up the equipment does not mean that the tests were not administered as soon as practicable. In *R. v. Mailey*, 2009 CarswellAlta 2107, 2009 ABPC 364 (Alta. Prov. Ct.), the Court explained that some delay is inevitable and that tests need not be administered as soon as possible. However, the longer the delay the greater level of scrutiny required. In *Mailey*, the delay of 26 minutes was not explained but was not of such importance to preclude the Crown from relying on the presumption.

In *R. v. Burwell*, 2015 SKCA 37, 2015 CarswellSask 196 (Sask. C.A.), the accused registered a fail on a roadside screening device and a demand was made at 12:04 a.m. The officer tried to determine which was the closest detachment with a qualified technician. He made a decision and later learned there was no available technician at that location but since he was a qualified technician he could perform the tests himself. The tests were taken at 1:06 and 1:27 a.m. At trial, the judge found that the cumulative effect of delays in sample taking meant they were not taken as soon as practicable. The Crown successfully appealed to Summary Conviction Appeal Court and the acquittal was set aside. The accused appealed to the Court of Appeal, where the appeal was allowed and a new trial was ordered (based on the trial judge failing to extend to the accused an opportunity to address his argument that his s. 7 rights under the *Charter* were violated). However, the Court of Appeal concluded that appeal judge correctly interpreted and applied the “as soon as practicable” standard and correctly concluded that the trial judge erred in determining the standard had not been met because the breath samples possibly could have been taken earlier had the RCMP managed its human resources differently and declaring it was a unacceptable practice for a technician to not be available 24 hours a day.

Police Station Delay

In some cases, the police may have several detachments to select from in order to have the breath tests administered. The decision to take an accused to a more distant detachment may not necessarily mean that the samples were not taken as soon as practicable. In *R. v. Krivoblocki*, 2010 CarswellSask 117, 2010 SKQB 76 (Sask. Q.B.), the Court explained:

> [19] In the present case, the RCMP detachment operates at three locations some distance apart—St. Walburg, Turtleford and Glaslyn. The breath tests could have been administered a little sooner if the accused had been taken to St. Walburg, rather than to Turtleford. However, the evidence is that Corporal Prosser, a technician living at Glaslyn, was conveniently available. Glaslyn is further from St. Walburg than it is from Turtleford. Turtleford is more or less between St. Walburg and Glaslyn. It took about 35 minutes for Constable Milne to take the accused to Turtleford. Corporal Prosser arrived at Turtleford at about the same time as Constable Milne and the accused. The tests could have been taken a little sooner at St. Walburg. The delay is explained, but not fully. However, these are not, as the accused contends, circumstances such as to impose a burden on the Crown to provide a more detailed explanation to enable closer scrutiny as to whether the tests were administered as soon as practicable.

In *R. v. Yamka*, 2009 CarswellOnt 7414, 2009 ONCJ 528 (Ont. C.J.), the police officer was instructed to travel to a police station some distance away despite closer proximity to a different station. The court found this to be reasonable given that no qualified breath technician was available at the closer station. The Crown argued that there was no obligation to call evidence that a qualified breath technician was not available at the closer detachment. Andre J. accepted this argument and observed:

> In assessing whether or not the tests were taken as soon as is practicable, I asked myself whether Constable Hunter paid undue attention or priority to any task which was unrelated to the taking of the breathalyzer tests. I also asked myself whether his actions were reasonable. The officer contacted the police dispatch for direction about the closest detachment where a breathalyzer technician was available. He was advised that the Toronto detachment was the closest available. Was it unreasonable or was it reasonable for him to rely on this information? In my view, it was. He was not required, contrary to that information, to drive to the Port Credit detachment to personally satisfy himself that a breathalyzer technician was not available at that location. It is not the veracity of the information received from the police dispatch that is at issue here, it is the reasonableness of the officer's actions. In my view, there was nothing or no reason why the officer should have questioned information provided by the dispatcher.

Unaccounted for Delay

As noted above, each minute of the investigation need not be accounted for but unexplained delays can create difficulties in the prosecution of the case.

In *R. v. Fletcher*, 2013 CarswellOnt 10026, 2013 ONCJ 396 (Ont. C.J.), the court concluded that the police had neither made the demand nor taken the breath sample “as soon as practicable”, in circumstances where there were a series of unaccounted-for delays in the course of the arrest and subsequent demand. These included an 8-minute delay between the arrest and demand, an unexplained span of 7 minutes in order to “parade the defendant before the Staff Sergeant”, a 15-minute period during which the accused was handcuffed and kept waiting, and another 9 minutes required to contact duty counsel

In *R. v. Mario*, 2010 CarswellAlta 2018, 2010 ABPC 305 (Alta. Prov. Ct.), the court found that an unaccounted for delay of 22 minutes meant that the breath tests were not taken as soon as practicable and, accordingly, the accused was acquitted.

In *R. v. Carriere*, 2010 CarswellSask 563, 2010 SKPC 118 (Sask. Prov. Ct.), the accused was charged with impaired driving and “over 80”. The accused was taken to the police station for the purpose of providing two suitable samples of his breath. At the police station, the accused waited 39 minutes before the police provided the accused with rights to counsel and a total of 63 minutes before the first breath sample was taken. At trial, the police officer was unable to account for the 39 minutes. The accused was acquitted.

In *R. v. McCorriston*, 2010 CarswellMan 1, 2010 MBCA 3, 251 C.C.C. (3d) 102, 251 Man. R. (2d) 106 (Man. C.A. [In Chambers]), the Summary Conviction Appeal Court overturned the appellant's conviction reasoning that the trial judge erred in properly considering the totality of the delay in ad-ministering the breath tests. The court found that the presumption was not available to the Crown. In that decision, there was a delay of 41 minutes at the scene—including 25 or 29 minutes waiting for a tow truck—which prompted the Court to conclude that simply following a police policy with respect to tow trucks did not automatically make the resulting delay reasonable.

In *R. v. Parkin*, 2015 ABPC 76, 2015 CarswellAlta 634 (Alta. Prov. Ct.), there was no explanation for 11 out of 16 minutes delay between the first and second samples. There were also no notes or recollections between the time of the accused's arrival and taking of the first sample. The Court found the samples were not taken as soon as practicable.

FURTHER SUGGESTED RESEARCH:

Breathalyzer Law in Canada: The Prosecution and Defence of Drinking and Driving Offences, 4th Edition, R.M. McLeod, Q.C., Judge J.D. Takach, Murray D. Segal, Carswell.

Drinking & Driving Law, Alan Gold, Carswell

Defending Drinking and Driving Cases 2010, Alan Gold, Carswell

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