IN THE PROVINCIAL COURT OF NOVA SCOTIA
**Citation:** R. v. Austin George MacInnis, 2003 NSPC 63

**Date:** 20031218
**Docket:** 1324191
**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Austin George MacInnis

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| **Judge:** | The Honourable Judge Alan T. Tufts |
| **Heard:** | December 4, 2003, at Kentville, Nova Scotia |
| **Written Decision:** | May 11, 2004 |
| **Counsel:** | Darrell I. Carmichael, for the Crown<br>Chris Manning, for the Defence |

**By the Court (orally):**

[1] This is the matter of R. v. MacInnis. The defendant here is charged under s. 253(a) and (b) of the **Criminal Code**. The Crown conceded at the conclusion of the proceedings last time that the evidence is not sufficient to sustain a conviction for impaired driving and accordingly the charge under s. 253(a) was dismissed.

[2] The defence raises two issues on the remaining charge under s. 253(b), namely: number one, the arresting officer did not have reasonable and probable grounds to make the demand for a breath sample and number two, the samples were not taken as soon as practicable and accordingly the presumption under s. 258(1)(c)(ii) cannot be relied upon by the Crown.

[3] The facts are straightforward and not in dispute. The police noticed the defendant when they saw him near his vehicle after exiting same at the extreme south end of Prospect Avenue in Kentville, Nova Scotia. As the police pulled in behind his vehicle it appeared the defendant had just finished urinating and was getting back into the driver's side of the vehicle. He was alone. The police noticed he had glassy eyes and there was a strong smell of alcohol. The defendant fumbled his papers when asked to produce the usual license and other documentation. The vehicle was still running. The officer read the breath demand at 8:10 p.m. having first encountered him

a very short time before. The defendant was then taken to the police station, arriving at approximately 8:20 p.m. He then made a call to counsel at 8:22 p.m. The call to counsel ended at 8:25 p.m. however he was not taken to the breath technician until 9:00 p.m. The analysis of the first sample was completed at 9:17 p.m. When asked if the defendant could have been brought to the technician before 9:00 p.m. the officer replied, “Not that I recall.”

[4] I will deal with the second issue first. Section 258(1)(c)(ii) requires that the breath samples be taken as soon as practicable after the alleged offence if the Crown wishes to rely on the presumption that the test results reflect the defendant's blood alcohol level at the time of the alleged offence, the so-called “presumption of identity,” although failure to do so does not make the Certificate inadmissible. However the Crown is otherwise required to show that the test results extrapolated to the time of the alleged offence show the defendant's alcohol level exceeded the legal limit. “As soon as practicable” does not mean as soon as possible and the police do not necessarily need to detail every single minute expended between the time of the alleged offence and the time the samples were taken. However, the police must be reasonably diligent in their efforts to take the samples. I have had an

opportunity of reviewing this area of the law in my recent decision in **R. v. Davidson** dated February 20, 2001. It is not necessary for me to repeat that here again.

[5] The cases of **R. v. Mudry,** [1979] AJ No. 613; **R. v. Van Der Veen,** [1988] AJ No. 710; **R. v. Payne** 56 CCC (3d) 548, **R. v. McCoy,** [1990] SJ No. 657; **R. v. Myrick** 13 MVR (3d) 1; **R. v. Letford** 51 O.R. (3d) 737; **R. v. Cook** 130 NSR (2d) 99; and **R. v. Cambrin** 1 CCC (3d) 59 all review the law applicable to this subject. In addition I have reviewed many cases which implement these principles to particular fact situations. There are certainly cases where short periods of time - minutes - do not need to be explained in order for the test to be regarded as taken as soon as practicable. However longer periods of time do require some explanation. Further, as the total time expands more scrutiny, in my opinion, is required. Also, there are incidents where the court may take judicial notice or make inferences regarding certain procedures which require necessarily a certain expenditure of time, such as readying the breathalyzer instrument or making arrangements to secure vehicles or arranging counsel.

[6] In this case the defendant was at the police station. He had concluded speaking to counsel. Thereafter thirty-five minutes elapsed before he was

introduced to the breath technician. Given that the first sample was not completed until 9:17 p.m. I can only conclude that the time after 9:00 p.m. was necessary to ready the instrument. There is simply no explanation for the thirty-five minutes between 8:25 p.m. when the call to counsel ended and when the defendant was turned over to the breath technician. While the officer explained it was a very busy evening as it was Apple Blossom weekend, there was no evidence that other prisoners were in custody or that others were being tested by the technician or that the technician was otherwise not available. There is simply nothing to explain the delay or any evidence from which I can make any reasonable inferences to explain the delay. In my opinion the tests were not taken as soon as practicable.

[7] The following cases are examples of other unexplained delays which resulted in tests not being seen to be practicable: **R. v. Allin**, [2003] SJ No. 289; **R. v. Brazeau,** [2003] OJ No. 616; **R. v. Chhabra,** [1997] OJ No. 5496; **R. v. Hiebert,** [2003] SJ No. 398; **R. v. Huot,** [2001] SJ No. 356; **R. v. Knuckle**, [2002] OJ No. 5454; **McCauley** 12 WCB 466; **R. v. McCoy**, [1990] SJ No. 657; **R. v. Porter** 12 MVR 192; **R. v. Priano,** [2002] OJ No. 4296; **R. v. Schouten,** [2002] OJ No. 4777; **R. v. Stapley,** [1997] OJ No.

4307; **R. v. Stupinkoff**, [2002] SJ No. 744; **R. v. Yarmilou,** [2002] OJ No. 1613 and **R. V. Youssef** ,[1993] OJ No. 1324.

[8] While the Certificate is admissible and the readings may demonstrate what the blood alcohol level was at the time of the testing there is no other evidence from which I can conclude whether the blood alcohol concentration was above the allowable limit at the time the defendant was found in care and control of the vehicle.

[9] Accordingly, I have a reasonable doubt that his blood alcohol concentration exceeded 80 mg. of alcohol in 100 ml. of blood. Given my conclusion it is not necessary for me to consider the defendant's first issue. He is found not guilty.

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ALAN T. TUFTS, J.P.C.