

DELIVERED VIA EMAIL

August 23, 2019

Foster Iovinelli Beyak
#100, 224 11th Avenue SW
Calgary, AB T2R 0C3

Attention: «First and Last Name»

Dear Katherin Beyak:


**RE: Roussel, Dean - M.V.I.D. No.: 0587-97671
Written Hearing with the Alberta Transportation Safety Board**

Attached is the decision from the Alberta Transportation Safety Board (the "Board") arising from the above noted hearing, which took place in Edmonton on May 30, 2019.

The Board's decision was to allow the appeal and cancel the licence suspension immediately. As a result, a refund of the application fee (excluding GST and service fee(s)) has been requested on the purchaser's behalf.

Per section 46 of the *Act*, the Appellant may apply for a reconsideration of this decision by purchasing a new Application for Hearing and submitting it to the Board. Once received, the Board shall reconsider the decision if, in the opinion of the Board, the circumstances in respect to the matter have substantially changed from the time of the original decision. Please be advised that the 30-day limitation period described in section 45 applies to any reconsideration commenced under Division 3 of the *Act*.

Yours truly,
Alberta Transportation Safety Board



FOR:
Andrea Baker
Acting Board Secretary

Attachment

Alberta Transportation Safety Board

Citation: 2019 ABTSB 1400
Date: 2019-05-30
AALSN

IN THE MATTER OF THE *Traffic Safety Act* (the “Act”);

AND IN THE MATTER OF an Administrative Licence Suspension Appeal to the Alberta Transportation Safety Board (the “Board”) lodged by D. Roussel (the “Appellant”).

A written hearing was held in the City of Edmonton, in the Province of Alberta, on May 30, 2019.

BEFORE:

K. Cherniawsky, Presiding Officer
J. Pendleton, Member
W. Haas, Member

PRESENT:

A. Florea, Board Secretary
M.J. Redman, Independent Counsel to the Board

BACKGROUND / PRELIMINARY MATTERS

Notice of the hearing and the police disclosure were provided to the Appellant by email dated January 3, 2019 and to the Registrar of Motor Vehicle Services (the “Registrar”), in advance of the hearing.

EVIDENCE AND DOCUMENTS CONSIDERED

The Board considered the documents and evidence listed in Appendix “A”, which were provided in advance of the hearing.

SUBJECT MATTER OF THE APPEAL

1. The subject matter of the appeal is a licence suspension issued to the Appellant under the *Act*. The Notice of Suspension shows that the Appellant was issued an Alberta Administrative Licence Suspension (“AALS”) under section 88.1 of the *Act* because, in relation to driving a motor vehicle:
 - a. the Appellant was impaired by alcohol or a drug or by a combination of alcohol and a drug; and

- b. the concentration of alcohol in the Appellant's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.
2. The Appellant has appealed the AALS on the following grounds:
- a. he was not impaired;
 - b. it would be unfair to consider the ASD results because he burped; and
 - c. his 10(b) Charter rights were breached.

ROLE OF THE BOARD

3. The role of the Board under section 39.2 of the *Act* is to determine whether to confirm or cancel an AALS. The basis upon which the Board must make this determination is set out in sections 39.2(5) and (6) of the *Act*, which provide in part:

39.2(5) if, after conducting an appeal under this section, the Board is satisfied that

- (a) the person drove a motor vehicle having consumed a drug, alcohol or a combination of a drug and alcohol in such a quantity that the person's ability to operate the motor vehicle was impaired at any time within 3 hours after having driven a motor vehicle,

...

- (b) the person drove a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in that person's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood at any time within 3 hours after having driven a motor vehicle, or

...

the Board must confirm the suspension or disqualification.

39.2(6) If, after conducting an appeal under this section, the Board is satisfied

- (a) that the person did not drive a motor vehicle having consumed a drug, alcohol or a combination of a drug and alcohol in such a quantity that the person's ability to operate the motor vehicle was impaired at any time within 3 hours after having driven a motor vehicle,

...

(b) that the person did not drive a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in that person's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood at any time within 3 hours after having driven a motor vehicle, or

...

the Board must cancel the suspension or disqualification and direct the return to that person of any fees paid to the Government by that person in respect of the appeal conducted under this section.

4. The Board is aware that sections 39.2(5) and (6) of the *Act* have been amended effective December 18, 2018. However, the amendments are to address changes to the *Criminal Code* (Canada) that were not applied to the Appellant. For this reason, the Board has referenced the wording of the *Act* in place at the time the suspension was triggered.

POLICE DISCLOSURE

5. On December 17, 2018, at 0201 hours, Cst. Begley was on patrol and observed a vehicle stop over the stop line and wait longer than usual. Cst. Begley conducted a traffic stop and in speaking with the driver (the Appellant) noted signs of impairment including glassy eyes and an odour of liquor coming from the Appellant's breath. Cst. Begley asked the Appellant how much alcohol he had consumed and the Appellant said that he had a beer at hockey at approximately 2245 hours.
6. At 0203 hours, Cst. Begley formed reasonable suspicion the Appellant had alcohol in his body, and read the Appellant the Approved Screening Device ("ASD") demand.
7. At 0208 hours, the Appellant provided a breath sample into the ASD. Immediately after providing the breath sample, the Appellant stated that he burped, and asked if that could affect the result of his test. Cst. Begley said that it could.
8. The result of the breath sample was a "Fail" and Cst. Begley arrested the Appellant for impaired driving.
9. At 0213 hours, Cst. Begley transported the Appellant to the Canmore Detachment, arriving at 0218 hours. At 0225 hours, the Appellant was placed in the phone room and Cst. Begley explained to him how to use the phone and showed him the Legal Aid number and yellow pages. At 0247 hours, the Appellant hung up the phone. Cst. Begley asked the Appellant if he had talked to legal counsel and the Appellant advised that he had.

10. The Appellant provided two breath samples at 0253 hours and 0314 hours, which resulted in readings of 100 milligrams of alcohol in 100 millilitres of blood and 90 milligrams of alcohol in 100 millilitres of blood, respectively.
11. The breath technician noted that the Appellant's cheeks were slightly flushed, there was a strong smell of alcohol, and the Appellant admitted to drinking.
12. At 0345 hours, the Appellant was released on a Promise to Appear and was served with all relevant police documents.
13. A police DVD was included with disclosure which included video taken from the police vehicle and audio from Cst. Begley.

SUMMARY OF THE APPELLANT'S EVIDENCE

14. The Appellant provided an Affidavit to the Board which stated:
 - a. on December 17, 2018 at 0200 hours he was driving home from a hockey game;
 - b. he was stopped by Cst. Begley and asked to provide a breath sample, which he complied with;
 - c. as he was providing the breath sample, he burped into the device;
 - d. he immediately advised Cst. Begley that he had burped;
 - e. Cst. Begley stated that the burp could affect the results, but then stated that he had blown a fail and arrested him;
 - f. at the police station he asked to use his cell phone so he could call someone he knew to assist him;
 - g. he was not given access to his cell phone; and
 - h. He attempted to call Legal Aid, but was unable to hear what the person was saying.

SUMMARY OF ARGUMENTS

Appellant

15. Counsel for the Appellant argued that there is insufficient evidence to conclude that the Appellant was impaired by alcohol.
16. Counsel further argued that it would be unfair to the Appellant to consider the evidence of his breath sample, as Cst. Begley should not have relied on the results of the ASD to form his reasonable grounds. The Appellant stated that he burped, and Cst. Begley confirmed that this could result in an invalid sample.

17. Counsel also argued that the Appellant's section 10(b) Charter rights were breached as the Appellant was denied the use of his cell phone and was not able to connect with anyone at Legal Aid to receive meaningful advice.

Registrar

18. Counsel for the Registrar conceded that there was insufficient evidence to conclude that the Appellant's ability to operate a motor vehicle was impaired by alcohol.
19. The Registrar argued that while the Appellant stated he burped, Cst. Begley did not accept this statement as the truth. Therefore, he still subjectively had grounds to arrest the Appellant.
20. Further, the Appellant's section 10(b) Charter right was not infringed, as he was given access to the phone room, provided with the number for Legal Aid, telephone books, and a working telephone.

ISSUES BEFORE THE BOARD

21. In the Board's view, the issues in this appeal are:
 - a. whether the evidentiary breath sample evidence was collected in a way that is inconsistent with Charter values and if it was, whether it would be manifestly unfair to the Appellant for the Board to give any weight to that evidence;
 - b. whether the Appellant drove a motor vehicle having consumed alcohol in such a quantity that his ability to operate the motor vehicle was impaired within three hours after having driven a motor vehicle; and,
 - c. whether the Appellant drove a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in the Appellant's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood within three hours after having driven a motor vehicle.

FINDINGS OF THE BOARD

22. The Board finds that the evidentiary breath samples were collected in a way that is inconsistent with Charter values, and that it would be manifestly unfair to the Appellant for the Board to give any weight to that evidence.
23. The Board finds that the Appellant did not drive a motor vehicle having consumed alcohol in such a quantity that his ability to operate the motor vehicle was impaired within three hours of driving.

24. The Board finds that the Appellant did not drive a motor vehicle having consumed alcohol in such a quantity that his blood alcohol concentration exceeded 80 milligrams of alcohol in 100 millilitres of blood within three hours of driving.

REASONS OF THE BOARD

25. First, the Board reviewed the Police DVD. The Board notes that immediately after providing the breath sample, the Appellant informed the officer that he burped. The officer responds that it could affect the results of the ASD test. The Board notes that it was unclear from the video whether the burp happened while the Appellant was providing a sample, or immediately afterwards.

Reasonable Grounds

26. The Appellant argued that the police officer did not have reasonable grounds to believe that the Appellant was impaired by alcohol at the time the police officer arrested the Appellant, because the result of the ASD test was not reliable. The Board understands that this standard was previously, and often still referred to as “reasonable and probable grounds”, or RPG.

27. The Board accepts that a police officer must have reasonable grounds to believe that the Appellant has committed an offence for a breath demand to be validly made. The Board’s analysis follows the concepts of the criminal common law. RPG includes both subjective and objective components. First, the Board must be satisfied that the police officer genuinely believed that an offence had been committed. Second, the Board must be satisfied that this belief was objectively reasonable. As the Alberta Court of Appeal summarized in *R. v. Ha*, 2018 ABCA 233 at para 70:

70 The court must ask if there are objectively verifiable facts that would have caused a reasonable person with the training and experience of the police officer, who was aware of the information known to the police officer, to believe in the facts supporting the arrest.

28. The Registrar argued that Cst. Begley considered the Appellant’s statement that he burped and rejected it, therefore he had RPG to proceed. Based on the evidence the Board disagrees with the Registrar’s interpretation of events and finds that Cst. Begley did not subjectively believe that he had obtained a good breath sample at the time he arrested the Appellant and made the demand.

29. When the Appellant first provides his breath sample, Cst. Begley states that a burp could affect the results of the ASD. At 0212 hours, Cst. Begley can be heard on the police DVD stating for a second time that a burp could contaminate the breath sample, and that therefore the Appellant was being taken to the police detachment to provide two more samples after waiting 15 minutes. The Appellant confirms to Cst. Begley that he did burp at this point. Back at the police station, Cst. Begley can be heard having a conversation with another officer during which he indicates that

the Appellant burped, and that this could affect the validity of the breath sample. Cst. Begley explains to the other officer that he brought the Appellant to the station to be sure. The Board further considered that Cst. Begley was aware that fresh mouth alcohol could also affect the reliability of the results of an ASD test, as he stated this to the Appellant as he was explaining his rights.

30. Given his training, his experience and the facts he knew, the Board finds that Cst. Begley did not have reasonable grounds to support arresting the Appellant and making the evidentiary breath demand. Based on Cst. Begley's own comments, the Board finds he did not subjectively believe that he had obtained a reliable ASD sample. Making a demand for a bodily sample from the Appellant without proper grounds is a breach of the Appellant's Charter right to be free from unreasonable search or seizure.
31. On the facts of this case, the Board finds that taking a bodily sample in the absence of the requisite reasonable grounds to believe an offence was committed is egregious conduct, and that it would be manifestly unfair to the Appellant for the Board to give any weight to the evidence gathered after the Appellant was arrested. Given his own comments, Cst. Begley should have waited 15 minutes at the roadside for the Appellant's mouth alcohol to dissipate, and have the Appellant provide another sample. The purpose of an evidentiary breath demand is not to compensate for uncertain ASD results, it is to determine the concentration of alcohol in the Appellant's blood after the officer already has reasonable grounds to believe that the Appellant has committed an offence.
32. Given this finding, it was unnecessary for the Board to consider the Appellant's argument with respect to his section 10(b) Charter rights.

Whether the Appellant's Ability to Operate a Motor Vehicle was Impaired by Alcohol

33. In order to uphold the suspension for impaired operation of a motor vehicle, the Board must be satisfied that the Appellant consumed alcohol and be satisfied that the Appellant's ability to drive was impaired.
34. The Board finds the Appellant consumed alcohol based on his admission that he consumed a beer, and the odour of alcohol on his breath.
35. Having found consumption, the Board went on to consider whether the Appellant's ability to drive was impaired. There is no evidence before the Board that the Appellant was impaired by alcohol. The Registrar also conceded that there was not enough evidence to conclude that the Appellant was impaired.
36. On the evidence before it, the Board is satisfied that the Appellant did not drive a motor vehicle having consumed alcohol in such a quantity that his ability to operate the motor vehicle was impaired within three hours after having driven a motor vehicle.

Whether the Appellant's Blood Alcohol Concentration Exceeded 80 Milligrams of Alcohol in 100 Millilitres of Blood

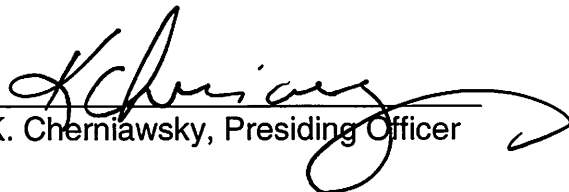
37. For the reasons set out above, the Board did not give any weight to the evidence of the Appellant's blood alcohol concentration.
38. On the evidence that is fair to consider, the Board is satisfied, on a balance of probabilities, that the Appellant did not drive a motor vehicle having consumed alcohol in such a quantity that the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood at any time within three hours after having driven a motor vehicle.

CONCLUSION

39. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant's licence suspension immediately.
40. In addition, under section 39.2(6) of the *Act*, the Board directs the return of any fees paid to the Government by the Appellant in respect of this appeal.

DATED at the City of Edmonton, in the Province of Alberta, this 20th day of August, 2019.

ALBERTA TRANSPORTATION SAFETY BOARD


K. Cherniawsky, Presiding Officer

APPENDIX "A"

DOCUMENTS RECEIVED PRIOR TO THE HEARING:

No. ITEM

Application for Hearing

1. Application for Hearing received by the Board January 7, 2019, including Notice of Suspension/Disqualification

Police Disclosure

2. Court Folder
3. Information Sheet
4. Promise to Appear
5. General Report of Cst. Begley
6. Certificate of a Qualified Technician for S.J.B.
7. Affidavit of Personal Service of Cst. Begley
8. Notice of Intention to Seek Greater Punishment
9. Affidavit of Personal Service of Cst. Begley
10. Intox EC/IR II: Operational Checksheet
11. Intox EC/IR II: Subject Test for Test Number 599
12. Photocopy of Alco-Sensor Calibration Log
13. Notice of Suspension / Disqualification
14. Seizure Notice
15. Motor Vehicle 24 Hr. Suspension/Seizure/Impound Report
16. Handwritten Notes of Cst. Begley
17. DVD (1)

Submissions of the Appellant

18. Written Submission from Counsel for the Appellant dated March 5, 2019 including:
 - a. Affidavit of the Appellant

Submissions of the Registrar

19. Written Submission from Counsel for the Registrar dated March 11, 2019