

## Alberta Transportation Safety Board

Citation: 2018 ABTSB 1198

Date: 2018-11-07

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 W. Hood (the “Appellant”);

A written hearing was held in the City of Edmonton, in the Province of Alberta, on November 7, 2018.

### **BEFORE:**

D. Poon Phillips, Presiding Officer

A. Koski, Member

E. Sullivan, Member

### **PRESENT:**

B. Marshall, Board Secretary

A. Chisholm, Independent Counsel to the Board

### **BACKGROUND / PRELIMINARY MATTERS**

Notice of the hearing and the police disclosure were provided to the Appellant by letter dated September 26, 2018, and to the Registrar of Motor Vehicle Services (the “Registrar”), in advance of the hearing.

### **EVIDENCE AND DOCUMENTS CONSIDERED**

The Board considered the documents 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, the Appellant failed or refused to comply with a demand made under section 254 of the *Criminal Code* (Canada).
2. The Appellant has appealed the AALS.

3. The Appellant provided the following reasons for the appeal:
  - a. His right to counsel was breached when he was denied an opportunity to complete his consultation with his lawyer without waiving his right to do so.
  - b. He had a reasonable excuse for refusing to provide a breath sample, as he had not completed his consultation with his lawyer.

### **ROLE OF THE BOARD**

4. 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) ...
  - (a.1) ...
  - (a.2) ...
- (b) ...
- (c) the person, with respect to the driving of a motor vehicle, failed or refused, without a reasonable excuse, to comply with a demand made on that person under section 254 of the *Criminal Code* (Canada),

the Board must confirm the suspension or disqualification.

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

- (a) ...
  - (a.1) ...
  - (a.2) ...
  - (a.3) ...
- (b) ...
- (c) that with respect to the driving of a motor vehicle

- (i) the person did not fail or refuse to comply with a demand made on that person under section 254 of the *Criminal Code* (Canada), or
- (ii) the person had a reasonable excuse for failing or refusing to comply with the demand referred to in subclause (i),

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.

## **POLICE DISCLOSURE**

5. On August 31, 2018, at approximately 2140 hours, Cochrane RCMP received a complaint of an impaired driver on Hwy 1 east of Hwy 22. The complainant, D.L. advised that he saw a motor vehicle drive off the road through a fence. The driver (the Appellant) was reported as male, possibly intoxicated, smelled like alcohol, had trouble standing and was, at the time of the complaint, sleeping. D.L. reported that he took the Appellant's keys.
6. At around 2210 hours, Cst. Garland and Cst. Gordon arrived on scene and D.L. identified the Appellant and the Appellant's vehicle.
7. As Cst. Garland and Cst. Gordon spoke with the Appellant, Cst. Garland noted that the Appellant was leaning against his vehicle. He asked the Appellant to walk to the back of the vehicle, at which time he noted that the Appellant could not walk on his own without the aid of his vehicle.
8. While speaking with the Appellant, Cst. Garland detected an odour of liquor on the Appellant's breath and observed that the Appellant's speech was slurred. At this point, Cst. Garland had reasonable and probable grounds to believe the Appellant's ability to operate a motor vehicle was impaired by alcohol and arrested the Appellant.
9. Cst. Garland read the Appellant his Charter rights and the police caution, and the Appellant stated that he understood. Cst. Garland read the Appellant the evidentiary breath demand, and the Appellant advised that he did not understand and that he wanted to speak to his lawyer. Cst. Garland noted that he explained the process more than once.
10. Cst. Garland transported the Appellant to the police detachment and at 2256 hours, placed him in the phone room, where he spoke with his lawyer for 30 minutes. At 2323 hours, Cst. Gordon checked on the Appellant who then handed Cst. Gordon the phone. Cst. Gordon spoke with the Appellant's lawyer briefly.
11. The Appellant then requested medical attention. At 2349 hours, EMS arrived at the detachment. The Appellant was medically cleared at 0000 hours.

12. At 0004 hours, the Appellant was brought into the breath technician's room. At 0006 hours, the Appellant refused to provide a breath sample and indicated that he wanted to consult with his lawyer, who was waiting out front. Cst. Lambert, the breath technician, explained what was required of the Appellant and that they were running out of time for a breath sample. The Appellant advised that he would provide a breath sample.
13. At 0009 hours, the Appellant was brought back into the breath technician's room and refused to provide a breath sample. Cst. Lambert explained to the Appellant that the penalty for refusal holds the same weight as an impaired driving charge and that it was in his best interest to provide a sample. The Appellant advised that his lawyer told him not to provide a breath sample.
14. At 0108 hours, the Appellant was released on a Promise to Appear and served with all relevant police documents. He was released into the care of his corporate lawyer.
15. The witness, D.L. provided a statement to the police, which included further details of the incident.
16. Two DVDs were provided with the police disclosure and included video from the roadside and at the police detachment.

#### **SUMMARY OF THE APPELLANT'S EVIDENCE**

17. The Appellant submitted a sworn affidavit dated October 12, 2018 to the Board, which set out in part that:
  - a. On August 31, 2018, he was involved in a motor vehicle collision.
  - b. Police arrived and arrested him for impaired driving.
  - c. Cst. Garland told him it was his right to call a lawyer, and he immediately told Cst. Garland that he had a lawyer and wanted to speak to him.
  - d. Once at the police station, he was placed in a phone room and given his cell phone. He called his lawyer, J.L., and told him that he had lost control of his vehicle, driven into a ditch, crashed into a fence and was under arrest for impaired driving.
  - e. J.L. asked him if he had been provided with medical attention, and he said no. J.L. told him that since he had been in a motor vehicle collision, it would be a good idea to seek medical attention to ensure he was not injured.
  - f. J.L. told him that he was on his way to the police detachment and would be there shortly.

- g. He told Cst. Garland he needed medical attention. An ambulance was called and paramedics arrived sometime thereafter to examine him. When they finished their examination, he was told by Cst. Garland and Cst. Lambert that he had to provide a breath sample.
  - h. He told the officers that he wanted to speak to his lawyer, who was waiting inside the lobby of the police detachment. However, the officers would not let him see or speak to J.L. and he was told that he was not allowed to do so.
  - i. Cst. Lambert told him he had to provide a breath sample or he would be charged with refusal. He again told Cst. Lambert that he wanted to speak to his lawyer, J.L., before providing a breath sample.
  - j. He was arrested for refusing to provide a breath sample.
  - k. At no time after receiving medical attention was he permitted to talk to his lawyer by phone or in person and at no time did he waive his right to counsel.
18. Counsel for the Appellant, J.L., submitted a sworn affidavit dated October 15, 2018, which sets out in part:
- a. On August 31, 2018, at approximately 10:45 p.m., he received a call from the Appellant advising him that he had been in a motor vehicle accident and was at the RCMP detachment in Cochrane.
  - b. The Appellant advised him that he had a headache, was tired, had nausea and could not remember the full details of the motor vehicle accident.
  - c. He advised the Appellant to request medical attention and told him that he was on his way to the RCMP detachment in Cochrane.
  - d. He arrived at the RCMP detachment at 11:20 p.m. and advised the officer he wanted to see and speak to the Appellant.
  - e. He was advised that he was not permitted to see the Appellant.
  - f. He waited in the lobby for approximately one hour and 30 minutes. Throughout this time, he spoke with an officer three times; however, he was not allowed to consult with the Appellant or given any updates.
  - g. On one occasion, an officer made a comment about the Appellant refusing to provide a breath sample. He advised the officers that he had directly asked an officer earlier if a breath sample had been requested, at which point the officer told him that he could not say because it was private.
  - h. At about 1:00 a.m., he drove the Appellant home.

## **SUMMARY OF ARGUMENTS**

### Appellant

19. Counsel for the Appellant argued that Appellant's right to counsel was egregiously breached when he was denied an opportunity to complete his consultation with counsel without waiving his right to do so. The Appellant argued that there was no lawful or reasonable justification for the police conduct in this case.
20. The Appellant unequivocally advised the officers that he wished to speak with his counsel before providing a breath sample, and advised the officers that his lawyer was at the police station. However, the Appellant was not provided the opportunity to speak to him even though it could have been easily facilitated. The Appellant argued that there is no suggestion that he was not being diligent.
21. The Appellant argued that it is well settled law that one phone call to counsel will not necessarily satisfy an appellant's section 10(b) right and cited *R. v. Whitford*, 1997 ABCA 85 and *R. v. Rusnow*, [2009] OJ No 4951 in support of this argument.
22. The Appellant also argued that he had a reasonable excuse for refusing to provide a breath sample, as he had not completed his consultation with his counsel yet.

### Registrar

23. Counsel for the Registrar argued that the Appellant's AALS should be upheld on the basis that the evidence demonstrates, on a balance of probabilities, that the Appellant refused a breath demand.
24. The Registrar also argued that the Appellant did not have a reasonable excuse for refusing the breath demand and that his section 10(b) Charter right was not breached. The Registrar argued that the Appellant was provided with a reasonable opportunity to contact a lawyer and in fact did contact a lawyer and received advice as demonstrated by the fact that he told Cst. Lambert that his lawyer had advised him not to provide a breath sample.

### Rebuttal Submissions from the Appellant

25. In reply to submissions from counsel for the Registrar, counsel for the Appellant reiterated that the Appellant was not permitted to complete his consultation with counsel after his medical evaluation. The Appellant argued that this was significant, as the Appellant's counsel was present at the police detachment and the Appellant asserted that he wished to continue his consultation with counsel.

## **ISSUES BEFORE THE BOARD**

26. In the Board's view, the issues in this appeal are:

- a. whether evidence was collected in a way that infringed the Appellant's Charter rights and if it was, whether it would be manifestly unfair to the Appellant for the Board to consider that evidence; and
- b. whether the Appellant, with respect to the driving of a motor vehicle, failed or refused, without a reasonable excuse, to comply with a demand made on him under section 254 of the *Criminal Code* (Canada).

## **FINDINGS OF THE BOARD**

27. The Board finds that evidence was collected in a way that infringed the Appellant's Charter rights, or was inconsistent with Charter values, and that it would be manifestly unfair to the Appellant for the Board to consider that evidence.
28. The Board finds that the Appellant did not fail or refuse, without a reasonable excuse, to comply with a demand made on him under section 254 of the *Criminal Code* (Canada).

## **REASONS OF THE BOARD**

29. The Board is not designated by the Legislature under the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c. A-3, as a decision maker authorized to make determinations of constitutional law. However, the Board may consider the police conduct in relation to the Appellant's right to counsel as part of its duty of fairness to the Appellant. One component of that duty of fairness was that the Board consider the source of the evidence or information, including whether it was gathered in a manner contrary to the Charter or Charter values (*Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256 (CanLII), at paragraph 68).
30. The analysis is not the same as the analysis that would be done in a criminal case.
31. As the Court of Appeal determined in *Thomson* at paragraph 29:

Where, as here, the consequences of the behaviour are civil in nature, the stringent procedural safeguards required under the criminal law are of less significance and the balance shifts somewhat in favour of the societal goal of deterrence and safety.
32. However, the Board may be guided by concepts defined in the criminal common law in its assessment of whether there was an egregious Charter breach.
33. In the case at hand, counsel for the Appellant argued that the Appellant's Charter rights were breached by police when the Appellant was denied an opportunity to complete his consultation with his lawyer without waiving his right to do so.
34. In considering whether the Appellant's Charter rights were breached, the Board found that the officer's decision to proceed with the demand for evidentiary breath

samples and not read the Appellant a waiver of his right to counsel, after the Appellant requested to speak with his lawyer at 0004 hours, was an action that was not in accordance with Charter values and breached the Appellant's section 10(b) Charter rights.

35. While the Appellant was in the phone room from 2256 hours to 2323 hours, the Board notes that at 2323 hours, the Appellant passed the phone to Cst. Gordon and requested medical attention. EMS was called to the detachment and cleared the Appellant at 0000 hours. The Appellant was taken into the breath room and refused his first sample, stating that he wanted to consult his lawyer, who was waiting out front. Further, the affidavit evidence submitted by the Appellant's counsel is consistent with the police disclosure in that it states the Appellant's lawyer was present at the detachment. The Board also considered that there is no evidence before it to suggest that the Appellant was not being diligent in contacting a lawyer.
36. Having found that the officer's conduct was not in accordance with Charter values, the Board considered whether it would be manifestly unfair to the Appellant to consider a piece of evidence. For the purpose of assessing if the police conduct or Charter breach was egregious, the analysis standard for the Board was set out by the Court of Queen's Bench in *Baker v. Alberta (Transportation Safety Board)* 2004 ABQB 244 ("*Baker*") (paragraph 62):

The Board may view reliance on evidence resulting from an egregious breach by the police as an abuse of its process or a breach of natural justice. To expand on the extreme example from *Mooring*, if a person was tortured, produced a confession and that confession was corroborated to some degree, the concern regarding reliability may be overcome or mitigated, however it would be manifestly unfair or an abuse of process to rely in any way on the evidence obtained through torture.

[Emphasis added]

37. The Board accepts the meaning of "egregious" to be:
  - a. gross, flagrant, shocking, or outstandingly bad (Canadian Oxford Dictionary, 1998);
  - b. outstandingly bad, shocking (Concise Oxford Dictionary, 8th ed., 1990);
  - c. conspicuous for bad quality or taste; notorious; extraordinary, extreme; flagrant (Webster's Third New International Dictionary, unabridged, 1993).
38. In this case, the Board finds that the officer's decision to proceed with the demand for evidentiary breath samples, despite knowing that the Appellant had not finished speaking with his lawyer and not reading the Appellant the waiver before placing him before the breath technician, amounted to egregious conduct. From the timeline set out above, the Board notes that the Appellant made efforts to contact his lawyer and



that the Appellant's lawyer was present at the detachment and asked to speak with the Appellant.

39. While the Board may not exclude evidence under section 24(2) of the Charter, the Board may choose not to consider a piece of evidence on the basis that it was obtained as a result of an egregious Charter breach and therefore manifestly unfair:

**58** As Binnie J. noted in *Little Sisters* at para. 137, there is potential for Charter abuse in the administration of a legislated scheme, however, "a rule requiring Parliament to enact in each case special procedures for the protection of Charter rights would be unnecessarily rigid." He noted that there are various methods to ensure respect by the public service for the Charter rights of citizens. One such example is the imposition of the duty of procedural fairness which applies to guide the Board when dealing with the rights, privileges and interests of individuals. While distinct from a s. 24(2) remedy, the duty in a particular circumstance may require a tribunal not to consider evidence.

[Emphasis added]

*Thomson v. Alberta (Transportation Safety Board)*, 2003 ABCA 256

40. In this case, as a result of the egregious police conduct, the Board finds that it would be manifestly unfair to the Appellant to consider the evidence collected after the Appellant was denied his right to counsel, including the evidence of the Appellant's refusal.

#### Whether the Appellant Refused to Comply with a Breath Demand

41. For the reasons set out above, the Board did not consider the evidence of the Appellant's refusal. On the evidence that is fair to consider, the Board finds that the Appellant did not refuse a breath demand made under section 254 of the *Criminal Code* (Canada).

## CONCLUSION

42. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant's licence suspension immediately.
43. 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 6<sup>th</sup> day of December, 2018.

ALBERTA TRANSPORTATION SAFETY BOARD

  
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D. Poon Phillips, Presiding Officer

## **APPENDIX “A”**

### **DOCUMENTS RECEIVED PRIOR TO THE HEARING AND MADE AVAILABLE AT THE HEARING:**

#### **No. ITEM**

#### **Application for Hearing**

1. Application for Hearing received by the Board September 7, 2018, including Notice of Suspension/Disqualification

#### **Police Disclosure**

2. Court Folder
3. Information
4. Promise to Appear
5. Statement of D.H.L
6. Notice of Intention to Seek Greater Punishment
7. Affidavit of Personal Service of Cst. Garland
8. Seizure Notice
9. Notice of Suspension/Disqualification
10. Motor Vehicle 24 Hr. Suspension/Seizure/Impound Report
11. Intox EC/IR II: Operational Checksheet
12. Intox EC/IR II: Subject Test for Test Number 1009
13. Intox EC/IR II: Quick Test for Test Number 1010
14. General Report of Cst. Garland
15. Handwritten Notes of Cst. Garland
16. DVDs (2)

#### **Submissions of the Appellant**

17. Written Submission from Counsel for the Appellant dated October 15, 2018
18. Rebuttal Submission from Counsel for the Appellant dated October 24, 2018

#### **Submissions of the Registrar**

19. Written Submission from Counsel for the Registrar dated October 23, 2018