

Alberta Transportation Safety Board

Citation: 2018 ABTSB 1081

Date: 2018-06-13

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. Grover (the “Appellant”);

A written hearing was held in the City of Edmonton, in the Province of Alberta, on June 13, 2018.

BEFORE:

D. Poon Phillips, Presiding Officer

A. Koski, Member

P.E. Maeda, Member

PRESENT:

B. Marshall, Board Secretary

A. Chisholm (Student-at-Law), Independent Counsel to the Board

BACKGROUND / PRELIMINARY MATTERS

Notice of the hearing and the police disclosure were provided to the Appellant by letter dated April 24, 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 the Appellant failed or refused, without reasonable excuse, to comply with a valid demand made under section 254 of the *Criminal Code* (Canada), to perform roadside sobriety tests, a drug evaluation or provide a sample of breath, blood, urine or oral fluid.

2. The Appellant has appealed the AALS.
3. The Appellant provided the following reason for the appeal:
 - a. The Appellant's section 8 and 9 Charter rights were egregiously breached when he was removed from his vehicle and thoroughly searched before being secured in the rear of the marked police vehicle; resulting in an unnecessary delay in the Approved Screening Device ("ASD") demand and test.

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) ...
- (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) ...
- (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 March 29, 2018, at 1926 hours, Coronation RCMP received a complaint of an impaired driver. The complainant, L.K., stated that he observed an older male, wearing a grey plaid shirt, driving a silver or beige Cadillac Escalade all over the road, braking erratically and traveling over 140 km/h southbound, on Highway 36 near Township Road 384. L.K. reported that he last saw the vehicle perform a "U-Turn" near the Castor Co-op.
6. At 1940 hours, Cst. MacIntyre was patrolling the area in search of the suspect vehicle when he came upon a vehicle that matched the description and licence plate given by the complainant. The suspect vehicle was parked and running in the roadway leading to the County of Paintearth office building, which was next door to the Castor Co-op.
7. Cst. MacIntyre drove past the driver's window and observed an elderly male asleep behind the wheel. Cst. MacIntyre then turned around and parked behind the vehicle. The driver attempted to drive away, at which point, Cst. MacIntyre activated his vehicle's emergency lights and the vehicle stopped.
8. Cst. MacIntyre observed that the driver (the Appellant) had red, bloodshot and glossy eyes and an odour of liquor emanating from his breath.
9. Cst. MacIntyre informed the Appellant of the complaint. In response, the Appellant denied having any drinks or driving erratically.
10. Cst. MacIntyre formed reasonable suspicion based on: the complainant's report of erratic driving; his observation of the Appellant sleeping behind the wheel while the vehicle was still running; the smell of alcohol emanating from the Appellant; the Appellant's red, bloodshot and glossy eyes; and the Appellant's denial of drinking alcohol.
11. At this point, Cst. MacIntyre read the Appellant the ASD demand by memory and asked the Appellant to step out of his vehicle and accompany him to the police vehicle. The Appellant complied with Cst. MacIntyre's request.
12. At 1949 hours, Cst. MacIntyre read the ASD demand and asked the Appellant if he would comply with the demand. The Appellant indicated that he was willing to provide samples of his breath.
13. Cst. MacIntyre explained to the Appellant how to provide a proper breath sample. Cst. MacIntyre stated that the Appellant should not touch the ASD but rather lean

forward, form a seal around the mouthpiece and blow air through the mouthpiece until he was told to stop. The Appellant indicated that he understood this direction.

14. Between 1949 hours and 1958 hours, the Appellant made five attempts to provide a sample of his breath on the ASD. Between each attempt, Cst. MacIntyre provided verbal direction to the Appellant and reminded him of the consequences of failing to provide a sample of his breath. All five attempts resulted in an "INS FLO" reading.
15. Cst. MacIntyre observed that the Appellant was "purposefully stopping his breath short each time and was not running out of breath as he suggested to Cst. MacIntyre".
16. At 2004 hours, Cst. MacIntyre arrested the Appellant for failing to comply with the ASD demand. Cst. MacIntyre read the Appellant his Charter rights and the police caution.
17. At 2110 hours, the Appellant was released on a Promise to Appear and served with other relevant police documents.
18. The police DVD contains video from the roadside, including video of Cst. MacIntyre pulling up behind the Appellant's vehicle, as well as video of Cst. MacIntyre's search of the Appellant prior to the Appellant being placed the police vehicle and the Appellant's attempts to provide a sample of his breath on the ASD.

SUMMARY OF THE APPELLANT'S EVIDENCE

19. The Appellant did not submit any evidence to the Board.

SUMMARY OF ARGUMENTS

Appellant

20. Counsel for the Appellant argued that the Appellant's section 8 and 9 Charter rights were egregiously breached and, as such, the ASD demand and the testing procedure were not conducted "forthwith".
21. The Appellant argued that there was no rational reason for Cst. MacIntyre to remove the Appellant from his personal vehicle and secure him in the police vehicle before administering the ASD. There was no evidence to suggest that the Appellant was uncooperative, aggressive or a flight risk. Therefore, the delay was unnecessary and resulted in the ASD demand not being made forthwith and subjected the Appellant to a higher degree of detention.
22. Further, as can be seen in the videos provided on the police DVDs, Cst. MacIntyre's thorough pat down search of the Appellant's person was unreasonable in the circumstances and elevated the severity of the breaches, creating a distinct

breach of the Appellant's section 8 Charter rights. The Appellant cited *R. v. Fournier*, 2017 ABQB 533, and the Board's decisions in *Marceau (Re)*, 2016 ABTSB 660 (CanLII) and *Emmerich (Re)*, 2017 ABTSB 759 (CanLII), in support of this position.

23. Finally, the Appellant argued that it would be manifestly unfair to consider any evidence that arose from these breaches, including any evidence of the Appellant's failure to provide an adequate sample into the ASD.

Registrar

24. Counsel for the Registrar summarized the evidence in the police disclosure and argued that the Appellant's AALS should be upheld on the basis that the Appellant failed to provide a sufficient sample of his breath on the ASD despite being given instructions, five attempts to provide a sample and warnings of the consequences should he fail to provide a sample.
25. Despite the Appellant's suggestion that he struggled to provide a sample, the Appellant did not provide any evidence of this, such as medical documentation. Moreover, the video on the police DVD demonstrated that the Appellant's insufficient attempts to provide a sample of his breath on the ASD related to starting and stopping rather than an inability to blow long enough, as would be expected if shortness of breath was the issue.
26. In response to the Appellant's argument that his Charter rights were egregiously breached when Cst. MacIntyre removed him from his vehicle and performed a search on him, the Registrar argued that Cst. MacIntyre's actions were reasonable in the circumstances.
27. When Cst. MacIntyre took these steps, he already had the complainant's report of the Appellant's reckless driving; when he pulled in behind the Appellant in his marked police vehicle, the Appellant tried to drive away; and when he spoke to the Appellant, the Appellant denied erratic driving and alcohol consumption, which Cst. MacIntyre must have believed to be lies, given his subsequent actions.
28. Considering the Appellant had already tried to drive away, it was reasonably necessary for Cst. MacIntyre to require him to exit his vehicle and enter the police vehicle. The Registrar submitted that, as Cst. MacIntyre was working alone in a rural location, it was reasonably necessary for him to do a frisk search for safety. It was also evident that Cst. MacIntyre acted out of concern for his personal safety and not in order to compel evidence, considering that it can be seen in the video on the police DVDs that he seized a pen from the Appellant's pocket, which could have no bearing on the impaired investigation.
29. The Registrar submitted that there was no breach or, alternatively, if there was a breach, it was not egregious enough to warrant that the Board refuse to consider the evidence.

ISSUES BEFORE THE BOARD

30. 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 or in a way that was inconsistent with Charter values 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, without a reasonable excuse, to comply with a demand made on him under section 254 of the *Criminal Code* (Canada).

FINDINGS OF THE BOARD

31. 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.
32. The Board finds that the Appellant did not fail to comply with a demand made on him under section 254 of the *Criminal Code* (Canada).

REASONS OF THE BOARD

Fairness of Police Conduct

33. The Board does not have jurisdiction to determine questions of constitutional law. However, the Alberta Court of Appeal in *Thomson v. Alberta (Transportation Safety Board)*, 2003 ABCA 256, made clear that the Board owes a duty of fairness to the Appellant. As part of that duty, the Court held that the Board must consider the source of the evidence or information, including whether it was gathered in a manner contrary to the Charter or Charter values.
34. The analysis is not the same as the analysis that would be done in a criminal case.
35. 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.
36. 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.

37. In the case at hand, counsel for the Appellant has argued that the Appellant's section 8 and 9 Charter rights were breached by police when the Appellant was removed from his vehicle and thoroughly searched before being secured in the rear of the marked police vehicle; resulting in an unnecessary delay in the ASD demand and test.
38. In considering whether the Appellant's Charter rights were breached, the Board considered the timeline of events and the interactions between the Appellant and Cst. MacIntyre, as they are set out in the police DVDs and the typed notes of Cst. MacIntyre. The Board also considered the principles arising from the case law cited by the Appellant's counsel.
39. The Board finds, on a balance of probabilities, that Cst. MacIntyre's conduct was unreasonable in the circumstances.
40. The Board reviewed the police DVDs provided as part of the police disclosure and finds that Cst. MacIntyre's search of the Appellant was more invasive than a "pat down" search. The Board finds Cst. MacIntyre conducted a complete search of the Appellant, including a search of the Appellant's pant pockets and the removal of a pen, cellphone and wallet from the Appellant's front shirt pocket. In the Board's view, a "pat down search" would only take a few moments. However, based on the video on the police DVD, the Board finds that Cst. MacIntyre's search of the Appellant lasted nearly a minute.
41. The Board finds that there was no indication from the police DVD or Cst. MacIntyre's typed notes that the Appellant threatened Cst. MacIntyre's safety such that an invasive search was required. The Board considered the Registrar's submissions that the traffic stop was conducted in a rural area and that the Appellant attempted to drive away after Cst. MacIntyre pulled up behind him. However, the Board notes that the Appellant attempted to drive away prior to Cst. MacIntyre turning on the lights of the police vehicle and that when Cst. MacIntyre turned on the lights of the police vehicle to perform the traffic stop, the Appellant stopped his vehicle. Further, the Board considered that the stop occurred during the hours of daylight, there was traffic on the road and the area was not secluded. The Board also notes that the Appellant walked with a limp and was cooperative with Cst. MacIntyre. There was no justifiable reason to seize the Appellant's cell phone or wallet. In the totality of these circumstances, the Board finds the Appellant posed no apparent safety concern to the officer.
42. The Board also notes that on the video, Cst. MacIntyre is heard notifying dispatch that he had an individual "in custody" prior to administering the ASD. In the Board's view, this statement implies that Cst. MacIntyre had made up his mind with respect to the results of his investigation into the Appellant.
43. Having found that the police conduct was unreasonable in the circumstances, the Board must consider whether it would be manifestly unfair 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]

44. 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); and
 - c. conspicuous for bad quality or taste; notorious; extraordinary, extreme; flagrant (Webster's Third New International Dictionary, unabridged, 1993).
45. In this case, for all of the various factors mentioned, the Board finds Cst. MacIntyre's conduct in removing the Appellant from his vehicle and performing an invasive personal search amounted to egregious police conduct.
46. 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]

47. Therefore, as a result of finding Cst. MacIntyre's conduct egregious, the Board finds that it would be manifestly unfair to the Appellant to consider the evidence after Cst. MacIntyre performed a search on the Appellant, which includes evidence of the Appellant's failure to comply with the roadside breath demand.

Whether the Appellant Failed to Comply with a Breath Demand

48. For the reasons outlined above, the Board did not consider the evidence of the Appellant's failure to comply with the roadside breath demand.
49. As a result, the Board is satisfied, on a balance of probabilities, that the Appellant did not fail to comply with the breath demand.

CONCLUSION

50. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant's licence suspension immediately.
51. 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 10th day of July, 2018.

ALBERTA TRANSPORTATION SAFETY BOARD

Original signed by D. Poon Phillips

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 April 6, 2018, including Notice of Suspension/Disqualification

Police Disclosure

2. Court Folder
3. General Report of Cst. MacIntyre
4. DVDs (2)

Submissions of the Appellant

5. Written Submission from Counsel for the Appellant received by the Board May 29, 2018

Submissions of the Registrar

6. Written Submission from Counsel for the Registrar dated June 5, 2018