

Alberta Transportation Safety Board

Citation: 2018 ABTSB 1084

Date: 2018-06-20

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 M. Iwanyshyn (the “Appellant”);

A written hearing was held in the City of Edmonton, in the Province of Alberta, on June 20, 2018.

BEFORE:

D. Poon Phillips, Presiding Officer
J.G. Glavin, Member
W. Haas, Member

PRESENT:

B. Marshall, Board Secretary
P. Hale, Independent Counsel to the Board
J. Arendt, Student-at-Law

BACKGROUND / PRELIMINARY MATTERS

Notice of the hearing and the police disclosure were provided to the Appellant by letter dated April 13, 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:

- a. the Appellant drove a motor vehicle while impaired by alcohol, drug, or a combination of alcohol and drug contrary to sections 253(1)(a), 255(2), and (3) of the *Criminal Code* (Canada); and
 - b. the Appellant drove a motor vehicle having a blood alcohol concentration in excess of 80 milligrams percent contrary to sections 253(1)(b), 255(2.1), and (3.1) of the *Criminal Code* (Canada).
2. The Appellant has appealed the AALS. The Appellant provided the following reasons for the appeal:
- a. It has not been established that he operated a motor vehicle while impaired.
 - b. His Charter rights were egregiously breached when he was removed from his vehicle, handcuffed, and searched before being placed in the police vehicle for the purpose of complying with the breath demand.

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
- (c) ...

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

(c) ...

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

4. On March 20, 2018, at approximately 2310 hours, in Cochrane, RCMP Cst. Ecker was taking part in a Checkstop on Hwy 1A, just east of Hwy 22. Cst. Ecker spoke with the male driver (the Appellant) of a stopped vehicle and noted an odour of liquor coming from his breath. The Appellant stated that he had one beer while curling. Cst. Ecker noted that there was a slight slur to the Appellant's speech and he was chewing gum. Cst. Ecker asked the Appellant to pull over to the right shoulder and advised him that he would have to provide a breath sample.
5. Cst. Ecker asked the Appellant to grab his driver's licence and exit the driver's seat, and then he escorted the Appellant to the rear seat of the police vehicle and placed him inside. While escorting the Appellant, Cst. Ecker did not notice anything unusual about the Appellant's balance or walking. At 2312 hours, Cst. Ecker read the Appellant the Approved Screening Device ("ASD") demand, and the Appellant stated that he understood. The Appellant provided a breath sample into the ASD that resulted in a "fail" reading. The Appellant was arrested for impaired driving.
6. At 2314 hours, Cst. Ecker Chartered and cautioned the Appellant and read him an evidentiary breath demand. The Appellant stated that he understood and did not wish to contact a lawyer.
7. At 2320 hours, Cst. Ecker transported the Appellant to the Cochrane Detachment, arriving at 2324 hours. While speaking with the Appellant enroute, Cst. Ecker again noted an odour of liquor coming from the Appellant's breath and a slight slur to his speech.
8. The Appellant provided breath samples at 2334 hours and 2356 hours, both of which resulted in blood alcohol concentration readings of 110 milligrams of alcohol in 100 millilitres of blood.

9. The breath technician noted an odour of liquor coming from the Appellant's breath and that he had glassy eyes.
10. The Appellant was released on a Promise to Appear and served with all relevant police documents.
11. The police disclosure included video from the police vehicle.

SUMMARY OF THE APPELLANT'S EVIDENCE

12. The Appellant did not provide any testimony but did submit an Affidavit, which set out the following:
 - a. he was driving home from a curling game, and throughout the evening, had consumed one can and two pints of beer;
 - b. he was stopped by a police officer conducting a Checkstop who approached his window and asked him if he had been drinking;
 - c. he answered that he had consumed one can of beer before curling and began to explain that he had two pints of beer afterwards, but the officer interrupted him asking "One can, what kind?", and he responded that it had been a Kokanee;
 - d. the officer directed him to pull over to the right and he complied, having no difficulties maneuvering his vehicle. Once stopped, he was removed from his vehicle and taken to the police vehicle;
 - e. at the police vehicle, the officer completed a brief pat down, placed him in handcuffs and secured him in the back of the police vehicle;
 - f. the officer requested a sample of his breath; he complied and provided a sample into a handheld device and shortly after, he was advised that he was being charged;
 - g. he was transported to the RCMP Detachment in Cochrane and once there, the officer removed his handcuffs and directed him to another machine. He was offered an opportunity to speak with a lawyer but declined;
 - h. he was required to provide two breath samples. His fingerprints were taken, he was provided with a number of documents, and was then released from the police station; and
 - i. he left the police station and walked home.

SUMMARY OF ARGUMENTS

Appellant

13. The Appellant argued that there is insufficient evidence of impairment to uphold the suspension on that ground. More specifically, the police disclosure reveals that the Appellant had significant interactions with two officers: Cst. Ecker and Cst. Bouthillier. However, Cst. Ecker does not observe the Appellant to have any issues operating his vehicle, either while approaching the Checkstop or pulling over. Cst. Ecker only notes as indicia an odour of alcohol and a potential slur to the Appellant's speech and does not note the Appellant having any issues with comprehension, fine or gross motor skills, or coordination. Cst. Ecker spoke with the Appellant at the roadside and observed the indicia firsthand, but could not himself form the opinion that the Appellant was impaired by alcohol without the assistance of a roadside screening device. The only reason to administer the ASD is if the officer cannot subjectively form a reasonable belief that the Appellant was impaired: *R. v. Milne* [1006] OJ No. 1728.
14. Cst. Bouthillier noted that the Appellant had an odour of alcohol on his breath and glossy eyes; however, no other indicia is noted and Cst. Bouthillier makes no comments regarding the Appellant's sobriety.
15. The immediate search and handcuffing before the Appellant was arrested or given the ASD test was an egregious breach of his Charter rights such that the Board should not consider the results of the evidentiary breath tests which were collected following the breach.
16. Before the ASD, Cst. Ecker did not have the requisite grounds to arrest the Appellant. Nonetheless, Cst. Ecker handcuffed the Appellant, searched him and put him in the police vehicle. This greatly escalated the degree of the Appellant's detention for no justifiable reason and was an egregious breach of the Appellant's Charter rights. There was no evidence that the Appellant was non-compliant or represented any risk to the public or to officer safety.
17. Counsel for the Appellant submitted the case of *R. v Comrie*, 2017 ABPC 14 (paragraphs 79-85) and the previous Board decisions in *MBB (Re)* 2015 ABTSB 520 and *Garner (Re)* 2017 ABTSB 72, in support this argument.

Registrar

18. In response to the Appellant's submissions, the Registrar conceded that there is insufficient evidence that the Appellant's ability to drive was impaired to uphold the suspension on that ground.
19. The Registrar agreed that it would not have been necessary in the circumstances to handcuff and search the Appellant prior to administering the ASD test; however,

the Registrar argued that the evidence does not establish, on a balance of probabilities, that this occurred.

20. The Appellant's affidavit was sworn on May 29, 2018, in support of the appeal but is based on his memory of a night more than a month in the past when he acknowledged he had consumed alcohol and his blood alcohol concentration was significantly over the legal limit. The question is not whether the Appellant was handcuffed at all – that is conceded based on video footage – but whether it took place prior to the ASD test at approximately 2312 hours or upon arrest two minutes later at 2314 hours.
21. The Registrar argued that considering the passage of time and the Appellant's admitted alcohol consumption, his memory is not reliable on the fine point of whether he was handcuffed or searched prior to the ASD test being administered or two minutes later, upon arrest.
22. In contrast, Cst. Ecker's handwritten notes were prepared contemporaneously with events by a trained officer acting in the course of his duty. The General Report prepared within 48 hours of the close of investigation is consistent with the handwritten notes; both are clear and detailed, making no mention of a handcuffing or search prior to the ASD test, which would be unusual. In any case, the handcuffing and a search would be difficult to fit into the two minutes taken for Cst. Ecker to conduct the vehicle stop, interview the Appellant, wait for him to obtain his driver's licence and vehicle documents, and escort him back to the police vehicle. Cst. Ecker's report also does not contain any apparent exaggeration or hyperbole to bolster the case – for example – clearly noting the Appellant had no issues with his balance or walking.
23. The Registrar argued that the police evidence should be preferred and that the police evidence indicates that the Appellant was handcuffed after his arrest such that his Charter rights were not breached.
24. The Registrar argued that the evidence of the two breathalyzer tests showing the Appellant had a blood alcohol concentration of 110 milligrams of alcohol in 100 millilitres of blood 24 minutes and 46 minutes after the vehicle stop establishes that the Appellant drove 'over 80'.

ISSUES BEFORE THE BOARD

25. In the Board's view, the issues in this appeal are:
 - a. whether the evidence of the Appellant's blood alcohol concentration 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;

- 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 at any time 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 at any time within three hours after having driven a motor vehicle.

FINDINGS OF THE BOARD

26. The Board finds that the evidence of the Appellant's blood alcohol concentration was collected in a way that infringed the Appellant's Charter rights and in a way that was inconsistent with Charter values, and that it would be manifestly unfair to the Appellant for the Board to consider that evidence.
27. 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.
28. 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

Police conduct

29. The Board does not have jurisdiction to determine questions of constitutional law but does owe a duty of fairness to the Appellant to consider Charter values. More specifically, in *Thomson v. Alberta (Transportation Safety Board)*, 2003 ABCA 256, the Court of Appeal made clear that the Board's duty of fairness includes considering the source of evidence or information and whether it was gathered in a manner contrary to the Charter or Charter values.
30. The analysis is not the same as the analysis that would be done in a criminal case, although the Board may still be guided by the principles developed in the criminal common law.
31. In the case at hand, counsel for the Appellant has argued that the Appellant's Charter rights were breached by police when he was removed from his vehicle, searched and handcuffed in advance of the ASD test.
32. The Board finds that the Appellant was handcuffed almost immediately upon being pulled over. The Board accepted the Appellant's statements in his sworn affidavit and declined to speculate or draw an inference based on the absence of notes

from Cst. Ecker, as suggested by the Registrar. The Board notes that Cst. Ecker did not record at any point that the Appellant was handcuffed notwithstanding that the video shows the Appellant was handcuffed when he arrived at the detachment. In the Board's view, it would be illogical to infer that the absence of a notation earlier in the investigation supported that handcuffing did not occur when there is no notation of handcuffing later when we know it did occur.

33. Based on the Appellant's sworn evidence, which does not conflict with the police evidence, the Board finds that the Appellant was handcuffed immediately on exiting his vehicle and arriving at the police vehicle.
34. The Board reviewed the case of *R. v. Comrie* provided by the Appellant and accepts that handcuffing and searching by police in a pre-arrest detention setting can be justified, but in the absence of such justification, searching and handcuffing someone is a substantive breach of that person's Charter rights. This is consistent with the Board's previous decisions in *MBB* and *Garner (Re)*, as submitted by the Appellant.
35. In this case, there is no evidence before the Board that the Appellant was anything but calm and cooperative; he was not a risk to officer safety, nor to the safety of the public. In the Board's view this conduct is inconsistent with Charter values and resulted in a substantive breach of the Appellant's Charter rights.
36. The Board went on to consider whether this conduct was egregious. Although there is no evidence of bad faith on the part of Cst. Ecker, his conduct demonstrates a significant disregard or lack of understanding as to when it is appropriate to physically restrain someone who is not arrested. Accordingly, the Board finds that it would be manifestly unfair to consider the results of the evidentiary breath tests, as this evidence was collected by police pursuant to this breach.

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

37. 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.
38. The Board finds that the Appellant consumed alcohol based on his admission of consumption to the police and to the Board in his affidavit, Cst. Ecker's evidence of the smell of alcohol on his breath and the ASD fail.
39. Having found consumption, the Board went on to consider whether the Appellant's ability to drive was impaired. The Board notes there was no problematic driving pattern noted by Cst. Ecker and the only potential indicator of impairment was one notation of "slightly" slurred speech. The Board reviewed the police video and saw no evidence of poor balance, deficient motor skills, or a lack of comprehension.

40. On the evidence before it, 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 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 Percent

41. For the reasons set out above, the Board did not consider the evidence of the Appellant's blood alcohol concentration.
42. Based on the evidence it considered, the Board is satisfied 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.

CONCLUSION

43. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant's licence suspension immediately.
44. 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

No. ITEM

Application for Hearing

1. Application for Hearing received by the Board March 27, 2018, including Notice of Suspension/Disqualification

Police Disclosure

2. Court Folder
3. General Report of Cst. Ecker
4. Handwritten notes of Cst. Ecker
5. Certificate of a Qualified Technician for S.J.G.B.
6. Affidavit of Personal Service of Cst. Ecker
7. Notice of Intention to Seek Greater Punishment
8. Intox EC/IR II: Documents
9. Photocopy of Alco-Sensor FST Calibration Log
10. Certificate of Annual Inspection dated 2017-05-16
11. Certificate of an Analyst for K.C.
12. Certificate of an Analyst for C.H.
13. Notice of Suspension / Disqualification
14. Seizure Notice
15. Motor Vehicle 24 Hr. Suspension/Seizure/Impound Report
16. DVD

Submissions of the Appellant

17. Affidavit of Appellant dated May 24, 2018 and Written Submission from Counsel for the Appellant dated May 29, 2018

Submissions of the Registrar

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