

**Alberta Transportation Safety Board**

Citation: 2019 ABTSB 1285  
Date: 2019-01-23  
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 R. Clarke (the "Appellant").

A written hearing was held in the City of Edmonton, in the Province of Alberta, on January 23, 2019.

**BEFORE:**

D. Poon Phillips, Presiding Officer  
K. Cherniawsky, Member  
J. Pendleton, Member

**PRESENT:**

A. Baker, Acting Board Secretary  
J. Arendt, Independent Counsel to the Board

**BACKGROUND / PRELIMINARY MATTERS**

Notice of the hearing and the police disclosure were provided to the Appellant by email dated December 5, 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 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/disqualification 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 on the following grounds:
  - a. The Appellant's section 7, 9 and 10(b) Charter rights were egregiously breached when police approached the Appellant for no apparent reason. After being confronted by police, the Appellant was immediately handcuffed and placed in the back of the police vehicle without grounds to do so.
  - b. The Appellant's section 8 Charter rights were breached when the officers searched his vehicle subsequent to an unlawful arrest.
  - c. The Appellant did not refuse to comply with a lawful breath demand. He was placed under arrest for impaired operation of a motor vehicle, and there was no lawful authority for the officers to then make a roadside 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) ...
- (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) ...
- (i) ...
- (ii) ...
- (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**

4. On November 11, 2018, Cst. Hauenstein and Cst. McLeod, of the Red Deer RCMP, observed a known prostitute in a vehicle which was running with its lights on in a parking stall. Cst. McLeod activated the police vehicle's emergency lights and conducted a traffic stop of the vehicle. Cst. Hauenstein noted that when he exited his vehicle, a male (the Appellant), opened the driver's side door of the vehicle and approached the officers. The Appellant's balance was very poor and he staggered from side to side when he approached him.
5. The Appellant stated that he was coming from the bar and he was giving his friend a lift. When the Appellant spoke, Cst. Hauenstein could detect a strong odour of alcohol coming from his breath; the Appellant's eyes were bloodshot.
6. Cst. Hauenstein "declared to Clarke that he was being detained for impaired care and control of a motor vehicle" at which point the Appellant made a spontaneous confession that he had a few beers in the bar. Cst. Hauenstein handcuffed the Appellant and read him his Charter rights verbatim. Cst. McLeod, however, noted, "At this point Cst Hauenstein detained the male for impaired care and control of a motor vehicle", and then searched the Appellant's vehicle.
7. At 2157 hours, Cst. Hauenstein read the Appellant the Approved Screening Device (ASD) demand and the Appellant responded, "No I will not provide you a sample of my breath". Cst. Hauenstein informed the Appellant that he was under arrest for refusal. At 2158 hours, Cst. Hauenstein Chartered and cautioned the Appellant. The

Appellant was belligerent and refused to acknowledge his Charter rights or police caution.

8. Cst. McLeod searched and located a butterfly knife in the Appellant's vehicle. The Appellant was then informed that he was under arrest for possession of a prohibited weapon.
9. The Appellant was transported to the RCMP detachment.
10. Two DVDs were provided with police disclosure which showed the Appellant in the back of the police vehicle.

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

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

### **SUMMARY OF ARGUMENTS**

#### Appellant

12. Counsel for the Appellant argued that the Appellant's section 7 and 9 Charter rights were breached by police when he was approached by the police officers for no apparent reason other than where his vehicle was parked and having a female "street person" in his vehicle. The Appellant argued that shortly after speaking to police, he was handcuffed and placed in the back of the police vehicle; due to contradictory police officer notes, it is unclear why this occurred. The Appellant argued that the arrest was unlawful as police had no grounds to do so (*R. v. Comrie*, 2017 ABPC 14). The Appellant argued that due to the breaches of his Charter rights, it would be manifestly unfair for the Board to consider the evidence of the evidentiary breath demand readings.
13. The Appellant acknowledged that an individual's right to counsel is suspended for the purposes of the ASD demand and that the suspension of an accused's rights during this time is only justified because the screening process is minimally intrusive and the detention is brief. The Appellant argued that it is clear that his detention was significant as he was put in handcuffs and placed in the back of the police vehicle, which constitutes an arrest and not just a detention, such that his right to counsel was engaged. The Appellant argued that he was not provided his right to counsel at this time in breach of his section 10(b) Charter right.
14. The Appellant argued that the police officers breached the Appellant's right to be free from unreasonable search and seizure when they searched his vehicle when no grounds existed to conduct that search.
15. The Appellant argued that, he did not refuse to comply with a lawful breath demand. He was placed under arrest for impaired operation of a motor vehicle, and there was

no lawful authority for the officers to then make a roadside breath demand (*R. v. Minielly*, 2009 YKTC 9; *Kosinsky (Re)*, 2017 ABTSB 820).

Registrar

16. Counsel for the Registrar argued that the ASD demand was lawful. Cst. Hauenstein had observed indicia of impairment by alcohol and a strong odour of alcohol on the Appellant's breath.
17. The Registrar conceded that the police officers acted contrary to Charter values when they handcuffed and searched the Appellant prior to arresting him for impaired driving and refusal, and without having reasonable and probable grounds to do so.
18. However, the Registrar submitted that the Board must consider, pursuant to its duty of fairness, if the manner in which the evidence was collected was such an egregious breach of the Appellant's rights, that it would be manifestly unfair to consider it. The Registrar noted that the Board has defined egregious as "gross, flagrant, shocking or outstandingly bad" (*DNQ (Re)*, 2013 ABTSB 169).

**ISSUES BEFORE THE BOARD**

19. In the Board's view, the issues in this appeal are:
  - a. whether the evidence gathered after the Appellant was detained was collected in a way that infringed the Appellant's Charter rights or 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; 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**

20. The Board finds that the evidence gathered after the Appellant was detained was collected in a way that infringed the Appellant's Charter rights, and 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.
21. The Board finds that the Appellant did not 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

### Fairness

22. The Board does not have jurisdiction to determine questions of constitutional law. Therefore, the Board does not exclude evidence in the same manner that a criminal court may exclude certain evidence. However, the Alberta Court of Appeal in *Thomson v. Alberta (Transportation Safety Board)*, 2003 ABCA 256 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. As a result of these considerations, the Board may place little or no weight on certain evidence brought before it. This analysis is not the same as the analysis carried out in criminal law.
23. Although the Board is not bound by the criminal common law it can still be guided by the concepts and principles which have developed in the criminal common law in its assessment of whether there was an egregious Charter breach.
24. The Board considered the Appellant's arguments that the police officers breached the Appellant's Charter rights at the roadside. The Board makes the following findings of fact based on their review of the police DVD:
- a. The Appellant is placed in the back of the police vehicle in handcuffs. The Appellant asked the officer why they are violent with him and treating him "like a piece of shit".
  - b. The officer stated "we are going to do a breath demand right away here".
  - c. The Appellant asked the officer why the other officer is looking through his vehicle.
  - d. While in the back of the police vehicle, the Appellant asked the officer several times why he is being arrested and stated "I've never been arrested in my life". The officer did not respond to the Appellant's questions.
  - e. An officer stated, "At this point in time you are under arrest for possession of a prohibited weapon, as well you are under reasonable suspicion ... you are detained right now to determine if you got a ... are impaired by alcohol."
  - f. The officer reads the evidentiary breath demand to the Appellant stating, "In accordance with the provisions of the *Criminal Code* (Canada), I demand you provide such samples of your breath that are necessary in the opinion of a qualified technician to enable a proper analysis be made in order to determine the concentration, if any, of alcohol in your blood that you may accompany me for that purpose, you will be charged under the provisions of the *Criminal Code*

(Canada) if you do not comply. Do you understand that". The Appellant responds "nope, nope" and that he wants a lawyer.

9. The officer then made an ASD demand on the Appellant stating, "In accordance with the provisions of the *Criminal Code* (Canada), I demand that you provide a forthwith sample of your breath ... into an approved screening device ...". The Appellant refused to comply.

h. The officer advised the Appellant he is under arrest for not providing a sample of his breath.

i. The officer read the Appellant his Charter rights and the police caution.

j. The Appellant told the officer that he needs to go to the hospital as his "heart is hurting". The Appellant asked repeatedly for assistance and appeared to be in serious medical distress. The officer did not acknowledge the Appellant's statements.

25. The Board did not observe any indicia of impairment exhibited by the Appellant on the police DVD, although he did appear aggressive.

26. The Board reviewed the officers' handwritten notes and finds that they are inconsistent with respect to when the Appellant was arrested. Cst. Hauenstein's General Report states he placed handcuffs on the Appellant after he noted a strong odour of alcohol on the Appellant's breath, poor balance, bloodshot eyes and an admission to consuming alcohol. Cst. Hauenstein then noted that he detained the Appellant for care or control and placed handcuffs on the Appellant. Cst. McLeod's handwritten notes, on the other hand, state that Cst. Hauenstein arrested the Appellant for impaired care or control of a motor vehicle.

27. The Board finds that the above noted police conduct involved several breaches of the Appellant's Charter rights. First, the Board finds that Cst. Hauenstein made a *defacto* arrest of the Appellant when he placed handcuffs on the Appellant and put him in the back of the police vehicle. Cst. Hauenstein stated that he was detaining the Appellant for impaired care or control of a motor vehicle. However, he handcuffed the Appellant and placed him in the back of the police vehicle. At the time the Appellant is handcuffed, the Board finds that the indicia of impairment noted by Cst. Hauenstein were insufficient for Cst. Hauenstein to form reasonable and probable grounds to arrest him for impaired care or control.

28. The Board notes that the officers' General Reports and handwritten notes are silent with respect to why the Appellant was arrested. Further, the Board finds that the Appellant believed he had been arrested, stating, "I have never been arrested in my life". In the Board's view, the officers acted contrary to Charter values in arresting the Appellant without any grounds or justification to do so, without reading him his Charter rights and without providing him with an opportunity to contact legal counsel.

29. Second, the Board finds that Cst. Hauenstein's conduct throughout his impaired investigation showed a serious disregard or misunderstanding for the Appellant's Charter rights, as illustrated by the sequence of events above. Cst. Hauenstein may have had a belief he was only detaining the Appellant; however, his actions in handcuffing the Appellant and placing him in the back of the police vehicle was contrary to the Charter and Charter values.
30. Third, the Board finds the ASD demand was unlawful. After the Appellant is arrested for impaired care or control, Cst. Hauenstein makes an evidentiary breath demand, which the Appellant refused. Then, Cst. Hauenstein immediately makes an ASD demand on the Appellant. The Board finds that it was improper for the officer to make the ASD demand on the Appellant after forming reasonable grounds and arresting the Appellant for impaired care or control, and reading an evidentiary breath demand. An accused's right to counsel is engaged following an arrest and evidentiary breath. Once the evidentiary demand is made, it is improper to then make an ASD demand, which suspends the accused's right to counsel and is performed to provide evidence during an ongoing impaired investigation to support a subsequent arrest. The Board finds that the police procedures were inconsistent with the Charter in this case.
31. Fourth, the Board notes that if the Appellant had been detained for the purposes of the ASD demand, then the ASD demand was not made or administered "Forthwith" as there was an unreasonable delay in making the demand. In this case, prior to being read the ASD demand, the Appellant is placed in handcuffs, walked to the police vehicle and the Appellant's vehicle is searched. The Appellant then sits for several minutes in the back of the police vehicle asking what he did wrong. The Appellant is then arrested for possession of a dangerous weapon, an evidentiary breath demand is read and then the ASD demand is read. Not only was the ASD demand improper, it was not "forthwith".
32. Fifth, Cst. McLeod conducted an improper search of the Appellant's vehicle. At the time of the search, the officers had not read the Appellant his rights and there were no investigative grounds to search the Appellant's vehicle. Cst. Hauenstein used the evidence gathered in the unlawful search to arrest the Appellant for possession of a dangerous weapon. Prior to this point, Cst. Hauenstein had not informed the Appellant of any reason for why he was being detained.
33. Sixth, the Board is concerned that the police failed to explain why the Appellant was handcuffed and there is no documentation of the Appellant's obvious and serious medical distress while being transported to the RCMP detachment or his repeated requests for medical assistance.
34. Finally, the Appellant's Seizure Notice is not filled out properly, as the AALS section of the document is blank, and the Immediate Roadside Sanction section



wrongly checked off. The Notice of Suspension also has the Immediate Roadside Sanction section wrongly checked off.

35. The Board also gave considerable weight to the Registrar conceding that the police conduct was contrary to the Charter.
36. The Board finds that, overall, the investigation by Cst. Hauenstein and Cst. McLeod was outstandingly bad and demonstrated a blatant disregard or misunderstanding of the Charter and how it applies to individuals who are detained by police. The evidence discloses a series of flagrant errors, which disregard Charter values. The Board finds that the conduct of the police officers was egregious. Therefore, the Board finds that it would be manifestly unfair to consider any evidence after the officers initially detained the Appellant, including the evidence of the Appellant's refusal.

Whether the Appellant Refused to Comply with a Breath Demand


37. For the reasons set out above, the Board did not give any weight to the evidence of the Appellant's purported refusal to comply with a breath demand made on him.
38. Based on the evidence that is fair to consider, the Board is satisfied, on a balance of probabilities, that the Appellant did not refuse to comply with the demand made under section 254 of the *Criminal Code* (Canada).

**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 12<sup>th</sup> day of March, 2019.

ALBERTA TRANSPORTATION SAFETY BOARD

  
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 November 20, 2018, including written statement and Notice of Suspension/Disqualification

#### Police Disclosure

2. Red Deer RCMP Court Disclosure Coversheet
3. General Report of Cst. Hauenstein
4. Handwritten Notes of Cst. Hauenstein
5. Supplementary Occurrence Report of Cst. McLeod
6. Handwritten Notes of Cst. McLeod
7. Case Tracking Sheet
8. Justice Online Information Network (JOIN) – Witness List
9. Court Folder
10. Information
11. Undertaking
12. Notice of Suspension/Disqualification
13. Notice of Intention to Seek Greater Punishment
14. Affidavit of Personal Service of Cst. Hauenstein
15. Seizure Notice
16. Motor Vehicle 24 Hr. Suspension/Seizure/Impound Report
17. DVDs (2)

#### Submissions of the Appellant

18. Written Submission from Counsel for the Appellant dated December 17, 2018

#### Submissions of the Registrar

19. Written Submission from Counsel for the Registrar dated December 20, 2018