

## Alberta Transportation Safety Board

Citation: 2018 ABTSB 1083

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. Oliphant (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

W. Haas, Member

J.G. Glavin, 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 May 1, 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 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).

2. The Appellant has appealed the AALS on the grounds that the Registrar has not established that she drove a motor vehicle while her ability to do so was impaired by alcohol.

### **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) ...
- (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) ...
- (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 28, 2018, at approximately 0350 hours, near the Town of Strathmore, RCMP Cst. McNeil was travelling westbound on 2nd Avenue when he viewed a yellow vehicle that he recognized as being involved in a previous call earlier in the

night. Cst. McNeil noted that in the earlier incident, the owner of the yellow vehicle had been consuming a large quantity of alcohol but left the location before speaking with police. Cst. McNeil conducted a traffic stop on the vehicle.

5. Cst. McNeil confirmed that the driver (the Appellant) was the only occupant in the vehicle and informed the Appellant that it was reported that she had consumed alcohol earlier. The Appellant confirmed to Cst. McNeil that she had consumed alcohol but indicated that it was a while ago.
6. Cst. McNeil read the Appellant the Approved Screening Device ("ASD") demand, and the Appellant stated that she understood and agreed to comply. Cst. McNeil brought the ASD instrument to her at the roadside and administered the ASD test that resulted in a "Fail." Cst. McNeil arrested the Appellant for impaired driving.
7. Cst. McNeil Chartered and cautioned the Appellant and then transported her to the Strathmore RCMP Detachment arriving at 0409 hours. Cst. McNeil placed the Appellant in the phone room and instructed her to knock on the door when she was finished with the phone and satisfied with contacting a lawyer or Legal Aid. At 0431 hours, the Appellant knocked on the door and exited.
8. The Appellant provided evidentiary breath samples at 0438 and 0500 hours that resulted in blood alcohol concentration readings of 110 milligrams and 90 milligrams of alcohol in 100 millilitres of blood respectively.
9. Cst. McNeil informed the Appellant that she was over the limit and would also be charged with driving 'over 80'.
10. The breath technician noted a strong odour of liquor on the Appellant's breath and that she had glossy, bloodshot eyes and appeared nervous and/or embarrassed.
11. The Appellant was released on a Promise to Appear and served with all other relevant police documents.

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

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

### **SUMMARY OF ARGUMENTS**

#### Appellant

13. Counsel for the Appellant argued that the suspension should be cancelled because the indicia of impairment are minimal in nature and entirely equivocal; the only indicia noted are the Appellant's admission and the smell of liquor in the vehicle.

14. Cst. McNeil had the most significant interaction with the Appellant and did not note any issues with the Appellant's coordination, motor skills, comprehension or driving pattern. Overall, Cst. McNeil was not satisfied that the Appellant was impaired, and this is evident in his decision to administer an ASD test prior to forming grounds for arrest. If the arresting officer cannot be satisfied that the Appellant was impaired, then the Board cannot be convinced of it either: *R. v. Milne*, [1996] OJ No. 1728.
15. Similarly, once at the police detachment, neither Cst. McNeil nor Cst. Morey note any significant indicia of impairment and the Appellant's interactions at the detachment, which are included on video, display no indicia of impairment.

#### Registrar

16. In response to the Appellant's submissions, the Registrar argued that impaired driving requires both proof of alcohol consumption and an impaired ability to drive. While there is clear evidence of alcohol consumption in this case, there is insufficient evidence that the Appellant's ability to drive was impaired.

#### **ISSUES BEFORE THE BOARD**

17. In the Board's view, the only issue in this appeal is whether the Appellant drove a motor vehicle having consumed alcohol in such a quantity that her ability to operate the motor vehicle was impaired at any time within three hours after having driven a motor vehicle.
18. The Board notes that although the Appellant was subject to evidentiary breath tests, the only reason indicated for her AALS on the Notice of Suspension is for driving while impaired. Accordingly, the Board did not consider whether the Appellant drove with a blood alcohol concentration exceeding 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**

19. The Board finds that the Appellant did not drive a motor vehicle having consumed alcohol in such a quantity that her ability to operate the motor vehicle was impaired within three hours of driving.

#### **REASONS OF THE BOARD**

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

20. In order to uphold the suspension for impaired operation of a motor vehicle, the Board must be satisfied that the Appellant consumed alcohol and that the Appellant's ability to drive was impaired.

21. The Board finds the Appellant consumed alcohol based on her admission of consumption to the police, the failed ASD test, and the strong smell of liquor coming from her vehicle and her breath.
22. Having found consumption, the Board went on to consider whether the Appellant's ability to drive was impaired. The Board reviewed the police evidence, including the police video, and noted no indicia of physical impairment. There are no observations by the police that the Appellant had poor coordination, deficient cognition or balance deficits. This is consistent with the police video where the Appellant can be seen getting out of her car without difficulty, standing without swaying and walking to the police car without any problems whatsoever.
23. Although the Board has a statutory duty to be satisfied one way or the other based on the evidence before it, the Board gave significant weight to the Registrar's submission conceding that there is insufficient evidence of an impaired ability to uphold the suspension on this ground.
24. The Board finds the Appellant's ability to drive was not impaired.
25. 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 her ability to operate the motor vehicle was impaired within three hours after having driven a motor vehicle.

## CONCLUSION

26. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant's licence suspension immediately.
27. 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 10<sup>th</sup> 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 13, 2018, including Notice of Suspension/Disqualification and Certificate of a Qualified Technician

#### **Police Disclosure**

2. Court Folder
3. Information Sheet
4. Promise to Appear
5. Notice of Suspension / Disqualification
6. Seizure Notice
7. Summary of Driving Record
8. General Report of Cst. McNeil
9. Handwritten notes of Cst. McNeil
10. Intox EC/IR II: Documents
11. Certificate of a Qualified Technician for D.J.M.
12. Affidavit of Personal Service of Cst. McNeil
13. Photocopy of Alco-Sensor FST Instructions and Calibration Log
14. DVD

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

15. Written Submission from Counsel for the Appellant dated May 30, 2018

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

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