

Alberta Transportation Safety Board

Citation: 2018 ABTSB 1076

Date: 2018-06-07

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 L. Singh (the “Appellant”);

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

BEFORE:

D. Poon Phillips, Presiding Officer

P.E. Maeda, Member

W. Haas, Member

PRESENT:

B. Marshall, Board Secretary

A. Athwal, 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 9, 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. The Appellant confirmed receipt of these documents.

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 reasons for the appeal:
 - a. The Appellant's section 7, 8, 9, 10(a) and 10(b) Charter rights were breached, while Cst. Lecours' initial investigation was being conducted.
 - b. The ASD breath demand was not made "forthwith", which made the breath demand unlawful.

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 April 8, 2018, at 2014 hours, Airdrie RCMP received a complaint about a vehicle driving erratically by running lights and driving between two lanes. The complainant L.S. reported that the vehicle was a white semi-truck and trailer that was being driven by an East Indian driver. The complainant, L.S., reported the trailer licence plate number and observed the semi-truck pull into the Airdrie Post Office loading dock.
6. At 2024 hours, while en route, Cst. Lecours called the registered owner of the trailer's licence plate. The registered owner stated to Cst. Lecours that, if the licence plate was in Airdrie, then it was stolen. Cst. Lecours updated the other responding officers with this information.
7. At 2033 hours, Cst. Boxall and Cst. Lecours arrived on scene and saw a semi-truck parked in the bay of the Post Office.
8. Cst. Lecours walked up to the door of the Post Office, which was adjacent to the semi-trailer, and saw a male matching the description from the complainant (this male was later identified as the Appellant). Cst. Lecours opened the door, and the Appellant was unloading mail from the semi-truck. Cst. Lecours told the Appellant that there was a driving complaint of his semi-truck. The Appellant was not with anyone else, and there was no other person inside the Post Office. On the DVD video footage provided by police, Cst. Lecours asked the Appellant whose semi-truck it was, and the Appellant said "mine". Cst. Lecours then said "police caution, anything you say can be used as evidence".
9. Cst. Lecours told the Appellant that he was doing something like a traffic stop and requested to see the Appellant's documents. Cst. Boxall and Cst. Lecours walked to the semi-truck so that they could see the Appellant's documents. Further, Cst. Lecours asked the Appellant if he had any alcohol to drink, to which he responded "No".
10. The Appellant produced his driver's licence and was identified by his Ontario driver's licence. Cst. Lecours completed police checks on the Appellant and discovered that he was on conditions to notify police of an address change. The Appellant stated that he lived in Calgary, but his listed address was in Brampton, Ontario.
11. At 2039 hours, Cst. Lecours verbally arrested the Appellant for possession of stolen property and a breach of conditions with respect to the address change notification requirement stemming from a previous charge. The Appellant was handcuffed.

12. Cst. Boxall informed Cst. Lecours that there was a bottle of Bacardi inside the semi-truck cab with a small amount of liquid left inside. The Appellant spoke slowly and had slow movements, an open bottle of Bacardi within reach of the driver's seat and an odour of alcoholic beverage coming from his mouth. Cst. Lecours asked the Appellant if he had consumed alcohol, and he stated that he had drank the night before. Cst. Lecours commenced an impaired driving investigation.
13. At 2046 hours, Cst. Lecours read the Approved Screening Device ("ASD") demand to the Appellant and asked if he understood, to which he stated "I do not. I was not driving the vehicle."
14. At 2049 hours, Cst. Lecours asked again if he understood, to which he stated "I got it". Cst. Lecours explained how to provide a breath sample and asked if he understood, to which the Appellant stated "My ribs hurting".
15. The Appellant attempted six times to provide a breath sample as follows:
 - a. the first attempt was at 2053 hours; the Appellant sputtered and did not form a tight seal. There was insufficient flow;
 - b. on the second attempt, the Appellant did not form a tight seal, sputtered out and did not provide a consistent flow of breath outward;
 - c. on the third attempt, Cst. Lecours explained to the Appellant that if he failed or refused to provide a sample, he would be charged with a similar offence to impaired operation that holds the same consequences. The Appellant provided an inconsistent flow of breath outward, and there was no tight seal formed. Cst. Lecours further explained the Appellant's jeopardy;
 - d. at 2100 hours, the Appellant provided his fourth attempt. Cst. Lecours noted that the Appellant formed a weak seal, and he could see spit coming out of the top of the tube;
 - e. at 2103 hours, the Appellant provided his fifth attempt, which resulted in a reading of "Insufficient Flow"; and
 - f. at 2105 hours, the Appellant was panting and breathing in and out really fast. The Appellant stated that he did not steal the vehicle. The Appellant provided his sixth attempt, and Cst. Lecours observed the Appellant spit into the tube and could see spit coming out of a hole in the top of the mouthpiece.
16. At 2111 hours, Cst. Lecours read the Appellant his section 10(a) Charter rights, arrested the Appellant for failing or refusing to comply with a breath sample and asked if he understood. The Appellant said that he did not understand and stated that the alcohol was from last night. Cst. Lecours explained again and asked if he understood, to which the Appellant said "Can I talk to my wife please?" The

Appellant was arrested and was not permitted to speak to his wife at that time. Cst. Lecours asked again if he understood, and the Appellant said "I'm sorry, can I talk to my wife please?".

17. At 2114 hours, Cst. Lecours read the Appellant his section 10(b) rights and asked if he understood, to which the Appellant did not say anything. Cst. Lecours asked again and the Appellant remained silent. Cst. Lecours asked the Appellant if he wanted to speak to a free lawyer or any other lawyer, and he said "I want to call my wife please." Cst. Lecours then read the police caution twice to the Appellant.
18. At 2116 hours, the trailer licence plate was confirmed to be not stolen, as the trailer licence plate letters were mistakenly given and incorrect.
19. At 2204 hours, Cst. Lecours transported the Appellant to the Airdrie RCMP detachment and arrived at 2212 hours.
20. At 2220 hours, the Appellant wanted to speak to lawyer who was in Ontario. At 2224 hours, Cst. Lecours noted that the Appellant had red eyes. At 2231 hours, the Appellant called a lawyer, but there was no answer. At 2235 hours, the Appellant had a strong odour of alcoholic beverage on him. The Appellant called free Legal Aid and left a voice message, as they were busy.
21. At 2325 hours, Cst. Lecours explained and served the Appellant with all the relevant documents.
22. A DVD was also provided with the police disclosure, which included the cell block footage and VICS cam. The DVD has audio and Cst. Lecours can be heard throughout the video, as well as his interactions with the Appellant and other police officers. The video footage shows the following:
 - a. police driving while responding to the Airdrie Post office;
 - b. the Appellant's semi-truck backed into the Airdrie Post office;
 - c. additional police arriving on scene;
 - d. the police investigation including the police entering the truck;
 - e. the Appellant talking with police;
 - f. the police arresting the Appellant;
 - g. the appellant attempting to provide a sample of breath in the back of the police vehicle; and
 - h. transport of the Appellant to the police station.

23. The police later discovered that the Appellant's charge of impaired driving on December 9, 2012, had been stayed.

SUMMARY OF THE APPELLANT'S EVIDENCE

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

SUMMARY OF ARGUMENTS

Appellant

25. Counsel for the Appellant argued that the Appellant's section 7, 8, 9, 10(a) and 10(b) rights were breached during the initial investigation when police detained the Appellant for a criminal investigation, with respect to what was believed to be stolen property and a driving complaint. Once detained by police, the police should have immediately provided him with his right to counsel and not further questioned the Appellant until this was done (*R. v. Suberu*, 2009 SCC 33). This was not done. When detained, the police did not advise the Appellant of his right to counsel until approximately four minutes after his detention, and he was not advised of his right to counsel until after the ASD refusal had been administered.
26. While a 'police caution' was provided, the caution was essentially useless, as it was not explained to the Appellant, and he was not advised of the state of his jeopardy at any time. Specifically, the Appellant was never advised that he was not obligated to say anything or answer any questions. Further, the Appellant's confusion over why he was being detained and what he was being investigated for is evident in his questions to Cst. Lecours. Cst. Lecours' failure to comply with section 10(a) and 10(b) resulted in significant breaches of the Appellant's rights.
27. The Appellant argued that Cst. Lecours' conduct in this preliminary investigation shows a blatant disregard and extreme lack of understanding for an individual's Charter rights. Cst. Lecours did not comply with, or satisfy, a single implementation duty related to section 7, 8, 10(a), or 10(b) in a timely manner. Further, when he finally complied with these obligations, he provided incomplete information that failed to inform the Appellant of his rights or his jeopardy.
28. This conduct resulted in egregious breaches of the Appellant's rights, and it would be manifestly unfair for the Board to consider any evidence gathered subsequent to these breaches, specifically any evidence of the officer's reasonable suspicion (which was formed as the result of Cst. Lecours handcuffing, searching, and securing the Appellant in the police vehicle) and any evidence of the Appellant's failure to provide an adequate breath sample.
29. The Appellant further argued that the ASD test was not valid, as the ASD demand and ASD test were not made "forthwith", meaning as soon as reasonably possible (*R. v. Janik* (unreported)). In *R. v. Megahy*, 2008 ABCA 207, a delay by police will

be acceptable only in situations in which the delay is reasonably possible for the police to carry out its duties. Cst. Lecours began questioning the Appellant on his consumption of alcohol at 20:36 hours. Cst. Lecours next questioned the Appellant regarding alcohol consumption at 20:40 hours. At this time, it is clear from the VICS video that Cst. Lecours had decided to conduct an ASD test.

30. However, Cst. Lecours did not make the ASD demand until 20:47 hours. During this seven-minute period, Cst. Lecours personally inspected the Appellant's vehicle to determine what alcohol was located inside of it. He then entered his marked police vehicle and presumably took notes or completed some other tasks. At the very least, Cst. Lecours delayed the ASD demand by seven minutes. At the most, Cst. Lecours delayed the demand by 11 minutes. Either way, it cannot be said that the demand was read as soon as "reasonably possible" as defined in *R. v. Megahy*, 2008 ABCA 207.

Registrar

31. Counsel for the Registrar argued that the suspension should be upheld. The Registrar argued that there were no Charter breaches or, alternatively, if there were, they were minor or technical and not egregious.
32. The Appellant was not detained at 2035 hours in a way that triggered his Charter rights. The Appellant was informed of the reason for his arrest or detention at all relevant times. When Cst. Lecours stopped the Appellant at 2035 hours, he told him, "Anything you say can be used as evidence," and that he was conducting a traffic stop related to the Appellant "running red lights". Further, Cst. Lecours asked the Appellant, "Any alcohol to drink today?" Once Cst. Lecours confirmed that the semi-truck matched the complainant's description and that the semi-truck belonged to the Appellant, Cst. Lecours obtained the Appellant's driver's licence and ran a police check.
33. He then arrested him at 2039 hours and informed him that it was for the possession of a stolen licence plate and a breach of conditions. The Registrar submitted that there was no delay, and the Appellant had the information needed to decide whether or not to submit to arrest.
34. The police actions were reasonably necessary given their grounds to believe that the Appellant was possibly impaired, already facing charges in another jurisdiction, in breach of conditions, and in possession of stolen property, the latter of which was not ruled out until later. Police are authorized to arrest a person, without a warrant, if they reasonably believe that a person has displayed an unauthorized licence plate. Further, the Court of Appeal has consistently recognized that police have powers under the *Act* to stop vehicles to check for driver documents, and in *R. v. Ali*, 2016 ABCA 261, it was found that a "cascading search", such as the one that occurred during the police investigation, does not offend the Charter.

35. In determining whether the police conduct in detaining and searching the Appellant was authorized by law and reasonably necessary in the circumstances, the totality of the situation must be assessed (*R. v. Clayton*, 2007 SCC 32). Notably, here, the Appellant had not yet produced the key to the semi-truck despite police instruction, notwithstanding his confirmation that the semi-truck was his. The Registrar further submitted that the dangers of a vehicle as large and powerful as a semi-truck being operated on the road in a way that does not conform to traffic laws are obvious.
36. The ASD demand and test were made "forthwith." Cst. Lecours did not have reasonable suspicion for the ASD demand until after the arrest and pat down search, when he smelled alcohol, heard about the Bacardi bottle and obtained an admission of consumption from the Appellant that he had previously denied. This occurred at 2045 hours and at 2046 hours. The ASD demand was made, and Cst. Lecours proceeded immediately with the test.

ISSUES BEFORE THE BOARD

37. 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 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

38. 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.
39. The Board finds that the Appellant did not fail or refuse to comply with a demand made on him under section 254 of the *Criminal Code* (Canada).

REASONS OF THE BOARD

40. 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.

41. The analysis is not the same as the analysis that would be done in a criminal case.

42. 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.

43. The Board reviewed the police disclosure and video footage. The Board finds that the police did not have reasonable or probable grounds to believe the Appellant was the driver of the semi-truck reported by the complainant, and was therefore arbitrarily detained in breach of his section 9 Charter rights and unlawfully arrested.

44. At 2014 hours, Airdrie RCMP received information from a complainant that there was erratic driving of a white semi-truck, the driver was East Indian, the driver had backed the semi-truck into the Airdrie Post Office loading dock and a trailer licence plate was provided. At 2033 hours (19 minutes after the complaint), Airdrie RCMP arrived on scene and saw a semi-truck parked in the bay of the post office.

45. Once at the scene, the Board finds that the police investigation was wholly insufficient in determining if the Appellant was the driver of the vehicle reported by the complainant. The police located a semi-truck and identified that the trailer licence plate may have been stolen; however, the police did not confirm the Appellant was the driver of the semi-truck that was reported by the complainant before detaining or arresting him. Cst. Lecours located the Appellant unloading mail and immediately read him the police caution, without explaining the caution to the Appellant or informing him of the state of his jeopardy. Further, on the video footage provided by police, the Appellant indicated that he was not driving, and Cst. Lecours even asked other officers to look for another driver after he had already detained the Appellant in the back of his police vehicle and read him the ASD demand.

46. Additionally, Cst. Lecours failed to take basic investigative steps before arresting the Appellant, such as performing the necessary checks to ensure that the trailer licence plate was in fact stolen. Cst. Lecours also failed to ask the Appellant enough questions before arbitrarily detaining him at the scene. Upon his initial encounter with the Appellant, Cst Lecours states “Come over here, I need to talk to you, come on over here. Are you with anyone else? [...] Come on over here, just need to talk to you” at 20:35:10 on the police video footage. After hearing the Appellant say that the truck in question was his, he then proceeds to articulate a form of police caution to the Appellant.

47. The Board finds that the Appellant was clearly detained by Cst. Lecours by this time and had no choice but to comply with the officer’s directions. Further, the Appellant was not advised of the reason for his detention or the complaint that was

received by police. It was not until Cst. Lecours stated “the licence plate is believed to be stolen, so you’re under arrest for that” that the Appellant was given any indication that a stolen property investigation was underway.

48. The Board finds that had Cst. Lecours checked the trailer licence plate, which he should have done promptly once he arrived on the scene, he would have discovered that the trailer licence plate had not, in fact, been stolen.
49. The Board finds that the police conduct breached the Appellant’s Charter rights. The Board went on to consider whether this conduct was egregious. The Board accepts the meaning of “egregious” to be:
 - a. gross, flagrant, shocking, or outstandingly bad (Canadian Oxford Dictionary, 1998); and
 - b. outstandingly bad, shocking (Concise Oxford Dictionary, 8th ed., 1990).
50. In this case, Cst. Lecours’ conduct showed a blatant disregard for several of the Appellant’s Charter rights, as a result of a deficient and presumptuous investigation. A more thorough investigation before unlawfully arresting the Appellant would not have been difficult or taken very long. This is egregious conduct on the part of Cst. Lecours, such that it would be manifestly unfair to the Appellant for the Board to consider any evidence following the Appellant’s unlawful arrest.

Whether the Appellant Refused or Failed to Comply with a Breath Demand

51. For the reasons set out above, the Board did not consider any evidence following the Appellant’s arrest. The Board finds, based on the evidence that is fair to consider, that there is no evidence before it that the Appellant failed or refused to comply with the roadside breath demand.

CONCLUSION

52. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant’s licence suspension immediately.
53. 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 28th day of June, 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 23, 2018, including written Notice of Suspension/Disqualification

Police Disclosure

2. Court Folder
3. Information
4. RCMP – Identification Services
5. Recognizance
6. Warrant for Committal
7. Assignment of Cash Deposit
8. Fine Money Receipt Sheet
9. Violation Ticket
10. Notice of Intention to Seek Greater Punishment
11. Affidavit of Personal Service
12. Request for Drivers Abstract or Court Certificate
13. Motor Vehicle 24 Hr. Suspension/Seizure/Impound Report
14. Photocopy of Appellant's Driver's Licence
15. Supplementary Occurrence Report of Cst. Nielsen at 22:15:19
16. Supplementary Occurrence Report of Cst. Nielsen at 22:39:18:280
17. Supplementary Occurrence Report of Cst. Nielsen at 22:39:18:815
18. Supplementary Occurrence Report of Cst. Nielsen at 22:40:51:925
19. Supplementary Occurrence Report of Cst. Nielsen at 22:43:54
20. Supplementary Occurrence Report of Cst. Nielsen at 23:18:26
21. Photocopy of Alco-Sensor Serial # 131995, calibration date, and expiry date

22. Notice of Suspension/Disqualification
23. Seizure Notice
24. General Report of Cst. Lecours
25. Handwritten notes of Cst. Lecours
26. Supplementary Occurrence Report of Cst.Boxall
27. Handwritten notes of Cst. Boxall
28. Supplementary Occurrence Report of Cst. Wyczynski
29. Photographs
30. Photocopy of Driver's Daily Logs
31. DVD

Submissions of the Appellant

32. Written Submission from Counsel for the Appellant dated May 22, 2018

Submissions of the Registrar

33. Written Submission from Counsel for the Registrar dated May 28, 2018