

## Alberta Transportation Safety Board

Citation: 2018 ABTSB 1077

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 D. Lichtenberger (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

W. Haas, Member

P.E. Maeda, Member

### **PRESENT:**

B. Marshall, Board Secretary

A. Athwal, Independent Counsel to the Board

J. Arendt (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 email dated May 2, 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*.
2. The Appellant has appealed the AALS.
3. The Appellant provided the following reason for the appeal:

- a. He was not served with a copy of the Notice of Suspension and, as a result, the suspension was not properly commenced and the Appellant was not advised of the grounds of his suspension. Therefore, the Appellant is not able to make a full answer and defence, as he does not know the case against him.

## 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) 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 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) 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) 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

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 26, 2018, at 0010 hours, Airdrie RCMP received a BOLO (“Be On Look Out”) from the Calgary Police Service (“CPS”) regarding an impaired driver with an Airdrie address leaving a Calgary bar in a grey Ford F150.
6. At 0030 hours, Cst. Rivard attended the area of the registered owner’s address and observed a grey Ford F150, with a licence plate matching that provided by the CPS, drive northbound past his fully marked police vehicle.
7. At 0035 hours, Cst. Rivard initiated a traffic stop on the vehicle. Upon approaching the driver's side window, Cst. Rivard observed that the driver (“the Appellant”) matched the physical description provided by the CPS.
8. Cst. Rivard immediately smelled an overwhelming odour of liquor emanating from the vehicle. Cst. Rivard observed that the Appellant had red, bloodshot eyes, was swaying in his seat and was unable to maintain eye contact. When the Appellant spoke, a very strong odour of liquor was detected on his breath.
9. At 0039 hours, Cst. Rivard read the Appellant the Approved Screening Device (“ASD”) demand from memory and requested that the Appellant exit his vehicle to accompany Cst. Rivard to the police vehicle in order to conduct the test. The Appellant agreed and walked to the police vehicle and sat in the rear seat. Cst. Rivard then read the ASD demand verbatim from the RCMP card. The Appellant did not answer when asked if he would provide a sample of his breath on the ASD.
10. The Appellant swayed in the seat and stared straight ahead. Cst. Rivard explained to the Appellant that if he refused to provide a breath sample, he would be charged. The Appellant again stared straight ahead, swaying from side to side and from front to back. Cst. Rivard asked again if the Appellant would provide a sample of his breath and the Appellant stated “No”. During the interaction with the Appellant, Cst. Rivard continued to notice an overwhelming smell of liquor emanating from the Appellant.

11. At 0041 hours, Cst. Rivard arrested the Appellant for failing to provide a sample of his breath. Cst. Rivard read the Appellant his Charter rights and the police caution. The Appellant continued to stare straight ahead and refused to answer or acknowledge Cst. Rivard. The Appellant did not provide a response when Cst. Rivard asked if the Appellant wanted to contact a lawyer or when Cst. Rivard read the Appellant a waiver of his right to counsel.
12. Cst. Ritchie attended the scene to assist Cst. Rivard. Cst. Ritchie advised that she observed a bottle of alcohol on the rear floor behind the passenger seat of the Appellant's vehicle. Cst. Ritchie took photographs of the bottle.
13. Cst. Rivard got back into his police vehicle and asked the Appellant if he lived alone, to which he stated he lived at home with his wife. Cst. Rivard told him that if it was ok with the Appellant's wife, he would drive him home rather than taking him to the Airdrie Detachment.
14. Cst. Rivard engaged in conversation and noticed the Appellant's speech to be slurred when he spoke. Cst. Rivard drove the Appellant home and spoke with his wife. While outside of the police vehicle, the Appellant continued to ask if he made the right decision to not provide a sample of his breath. Cst. Rivard explained a number of times that, as a result of the Appellant not providing a breath sample, he was being charged criminally. The Appellant was released on a Promise to Appear and issued the usual AALS forms.

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

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

## **SUMMARY OF ARGUMENTS**

### Appellant

16. Counsel for the Appellant argued that the Appellant was not provided with any notice of his suspension. The Appellant submitted that a Notice of Suspension was not served on him and evidence that a Notice of Suspension was issued or served on the Appellant is absent from the police disclosure.
17. The Appellant also argued that the disclosure does not indicate that the Appellant was ever advised of the impact his criminal charges had on his driving privileges. Cst. Rivard notes the Appellant was provided with a "PTA with the usual AALS forms", but does not specify what these forms included. There is no indication if the suspension is based on impaired driving, failing to provide a sample, or refusing to provide a sample. All three offences are listed on the Promise to Appear.
18. The Appellant argued that, in the circumstances, it would be manifestly unfair for the Board to consider any of the grounds available under the Notice of Suspension. The Appellant was not served with a copy of the Notice of

Suspension, and he is not able to make a full answer and defence, as he does not know the case against him.

19. The Appellant relied on the Board's previous decisions of *Bodie (Re)*, 2018 ABTSB 979, *BAB (Re)*, 2012 ABTSB 30 and *Olson (Re)*, 2017 ABTSB 804.

### Registrar

20. Counsel for the Registrar submitted that the Registrar does not oppose the appeal and acknowledged that the police disclosure did not include a Notice of Suspension. There is no indication of the basis on which the AALS was issued.

### **ISSUES BEFORE THE BOARD**

21. In the Board's view, the sole issue in this appeal is whether the Notice of Suspension was in fact served on the Appellant.

### **FINDINGS OF THE BOARD**

22. On the evidence before it, the Board finds, on a balance of probabilities, that the Notice of Suspension was not served on the Appellant. The suspension did not properly take effect.
23. To uphold the suspension would be a breach of the Board's duty of fairness to the Appellant to provide him with information of the case against him and the ability to make a full answer and defence.

### **REASONS OF THE BOARD**

24. The primary issue in this appeal is whether the Appellant was served with the Notice of Suspension, which, in general, informs the Appellant of the case against him by providing details of where and when the incident took place, and the nature and statutory authority of the suspension.
25. In this case, the Board reviewed the police disclosure and finds that no Notice of Suspension was included. Aside from Cst. Rivard's typed notes, which indicate that the Appellant was issued a Promise to Appear with the "usual AALS forms", the police disclosure does not make reference to a Notice of Suspension being served on the Appellant, or on what basis.
26. The Board notes its duty of fairness owed to an Appellant set out at paragraph 68 of *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256.
27. As a result, and based on the facts in this appeal, it would be unfair for the Board to assume the police acted properly and served the Notice of Suspension on the Appellant. This is not a case where there is even some evidence of service, which the Board has seen in previous cases. In this case, there is no evidence in the

police disclosure that the police served the Appellant with the Notice of Suspension. Further, the Appellant did not submit a copy of the Notice of Suspension with his Application for Hearing but, even if he did, section 39.2(4) of the *Act* stated that, an "...appellant is not compelled to give evidence in an appeal under this section".

28. The Board reviewed its previous decisions of *Bodie (Re)*, 2018 ABTSB 979 (CanLII), and *BAB (Re)*, 2012 ABTSB 30 (CanLII), and finds that they are instructive and applicable to the case at hand.
29. Therefore, on the evidence before it, the Board finds, on a balance of probabilities, that the Notice of Suspension was not served on the Appellant and the suspension did not properly take effect.
30. Since the Appellant was not served with a Notice of Suspension, it would be manifestly unfair for the Board to uphold the suspension.
31. The Board is satisfied that the suspension of the Appellant's licence did not take effect under section 88.1(3) of the *Act*. The Board cannot uphold a suspension that did not properly take effect. To uphold the suspension would be a breach of the Board's duty of fairness to the Appellant to provide him with information of the case against him and the ability to make a full answer and defence.

## CONCLUSION

32. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant's licence suspension immediately.
33. 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 28<sup>th</sup> 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 25, 2018, including Summary of Driving Record

#### **Police Disclosure**

2. Prosecutor's Information Sheet
3. Information
4. Promise to Appear
5. CPIC Transaction Results
6. Handwritten Notes of Cst. Rivard
7. General Report of Cst. Rivard
8. Handwritten Notes of Cst. Ritchie
9. Supplementary Occurrence Report of Cst. Ritchie
10. Witness Statement
11. Photocopy on Information on Family Violence
12. Will Say Statement of Cst. Hewitt
13. Handwritten Notes of Cst. Hewitt
14. Event Chronology
15. Photocopy of Alco-Senor FST Serial #073259, including Calibration Date and Expiry Date
16. Photos

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

17. Written Submission from Counsel for the Appellant received May 22, 2018

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

18. Written Submission from Counsel for the Registrar dated May 29, 2018