

## Alberta Transportation Safety Board

Citation: 2018 ABTSB 1252

Date: 2018-12-18

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 J. Waugh (the “Appellant”).

A written hearing was held in the City of Calgary, in the Province of Alberta, on December 18, 2018.

### **BEFORE:**

D. Poon Phillips, Presiding Officer

J. Porter, Member

R. Lambie, Member

### **PRESENT:**

B. Marshall, Board Secretary

M.J. Redman, Independent Counsel to the Board

### **BACKGROUND / PRELIMINARY MATTERS**

Notice of the hearing and the police disclosure were provided to the Appellant by email dated October 25, 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” that were submitted to the Board prior to 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 in relation to driving a motor vehicle:
  - a. the Appellant was impaired by alcohol or a drug or by a combination of alcohol and a drug; and

- b. the concentration of alcohol in the Appellant's blood exceeded 80 milligrams of alcohol in 100 millilitres of blood.
2. The Appellant has appealed the AALS on the following grounds:
- a. he was not impaired by alcohol; and
  - b. the ASD demand was not made forthwith.

### 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,

(a.1) ...

(a.2) ...

(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,

(a.1) ...

(a.2) ...

(a.3) ...

(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. Police provided a DVD with video and audio footage from the incident as part of disclosure to the Board.
5. On October 16, 2018 at 2103 hours, Cst. Wolf and Cst. Holloway of the Calgary Police Service responded to a motor vehicle collision at the intersection of 64 avenue and Deerfoot trail NE.
6. When Cst. Wolf arrived on scene, he provided both drivers with witness statements to fill in. Cst. Holloway observed that the driver of one of the vehicles (the "Appellant") was moving slowly and deliberately and appeared to be slightly unbalanced.
7. At approximately 2122 hours, Cst. Wolf collected the witness statement from the Appellant and noted the smell of alcohol on the Appellant's breath. Cst. Wolf asked the Appellant if he had consumed alcohol, and the Appellant admitted that he had.
8. On the police DVD, Cst. Wolf can be heard telling the Appellant to wait in his vehicle.
9. At 2124 hours, Cst Wolf requested an Approved Screening Device ("ASD") be delivered to the scene.
10. At 2137 hours, Cst. Wolf read the Appellant the road side demand for a breath sample. The Appellant agreed to provide a sample and at 2139 hours, provided a breath sample that resulted in a "Fail" reading.
11. Cst. Wolf arrested the Appellant for impaired driving. Cst. Wolf read the Appellant his Charter rights and caution, and transported the Appellant to a Check Stop bus.

12. The Appellant provided two breath samples, resulting in readings of 110 milligrams of alcohol in 100 millilitres of blood and 100 milligrams of alcohol in 100 millilitres of blood at 2241 hours and 2302 hours, respectively. The Appellant was charged with driving over 80.
13. The Appellant was released on a Promise to Appear and with other police documents.

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

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

### **SUMMARY OF ARGUMENTS**

#### Appellant

15. Counsel for the Appellant argued that there is insufficient evidence to conclude that the Appellant drove a motor vehicle while impaired by alcohol. There were minimal indicia of impairment noted by the officers, and the officers required the use of an ASD to confirm that the Appellant was over the legal limit.
16. Counsel further argued that the ASD demand was not made forthwith, thus breaching the Appellant's Charter rights. The arresting officer formed his suspicion that the Appellant had alcohol in his body at 2124 hours, but did not read the Appellant the breath demand until 13 minutes later at 2137 hours.

#### Registrar

17. Counsel for the Registrar argued that the Appellant did operate a vehicle while impaired, based on his driving pattern of being involved in a collision, and the indicia of impairment noted by police.
18. The Registrar also argued that the use of an ASD device does not necessarily mean that there is insufficient evidence for the Board to conclude that the Appellant was impaired (*R. v. Dunphy*, 2012 ONCJ 492 at paragraph 90).
19. Finally, the Registrar argued that the Appellant's Charter rights were not breached. Prior to Cst. Wolf reading the ASD demand to the Appellant, the Appellant was not detained, but rather simply a witness to a collision. The Appellant's Charter rights were not engaged until he was detained by police, which occurred when he was read the breath demand.

### **ISSUES BEFORE THE BOARD**

20. In the Board's view, the issues in this appeal are:

- a. whether the ASD evidence was collected in a way that infringed the Appellant's Charter rights and if it was, whether it would be manifestly unfair to the Appellant for the Board to give any weight to 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**

21. The Board finds that the ASD evidence was collected in a way that infringed the Appellant's Charter rights and that it would be manifestly unfair to the Appellant for the Board to give any weight to that evidence and the evidence gathered subsequent to it.
22. 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.
23. 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**

### Fairness

24. The Board has a duty of fairness when admitting evidence and making its decision under section 39.2 of the *Act*. In addition to the principles of natural justice, the Alberta Court of Appeal in *Thomson v. Alberta (Transportation and Safety Board)*, 2003 ABCA 256 (paragraph 68) stated that the Board is bound by a duty of fairness, which includes to:
  - a. give full and fair consideration to the issues;
  - b. consider the source of the evidence or information, including whether it was gathered in a manner contrary to the Charter or Charter values;
  - c. consider relevant evidence and information; and
  - d. not consider irrelevant or unreliable evidence or information.

25. 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. As a result of these considerations, the Board may place little or no weight on certain evidence brought before it.
26. In considering whether the Appellant's Charter rights were breached, the Board considered whether the ASD demand was made "forthwith" after Cst. Wolf formed his reasonable grounds to suspect that the Appellant had alcohol in his body.
27. The Board finds that Cst. Wolf formed his reasonable grounds to suspect that the Appellant had alcohol in his body at 2124 hours, after the Appellant admitted to consuming alcohol. The Board considered that Cst. Wolf immediately radioed for an ASD to be delivered to the scene at this point in time.
28. The Board then considered the timing of the breath demand. The Board notes that the delay between the officer radioing for the ASD and reading the Appellant the breath demand was 13 minutes. In the circumstances, the Board finds that this delay was a breach of the Appellant's Charter rights, as the demand was not read forthwith. The Board considered that there is nothing in the police notes to suggest that the ASD demand could not have been read to the Appellant immediately after Cst. Wolf formed his suspicion.
29. Having found conduct that is inconsistent with the Charter, the Board must go on to consider the severity of the conduct on the facts of this case. The standard for the Board's analysis was set out by the Court of Queen's Bench in *Baker v. Alberta (Transportation Safety Board)* 2004 ABQB 244 at paragraph 62:

The Board may view reliance on evidence resulting from an egregious breach by the police as an abuse of its process or a breach of natural justice. To expand on the extreme example from Mooring, if a person was tortured, produced a confession and that confession was corroborated to some degree, the concern regarding reliability may be overcome or mitigated, however it would be manifestly unfair or an abuse of process to rely in any way on the evidence obtained through torture.

[Emphasis added]

30. In this case, the Board finds that the breach was egregious. The Board considered that after Cst. Wolf formed his reasonable grounds to suspect that Appellant had alcohol in his body, he asked the Appellant to sit and wait in his vehicle for 13 minutes, without telling the Appellant why he was waiting. There is no evidence that the Appellant was aware that he was required to provide a breath sample. The Board notes that in the circumstances, it would have been reasonable for police to read the Appellant the ASD demand, or inform the Appellant that he was required to provide a sample; the police then could have placed the Appellant in the back of the police vehicle, and radioed for an ASD to be delivered to the scene.

31. On the evidence before it, the Board finds it is manifestly unfair to consider the evidence as to the Appellant's blood alcohol concentration, and any evidence of impairment gathered after Cst. Wolf formed his suspicion.

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

32. 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.
33. The Board finds the Appellant consumed alcohol based on the smell of alcohol on the Appellant's breath, and his admission that he consumed alcohol.
34. Having found consumption, the Board went on to consider whether the Appellant's ability to drive was impaired. The Board considered that the Appellant was involved in a motor vehicle collision. However, the Board notes that a collision is not necessarily indicative of impairment, as sober people are involved in collisions as well. The Board notes that its observations of the Appellant's speech and walking prior to Cst. Wolf forming his suspicion do not suggest that the Appellant was impaired. The Board did not give any weight to the observations of the breath technician, or the Appellant's blood alcohol concentration, since this evidence was obtained after the Appellant's Charter rights were egregiously breached.
35. 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.

#### Whether the Appellant's Blood Alcohol Concentration Exceeded 80 Milligrams of Alcohol in 100 Millilitres of Blood

36. For the reasons set out above, the Board did not give any weight to the evidence of the Appellant's blood alcohol concentration.
37. 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 the concentration of alcohol in his blood exceeded 80 milligrams of alcohol in 100 millilitres of blood within three hours after having driven a motor vehicle.

#### **CONCLUSION**

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

39. 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 February, 2019.

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 October 22, 2018, including Notice of Suspension/Disqualification

#### **Police Disclosure**

2. Report to Prosecutor
3. Photocopy of Alco-Sensor FST Calibration Log
4. Seizure Notice
5. Intox EC/IR II: Subject Test for Test Number 342
6. Photocopy of Appellant's Driver's Licence
7. Witness Statement for J.T.W.
8. Certificate of a Qualified Technician for A.D.B.
9. Event Chronology
10. Witness Statement for N.L.
11. Intox EC/IR II: Alcohol Standard (Dry Gas) Change Form
12. Intox EC/IR II: Quick Test for Test Number 311
13. Intox EC/IR II: Supervisor Test for Test Number 313
14. Certificate of Annual Inspection dated June 6, 2018
15. Certificate of an Analyst for A.E.M.
16. Certificate of an Analyst for K.P.L.C.
17. Notice of Intention to Seek Greater Punishment
18. Notice of Suspension / Disqualification
19. Handwritten Notes of Cst. Holloway
20. Handwritten Notes of Cst. Wolf
21. Intox EC/IR II: Operational Checksheet

22. DVD (1)

**Submissions of the Appellant**

23. Written Submission from Counsel for the Appellant dated November 22, 2018

**Submissions of the Registrar**

24. Written Submission from Counsel for the Registrar dated November 28, 2018