

## Alberta Transportation Safety Board

Citation: 2018 ABTSB 1256

Date: 2019-01-10

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 B. Cooper (the “Appellant”).

A written hearing was held in the City of Edmonton, in the Province of Alberta, on January 10, 2019.

### **BEFORE:**

D. Poon Phillips, Presiding Officer

J.G. Glavin, Member

E. Sullivan, Member

### **PRESENT:**

A. Baker, Acting Board Secretary

A. Chisholm, Independent Counsel to the Board

### **BACKGROUND / PRELIMINARY MATTERS**

Notice of the hearing and the police disclosure were provided to the Appellant by email dated November 27, 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 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 in care or control of his vehicle at the time he was approached and arrested.
  - b. He was not impaired.
  - c. His section 8 and 9 Charter rights were breached as Cst. Bales did not have reasonable and probable grounds to make the arrest or issue the 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) 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. On October 27, 2018, at approximately 0300 hours, Cst. Bales, of the Beaverlodge RCMP detachment, was travelling eastbound on Highway 43 when he observed a vehicle parked near the back alley of the "Trio of Hearts / Beaverlodge Tavern" parking lot. Cst. Bales noted that he thought it seemed unusual for a vehicle to be running there and parked at that time of the night, however, continued to another occurrence.
5. At approximately 0350 hours, Cst. Bales was en route back to the Beaverlodge detachment when he noticed that the same vehicle was still parked in the back alley with its lights on. Cst Bales performed a traffic stop on the vehicle.
6. Cst. Bales approached the driver's side door and observed that the keys were in the ignition and that there was a male (the Appellant) slumped over in the passenger seat. Cst. Bales also observed a can of open Twisted Tea in the console and a rifle by the passenger seat.
7. At 0355 hours, Cst. Bales approached the passenger side door and knocked on the window. The Appellant appeared to be sleeping and woke up in a startled state. Cst. Bales observed the Appellant's eyes were very red and glossy. The Appellant opened the door, identified himself and stated he was not driving home and was sleeping instead.

8. In response to being asked about the rifle, the Appellant stated that he had been elk hunting earlier. At this point, Cst. Bales noted there was an odour of alcohol on the Appellant's breath as he spoke.
9. At 0402 hours, Cst. Bales arrested the Appellant for impaired care or control of a motor vehicle. The Appellant exited the vehicle and appeared to be unsure of his foot placement while he was standing and walking. Cst. Bales placed the Appellant in handcuffs and escorted him back to the police vehicle.
10. At 0403 hours, Cst. Bales read the Appellant his Charter rights, the police caution and the evidentiary breath demand. The Appellant stated he did not want to call a lawyer.
11. At 0410 hours, Cst. Bales transported the Appellant to the Beaverlodge detachment, arriving at 0412 hours.
12. At 0431 hours, the Appellant provided an evidentiary breath sample, which resulted in a blood alcohol concentration reading of 150 milligrams of alcohol in 100 millilitres of blood. At 0451 hours, the Appellant provided a second breath sample, which resulted in a blood alcohol concentration reading of 140 milligrams of alcohol in 100 millilitres of blood.
13. The breath technician noted a very strong odour of liquor coming from the Appellant's breath, his speech was slow and slurred, his eyes were very glassy, his cheeks were blotched, his movements were very deliberate, he was very focused when he walked, and he had a dazed look and was staring past the technician as he spoke.
14. At 0510 hours, the Appellant was released on a Promise to Appear and served with all relevant police documents.
15. A DVD was provided with the police disclosure and contained video from the police detachment.

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

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

## **SUMMARY OF ARGUMENTS**

### Appellant

17. Counsel for the Appellant argued the Appellant was not in care or control of the motor vehicle. The Appellant argued he was not seated in the driver's seat and there is no evidence that he was doing anything in the vehicle but sleeping. The Appellant argued that the evidence suggests he made a conscious decision to not drive home from the bar, and that it made sense that the vehicle was running due to the likely frigid temperature outside; it was October in northern Alberta.

18. The Appellant also argued that there is no evidence that his ability to drive was impaired by alcohol within three hours of operating a motor vehicle. The Appellant submitted that Cst. Bales' notes provide no observations that constitute objective evidence of impairment. There is no driving pattern observed, nor evidence of poor balance or gait, comprehension or coordination.
19. Finally, the Appellant argued that Cst. Bales did not have reasonable and probable grounds to arrest the Appellant such that the Appellant's arrest and the subsequent evidentiary breath demand were unlawful. The Appellant argued that the only evidence before Cst. Bales at the time of arrest was that the Appellant had an odour of alcohol on his breath and his eyes appeared red and glossy.

### Registrar

20. Counsel for the Registrar argued that the Appellant was in care or control of his vehicle under the test from *R. v. Boudreault*, 2012 SCC 56, as there is some evidence that he may have woken up and proceeded to drive, constituting a realistic risk of danger. To support this argument, the Registrar submitted that the Appellant's blood alcohol concentration was nearly double the legal limit and he did not provide evidence that he did not intend to drive or that he had an alternate plan.
21. The Registrar conceded that the Appellant's arrest was based on grounds that fell short of reasonable and probable grounds and was thus inconsistent with Charter values. However, the Registrar argued that the Board was still required to consider whether the evidence was collected against the Appellant as a result of an egregious breach of Charter values.
22. Finally, the Registrar argued that based on all the evidence before the Board, the Appellant's ability to drive was impaired by alcohol at the relevant time.

### **ISSUES BEFORE THE BOARD**

23. In the Board's view, the issues in this appeal are:
  - a. whether the Appellant was in care or control of the motor vehicle and therefore "drove" under the *Act*;
  - b. whether evidence following the Appellant's arrest 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;
  - c. 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

- d. 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

24. The Board finds that the Appellant was not in care or control of the motor vehicle.
25. Finding the Appellant was not in care or control of the motor vehicle, the Board finds it was not necessary to consider the Appellant's additional ground of appeal which respect to whether the evidence was collected in a manner that infringed the Appellant's Charter rights or was inconsistent with Charter values.
26. 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.
27. 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

### Whether the Appellant Was In Care or Control of the Vehicle

28. The assessment of "care or control" is central to the Board's task under section 39.2 of the *Act*. Under section 39.2, the Board must determine if the Appellant "drove" or not while impaired. In section 1(1)(l) of the *Act* "driving" or "drive" includes "having care or control of a vehicle".
29. In criminal law, evidence as to intention to drive may be relevant to rebutting the presumption under section 258(1) of the *Criminal Code* (Canada). However, the test for care or control used by the Board is whether the Appellant committed acts that involve some use of the vehicle or its fittings and equipment, or some course of conduct associated with the vehicle that would involve the risk of putting the vehicle in motion so that it could become dangerous. In the establishment of the test, the Board has adopted the approach of the Supreme Court in *R. v. Toews*, [1985] 2 SCR 119 at paragraph 7.
30. With respect to assessing when there is a risk of danger, the Board is guided by the decision of the Supreme Court in the case of *R. v. Boudreault*, 2012 SCC 56. According to *Boudreault*, the risk of putting the vehicle in motion must be a realistic risk and not just theoretically possible. Having said that, the risk does not have to be probable or even substantial.

31. Although the intention to drive is not an essential component of care or control, intent can be considered as part of the risk analysis, particularly if an intention not to drive is supported by an alternate plan. The impact of an alternate plan will depend on if the plan is objectively concrete and reliable and if the plan was in fact implemented by the Appellant.
32. In this case, the Board considered the following evidence from the police disclosure:
  - a. Cst. Bales observed the Appellant's vehicle running and parked near the back alley of the Beaverlodge Tavern parking lot from 0300 hours to 0355 hours.
  - b. The Appellant was found slumped over and sleeping in the front passenger seat.
  - c. The Appellant told the officer he was not driving home and was sleeping instead.
33. For the following reasons, the Board is satisfied, on a balance of probabilities, that the Appellant was not in care or control of the vehicle and therefore, did not "drive" the vehicle. The Board finds there is no evidence that it was more than theoretically possible that the Appellant and his vehicle posed a realistic risk of danger to the public or property. First, the Board considered that the vehicle was parked in an alley near a parking lot. Second, the Board considered that although the vehicle was running, there was no realistic risk the Appellant could have accidentally put the vehicle in motion as he was sleeping in the passenger seat. Third, the Board considered whether the Appellant could have woken up and decided to drive. Here, the Board noted that the vehicle had remained stationary for 55 minutes (from 0300 hours to 0355 hours) and that the Appellant specifically told Cst. Bales that he was not driving home and was sleeping instead.

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

34. Having found that the Appellant was not in care or control of the vehicle, 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 at any time within three hours of having "driven" the vehicle.

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

35. Similarly, 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 at any time within three hours after having "driven" a motor vehicle.

## CONCLUSION

36. For the reasons provided above, the Board grants the AALS appeal and cancels the Appellant's licence suspension immediately.
37. 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 November 8, 2018, including Notice of Suspension/Disqualification

#### **Police Disclosure**

2. Prosecutor's Information Sheet
3. Information
4. Promise to Appear
5. Seizure Notice
6. Notice of Suspension/Disqualification
7. Notice of Intention to Seek Greater Punishment
8. Affidavit of Personal Service of Cst. Bales
9. Motor Vehicle 24 Hr. Suspension/Seizure/Impound Report
10. Certificate of a Qualified Technician for D.E.I.
11. Intox EC/IR II: Subject Test
12. Intox EC/IR II: Operational Checksheet
13. General Report of Cst. Bales
14. Photos
15. DVD

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

16. Written Submission from Counsel for the Appellant received by the Board December 3, 2018

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

17. Written Submission from Counsel for the Registrar dated December 6, 2018