

## Alberta Transportation Safety Board

Citation: 2019 ABTSB 1539

Date: 2019-09-12

AALSO

**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 R. Grewal (the “Appellant”).

An in-person hearing was held in the City of Edmonton, in the Province of Alberta, on September 12, 2019.

### **BEFORE:**

L. Varty, Presiding Officer

W. Haas, Member

J. Budinski, Member

### **PRESENT:**

R. Grewal, Appellant

B. Mohan, Counsel for the Appellant

J. Grewal, Interpreter for the Appellant (Student-at-Law)

A. Baker, Acting Board Secretary

A. Jeffs, Independent Counsel to the Board

### **BACKGROUND / PRELIMINARY MATTERS**

Notice of the hearing and the police disclosure were provided to the Appellant by email dated February 21, 2019 and to the Registrar of Motor Vehicle Services (the “Registrar”), in advance of the hearing.

The Appellant had no objections to the members of this panel and there were no preliminary applications, objections, or requests.

### **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.

During the hearing, the Board heard sworn testimony from the Appellant. The Appellant's testimony was provided through an interpreter, who swore to provide an accurate interpretation.

## 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 failed or refused to comply with a demand made under section 320.7 or 320.8 of the *Criminal Code* (Canada); and
  - b. the Appellant was impaired by alcohol or a drug or by a combination of alcohol and a drug.
2. The Appellant has appealed the AALS on the following grounds:
  - a. the Appellant did not have care or control of a motor vehicle;
  - b. the Appellant did not operate a motor vehicle while his ability to do so was impaired by alcohol; and
  - c. the Appellant had a reasonable excuse for failing to provide a breath sample.

## 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 of any of the following, the Board must confirm the suspension or disqualification:

- (a) that the person operated a motor vehicle while the person's ability to operate it was impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;

...

- (e) knowing that a demand had been made, the person failed or refused to comply with a demand made under section 320.27 or 320.28 of the *Criminal Code* (Canada) without a reasonable excuse.

(6) If, after conducting an appeal under this section, the Board is satisfied of any of the following, 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:

(a) that the person did not operate a motor vehicle while the person's ability to operate it was impaired to any degree by alcohol or a drug or a combination of alcohol and a drug;

...

(e) that the person did not fail or refuse to comply with a demand made under section 320.27 or 320.28 of the *Criminal Code* (Canada);

(f) that the person had a reasonable excuse for failing or refusing to comply with a demand made under section 320.27 or 320.28 of the *Criminal Code* (Canada);

...

## POLICE DISCLOSURE

4. On December 29, 2018, at 2207 hours, Cst. Lacaze-Masmonteil and Cst. Schryvers arrived at the address of 1752 Lakewood Road in Edmonton in response to a "curb the danger" call. The initial information from C.B., the witness who originated the complaint, was that there was a possible impaired driver stuck in the snow at the location who was revving the vehicle back and forth in a rocking motion. The evaluator assessing the call could hear the vehicle revving trying to get out. The licence plate number obtained came back to a Honda Civic. The male driver kept getting out of the vehicle and then would come back to it. He had last been seen at 2206 hours and had then walked towards his residence around the corner.
5. Upon Cst. Lacaze-Masmonteil's arrival, he observed a red Honda Civic with matching licence plate that had overshot a parking spot and was on a semi-green space between the townhouses. There was clear evidence that the vehicle had been moved forward and back again and again in an attempt to get out with clear tire marks in the fresh snow.
6. Cst. Lacaze-Masmonteil spoke briefly to the witness, C.B., who gave a suspect description of an East Indian male wearing boots, a puffy jacket, and a baseball cap. C.B. also pointed to the suspect's place of residence. Cst. Lacaze-Masmonteil and Cst. Schryvers located a male on the steps of the residence with the door open. The male matched the description of the suspect provided by C.B.
7. The male (the Appellant) looked at Cst. Lacaze-Masmonteil and Cst. Schryvers and Cst. Lacaze-Masmonteil identified himself and informed the Appellant that they

had received a call about his driving. From approximately a meter and a half away, Cst. Lacaze-Masmonteil could smell a strong odour of liquor coming from the Appellant which got stronger the closer Cst. Lacaze-Masmonteil got to him. Cst. Lacaze-Masmonteil determined that the smell of liquor was coming from the Appellant's breath when the Appellant spoke. Cst. Lacaze-Masmonteil noted that the Appellant was swaying on the spot, his eyes were glazed over, and when he looked at Cst. Lacaze-Masmonteil to speak, he looked straight through Cst. Lacaze-Masmonteil as though focusing was hard for him. The Appellant also had a hard time answering Cst. Lacaze-Masmonteil's questions and he seemed confused.

8. At 2209 hours, given the totality of the investigation, Cst. Lacaze-Masmonteil formed reasonable and probable grounds that the Appellant was impaired by alcohol and arrested him for impaired driving. Cst. Lacaze-Masmonteil and Cst. Schryvers then walked the Appellant back to the police vehicle where he was searched. In the search, Cst. Lacaze-Masmonteil located the vehicle keys in the Appellant's right jacket pocket. The Appellant also had his wallet on him which had his driver's licence.
9. At 2214 hours, Cst. Lacaze-Masmonteil read the Appellant his Charter rights and the Appellant became very argumentative and kept insisting that Cst. Lacaze-Masmonteil had not caught him driving and that he should not be arrested. Cst. Lacaze-Masmonteil repeated numerous times that the Appellant was under arrest for impaired driving and that he had the right to contact a lawyer. The Appellant finally said, "Yeah" to understanding and "Yes" to wanting to speak to a lawyer.
10. At 2216 hours, Cst. Lacaze-Masmonteil read the Appellant the Approved Screening Device ("ASD") demand. The Appellant kept interrupting and talking over Cst. Lacaze-Masmonteil and refused to tell Cst. Lacaze-Masmonteil whether or not he understood the demand as it had been read to him. Cst. Lacaze-Masmonteil even tried to explain to the Appellant that he would be brought back to the station to talk to a lawyer and that someone who spoke Punjabi (the Appellant's primary language) would attend to help explain everything. The Appellant kept saying he did not understand and eventually stopped talking.
11. Cst. Schryvers talked to the witness, C.B. and relayed the following information to Cst. Lacaze-Masmonteil upon his return to the vehicle:
  - C.B. confirmed that the male they had in custody (who she had seen us walk back to the police vehicle) was the same male that had been behind the wheel of the vehicle;
  - C.B. said the vehicle was continuously put in acceleration and in reverse and was not parked;
  - C.B. and her husband had been awakened by the sound of a collision and looked outside their window and saw the suspect vehicle and the male in the driver's seat.

12. At 2229 hours, Cst. Lacaze-Masmonteil transported the Appellant to the Southeast Division, arriving at 2235 hours. While enroute, the Appellant made the following statements:
  - “I pulled out my car and then I go home”;
  - “Nobody would help pull me out”
  - “And I tried to back up back up back up”.
13. In the bright lights of the division, Cst. Lacaze-Masmonteil could see that the Appellant’s eyes were bloodshot and he also had been unsteady on his feet walking from the vehicle to the search area.
14. Cst. Sanhotra attended the Southeast Cells and helped translate to the Appellant the Charter rights and caution. The Appellant indicated to Cst. Sanhotra that he understood both and that he wanted to speak to a lawyer. At 2248 hours, Cst. Lacaze-Masmonteil placed the Appellant in the phone room and read him the Brydges Component in English and Cst. Sanhotra then translated and pointed to the free legal advice number on the wall inside the phone room. Cst. Lacaze-Masmonteil checked that the phone was working by calling his work phone. At 2252 hours, Cst. Lacaze-Masmonteil observed the Appellant talking on the phone. At 2255 hours, the Appellant hung up the phone, waved at Cst. Lacaze-Masmonteil and gave Cst. Lacaze-Masmonteil a thumbs up. Cst. Lacaze-Masmonteil went over to the phone room, opened the door, and the Appellant got up and walked towards Cst. Lacaze-Masmonteil. Cst. Lacaze-Masmonteil asked the Appellant, “Are you done?” and he replied, “Yes” and gave Cst. Lacaze-Masmonteil a thumbs up.
15. At 2257 hours, Cst. Lacaze-Masmonteil read the Appellant the evidentiary breath demand and Cst. Sanhotra translated. At 2259 hours, the Appellant said he would comply.
16. At 2316 hours, the Appellant attempted to provide a breath sample; however, was not able to, despite being given several chances to do so and despite being explained the jeopardy of failing to comply and instructions given numerous times. The Appellant made little effort to provide a sample. At 2317 hours, Cst. Lacaze-Masmonteil charged the Appellant with failing to comply.
17. The breath technician noted that the Appellant had red, glossy eyes; his speech was slurred; and there was a light odour of alcohol on his breath.
18. At 2351 hours, the Appellant was released on a Promise to Appear and served with all relevant police documents.

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

19. In addition to his Affidavit, the Appellant provided the following sworn testimony to the Board in response to questions from his counsel and the Board:

- a. The Appellant was trying to park his car but got stuck because he did not have proper winter tires.
- b. He did not consume any alcohol prior to driving.
- c. He did not explain to the police officers that he had only consumed alcohol after driving and had spilled some brandy on his shirt because he was scared.
- d. He did his best to provide a breath sample, but he could not make it work.
- e. His discussion with the lawyer was in English. The lawyer told him he had to blow but should remain silent.
- f. He could not understand the Punjabi-speaking lawyers because of their Canadian accents.

## **SUMMARY OF ARGUMENTS**

### Appellant

20. Counsel for the Appellant argued:

- a. The Appellant did not refuse to provide a breath sample. He did his best to provide a sample, but was unable to do so.
- b. The Appellant's language difficulties were apparent at the appeal hearing. They constituted a reasonable excuse for failing to blow.
- c. The Appellant's evidence was given under oath and should be preferred to the evidence in the police report.

### Registrar

21. Counsel for the Registrar argued:

- a. It was unlikely that the Appellant consumed alcohol only after he stopped operating a motor vehicle, because the Appellant was seen and heard operating the vehicle until 2206 hours and the police officers arrived at the Appellant's home at 2207 hrs.
- b. There were sufficient indicia to show that the Appellant operated a motor vehicle while his ability to do so was impaired by alcohol.
- c. The Appellant knew that a demand for a sample of his breath had been made.

- d. The Appellant was provided with a number of resources to ensure he understood the instructions, cautions and demands in his native language. He consistently confirmed that he understood
- e. The Appellant's conduct of not making a seal around the breathalyzer tube and blowing for only a few seconds indicated that the Appellant was making only a minimal effort to provide a breath sample, rather than that the Appellant did not understand what he was supposed to do.

## ISSUES BEFORE THE BOARD

22. In the Board's view, the issues in this appeal are:
- a. whether the Appellant operated a motor vehicle at the material time;
  - b. whether the Appellant operated a motor vehicle while his ability to operate it was impaired to any degree by alcohol; and
  - c. whether the Appellant, knowing that a demand had been made, failed or refused to comply with a demand made under section 320.27 or 320.28 of the *Criminal Code* (Canada) without a reasonable excuse.

## FINDINGS OF THE BOARD

23. The Board finds that the Appellant had been operating a motor vehicle until a few minutes before he was arrested for impaired driving.
24. The Board finds that the Appellant did not operate a motor vehicle while his ability to operate it was impaired to some degree by alcohol.
25. The Board finds that knowing that a demand had been made, the Appellant failed or refused to comply with a demand made under section 320.28(1)(a) of the *Criminal Code* (Canada) without a reasonable excuse.

## REASONS OF THE BOARD

### Whether the Appellant Operated a Motor Vehicle

26. Under section 39.2(a) of the *Act*, the Board must determine if the Appellant "operated" a motor vehicle while impaired. Similarly, for a demand under section 328 (1)(a) of the *Criminal Code* (Canada) to be valid, the police officer must have had reasonable grounds to believe that the person to whom the demand was made had "operated" the motor vehicle while impaired.
27. "Operating" a motor vehicle means the same thing as "driving" a motor vehicle. In section 1(1)(l) of the *Act*, "driving" or "drive" includes "having care or control of a

vehicle”. Thus, if the Appellant had care or control of a motor vehicle, he was operating the motor vehicle.

28. The Appellant initially denied having care or control of a motor vehicle. However, in his Affidavit, he admitted that he was driving his motor vehicle until shortly before he was arrested.
29. The Board accepts this admission and finds that the Appellant operated a motor vehicle at the material time.

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

30. 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 as a result, the Appellant’s ability to drive was impaired to some degree.
31. The Appellant denied consuming any alcohol until after he had stopped operating his motor vehicle. His evidence was that once he reached his home, he drank a brandy to help warm him up and he spilled a little bit of brandy on his shirt.
32. The Board does not need to decide whether to accept the Appellant's evidence on this point, because in the opinion of the Board, there is insufficient evidence to show that the Appellant's ability to drive was impaired by alcohol. For example, the Appellant's behaviour of revving his motor vehicle back and forth was consistent with his statement that his vehicle was stuck in the snow and he was trying to get the vehicle unstuck.
33. 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 to some degree as a result.

#### Whether the Appellant Failed to Comply with a Breath Demand Without a Reasonable Excuse

##### Whether the Appellant Failed to Comply with a Breath Demand

34. The Board accepts that the Appellant did not explicitly refuse to provide a breath sample.
35. In considering whether the Appellant failed to comply with the breath demand, the Board considered the following evidence:
  - a. the Narrative provided by Cst. Lacaze-Masmonteil;
  - b. the observations of the Qualified Breath Technician; and

- c. the sworn evidence of the Appellant that he did his best to provide a breath sample but could not make it work.
36. The Board prefers the evidence in the police disclosure. That evidence shows that the Appellant was given numerous chances to provide a sample of his breath but only blew for a few seconds each time, and on a number of those attempts, failed to seal his lips around the breathalyzer tube.
37. In the Board's view, the evidence listed above establishes that the Appellant was provided with instruction and provided with a reasonable opportunity to provide a sample.
38. The Board finds that the Appellant failed to comply with a breath demand under section 320.28 of the *Criminal Code* (Canada).

#### Whether the Appellant had a Reasonable Excuse

39. Counsel for the Appellant argued that the Appellant's difficulties with the English language constituted a reasonable excuse; the Appellant was simply unable to understand what he was supposed to do. Counsel for the Appellant pointed to the fact that the Appellant required the assistance of an interpreter in order to conduct the appeal hearing and the Appellant's evidence that the Punjabi-speaking police officers did not speak Punjabi well enough to convey proper instructions to the Appellant.
40. The Board considered the following evidence:
  - a. The Appellant did not tell any of the police officers that he was having difficulty understanding what was going on. To the contrary, when he was asked whether he understood his Charter rights and the police caution, he said he did.
  - b. At the police station, the Appellant spoke to a lawyer in English. The Appellant understood the advice given by the lawyer.
  - c. The Appellant's evidence was that he did what the police officers told him to do, but was unable to make the breathalyzer machine work.
41. Further, the Board had an opportunity to observe the Appellant during the appeal hearing. The Board noted that the Appellant seemed to have a reasonable understanding of English. For example, the Appellant's viva voce evidence regarding the advice he received from the lawyer was given in English, without the assistance of the interpreter. Further, some of the questions put to the Appellant by the interpreter included technical English phrases such as "indicia of impairment", a phrase which the Appellant clearly understood.

42. In the opinion of the Board, while the Appellant may have faced some language difficulties, those difficulties were addressed by the provision of a Punjabi-speaking police officer. The result was that the Appellant understood what he was obliged to do and what his rights were.
43. Based on the totality of the evidence, the Board is satisfied, on a balance of probabilities, that the Appellant did not have a reasonable excuse for failing to comply with the demand made under section 328 of the *Criminal Code* (Canada).

## **CONCLUSION**

44. For the reasons provided above, the Board denies the AALS appeal and upholds the Appellant's licence suspension.

DATED at the City of Edmonton, in the Province of Alberta, this 20<sup>th</sup> day of December, 2019.

ALBERTA TRANSPORTATION SAFETY BOARD

"Original signed by L. Varty"

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L. Varty, Presiding Officer

## **APPENDIX “A”**

### **DOCUMENTS RECEIVED PRIOR TO THE HEARING:**

#### **No. ITEM**

#### **Application for Hearing**

1. Application for Hearing received by the Board January 20, 2019, including Notice of Suspension/Disqualification

#### **Police Disclosure**

2. Narrative of Cst. Lacaze-Masmonteil
3. Notice of Suspension / Disqualification
4. Report to the Board
5. Intox EC/IR II: Operational Checksheet
6. Intox EC/IR II: Subject Test for Test Number 733
7. Certificate of Annual Inspection dated 2018DEC13
8. Intox EC/IR II: Alcohol Standard (Dry Gas) Change Form
9. Intox EC/IR II: Supervisor Test for Test Number 729
10. Intox EC/IR II: Quick Test for Test Number 730
11. Intox EC/IR II: Quick Test for Test Number 734
12. Certificate of an Analyst for K.P.L.C.
13. Certificate of an Analyst for A.E.M.
14. Notice of Intention to Seek Greater Punishment
15. Affidavit of Personal Service of Cst. Lacaze-Masmonteil

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

16. Appellant’s Affidavit dated August 22, 2019
17. Written Submission from Counsel for the Appellant dated August 28, 2019

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

18. Written Submission from Counsel for the Registrar dated September 10, 2019

**APPENDIX “B”**

**ADDITIONAL DOCUMENTS RECEIVED BY THE BOARD AT THE HEARING:**

**No. ITEM**

1. Diagram prepared by the Appellant