

In the Court of Appeal of Alberta

Citation: Garnet v Alberta (Director of SafeRoads), 2025 ABCA 293

Date: 20250828
Docket: 2301-0171AC
Registry: Calgary

Between:

Talon Archie Garnet

Appellant

- and -

Director of SafeRoads Alberta

Respondent

The Court:

**The Honourable Justice Dawn Pentelchuk
The Honourable Justice Kevin Feth
The Honourable Justice Joshua B Hawkes**

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Justice A. Woolley
Dated the 13th day of June, 2023
Filed on the 28th day of June, 2023
(Docket: 2201-01046)

Memorandum of Judgment

The Court:

Introduction

[1] The appellant was issued a Notice of Administrative Penalty (NAP) after he failed two breath tests. The appellant was not observed driving but was seated in the driver's seat when the demands were made. A presumption therefore arose that he was in care or control of the vehicle. The appellant applied for a review arguing he had no intention of driving or moving the vehicle at any time. The issue before the adjudicator was whether the appellant had rebutted on a balance of probabilities the presumption that he was in care or control of the vehicle. The determination of this issue turned on the adjudicator's credibility assessment of the evidence proffered by the appellant at the review. The adjudicator rejected this evidence and upheld the NAP. For the following reasons, we conclude the decision was unreasonable and must be quashed.

Facts

[2] It is undisputed that the appellant's ability to operate a motor vehicle was impaired by alcohol just after 1:00 AM on November 19, 2021. It is also undisputed that the appellant was aware of that fact, and had asked his sober friend, Mr Charles, to drive him in his vehicle to a convenience store parking lot where he engaged in a consensual fight with another person.

[3] A concerned citizen saw the fight and called the police. The police first dealt with other individuals involved in the altercation. The appellant and Mr Charles remained outside the convenience store, assuming police would want to speak with them next. It was approximately -15°C, and neither of them were wearing coats. They got in the appellant's vehicle to stay warm.

[4] When the police went to speak with the appellant, he was in the driver's seat and Mr Charles was in the passenger seat. Only the appellant was questioned. The attending officer noted signs of impairment, including that the appellant's breath smelled of alcohol and his speech was not clear. The appellant confirmed to the officer that he had consumed several drinks. The officer conducted two approved screening device breath tests on the appellant, and he failed both. When the appellant asked the officer if Mr Charles could drive him home, the answer was no. Mr Charles was not questioned and offered no information to the police.

[5] The police issued a NAP to the appellant.

NAP Review

[6] The appellant applied for an oral review of the NAP, which took place on December 2, 2021. The appellant challenged the NAP under section 4(e)(i) of the *SafeRoads Alberta Regulation*, Alta Reg 224/2020 contending that he did not operate the motor vehicle. Section 1(1)(l) of the *Traffic Safety Act*, RSA 2000, c T-6 defines “driving” or “drive” as including “having the care or control of a vehicle.” As noted, the burden of proof was on the appellant on a balance of probabilities.

[7] The *Provincial Administrative Penalties Act*, SA 2020, c P-30.8 provides that a recipient of a NAP who applies for a review to cancel the NAP may provide records, representations, arguments or evidence in support of their argument: s 13(1). No person may be cross-examined in a review: s 16(3). Written submissions, with affidavit evidence from the appellant and Mr Charles were submitted. The appellant also provided *viva voce* evidence at the hearing. The notes of the attending officer were entered into evidence and deemed to have been made under oath.

[8] Since there was no evidence that the appellant was driving the vehicle at the relevant time, the issue at the review was whether the appellant nevertheless had care or control of the vehicle because he was found sitting in the driver’s seat. The parties agreed throughout these proceedings that the applicable framework for determining care or control was as described by the Supreme Court of Canada in *R v Boudreault*, 2012 SCC 56 at paras 33-38.

[9] The appellant’s evidence was that the only reason he got into the driver’s seat was because it was closest to where he was standing when the police arrived. The plan was for Mr Charles to drive after they spoke to the police. Mr Charles’ evidence was consistent with this, and he deposed that he was the driver because he was sober that evening and the appellant never intended to drive. Both the appellant and Mr Charles deposed that they were confused as to why only the appellant was questioned and a breath sample was requested from him but not from Mr Charles.

The Reasons of the Adjudicator

[10] The adjudicator provided a three-page (19 numbered paragraphs) decision within the compressed time frame prescribed in the legislation. Based on the evidence and argument she correctly identified the key issues – whether the appellant had rebutted the presumption of care or control by his position in the driver’s seat, and in the alternative, if there remained a realistic risk of danger to persons or property.¹

[11] Determinations as to whether the presumption of care or control by occupancy of the driver’s seat while impaired is rebutted or whether there is a realistic risk of danger to persons or property are fact driven and context sensitive. “Realistic risk” has been described as a low

¹ *Boudreault* at paras 39-46.

threshold.² The adjudicator found both that the appellant had not rebutted the presumption and that his actions constituted a realistic risk of danger.

[12] While there was no evidence the vehicle was running when the attending officer approached, the adjudicator found the vehicle had to be running if the appellant got in it to stay warm. The adjudicator further found that the appellant intended to set the vehicle in motion. While acknowledging it was an unnecessary finding, the adjudicator also found that even without an immediate intention to drive, there was a realistic risk that the appellant would have changed his mind and driven the vehicle, and had this happened, there was a realistic risk of danger to persons or property. Finally, the adjudicator noted that neither the appellant nor Mr Charles advised the attending officer that the appellant had not been driving and had no intention of doing so. Since no ground had been established to cancel the NAP, it was confirmed.

Judicial Review

[13] The appellant sought judicial review of the adjudicator's decision. He argued the decision was unreasonable because the adjudicator ignored uncontradicted reliable evidence and made unreasonable inferences unsupported by the evidence.

[14] The reviewing justice identified several errors in the adjudicator's decision, including with the additional finding that the appellant posed a realistic risk of danger to persons or property because she failed to consider the totality of the evidence. Nevertheless, the reviewing justice concluded that the adjudicator's finding that the appellant was in care or control of the vehicle was reasonable and provided a sufficient basis to confirm the NAP.

Standard of Review

[15] This Court must determine whether the reviewing justice identified and applied the standard of review correctly. No deference is afforded to the reviewing justice. The appellate court "steps into the shoes" of the lower court and performs a *de novo* review of the administrative decision.³

Analysis

[16] The reviewing justice correctly identified the standard of review as reasonableness. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 summarized in *Pepa*

² *Boudreault* at para 35.

³ *Lausen v Alberta (Director of SafeRoads)*, 2023 ABCA 176 at para 27 citing *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 at para 10; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 45-47.

v Canada (Citizenship and Immigration), 2025 SCC 21 at paras 45-51 provides the following guidance on reasonableness review:

- a) The review must proceed on a “reasons first” approach. Reasons must be examined to understand the reasoning process of the decision maker and determine if the decision was based on “an internally coherent and rational chain of analysis” in relation to the applicable law and facts.
- b) Reasons are not to be assessed against a standard of perfection nor include all that a reviewing court might prefer. They are to be read “holistically and contextually” considering the evidence, submissions of the parties, applicable policies or guidelines, and past decisions. Reviewing courts must consider the rationale for the decision and the outcome from a perspective of reasonableness. That assessment does not include a determination of the range of possible conclusions, nor a determination of the correct conclusion on a *de novo* basis.
- c) Flaws must be sufficiently central or significant to render the decision unreasonable and include failures of internal rationality or failures of justification. Non exhaustive examples of such failures include where the reasoning process is not logical or rational and does not “add up”, or where the decision is untenable considering the statutory scheme, the evidence and positions of the parties, or other established legal principles.

[17] Unfortunately, the adjudicator’s conclusions do not meet the *Vavilov* standard of reasonableness. The affidavits of Mr Charles and the appellant as well as the appellant’s *viva voce* evidence provided uncontradicted evidence that: the appellant had a plan to avoid driving while intoxicated; he had in fact used that plan to get to the location where he encountered and waited to speak to the police; and Mr Charles was present at the scene and stayed with the appellant to drive him home. *Boudreault* confirms that important considerations in evaluating evidence of such an alternative plan are whether it was objectively concrete and reliable, and whether it had in fact been implemented.⁴ The presence of a viable alternative may also be used to assess the evidence of the appellant regarding the intent to drive.

[18] The adjudicator was entitled and in fact required to make credibility findings based on the record.⁵ Deference to the role of the adjudicator as the initial fact finder applies in the context of judicial review.⁶ However, the reasons in this case fail to explain why she rejected uncontradicted evidence from the appellant that was corroborated by Mr Charles. The reasons do not address what,

⁴ *Boudreault* at para 52.

⁵ *Provincial Administrative Penalties Act* at s 18; *Nagra v British Columbia (Superintendent of Motor Vehicles)*, 2010 BCCA 154 at paras 27-28; *Rempel v Alberta (Director of SafeRoads)*, 2023 ABKB 478 at para 34.

⁶ *Vavilov* at para 125.

if any, issues she had with either the reliability or credibility of this evidence. The adjudicator concluded that she was “not satisfied on a balance of probabilities that a person who did not drive a vehicle and who did not intend to drive the vehicle would be the one closest to the driver’s side of the vehicle, and upon seeing the police, would enter into the driver’s seat of the vehicle to stay warm and wait for police questioning.” This conclusion is not tethered to evidence; rather, it is based on the adjudicator’s assumption of what someone would do in that situation, fails to address the sworn evidence of the appellant and Mr Charles as described above, and does not account for the impact of an intervening act (the fight) on their movements.

[19] Finally, the adjudicator appears to have drawn an adverse inference from the failure of the appellant and Mr Charles to volunteer to the attending officer that Mr Charles had driven the vehicle to the convenience store and intended to drive the vehicle home after the fight. However, if an adverse inference was drawn, more was required in the circumstances of this case to explain the rejection of their evidence, especially where no adverse findings of credibility or reliability were expressly made. The issues of silence, or of adoptive admissions, or inferences arising in such circumstances are complex and context sensitive. While we have not been asked, nor do we need to clarify the law regarding those issues here, the adjudicator’s reasons failed to address them.

[20] In short, the reasons fail to grapple with the uncontradicted evidence provided by both the appellant and Mr Charles that Mr Charles had driven to the convenience store and intended to resume driving after they had spoken to the police regarding the fight. The adjudicator made no finding on this crucial point and this was the context in which the adjudicator had to assess whether the appellant intended to drive from the convenience store or whether he posed a realistic risk of danger to persons or property. Where decisions fail to make essential findings of credibility they have been quashed in analogous circumstances.⁷ We do so here.

[21] Assessing credibility in the context of the SafeRoads scheme can be challenging given the absence of cross-examination, but if an adjudicator rejects uncontradicted evidence, particularly if it is corroborated, they must provide articulable reasons *why* the evidence is rejected. It cannot simply be a hunch or a suspicion. The reasons here lack the hallmarks of reasonableness – justification, transparency and intelligibility on the central issue of credibility.⁸

⁷ *Mackenzie v British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 354 at paras 64-65.

⁸ *Vavilov* at paras 83, 96, 99, 103, 128; see also, *Gellarne Holdings (2001) Ltd v Edmonton (City)*, 2023 ABCA 327 at paras 13-16.

Conclusion

[22] The appeal is allowed and the adjudicator’s decision is quashed. Based on the totality of the record and in all of the circumstances of this case we decline to remit the matter back to the adjudicator for rehearing.⁹ The NAP is therefore cancelled.

Appeal heard on December 6, 2024

Memorandum filed at Calgary, Alberta
this 28th day of August, 2025

Authorized to sign for: Pentelechuk J.A.

Authorized to sign for: Feth J.A.

Hawkes J.A.

⁹ *Vavilov* at para 142.

Appearances:

A. Klassen
for the Appellant

M.N. Burkett
for the Respondent